Lawyer's Manual on Domestic Violence

Representing the Victim, 6th Edition

Edited by

Mary Rothwell Davis, Dorchen A. Leidholdt and Charlotte A. Watson

Supreme Court of the State of New York, Appellate Division, First Department

The New York State Judicial Committee on Women in the Courts

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Hon. Luis A. Gonzalez, Presiding Justice

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Hon. Betty Weinberg Ellerin, Chair

This project was supported by subgrant No.SV14-1117-E00 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women or the NYS Division of Criminal Justice Services.

Dedication

These three judicial leaders devoted their minds, hearts and the transformative power they held in their institutional roles to ensuring that domestic violence be recognized as a scourge that could and would be addressed by our courts.

Hon. Betty Weinberg Ellerin · Hon. Judith S. Kaye · Hon. Jonathan Lippman

We dedicate this 6th edition of the Lawyer's Manual on Domestic Violence to them, with our deepest gratitude.

The pages of this book, with its chapters, paragraphs and words that enfold knowledgeable discussion of legal strategy, legislative reform, and energetic social advocacy, have a tendency to tear open, and we see beneath the language the faces and terror of those living among us in fear of domestic violence. These fellow humans might be next to us on the bus, or in the apartment just two floors down, or handing us our items at the check-out counter. We do not see them. But this book reveals the horror that is all around us, too often invisible: a version of hell.

Teodors Ermansons,
Graphic Designer (retired) Office of Court Administration

–Spoken upon completing design of this book.

Acknowledgements

Hon. Jonathan Lippman, whose steadfast and energetic willingness to name domestic violence as one of the central concerns of the court system under his leadership has helped moved forward justice and jurisprudence.

Hon. A. Gail Prudenti, whose sensitivity to New York's most vulnerable citizens and the centrality of our courts to bettering their lives has helped make our judicial system ever more responsive.

Hon. Lawrence Marks, our new Chief Administrative Judge, who will carry forward administration of justice in domestic violence cases.

Hon. Luis Gonzalez, whose leadership of the Appellate Division, First Department has embraced the publication of this book and the promotion of best practices for domestic violence cases in New York courts.

Hon. Betty Weinberg Ellerin, Chair of the New York State Judicial Committee on Women in the Courts, special counsel to Alston & Bird, and former Presiding Justice of the Appellate Division, First Department for her constant leadership, vision and perseverance in the pursuit of justice.

Teodors Ermansons, who designed the cover and the book, cheerfully helping the co-editors through draft after draft of these chapters until they were perfect or, given Ted's impending and well-deserved retirement, we ran out of time. This book would not have been without his tireless care, attention and help.

U.S. Department of Justice's Office on Violence Against Women & the New York State Division of Criminal Justice Services for a generous STOP grant that underwrote creation of this book.

Jill Zuccardy, **Amanda Norejko**, and **William Silverman** of **Greenberg Traurig** for invaluable proofreading.

The contributors, one and all, who took time in professional lives that were already stretched to the breaking point to share with our readers and with the Bar the extraordinary collective wisdom they carry. We are so very grateful.

Mary Rothwell Davis

Dorchen A. Leidholdt

Charlotte A. Watson

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Foreword by Hon. Jonathan Lippman

Chief Judge of the State of New York

For most of human history, acts of domestic violence have been minimized, denied, swept under the carpet, and hidden behind closed doors. It is only in the last few decades that our criminal justice system and our culture have recognized domestic violence for the insidious and destructive crime that it is. The 1990s saw the beginning of revolutionary changes in the way our courts, prosecutors, and legislators respond to intimate partner violence. In the years since, these changes have helped to protect countless vulnerable people from harm by the very ones they look to for love and support.

Over this period, our court system embraced innovative approaches to domestic violence cases. Beginning in the 1990s, New York's judiciary introduced domestic violence courts, and later integrated domestic violence courts in all of New York's 62 counties. By emphasizing accountability and judicial monitoring of offender compliance with court orders as well as coordinating with services for victims and families, these courts transformed the way our judiciary responds to domestic violence. The judiciary's visible leadership has helped to shape public understanding of the dynamics of domestic violence, and the courts have been a catalyst for conversation and coordination among an array of system actors. With the advent of domestic violence and integrated domestic violence courts, along with significant legislative developments, the growth of specialized units in prosecutors' offices, and the hard work of many lawyers and advocates, we have made enormous progress.

Since its first edition in 1995, the *Lawyer's Manual on Domestic Violence: Representing the Victim* has had an important role in this shift in how we as a justice system and a society view acts of domestic violence. With each edition, the *Lawyer's Manual* has provided guidance on increasing numbers of topics from leading experts, and this new edition continues to add to this indispensable resource. It is, without a doubt, a powerful tool for those on the front lines and in the trenches to bring justice and safety to victims and accountability for perpetrators. There is valuable information across these pages for judges, prosecutors, law enforcement, government agencies, service providers, treatment professionals, community groups, and others who seek to protect victims and uphold the law. We look to all these groups to protect the rights and the safety of New Yorkers. Their continued education and commitment is critically needed if we are to continue to make progress in combatting the terrible problem of domestic violence.

Introduction by Hon. Betty Weinberg Ellerin

This Manual is designed to provide information and guidance as to the latest state of the law in the area of domestic violence to the bar generally and particularly to those who advocate on behalf of the victims of domestic violence, a group of lawyers to whom we are most grateful for their zealous and tireless efforts on behalf of our most vulnerable citizens. Insuring that such victims have meaningful access to the courts and the remedies available to address the scourge of violence that affects their lives and safety on multiple levels is one of the top priorities of our New York State Court System.

This 6th Edition of the *Lawyer's Manual on Domestic Violence* marks the twentieth year since publication of the first *Manual* in 1995 when the New York State legislature set in motion what soon became a sea change in how New York law addressed domestic violence. Along with it came increasingly sophisticated and energized focus within the legal community on representing victims, particularly in the family and matrimonial arenas. In response, Anne M. Lopatto and James C. Neely on behalf of the Appellate Division, First Department edited the first edition of the *Lawyer's Manual on Domestic Violence*, providing critical guidance in this newly recognized practice area. In 1998, Ronald E. Cohen and James C. Neely updated the *Manual*, with subsequent editions to follow, including the 3rd edition edited by Julie Domonkos and Jill Laurie Goodman and the 4th and 5th editions edited by Jill Laurie Goodman and Dorchen Leidholdt.

It has been ten years since publication of the last edition of the Lawyer's Manual on Domestic Violence and during that time the law in this area has continued to evolve at a rapid pace. This 6th edition provides an update to previously published information and adds new chapters on probation, integrated domestic violence courts, batterer intervention programs, and representing disabled and elderly victims. The research community has been very engaged over the last ten years in evaluating best practices and creating additional tools for responding to domestic violence. The wide use of the Internet has greatly accelerated the spread and depth of information sharing. As time moves forward, we will see more and more automation of some of the procedural functions of the court such as e-filing of court petitions and other documents.

We know that our work is never ending in improving our response to addressing domestic violence through the courts. The authors of this volume have been state, national, and international leaders in moving the law and regulations forward and in changing the societal perception of both victims and perpetrators of gender based violence. We are fortunate to have their guidance and we extend warm thanks for their invaluable efforts.

As new attorneys, service providers, and government agents join this multi-faceted developing area, we believe that this edition will provide invaluable information across a broad range of victim representation issues, including how to obtain assistance from immigration, the availability of public benefits, victim interviewing techniques, and legal representation of the victim in criminal, family,

matrimonial, and civil courts. Our goal is to engender an understanding of the dimensions of domestic violence and the history that has brought us to where we are today.

While twenty years ago we were optimistic that the new laws and the strong response and awareness in the legal community would greatly diminish the terrible crime of domestic violence and the havoc it wreaks on families and on society as a whole, we now understand that it remains a gnarly problem with many tentacles that demand constant and continued persistence, tenacity and courage to uproot. We hope this book will provide the wisdom and the technical information to help guide those called upon to respond within the legal system.

Section 1
Introductory Matters

1

Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*

by Hon. Jonathan Lippman

Introduction

The violent murder of Galina Komar by her abusive ex-boyfriend on February 12, 1996 grabbed the attention of New Yorkers and made domestic violence a front-page issue.[1] Ms. Komar, a Russian immigrant who lived in Brooklyn, endured over a year of abuse at the hands of her boyfriend, Benito Oliver.[2] Throughout the course of their relationship, Mr. Oliver repeatedly punched Ms. Komar, threatened her, and slammed her into walls.[3] On one particular occasion, he hit her on the head with a pipe so hard that it opened a gash that required twenty-two stitches to close.[4] Though Ms. Komar had twice been sent to the hospital by her boyfriend's beatings, the charges against Mr. Oliver were never more serious than misdemeanors, as felony assaults required more serious injuries, such as broken bones.[5] One night, after Mr. Oliver held a knife to her throat, threatened to kill her, and forced her to have sex, Ms. Komar called the police, and Mr. Oliver was arrested on misdemeanor assault charges.[6] While he was held over a forty-one day period, Mr. Oliver's prosecution was the subject of thirteen hearings in front of five different judges, eight different prosecutors, and three different defense lawyers.[7] Though Mr. Oliver was a four-time felon and Ms. Komar had two orders of protection filed against him, the judge modified the bail terms and allowed for Mr. Oliver's release.[8] Three weeks after his release, Mr. Oliver went to the car dealership where Ms. Komar worked, shot her in the head, and then killed himself.[9]

Ms. Komar's violent death raised awareness in New York City and throughout the state regarding the problem of domestic violence. Ms. Komar's murder highlighted the shortcomings within the court system with regard to how domestic violence cases were handled. Judges and court personnel were not adequately trained in domestic violence issues and often harbored negative and sexist preconceived notions about victims. In both criminal and family courts, structural and procedural impediments to safeguarding families from domestic violence were widespread.

Since then, New York courts have come a long way in changing the way domestic violence cases are handled. Legislative activity and changes in court administration have been effective in addressing some of the obstacles faced by litigants as they navigate the court system.

Educational programs have informed judges and court personnel about the myriad of issues surrounding domestic violence so that courts are better able to address and mitigate problems. While a lot has been accomplished, still more needs to be done to address the shortage of legal services for victims of domestic violence. There are a growing number of people who cannot afford legal services, yet public interest legal service providers must turn away the vast majority of people seeking

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help, creating a justice gap.[10] To stop the widening of this gap, state government, non-profit groups, bar associations, and the legal community at large must work together to set new standards for the provision of civil legal services in New York and around the country.

Changes to the New York Criminal Court System Over Time Have Improved Outcomes for Victims of Domestic Violence

In the past, antiquated views of women and domestic violence impeded the prosecution of abusers.

For many years, domestic violence was considered a "private matter" and a subject inappropriate for the public courts.[11] New York police officers were not required to, and often explicitly instructed not to, arrest individuals who committed domestic violence felonies, violated stay-away orders of protection, or committed family offenses in violation of an order of protection.[12] Victims of domestic violence were encouraged to attend counseling with their abusers instead of bringing a claim against them or assisting in their prosecution.[13] Victims also were not offered services after a domestic violence incident or assistance in leaving an abuser.[14]

Victims received little help from prosecutors, even when a criminal case was being brought against their abuser.[15] Prosecutors often felt that there was "little incentive … to pursue domestic violence cases, which were traditionally low-prestige and unlikely to have a high conviction rate."[16] Prosecutors lamented that victims often did not follow through with pressing charges and generally concluded that it was not worth additional resources to charge cases.[17] Moreover, the percentage of domestic violence incidents resulting in an arrest was low, and the dismissal rate of cases was high.[18] "Prosecutors would drop charges in anywhere from 50% to 80% of cases … [because] the "victim requested it, refused to testify, recanted, or failed to appear in court.'"[19] Only a tiny "number of domestic violence incidents to which police responded ever made it to court at all." [20]

Additionally, "judges and other professionals in the court system [were] … underinformed about the nature of domestic violence and the characteristics of victims and offenders," as well as the unique difficulties facing domestic violence victims.[21] Many believed that women could tolerate being battered and could not understand why they would not leave their abusers. [22] And since police, court personnel, and judges often presumed that victims provoked beatings and abuse, hostile attitudes towards victims in court were common. The 1986 Report of the New York Task Force on Women in the Courts made the observation that women were "treated dismissively, like burdensome children, or disrespectfully, like sexual objects." [23] Judge Amy Juviler of New York City Criminal Court testified in 1985 that court personnel reacted in one of two ways after learning that a victim failed to follow through with proceedings in family court or criminal court: court officials either believed that the minor intercession of the court resolved the problem or they felt that the woman who reconciled with her abuser was not worthy of respect because she did not respect herself. [24] Judges lacked awareness that a victim's decision not to pursue prosecution involved many complicating factors, such as psychological and physical intimidation, and emotional and financial dependence on her abuser.[25]

In general, judges rarely or never jailed abusers for violating an order of protection, except for cases where the abuse was extreme or where multiple violations occurred.[26] Perhaps most troubling, a victim's husband often was punished more leniently than a stranger committing a similar offense.[27] Judges also were not cognizant of the gravity of the crimes committed as a result of domestic violence[28] and did not have an adequate "understanding of issues of self-defense and justification as … [related] to battered women." [29] It was not until the early 1980s that battered women's syndrome

was seen as a valid defense, when "Francine Hughes, a battered woman who killed her abusive husband, was acquitted … [by] pleading temporary insanity."[30]

Logistical and procedural obstacles in criminal court also prevented litigants from accessing justice.

Victims who received little or no support from the police, prosecutors, and judges also found themselves stymied by the criminal court system and its inadequate treatment of domestic violence cases. Prior to 1994, victims were limited to pursuing a claim against their abuser either in family court or in criminal court "within 72 hours after an act of domestic violence."[31] Once a victim decided to pursue her case in family court, the abuser could be subject to an order of protection but would no longer be subject to criminal punishment for his actions, as the district attorney's office would be unable to prosecute the crime.[32] Victims, therefore, were forced to choose one legal recourse and forgo another at a time when they were most likely unprepared, uninformed, and in crisis.[33] "The process for civilians … to initiate criminal complaints was [also so] convoluted, [it] discouraged all but the most determined litigants."[34] In New York City, the complaint process required complainants to go "back and forth between a … summons part in lower Manhattan and the courts and police stations in their own boroughs," necessitating as many as ten different trips.[35] The court system put the onus of prosecution on the victim, instead of transferring the prosecutorial functions to the local district attorneys' offices.[36] As a result, victims of domestic violence were forced to proceed in criminal court on their own.[37] Furthermore, long delays and adjournments within the criminal court system also restricted victims' access to justice. "Cases involving violations of orders of protection [were] not given preference in calendar scheduling,"[38] as more serious cases involving jail time were prioritized in criminal court.[39] Many courtrooms were also designed in a manner that was not friendly to victims because batterers and victims were required to enter and exit through the same doors, making victims more vulnerable to intimidation and coercion.[40]

Mandatory arrest policies, a statewide domestic violence registry, and other reforms were implemented to aid law enforcement and prosecutors.

Events like the highly publicized death of Ms. Komar, pressure from advocates for battered women, and study findings from other jurisdictions put a spotlight on domestic violence issues and galvanized policymakers to initiate a wave of change.[41] In the late 1970s, twelve battered wives brought an action, *Bruno v Codd*, seeking declaratory and injunctive relief against the New York City Police Department, the Probation Department, and the New York City Family Court for failing to enforce state laws, failing to arrest their abusive husbands, discouraging applications for protective orders, and making it difficult to access a family court judge.[42] The affidavits of the battered wives highlighted how the police repeatedly told victims that they could not act unless there was a valid order of protection in place or unless their husbands used a weapon to beat them.[43] In one instance, a battered wife was attacked and gouged with a straight razor, but the police told her there was nothing they could do and referred her to family court.[44] Another victim had her arm sprained by her husband's attack, yet the police officer failed to make an arrest after she requested it.[45] *Bruno v Codd* was eventually resolved by a consent decree with the New York City Police Department where the police agreed to make changes in its policies to improve its domestic violence call response times and arrest rates.[46]

The *Bruno v Codd* consent decree paved the way for future changes to police policies. In 1994, the New York Legislature passed the Family Protection and Domestic Violence Intervention Act,[47] which implemented a mandatory arrest rule in New York for domestic violence misdemeanors unless the victim requested otherwise. [48] The law required police officers to arrest the abuser without attempting to "reconcile the parties or mediate."[49] Police officers were no longer allowed to ask the

victim whether she sought the arrest of her abuser.[50] The mandatory arrest provision was further updated in 1997 to require police officers to arrest the primary physical aggressor, rather than arresting both parties in a domestic dispute if both alleged or showed signs of injury.[51] Police would consider factors such as prior history of domestic violence, the comparative extent of injuries, and whether a party acted in defense in determining which one acted as the primary aggressor.[52] Although some battered women advocates and scholars have decried mandatory arrest policies, there still remains broad support for the state's expanded police powers.[53] In fact, the 1994 federal Violence Against Women Act (VAWA) required states to implement mandatory arrest or pro-arrest policies in order to receive federal funding for domestic violence programs.[54] There has also been further corroboration that mandatory arrest policies have worked. In the six-year period after mandatory arrest policies were put in place, felony domestic arrests in New York City increased by 33%, misdemeanor arrests increased by 114%, and arrests based upon violations of orders of protection increased by 76%.[55]

Another significant change originating from the Family Protection and Domestic Violence Intervention Act was the establishment and maintenance of a statewide-computerized registry of all orders of protection.[56] The registry enabled police and judges to more swiftly and easily determine whether an order had been violated and whether there was a pattern of domestic violence.[57] The legislation also created a police form called "Domestic Incident Reports," which allowed the police to better report and track incidents.[58] The establishment of the Domestic Incident Report and the registry for reports allowed New York to take a "giant step" forward "in documenting the incidence of domestic violence."[59] The 1994 Act permitted orders of protection to be put in place for up to three years if the court found the existence of aggravating circumstances[60] and also mandated training for state police in the investigation of and intervention in family offenses.[61]

New York State updated the registry by creating a Domestic Incident Report Repository in 2011, which allows law enforcement officials to search for information on incidents of domestic violence across jurisdictions and regardless of which police agency responded to a call or filed the report.[62] The Repository gives law enforcement and other authorized users the ability to search for domestic incident reports filed by the agencies in the fifty-seven counties outside of New York City,[63] improving both victim and officer safety. Police dispatchers are able to use the information to advise responding officers on how best to handle a call for help.[64] The Repository is also a vital tool for prosecutors, as a search within the database can unveil a pattern of behavior that would have previously gone undetected,[65] which allows prosecutors to build stronger cases resulting in stiffer penalties for abusers.[66] The Repository also aids in the supervision of offenders on parole and probation, which better protects domestic violence survivors and their communities.[67]

Furthermore, steps have also been taken by the New York State Division of Criminal Justice Services to integrate domestic violence initiatives into their crime reduction strategy. Operation IMPACT promotes information sharing among law enforcement agencies, intelligence-based policing, and the involvement of community organizations to reduce the incidence of domestic violence.[68] Crime analysis centers automate and scan domestic incident reports in order to identify repeat offenders.[69] For example, the Erie Crime Analysis Center has automated and scanned reports from the years 2008, 2009, and 2010.[70] Once a repeat offender is arrested, information such as "criminal history, criminal incident reports, probation-parole information, domestic incident reports, and warrant history [are all] sent to the Erie County District Attorney's Domestic Offender Section."[71] The information allows judges to see a complete picture of the offender before setting bail.[72]

An Operation IMPACT program run by the Niagara Falls Police Department has also made great strides by taking a closer look at domestic related assaults and establishing Domestic Violence Intervention Teams (DVIT).[73] The DVIT consists of specially trained domestic violence investigators and victim advocates from the police department, the district attorney's office, the probation and sheriff's office.[74] The teams take a more aggressive approach to the domestic violence problem by

enabling investigators to follow-up with victims and enforce orders of protection and domestic violence-related warrants.[75]

Prosecutors have also employed new strategies and tactics to generate positive outcomes for victims of domestic violence. Certain jurisdictions such as Manhattan, Queens, Brooklyn, and Staten Island adopted no-drop prosecution policies in domestic violence cases, meaning that almost all domestic violence cases were prosecuted even if the victim did not want the district attorney to pursue the case.[76] Under a no-drop policy, the district attorney's office keeps more cases active, and the prosecutors will spend time encouraging the victim to cooperate and to take advantage of services such as counseling and housing assistance.[77] If the victim is uncooperative, the prosecutor may rely on the victim's signed statement on a Domestic Incident Report, statements made on 911 calls, photographs, police testimony, and medical evidence, all which may be admissible through hearsay exceptions.[78] No-drop policies benefit victims by reducing the chance that an offender would intimidate the victim, since it is the prosecutor who controls whether a criminal case progresses, and not the victim.[79] As an additional benefit, the assistant district attorneys in no-drop jurisdictions are able to monitor a large number of offenders, since virtually all of them are involved in ongoing prosecutions.[80] A policy of prosecuting and sentencing domestic violence offenders signals to the community and to offenders that the criminal justice system takes domestic abuse seriously and will intervene to stop it.[81]

The creation of specialized domestic violence courts brings families with overlapping criminal and family court cases before the same judge.

In addition to legislative mandates, internal policy changes have affected the way domestic violence cases are handled by law enforcement and prosecutors. In 1996, the judicial branch of New York, helmed by then Chief Judge Judith Kaye, instituted a wide array of reforms with the implementation of specialized domestic violence (DV) problem-solving courts.[82] These courts were customized to handle criminal cases involving intimate partner violence,[83] and were instituted with the three goals of promoting victim safety, increasing defendant accountability, and encouraging better coordination among institutions in the criminal justice system already dealing with domestic violence.[84] Leaders within the court system realized that courts could not do justice in domestic violence cases unless judges "received training from experts about the nature of domestic violence," its effect on the victims, and how to hold abusers accountable.[85] The creation of the DV courts was made possible by the modeling of specialized DV courts by the Center for Court Innovation, the court system's research and development arm, and by the leadership of the Honorable John Leventhal of the Brooklyn Felony Domestic Violence Court.[86] These customized courts equipped to handle DV cases were able to discredit "excuses for battering such as substance abuse or anger management problems."[87] The specialized courts were also more aware that batterer intervention programs did not necessarily "change" the batterers and did not make victims safe.[88]

The DV courts were "created in local criminal courts to handle misdemeanors and violations" of orders of protection, as well as in superior courts to handle felonies.[89] The DV courts continue to operate today and feature a single presiding judge trained in issues common to domestic violence cases.[90] Defendants sentenced to probation are strictly monitored by trained probation officers, and those out on bail are required to appear regularly before judges who check on their status.[91] Court staff members called Resource Coordinators gather information from outside agencies such as victim services and treatment programs to allow the judges to have a complete picture before making decisions in domestic violence cases.[92] These specialized DV courts have increased defendant accountability with documented improvements in expedited processing of cases and improved monitoring of offenders.[93]

The next iteration of the specialized DV courts resulted in the development of the Integrated Domestic Violence (IDV) courts. The IDV courts were created in 2001 and initiated a one-family, one-judge model.[94] Prior to the creation of IDV courts, cases were heard in separate criminal, matrimonial, and family courts before a series of different judges in various buildings.[95] The separate courts were often in different parts of a county and required families to navigate a complicated court structure.[96] Now, IDV courts allow for one-stop shopping for services to victims and families and refer adult and child victims to supportive services, while holding offenders accountable by sending them to mandated programs.[97]

The goal of the IDV courts is to simplify the court structure so that the system can better and more holistically serve the victims of domestic violence.[98] These courts address "multiple criminal, family, and matrimonial disputes for families where domestic violence is an underlying issue."[99] In order to be eligible for IDV court, a family must have a criminal domestic violence case as well as a family court case, a matrimonial case, or both, where at least one of the defendant and complaining witness to the criminal case is also a party to the family or matrimonial case.[100]

The IDV courts provide ongoing judicial monitoring of offenders and also work closely with community agencies that provide mental health and substance abuse services to victims and offenders.[101] The IDV courts intentionally require offenders to make frequent court appearances to improve accountability and to generate increased coordination and communication between the court and service providers.[102] The courts also coordinate with victim advocates and outside agencies and services facilitating communication and lending support to victims and their families.[103]

Having one judge hear their case helps families to obtain more positive results by "ensuring consistency in judicial orders and allowing the court to better respond to the particularities of a family's situation."[104] The judges of the IDV courts receive special training in areas of the law and on domestic violence issues.[105] The training allows IDV judges to communicate with other judges on issues of strategy and implementation.[106] The training also aids the judges and their court staff "to handle related legal matters more consistently, comprehensively, [and] efficiently."[107] IDV courts attempt to calendar a family's criminal, family, and matrimonial cases on one day if feasible, in order to reduce the number of court appearances litigants need to make as their cases progress.[108] The Center for Court Innovation conducted a study of IDV courts in Erie and Bronx County and concluded that "litigants make significantly fewer trips to court than they would" have if they did not hear their cases in IDV court.[109]

Former Chief Judge Kaye further expanded the geographic reach of problem-solving courts during her tenure by announcing the creation of the Deputy Chief Administrative Judge for Court Operations and Planning (DCAJ) and appointing Judge Judy Harris Kluger to head the office in 2003.[110] What started out as two IDV courts serving 141 families in 2001,[111] has grown to 46 IDV courts around the state, with 17,300 new cases by 2010.[112] In 2011, the IDV courts around New York State served over 3000 families and handled over 16,000 new cases.[113] Additionally, "the 40 Domestic Violence Courts heard 32,983 new cases in 2011."[114]

Youthful Offender Domestic Violence Courts (YODV) are another specialized, problem-solving court that are innovative tools in the fight against domestic violence. These courts were "launched in late 2003 … to address exclusively misdemeanor domestic violence cases among teenagers between the ages of 16 and 19."[115] The YODV courts address violent tendencies in teens early on, before behavior becomes entrenched in their domestic relationships.[116] Though "women between the ages of 16 and 24 experience the highest rate of domestic violence and sexual assault" among all age groups, little had been done before 2003 to address the problem.[117] The YODV courts adapt the DV court model to the circumstances of teen defendants, and the "staff [of the YODV courts] are equipped to address the unique needs [of] teen complainants."[118] Furthermore, the YODV court "links victims

to … specialized services, [such as] a free 12-week program" for batterers.[119] YODV courts currently operate in Brooklyn, the Bronx, and Yonkers.[120]

The success of specialized domestic violence courts and other reforms are documented by encouraging statistical trends from the criminal courts.

While efficiency of court administration and the efficacy of reforms can be difficult to measure in cases of domestic violence, much of the data coming from the criminal courts regarding the volume and outcome of cases signals that the specialized courts have produced promising outcomes for victims and the community.[121]

For example, the percentage of dismissals and adjournments in contemplation of dismissal (ACD) out of all domestic violence dispositions in New York County Criminal Court has declined from a little over 70% to 61% of all dispositions between 2007 to 2012.[122] While previously there was no improvement in the percentage of dismissals in Manhattan Criminal Court from 1998 to 2001, the current declining trend of dismissals indicates that victims may be more willing to cooperate with the prosecution in bringing cases against their abusers or that law enforcement and prosecutors are focusing more resources on cases with strong evidence.[123]

There also has been an upward trend in the percentage of pleas and convictions out of all domestic violence dispositions in New York County Criminal Court, with the percentage increasing from 20.7% to 30%.[124] [Figures I & II omitted.]

The percentage of dismissals and ACDs in criminal courts in Kings County has also decreased from 2007 to 2012, but at a less steady pace,[125] while the percentage of pleas and convictions has increased dramatically, by almost 10 percentage points over six years.[126] While the combined dismissal and ACD rates are still high compared to the statistics for non-DV cases, part of this may be because defendants in DV cases have less serious criminal histories compared to defendants in non-DV cases.[127] There are also mandatory arrest policies and no-drop prosecution policies for DV cases in Manhattan, which also contribute to a higher dismissal rate.[128] Still, the statistical difference between dismissals in DV and non-DV cases demonstrates that there is room for improvement in encouraging and supporting victims so that they are willing to testify and cooperate in the prosecution of their batterers.

Innovative Solutions in the Family Courts Have Increased Access to Justice for Domestic Violence Victims

Historically, obstacles in Family Court prevented victims of domestic violence from obtaining relief.

Victims of domestic violence also faced barriers to accessing justice from the family courts. Often, "judges, attorneys, and court personnel erroneously presumed that petitions for orders of protection filed by women during the course of a matrimonial action [were] "tactical' in nature."[129] Judges and attorneys failed to understand that violence was "particularly likely to occur after a divorce action had been commenced."[130] Certain judges in the matrimonial part required the existence of "visible physical injuries" on the victim "before granting an order of protection."[131] A survey conducted in 1985 showed that about 40% of attorneys felt that judges in family courts and criminal courts asked why petitioners had no visible physical injuries either "sometimes" or "often."[132] The prevailing opinion from judges was that "women's testimony [was] not credible unless corroborated by" visible proof, like "a bruise, a laceration, or a black eye."[133] Judges particularly doubted a woman's version of events when the woman petitioned for an order of protection while she had a matrimonial case pending.[134]

Additionally, in the past, many family court judges ordered mediation, even though experts agreed that violence in the family destroyed the power balance that was necessary for a successful mediation.[135] Some judges were also unwilling to remove a batterer from the home, which often forced mothers and children to live in shelters.[136] Vacate orders that directed batterers to leave the family home were underused by judges in both criminal and family courts.[137] More disturbingly, many judges considered it a compromise of impartiality to learn more about domestic violence and to apply the specialized knowledge to the cases before them despite the pervasive lack of information in family court.[138]

In addition to the erroneous presumptions that plagued the family court in the past, many victims of domestic violence also confronted institutional and logistical barriers to obtaining relief.[139] Victims lacked information regarding where they could go to receive temporary orders of protection.[140] Though the Family Court Act section 161(c) allowed any judge to hear an ex parte application for an order of protection when family courts were closed,[141] victims lacked knowledge regarding where to access available services. Families found it difficult to navigate a complicated court structure, particularly New York City litigants.[142] Historically, there was also a pronounced shortage of legal services for battered women.[143] While pro bono counsel provided some relief to victims of domestic violence, other individuals and resources were needed to help usher litigants through the system, to assist in filling out paperwork, and to instruct litigants on procedures.[144]

Furthermore, family court resources were available to only a limited group of litigants in the past. State law only allowed married and divorced couples, relatives, or people with children in common to obtain an order of protection in family court.[145] While the criminal courts were open to a much broader range of litigants, many victims did not pursue their claims because they did not want to prosecute their abusers or because they recognized that criminal courts did not take domestic violence as seriously as family courts.[146] There was a perception that criminal court judges thought of domestic violence cases as mere family matters and focused on the cases that they saw as more serious.[147]

Legislative changes and the strengthening of civil protective orders have aided in combating domestic violence.

In 1962, legislation gave family court exclusive original jurisdiction over crimes amounting to assault or disorderly conduct perpetrated against family members.[148] Civil protective orders met the needs of victims who did not desire to secure a criminal conviction, but rather were seeking practical help.[149] The implementation of civil protective orders was a response by lawmakers to the dearth of remedies available to victims of family violence from the criminal courts.[150] Presently, civil orders of protection provide an immediate safeguard against further violence and send a message to the abuser that the courts will protect victims and hold abusers accountable.[151] Civil protective orders also empower victims and prevent abusers from keeping the abuse hidden.[152] New York was at the forefront of the issue and one of the first states to offer civil protective orders for domestic violence,[153] and the orders remain a vital tool for victims and advocates today.

The 1994 Family Protection and Domestic Violence Intervention Act produced a plethora of positive developments for victims of domestic violence in the family courts. The Act eliminated the rule which limited victims to choosing between pursuing a claim in "Family Court or Criminal Court within 72 hours" after an act of abuse.[154] The Act also created concurrent jurisdiction between the family and criminal courts so that victims would have access to both courts. Victims could proceed in either family court or criminal court without referral, and an arrest was not required for commencing either proceeding.[155] The state legislature made further updates in 1996, by expanding the definition of the crime of criminal contempt, as to encompass violations of orders of protection.[156] The law was updated so that a defendant would be guilty of an E felony if he or she violated an order of protection by stalking, harassing, or menacing a victim.[157]

More recently, in 2003, the maximum length that orders of protection can be granted in family court was expanded "from 1 to 2 years, and from 3 to 5 [years] if aggravating circumstances exist."[158] Furthermore, the Expanded Access to Family Court Act opened New York family courts to unmarried couples, teens, and victims of violence in same-sex relationships in 2008.[159] Unmarried, childless couples can now obtain orders of protection in family court without having to file criminal charges.[160] Since family court is more accessible to litigants without legal representation compared to criminal court, the landmark legislation expanded access to justice for many previously excluded groups.[161]

The implementation of Family Justice Centers and expanded access to civil legal services provide increased support to domestic violence victims.

In addition to legislative efforts, the court system has also endeavored to improve and streamline the process for domestic violence litigants in family courts. While he was Chief Administrative Judge from 1987 to 1989, the Honorable Albert Rosenblatt directed administrative judges to review the accessibility of courts for orders of protection and to expand judicial access.[162] Administrative judges also oversaw the development of a special simplified form to be filled out by prospective family offense petitioners.[163] The form was designed to help improve the complaint process, and experienced clerks were trained in its usage to help litigants.[164] While the examples of how the family court has improved its handling of domestic violence cases are many and varied, I will highlight two examples: Family Justice Centers and access to civil legal services.

In 2003, the U.S. Department of Justice created the Family Justice Center Initiative, and New York State was awarded two grants to create Family Justice Centers in Brooklyn and in Buffalo.[165] Family Justice Centers enable victims to speak to prosecutors and law enforcement officers, speak with trained counselors, apply for housing and financial assistance, and address immigration issues, all in a one-stop shop where childcare is provided.[166] The Family Justice Centers also provide services for elderly or disabled victims, language interpretation, and chaplains.[167] The Brooklyn Family Justice Center houses the entire Domestic Violence Bureau of the Kings County District Attorney's Office and is supported by nine government agencies, twenty-five community-based organizations, six faith-based organizations, and five universities.[168] The Family Justice Center of Erie County located in Buffalo also brought together thirty-two partner agencies to provide a safe haven for victims of domestic violence.[169] Two more Family Justice Centers in Queens and the Bronx opened in 2008 and 2010, respectively, and have increased the effectiveness of legal service delivery to domestic violence victims.[170]

Though the lack of legal services for poor, battered women has plagued our state in the past,[171] strides are being made to alleviate the dearth of qualified attorneys trained to deal with domestic violence cases.[172] While the current laws do not entitle indigent litigants to counsel in matrimonial or child support cases,[173] a trained attorney can be key in a victim's attempts to navigate through the court system to achieve a positive result.[174] Charles Hynes, the District Attorney for Kings County, and Kathleen B. Hogan, the District Attorney for Warren County, testified at the Civil Legal Services Task Force hearing that the lack of available civil legal assistance undermines comprehensive assistance for victims of crime, particularly survivors of domestic violence.[175] Currently, New York provides a patchwork of civil legal services to assist domestic violence victims. Some providers offer civil legal services regardless of income,[176] while others, such as Legal Aid, are restricted to indigent clients.[177] The state provides limited funding to a small number of domestic violence programs and legal programs to assist domestic violence victims.[178] Law school domestic violence clinics and pro bono attorneys are another key source of needed help.[179]

My current initiative to expand civil legal services in New York by increasing funding to legal service providers throughout the state and to require fifty hours of pro bono service for new lawyers goes to

address the marked justice gap between the availability of civil legal services and the need.[180] However, it is evident that additional funding and resources are needed. Both litigants and advocates testified at the 2012 Hearings on Civil Legal Services about the impressive efforts to try to address the access-to-justice gap in the field of domestic violence cases, but that nevertheless, a shortfall exists.[181] In 2011, Navigant Consulting reported that investing in civil legal services to prevent domestic violence in New York State could achieve $85 million in savings in the costs otherwise incurred to assist survivors of domestic violence.[182] The 2010 Report to the Chief Judge from the Task Force on Civil Legal Services also cited a study from Wisconsin which calculated that protecting a family from domestic violence provided savings in terms of medical care costs, lost wages, counseling, the cost of police resources, and incarceration of abusers, with savings totaling $ 3400 per family.[183] This surely is a worthwhile investment in terms of lives saved and improved and generates an additional benefit for the state fiscal environment. Professor Catherine Cerulli, from the Department of Psychiatry at the University of Rochester, posited that providing families access to lawyers trained in intimate partner violence could aid in ameliorating health and mental health consequences and reducing the amount of violence children are exposed to.[184] She stated at the 2010 Civil Legal Services Hearing that "at some point if we don't offer civil legal services, we will pay … [with] increased homicides, increased healthcare costs, increased incarceration for perpetrators, … and the impact on children will be immeasurable in terms of dollars."[185]

Conclusion

Both the criminal courts and family courts have come a long way in changing long-standing attitudes of domestic violence, implementing mandatory procedures, collaborating with community stakeholders and service providers, and harnessing technology to stop the violence against victims and to prevent batterers from escaping the consequences of their actions.

The ultimate goal in all of our efforts is to prevent tragic outcomes like the case of Galina Komar and to see more positive results, like the case of one domestic violence survivor, Yulia Abayeva. Ms. Abayeva shared her story with me at the Civil Legal Services Hearing before the First Department in 2010. Ms. Abayeva, an immigrant from Uzbekistan, was beaten severely by her husband for the smallest missteps, such as breathing too loudly or failing to clean a messy apartment.[186] At one point, Ms. Abayeva was beaten so badly that she spent two weeks in the hospital.[187] Ms. Abayeva's husband put on a special pair of shoes to kick Ms. Abayeva and would beat her on speakerphone to extort money from her parents in Uzbekistan.[188] To escape the violence, Ms. Abayeva spent cold nights sleeping outside in Time Square and in Brighton Beach.[189] Ms. Abayeva attempted to file an order of protection in 2005 but was too frightened to show up in court.[190] She was alone and lacked support and knowledge about her rights.[191] Ms. Abayeva was also fearful for her life because she knew her husband had connections to organized crime.[192]

Though Ms. Abayeva and her daughter had already escaped her violent home, her husband was able to track her down at the airport when Ms. Abayeva's parents visited from Uzbekistan.[193] Her husband went to the police, lied about her behavior, and Ms. Abayeva ended up spending time in jail because of her husband's accusations.[194] Those developments spurred Ms. Abayeva to reach out to the Jewish Community Center, who in turn, connected her to New York Legal Assistance Group (NYLAG).[195] NYLAG explained to Ms. Abayeva what she needed to do, translated her Russian documents into English, and helped her prepare a criminal case against her husband. NYLAG also prepared Ms. Abayeva's custody case so she would have full custody of her daughter and receive child support from her abusive husband.[196]

Ms. Abayeva's story is one where the system worked and where she was able to find safety for her and her child.[197] With a more accessible court system and appropriate legal assistance, it is my

hope that more survivors will transition to independence from their abusers and to build a safe and stable future for themselves and their children.[198]

Notes

1. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L & Pol'y Rev 125, 140 & n 62 (2004); Matthew Purdy & Don Van Natta Jr., *Before the Murder, A Judicial Journey*, NY Times, Mar. 14, 1996, at B1; Press Release, NYC Press Office, *Mayor Giuliani Honors the Memory of Domestic Violence Victim Galina Komar* (Feb. 19, 1997), www.nyc.gov/html/om/html/97/sp093-97.html.
2. Purdy & Van Natta Jr., *supra* n 1 at B1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.; see* Kaye, *supra* n 1 at 140.
9. Purdy & Van Natta Jr., *supra* n 1 at B1.
10. Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, NY Times, Sept. 20, 2012 at A25 (stating that the Legal Aid Society turns away eight of every nine people seeking help).
11. Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W St U L Rev 1, 1 (2000); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis L Rev 1657, 1662; *see* Criminal Procedure Law § 530.11(1) (McKinney 2013); Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222, § 1.
12. Sack, *supra* n 11, at 1662. *But see* Julie A. Domonkos, *The Evolution of the Justice System's Response to Domestic Violence in New York State*, in Lawyer's Manual on Domestic Violence: Representing the Victim 1, 2 (Jill Laurie Goodman & Dorchen A. Leidholdt eds, 5th ed. 2006), available at www.courts.state.ny.us/ip/womeninthecourts/DV-Lawyers-Manual-Book.pdf (noting a change in 1994 which required arrests for such crimes).
13. Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 162 (1982).
14. Sack, *supra* n 11 at 1662-63.
15. *See id.* at 1664-65.
16. *Id*. at 1665.
17. *Id*.
18. *Id*.
19. *Id.* at 1664 (quoting Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L Rev 853, 857 (1994)).
20. Sack, *supra* n 11 at 1665.
21. *Report of the New York Task Force on Women in the Courts*, 15 Fordham Urb L J 11, 47 (1987).
22. Id. at 32 (citing *New York City Task Force on Women in the Courts* Public Hearing 155-56 (1985) (testimony of Barbara Bartoletti)).
23. *Report of the New York Task Force on Women in the Courts, supra* n 21 at 27.
24. *Id.* at 36-37.
25. *See id.* at 37.
26. Sarah Eaton & Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts,* 19 Fordham Urb L J 391, 404 (1992).

27. Fran Reiter *et al., Comm'n on the Status of Women, Report on Domestic Violence in New York City: Listening with the Third Ear* 63-64 (2d ed. 1996); Eaton & Hyman, supr n 26, at 504.
28. *See* Reiter *et al., supra* n 27 at 66.
29. Eaton & Hyman, *supra* n 26 at 404 (footnote omitted).
30. Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 Cardozo Women's L J 1, 39 (1993).
31. Domonkos, *supra* n 12, at 1-2.
32. Jan Hoffman, *Domestic-Abuse Law: An Accuser's Painful Choice*, NY Times, May 7, 1993, at B16.
33. *Id.*
34. The Judicial Committee on Women in the Courts, *Five Year Report of the New York Judicial Committee on Women in the Courts*, 19 Fordham Urb L J 313, 331 (1992) [hereinafter *Five Year Report*].
35. *Id.; see* NY State Task Force on Processing Civilian Complaints by the New York City Criminal Court, *Report on the Task Force on the Civilian-Initiated Complaint Process in the New York City Criminal Court: Findings and Recommendations* 24 (1989) [hereinafter *Civilian Complaints*].
36. The Judicial Committee on Women in the Courts, *supra* n 34 at 332.
37. *Id.*
38. Eaton & Hyman, *supra* n 26 at 405.
39. *Id.*
40. Kerry Healey *et al*., US Dep't of Justice, Nat'l Inst for Justice, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* 88-89 (1998), www.ncjrs.gov/pdffiles/168638.pdf.
41. *See* Press Release, NYC Mayor's Office, *supra* n 1; Sack, *supra* n 12 at 1669-70.
42. *Bruno v Codd*, 90 Misc 2d 1047 (1977), *rev'd* 64 AD2d 582 (1st Dep't 1978) (Murphy, P.J., dissenting), *aff'd*, 47 NY2d 582 (1979).
43. *Id.*
44. *Id.*
45. *Id.*
46. Sack, *supra* n 12 at 1667 n51 (citation omitted).
47. Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222. Instrumental to the passage of the Act were the efforts of sponsor Assemblywoman Helene Weinstein, the current chair of the New York Assembly Judiciary Committee. *See* Assemblywoman Helene Weinstein, *Biography*, N.Y. State Assembly, assembly.state.ny.us/mem/Helene-E-Weinstein/bio.
48. Criminal Procedure Law § 140.10(4)(c).
49. *Id*. § 140.10(4); Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222, § 8; L 1994, ch 224.
50. Domonkos, *supra* n 12 at 2.
51. *Id.* at 3.
52. Criminal Procedure Law § 140.10(4)(c); NY Bill Jacket, 1997 SB 5791, 220th Leg Reg Sess (1997), ch 4, at 5; Domonkos, *supra* n 12, at 3.
53. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm & Mary L Rev. 1843, 1856 (2002).
54. *Id*. VAWA "created a new federal civil rights remedy for victims of gender-based crimes and instituted new penalties for interstate crimes of domestic violence." Domonkos, *supra* n 12 at 2.
55. Sack, *supra* n11 at 1672.
56. Executive Law § 221-a(1); Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222, § 50.
57. Domonkos, *supra* n 12 at 2.
58. *See id.*

59. NY State Office for the Prevention of Domestic Violence, *New York State's Response to Domestic Violence: Systems and Services Making a Difference* 5 (2006), opdv.ny.gov/whatisdv/about_dv/nyresponse/nysdv.pdf [hereinafter *Response to Domestic Violence*].
60. Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222 § 22. But see Family Court Act § 842 (extending the time to five years).
61. Executive Law § 840(2)(f); Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222 § 28.
62. Press Release, NY State Div of Criminal Justice Servs, *New York State Launches Domestic Incident Report (DIR) Repository* (Dec. 14, 2011), www.criminaljustice.ny.gov/pio/press_releases/2011-12-14_pressrelease.html.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id*.
67. *Id.*
68. Operation IMPACT NY State Division Crim Just Servs, www.criminaljustice.ny.gov/crimnet/ojsa/impact/index.htm. Operation IMPACT also applies to other crimes besides incidents of domestic violence. *See id*.
69. *See Press Release*, NY State Div of Criminal Justice Servs, *supra* n 62.
70. *See* NY State Office for the Prevention of Domestic Violence, Domestic Violence *Annual Report 2010* at 14 (2010) [hereinafter *2010 DV Annual Report*].
71. *Id.*
72. *Id.*
73. *Id.* at 15.
74. *Id.*
75. *Id.*
76. Richard R. Peterson, NYC Criminal Justice Agency, Inc., *Combating Domestic Violence in New York City: A Study of DV cases in the Criminal Courts* 4 (2003), www.nycja.org/research/reports/ressum43.pdf.
77. *Id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *Id.* at 26. However, no-drop policies do reduce conviction rates because resources are diluted across numerous domestic violence cases, many of which may be meritless. Statistics from 1998 reveal that domestic violence cases in no-drop districts had dismissal rates of 59% (Brooklyn) and 54% (Manhattan), while the percentage of dismissals in the Bronx, where there is not a no-drop policy, is much lower at 29%. *Id.* The conviction rate in the Bronx is only 53%, compared to the domestic violence conviction rates in Brooklyn and Manhattan of 17% and 28%, respectively. *Id.*
82. Jonathan Lippman, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 NYU L Rev 655, 658 & n10 (2009). *See generally* Robert V. Wolf et al., Center for Court Innovation, *Planning a Domestic Violence Court: The New York State Experience* 1 (2004), www.courtinnovation.org/_uploads/documents/dvplanningdiary.pdf (discussing the development of domestic violence courts in New York).
83. Judy Harris Kluger, *New York State Problem-Solving Courts: Five-Year Report* 1 (2008).
84. Kaye & Knipps, *supra* n 11 at 6-7.
85. Domonkos, *supra* n 12 at 4.
86. *See* Judge John Leventhal, Brooklyn Felony Domestic Violence Court, Center for Court Innovation, www.courtinnovation.org/research/judge-john-leventhal-brooklyn-felony-domestic-violence-court. For a thorough discussion on the implementation of the felony DV courts, *see* Lisa Newmark *et al., Specialized*

Felony Domestic Violence Courts: Lessons on Implementation and Impacts from the Kings County Experience 1 (2001), www.courtinnovation.org/sites/default/files/documents/SpecializedFelonyDomesticViolenceCourts.pdf.

87. Domonkos, *supra* n 12 at 4.
88. *Id.* (internal quotation marks omitted).
89. Kluger, *supra* n 83 at 1.
90. *Id.*
91. Kaye & Knipps, *supra* n 11 at 7.
92. *Id.* at 8.
93. Richard R. Peterson, NYC Criminal Justice Agency, Inc., *Manhattan's Specialized Domestic Violence Court* 6 (2004), www.cjareports.org/reports/brief7.pdf. In Manhattan's specialized DV court, "the average time between arraignment and disposition declined between 1998 and 2001." *Id.* Plea bargains were reached more expeditiously and efficiently. *Id.* Expedited processing allowed the courts to enroll batterers in intervention and drug and alcohol treatment programs more quickly. *Id.* More conditional discharge sentences were meted out under the specialized DV courts, indicating that there is now more monitoring of batterers even after their cases are disposed. *Id.* at 7.
94. Kluger, *supra* n 83 at 3. Judge Daniel J. Angiolillo presided over the first IDV court in New York in Westchester County. Pace Women's Justice Center Hosts Seminar on Mediating Domestic Violence, White Plains CitizeNet Rep. (Oct. 19, 2004), www.whiteplainscnr.com/modules.php?name=News&-file=print&sid=2989. Judge Angiolillo, along with Judge George B. Ceresia Jr. and the late Judge Ruth Levine Sussman, were pioneers in the implementation of IDV courts and paved the way for their future success. *See generally* John Caher, *Domestic Violence Project Falls Short of Integrated Courts*, Fund for Modern Courts (June 5, 2002), www.moderncourts.org/News/Forums/0602a.html (noting that the three justices were presiding over the IDV Courts in 2002).
95. Kluger, *supra* n 83 at 3.
96. *Id.*
97. *Integrated Domestic Violence Courts: Key Principles,* Center for Court Innovation 1-2, www.courtinnovation.org/sites/default/files/documents/IDV_FACT_SHEET.pdf [hereinafter IDV Courts].
98. *See* Kluger, *supra* n 83 at 3.
99. *Id.*
100. *Id.*
101. *See* IDV Courts, *supra* n 97 at 2.
102. *Id.*
103. Kluger, *supra* n 83 at 3.
104. *Id.* at 5.
105. *IDV Courts, supra* n 97 at 2.
106. *Id.*
107. *Id.*
108. Kluger, *supra* n 83 at 5.
109. *Id.*
110. *Id.* at ii.
111. *Id.* at 5.
112. *2010 DV Annual Report, supra* n 70 at 13.
113. Gwen J. Wright, *New York State Domestic Violence Dashboard Project: 2011 Data*, NYS Office for the Prevention of Domestic Violence (2012), opdv.ny.gov/statistics/nydata/2011/index.html.
114. *Id.*

115. Youth Domestic Violence Court, Center for Court Innovation, www.courtinnovation.org/project/youth-domestic-violence-court.
116. *See id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *2010 DV Annual Report, supra* n 70 at 13.
121. Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, 42 Judges' J 5, 6 (2003).
122. *See infra.*
123. Peterson, *supra* n 93 at 3.
124. See *infra.* [Figure I & II omitted.]
125. *Id.* The percentage of dismissals and adjournments in contemplation of dismissal from 2007 to 2012 were respectively, 70.3%, 67.9%, 59.7%, 60.9%, 63.1%, and 65.4%. *Id.*
126. *Id.* The percentage of pleas and convictions from 2007 to 2012 were respectively, 18.7%, 22.1%, 30.7%, 29.8%, 28.2%, and 27.1%. Other encouraging statistical trends include a reduction in probation violation rates in Kings County between 1997 and 2000. Newmark *et al., supra* n 86, at 69, 76.
127. Richard Peterson, NYC Criminal Justice Agency, Inc., *Combatting Domestic Violence in New York City, 2001*, at 2, 3 (2003), www.cjareports.org/reports/brief4.pdf.
128. *Id.* at 3-4.
129. *Report of the New York Task Force on Women in the Courts, supra* n 21 at 39-40, 47.
130. *Id.* at 47.
131. *Id.* at 33.
132. *Id.* at 33 & n 54.
133. *Id.* at 33.
134. Eaton & Hyman, *supra* n 26 at 404.
135. *Report of the New York Task Force on Women in the Courts, supra* n 21 at 46.
136. Schechter, *supra* n 12 at 162-63.
137. Eaton & Hyman, *supra* n 26 at 404.
138. Domonkos, *supra* n 12 at 3-4.
139. *See Five Year Report, supra* n 34 at 331.
140. *See id.*
141. *See* Family Court Act § 161(c) (authorizing any magistrate to act as a family court judge under certain circumstances).
142. *See Five Year Report, supra* n 34 at 331 (finding that New York City residents needed assistance "navigating the labyrinth of court procedures").
143. Eaton & Hyman, *supra* n 25 at 404.
144. Five Year Report, *supra* n 34 at 331.
145. Criminal Procedure Law § 530.12; Family Court Act § 812(1).
146. Eaton & Hyman, *supra* n 26 at 412.
147. *Id.*
148. Merril Sobie, Practice Commentaries, *Concurrent Jurisdiction*, in Family Court Act § 812 (McKinney 2013).
149. *Montalvo v Montalvo*, 55 Misc 2d 699 (Fam Ct, Bronx County 1968) (*quoting* Family Court Act § 811).
150. Kellie K. Player, *Expanding Protective Order Coverage*, 43 St. Mary's L J 579, 584 (2012).
151. *Id.* at 590-91.

152. *Id.* at 591-92.
153. *See id.* at 584; Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform,* 23 Yale L & Pol'y Rev 93, 98-99 (2005).
154. Domonkos, *supra* n 12, at 2.
155. *See* Family Protection and Domestic Violence Intervention Act of 1994, L 1994, ch 222, § 10, (enacted as amended at Family Court Act § 812(3).
156. *Response to Domestic Violence, supra* n 59 at 14; *see also* L 1996, ch 353 (expanding penalties for violating an order of protection).
157. *Response to Domestic Violence*, *supra* n 59 at 14; *see also* L 1996, ch 353.
158. *Response to Domestic Violence, supra* n 59 at 16; *see also* L 2003, ch 579.
159. Lela Gray, Comment, *Municipal Accountability in Domestic Violence: A Promising New Case*, 4 Alb Gov't L Rev 362, 381 (2011).
160. *See* Family Court Act § 812(1)(e); Eileen Swan, *Review of Expanded Access Two Years Later*, NYS Office of the Prevention of Domestic Violence, www.opdv.ny.gov/law/expandedaccess/year2review.html.
161. *See e.g. Fair Access to Family Court - One Year Later,* Sanctuary for Families, www.sanctuaryforfamilies.org/index.php?option=com_content&task=view&id=543&Itemid=135.
162. Albert M. Rosenblatt, *Women in the Courts A Historical Perspective*, NYLJ, Nov. 1, 1988 at 6.
163. *Id.*
164. *Id.*
165. *Response to Domestic Violence, supra* n 59, at 40. The efforts and support of District Attorney of Kings County Charles Hynes and Mayor Michael Bloomberg were critical in bringing the Family Justice Center to Brooklyn. Charles Hynes, Biography, Fordham L Forum on L, Culture & Soc'y, www.forumonlawcultureandsociety.org/biography/charles-j-hynes.
166. *Response to Domestic Violence, supra* n 59 at 40.
167. *Id.*
168. *Id.*
169. *Id.*
170. *See New York City Family Justice Center Initiative,* Mayor's Office to Combat Domestic Violence, www.nyc.gov/html/ocdv/downloads/pdf/FJC_FunderBrochure.pdf.
171. Domonkos, *supra* n 12, at 6.
172. *See Response to Domestic Violence, supra* n 59 at 38.
173. Domonkos, *supra* n 12 at 6; *see Response to Domestic Violence, supra* n 59 at 38.
174. *See Response to Domestic Violence, supra* n 59 at 38.
175. The Task Force to Expand Access to Civil Legal Servs in NY, *Report to the Chief Judge of the State of New York 10* (2010) [hereinafter *Civil Legal Services in New York 2010*].
176. *See e.g. Low-Income Listings,* Gay Alliance, www.gayalliance.org/directory/community-organizations-groups-and-activities/low-income-resources.html (listing legal service providers, such as the Sylvia Rivera Law Project, which offer services free of charge).
177. *See Civil Legal Services in New York 2010, supra* n 175 at 38.
178. *See id.*
179. Jonathan Lippman, Chief Justice, NY Court of Appeals, *Remarks on Law Day 2012* (May 1, 2012) [hereinafter *Lippman Law Day Remarks*]. For a detailed account of the first domestic violence law seminar in the United States and the establishment of a domestic violence clinic at Albany Law School, see Melissa L. Breger & Mary A. Lynch, *From Kate Stoneman to Kate Stoneman Chair, Katheryn D. Katz: Feminist Waves and the First Domestic Violence Law Seminar Taught in a United States Law School*, 77 Alb L Rev 443 (2014).
180. *Lippman Law Day Remarks, supra* n 179.

181. See Civil Legal Services in New York 2010, supra n 175 at 7.
182. *Id.* at 2, 18.
183. The Task Force to Expand Access to Civil Legal Services in NY, *Report to the Chief Judge of the State of New York* 25 (2012) [hereinafter *Civil Legal Services in New York* 2012].
184. The Task Force to Expand Access to Civil Legal Services in New York, *Appendices to the Report to the Chief Judge of the State of New York*, The Chief Judge's Hearings on Civil Legal Services, Fourth Department 80 (Sept. 29, 2010) [hereinafter *Minutes from Fourth Department*, Sept. 29, 2010].
185. *Civil Legal Services in New York 2012, supra* n 183, at 33 (*quoting Minutes from Fourth Department,* Sept. 29, 2010, *supra* n 184 at 83).
186. The Task Force to Expand Access to Civil Legal Services in New York, *Appendices to the Report to the Chief Judge of the State of New York*, The Chief Judge's Hearings on Civil Legal Services, First Department 115-16 (Sept. 28, 2010).
187. *Id.* at 115.
188. *Id.* at 115-16.
189. *Id.* at 116-17.
190. *Id.* at 117.
191. *Id.*
192. *Id.*
193. *Id.* at 117-18.
194. *Id.* at 118.
195. *Id.*
196. *See id.* at 118, 119.
197. *See id.* at 120.
198. The Task Force to Expand Access to Civil Legal Services in New York, *Appendices to the Report to the Chief Judge of the State of New York*, Second Department Hearing, Statements of Testifying Witnesses 6-7 (Oct. 7, 2010).

2

A Look Back on Our 40-Year Walk, and a Glimpse Ahead

by Charlotte A. Watson

Honey, don't you know that when you deal with domestic violence, you deal with death?

Maureen Conrad

While the Lawyer's Manual on Domestic Violence is a book about the law, it is also a book about the heart. The cases and laws described between these covers came about through the lessons taught by those harmed by domestic violence and the determination of many lawyers and advocates, each standing on the shoulders of those who came before. Forty years ago, when I first began to see, to really see, the domestic violence that had been all around me, this book could not have been written. We did not yet have the language, the organization, the understanding, the tools, and definitely not the law. But we could not leave the page blank.

At first, we tried to help each victim to be safe at home or with a friend or family member. It wasn't enough. Then we created safe homes within our own homes. But that wasn't enough. So we created shelters and longer-term transitional housing. And that wasn't enough. Victims continued to ask why the police wouldn't arrest him; why the courts wouldn't protect them. Nothing illustrates this more than the 1975 case that shocked the conscience.

Josephine Sorichetti filed for divorce from Frank and subsequently received a third, final order of protection. The court ordered him to stay away but allowed him visitation with their daughter Dina. As agreed, they met at the police precinct the following weekend for the exchange. He made a threatening comment as he walked away with the child. Josephine immediately went into the station, reported the life-threatening comment, showed the officer the order of protection, and requested that Frank be arrested. The officer told her that he could do nothing since there was no bodily harm.

Josephine went home and returned a half-hour before the court ordered return time for the child. She again demanded that they pick up her child and arrest Frank. She pleaded with the officers at the precinct for an hour after the child was due to be returned. They made excuses for Frank. Then they sent her home to wait.

At about that same time, Frank's sister went into his apartment and found him passed out on the floor and the child near death from multiple types of injuries over her entire body including Frank's attempt to saw off one of her little legs. The child was in a coma but eventually survived the attack only to remain severely disabled.

Josephine sued the City of New York for failure to protect and won what was a large settlement in 1978, $2 million.[2] As you will read throughout this book, orders of protection continued to be unevenly enforced, and it would be twenty years after the attempted murder of Dina Sorichetti before mandatory arrest laws would go into effect.

After Sorichetti, we did what advocates and lawyers do when their hearts break and injustice prevails: we reached for the law books, and we worked. We worked until we could build a structure of laws and policies and courts and resources we hoped would safely contain every victim and every child. So now our blank page has become a very long book with as much work yet to be done.

Consider: it was only in 1977 that New York State made violence in the context of marriage a crime. Prior to that time, "spouse abuse" was reserved for the purview of Family Court. When domestic violence was at last criminalized, the law gave the "abused spouse" 72 hours to choose a final forum.[3] This limitation came out of a general concern that women were indecisive and might tie up the courts by switching back and forth. The law would remain this way until 1994.

It became clear that, as Gloria Steinem noted, we only had one word for domestic violence — "life." So the degree of social change required to clear a path for legal change was massive. Although historical study of domestic violence reaches back to 753 BCE, it would take nearly 2000 more years before the world really began to wake up to the catastrophic violence in our midst.[4] And then so much changed in just 40 more years.

First, we had to find shared experience for women, to give voice to this experience, and to create a response from whole cloth. Some might say we even had to weave the cloth. In 1963, Betty Friedan published *The Feminine Mystique*,[5] which sparked the second wave of a women's civil rights movement for full social and legal equality. She founded the National Organization for Women, which distributed a guide for holding consciousness-raising groups. Women sat at kitchen tables and in living rooms across the country, in towns and villages, and shared experiences of their upbringing and their lives and how they differed from their brothers, conversations we later described as learning about the socialization of women and men.[6]

Women began to speak out everywhere about their experience and about their right to be free, to have reproductive and economic freedom, to be free from abuse. In 1976, Del Martin published *Battered Wives*.[7] The voices of rape survivors and intimate partner violence called for a response other than "boys will be boys." Rape in the context of marriage was a legal act. This didn't change in New York State until 1984, and then only through case law. In listening to and in witnessing the experience of women who were being abused, an agenda emerged. The women's movement began to coalesce in response to this call.

In 1974, President Gerald Ford joined the effort "to promote equality between men and women."[8] In 1977, President Jimmy Carter appointed Congresswoman Bella Abzug to lead a new Commission, and twenty thousand women attended the National Women's Conference in Houston, Texas that was sponsored with federal funds, equivalent to 21.9 million dollars in 2015, and chaired by Ms. Abzug.[9] The effort for women's equality was electrified. My Sisters' Place in Westchester County, New York was created in response to this conference.

Before there was a single funding source available, women used donated answering services to create hotlines staffed with volunteers to help those being harmed to find a strategy to find safety. Women began to invite abused women into their homes to escape the violence. This led to the development of safe home networks and then to shelters, creating what many saw as the new Underground Railroad. The backlash was tremendous. Women who were helping other women were called all kinds of pejorative names and accused of destroying both the family and the church. Some women, granted custody of their children, were then forbidden by the court to move more than 35 miles from the "marital" home.

An interesting thing happened during this period. As more and more safe homes and shelters opened, the number of men killed by their intimate partners dropped dramatically while the number of women murdered remained fairly stable. By the early to mid-eighties, the battered women's movement began to broaden its focus to address the criminal justice system response. So many women calling the hotlines expressed hopelessness as they told of police failing to respond to calls or, if they did respond, telling her to calm down and him to take a walk around the block.

These women and their advocates felt they should have the same right to police protection as victims of any other crime. They believed that if an authority figure such as a police officer would simply tell their partner to stop the violent behavior and even take them to jail for a night or two, their partner would change. After all, he had been Prince Charming once upon a time. They simply wanted the violence to stop. So, for over a decade, advocates met with law enforcement, begged for change in the institution's culture and response, and trained and trained police officers—with little impact.

An effort began to have police departments adopt and implement pro-arrest or mandatory arrest policies. A *pro-arrest policy* encouraged arrest and required it in some instances but left flexibility in the officer's discretion at the scene. A *mandatory arrest* policy required an arrest when a domestic violence related crime was alleged. In New York, the Office for the Prevention of Domestic Violence (OPDV), created by Governor Carey in 1983, drafted and disseminated a model pro-arrest policy and encouraged departments to adopt a version of it.[10] While a few departments responded, most did not.

In 1995, the state legislature passed what was called the mandatory arrest law even though the tenets of the law were more in line with the pro-arrest model allowing discretion in misdemeanor crimes. The unintended consequence of this law was an increase in dual arrest. Police officers felt that it was not up to them to decide who to arrest when domestic violence was alleged in a sort of "it takes two to Tango" mindset with both parties making allegations against the other. The law was amended to require police officers at the scene to perform a primary physical aggressor analysis and to arrest that person rather than both. (See Chapter 4, *Police Response: Mandatory Arrest & Physical Aggressor* for further discussion.)

Throughout, the response of the victim often became the focus of attention rather than the violence of the abuser. In 1980, Dr. Lenore E. Walker published her book *The Battered Woman* where she began to lay out her theory of "battered woman syndrome," which she described as growing out of "learned helplessness." She coined the phrase "cycle of violence" to describe what she saw happening within the context of an "abusive marriage."

Dr. Walker saw this cycle as having a "tension building" phase, during which everyday annoyances would build inside the male partner until finally there would be an "explosion" erupting in a violent "episode." This would be followed immediately by what she termed the "honeymoon" phase where the abuser would feel contrite and try to make up for his reaction to "what she had caused him to do." The "tension" would begin to build and the "cycle" would loop around again and again.

Dr. Walker saw the solution to ending this "cycle" as a disruption of the tension building phase which might be brought about by teaching anger management or coping skills. It became clear, however, that anger management was not an effective tool. Attempts at improving communication and coping skills through family or couple's counseling also failed. Some believed that women were put at greater risk if they participated honestly in joint counseling, yet not participating left the victim labeled as resistant.

In 1984, New York's Chief Judge, Lawrence H. Cooke, created a Task Force on Women in the Courts to explore gender bias in the court system and prepare a report with recommendations for improvement. As a result, in 1986, the New York State Judicial Committee on Women in the Courts was created.[12] Its immediate assignment was implementing the Task Force's many detailed

recommendations, but, from the beginning, the Committee was also asked to address the visionary goal of eradicating all vestiges of gender bias in New York Courts.

Under the leadership of its current chair, Hon. Betty Weinberg Ellerin, and her predecessor Hon. Kathyrn McDonald, the Committee has evolved into a broad-based group composed of sitting judges, court officials, and practicing lawyers. With support from New York State's Chief Judge Jonathan Lippman, the Committee continues to tackle the challenge of assuring equality and fair treatment for all those whose lives bring them into New York State's courts. Many of the accomplishments of the courts, in terms of response to domestic violence and sex trafficking, were initiated or nurtured by the Committee.

In 1985, Governor Mario Cuomo and the New York State Division for Women held a hearing inside Bedford Hills Correctional Facility (BHCF) — the only maximum security prison for women in New York — to give voice to women who had been incarcerated as a result of their having been abused as an intimate partner or as a victim of childhood abuse and the role that had in what led them to become incarcerated. This was the first such gathering in the country.[13]

Twelve women testified. Their testimony was so powerful that many policies were reviewed across state agencies, and the first Family Violence Program inside a correctional facility was created by BHCF Superintendent Elaine Lord. BHCF also created the first nursery inside a prison to allow women to keep their babies with them for the first year of the child's life.

In 1987 Dr. Angela Browne, a former student of Dr. Walker's, wrote *When Battered Women Kill*.[14] Her work took her inside prisons to speak with women to better understand the psychological impact of domestic violence on victims and how that had contributed to their killing their intimate partner. A new understanding was beginning to develop in the legal community.

For many years, defense attorneys had discouraged these women from mentioning the abuse they had experienced in fear that it would be interpreted as motive for their murderous crimes. A new approach was now developing. The defense used expert witnesses to explain to the court and to juries about the impact of "battered woman syndrome." This was an effort to explain why women sometimes stay with their abusers and then kill them rather than leave.

Experts such as Dr. Julie Blackman began to explain the texture of living with a violent, controlling partner, and how a woman could detect a change in the quality of a threat indicating she was in grave danger that might be imperceptible to an outside observer. In 1989, Dr. Blackman published *Intimate Violence: A Study of Injustice*.[15] Over time, the notion of "learned helplessness" and the "cycle of violence" morphed into the clearer understanding of "battered woman's experience," descriptive of living with an abuser, rather than "battered woman's syndrome," a description of reaction to abuse.

Ellen Pence, a plumber in Duluth, Minnesota who was working in a batterer intervention program, sat and listened to many women in support groups talk of their experience. Out of this, Ellen created the "Power & Control Wheel" to more accurately reflect their experience than the previous "cycle of violence" model. Women said their partners would use a variety of tactics spanning many behaviors, including emotional, financial, sexual and physical abuse, to maintain dominance over them. Physical abuse was used more as a reinforcer of the non-violent tactics used to maintain power and control.[16]

In 1989, "battered woman's experience" went from theoretical to horrifyingly real when the public met, through the city's first televised trial, Hedda Nussbaum. For so many New Yorkers, this was their first close-up look at how domestic violence could destroy a victim's agency and independence as they watched the prosecution of Joel Steinberg for the 1987 murder of the child that he and Nussbaum were raising together. The images of a highly educated, professional, but physically and emotionally shattered Hedda Nussbaum, utterly unable to protect herself or her beloved children from the ruthless, violent tyranny of her husband, were riveting and heartbreaking.[17]

Efforts began on the outside to push for clemency for many women convicted of killing their abusers, yet very few women received relief. Governor Mario Cuomo granted no applications; Governor George Pataki would grant the first of such clemencies to Charline Brundidge in December 1996.[18] The last battered woman to be granted clemency to date is Linda White, who gained clemency under Governor Pataki in 2002.[19] There was hope that such mercy would be shown to many more women, a hope that has never materialized in New York. While Governor Pataki was generous in his willingness to understand the plight of incarcerated battered women, his concurrent initiative to deny parole release to violent offenders kept an untold number of these women incarcerated for many more years than their sentences required.

Some question whether the development of the theory of "battered woman syndrome" created an unreasonable expectation that every woman would have obvious indicators of the impact of such trauma creating the notion of a "good battered woman." In a legal, and perhaps a societal, landscape where the standard is "clear and convincing," is it just too difficult to bridge the gap in the mind of a juror between being "helpless" and fighting back with lethal force? Does the term "syndrome" itself convey the notion of a disease or illness that was never intended to be the meaning hypothesized by Dr. Walker and her protégés?

Are we any more able today to explain how, in the context of family, after a long course of relating, a beaten-down woman can take the life of her abuser? Does the experience of women and children who are violated in the context of "family" still demand corroboration beyond that of victims of other crime? Does the term "trauma" capture the full texture of the fabric of women's lives as they experience it or does it only tease out the acceptable, palatable strands of their experience to a society that has yet to open its eyes to broader reality?

Civil Justice Reforms

Simultaneous with the effort to shore up the criminal justice system's response, there was an effort to address the civil justice side. Victims often sought relief for themselves and their children through Family Court. There were many reasons this was the primary avenue for relief, starting with the reality that this perpetrator was also often the breadwinner, the husband, the father of the children. Women saw the court as another authority that might be able to stop the violence without risking the loss of basic support; incarceration of the breadwinner could leave a family without resources. Many were reluctant to be seen as the reason her partner might go to jail, and they cared about the impact of incarceration on their children. For women of color, the impact on their community of incarcerating their husbands and fathers was an additional worry, and a barrier to soliciting police help.

So they asked the Family Court to intervene. They hoped that an order of protection would help stop the violence and create safety; an order of support would provide for meeting basic needs for the children, such as food, clothing, and shelter; an order of custody would allow them to parent their children free from continual threats, violence and disruption. Some hoped Family Court would order their partners into treatment for drug or alcohol abuse or mental illness. Some wanted the court to order their abusive partner out of the home and to stay away from them and the children. Again and again, they turned to the Family Court because they felt it was their last resort.

The result many women reported was disheartening. They most often appeared in court without an attorney, telling the judge bits and pieces they thought might be important in their story, not realizing that it might not actually be relevant to the court. Judicial response was inconsistent. Domestic violence programs and advocates began to call for courts to be more accountable and better informed about the dynamics of domestic violence. Women reported that judges would grant custody to the alleged abuser because he seemed better off financially or for reasons they couldn't understand,

given the violence this same person had perpetrated in front of the children. Organizations such as the Junior League took on court-watch efforts to try to better understand what was happening. Some judges would ask them to leave the courtroom, citing the confidential nature of the court.

In Westchester County, New York, interested people came together to form the Women's Justice Council which was chaired by Ruth Olver, a board member of My Sisters' Place and a retired social worker. They met regularly to gather anecdotal information on Family Court cases. Common threads would be identified, such as a particular judge with a pattern of not granting an order of protection in a particular set of circumstances. The Council would meet with the judge and offer information to help educate about issues involved in domestic violence cases. The meetings put judges on notice that domestic violence was important and should be given weight when making decisions on orders of protection, custody, and support. The goals were victim safety and offender accountability.

In 1989, Sanctuary for Families opened the first legal center for battered women, operating out of CUNY Law School in New York City.[20] It quickly became clear that dedicated, informed legal representation for victims of domestic violence in civil proceedings would be a game changer. Efforts began in several communities to train attorneys and to garner pro bono legal representation. Today, many legal service agencies address domestic violence specifically, and yet many women enter court *pro se*.

As more and more lawyers became involved, the Lawyers Committee Against Domestic Violence (LCADV) was formed in New York City to allow attorneys to share information and to work on strengthening the legal system's response to domestic violence. In 1996, LCADV joined with Fordham University School of Law, the New York State Judicial Committee on Women in the Courts, and the Appellate Division, First Department to convene what would be the first "Fordham Forum on Domestic Violence." This annual professional gathering, now approaching its 20th year, continues to be a lively venue for legal education on the most current approaches for attorneys and advocates seeking justice or legal remedies for victims of domestic violence.[21]

In October 1996, through Executive Order Number 46, Governor George Pataki appointed a Commission on Domestic Violence Fatalities, chaired by then Westchester County District Attorney Jeanine Pirro. The Commission included thirteen members representing a cross section of law enforcement, healthcare, social services, courts, and advocates, many of whom were high ranking public officials or practitioners, well regarded in the area of domestic violence. The Commission held public hearings in Albany, Buffalo, Bronx, Brooklyn, Mineola, and at Bedford Hills Correctional Facility. Investigators working for the Commission also reviewed and reported on 57 homicide cases. In October 1997, the Commission presented its final report, including recommendations to Governor Pataki.[22]

Questions included whether an order of protection was effective and whether incarceration for violating an order of protection was warranted. The first victim to testify at the public hearings was in Buffalo. She indicated frustration with the system and particularly with the courts. She had been married for ten years and was now seven years beyond the divorce. She reported having two disabled children ages fifteen and thirteen at the time of the hearing. In her testimony she identified many problems related to the function of the legal and healthcare systems.

She had maintained overlapping orders of protection from both the family and criminal courts during this period and called the police numerous times. The police had arrested him often. Although happy with the police response, she could not understand why she had to go back to court repeatedly, for years, trying to prevent him from seeing the children. He used visitation proceedings as a means of staying in her life and continuing the abusive behavior.

She was baffled by her experience of calling the police over and over for seven years and his being arrested over and over with no other consequence. She was worn down by the stress of living in a

constant state of fear and hypervigilance and what seemed like a never ending tie to her abuser. She reported that he was finally incarcerated for a six-month period for violating an order of protection.

One of the commission members asked her what the impact of his incarceration was on her and her children. She exuberantly replied,

> *Oh my gosh! In the summertime, I could open a window without any fear of anybody being out there. What I would usually do, at nighttime, I stay up all night. In the hot summer months, we sleep on the living room floor. More than that, we'll have the one window open. I'll stay up and monitor and make sure he doesn't come.…*
>
> *When they go to school, I sleep between my jobs. It was so nice to just go home and open a window. It was great. My neighbors must have thought I was crazy. I can open a window and no one cares. I can drive down the street and no one is following me. It was the most marvelous feeling in the world.*

Since many domestic violence homicide victims had or have had an order of protection, it might appear that they are just pieces of paper incapable of stopping a bullet, a knife, or a fist. However, the National Institute for Justice found that a final civil order of protection is associated with an eighty percent decrease in repeat domestic violence. The order sets concrete limits for the abuser and heightens the response of law enforcement; violation of the order triggers mandatory arrest and adds a crime for the prosecutor to pursue.[23]

In 1998, further solidifying New York's response to domestic violence, the OPDV issued a "Model Policy for Counties," which provided a guide for collaboration and best practices across county government and service providers.[24]

Judicial Insight into Domestic Violence: Court Responses

While exciting things were beginning to happen in the effort to address domestic violence, the push to improve the court's response was very challenging. The independent nature of the elected or appointed judiciary, which is key to the integrity of the system of justice, was also proving to be an obstacle in the effort to bring about reform. After a few cases across New York where victims of domestic violence were denied relief sought in Family Court or violations of orders of protection appeared to be minimized, the brutal beating of Anne Scripps Douglas by her husband Scott, in front of their three-year-old daughter, took place in Bronxville on December 31, 1993. Scott left Anne for dead and fled to the Tappan Zee Bridge, where he leapt to his death.

When the police gained entry to the Scripps' home, they found her three-year old child Tori asking why Daddy gave Mommy booboos and painted her face with warpaint. It was reported that Scott had used the claw end of the hammer to crush his wife's skull to the point where sections of her skull had been removed or damaged beyond repair. She was taken off life support on January 6 and died.

Anne Scripps had gone to court a month or so earlier, obtaining an order of protection because she was afraid of Scott's escalating abusive and violent behavior. She alleged that he had attempted to push her from a moving car. Her family indicated that around Christmas, Anne returned to the Family Court in New Rochelle to ask for more protection, and to have him removed from the home. She had told friends that Scott would wake her in the night as he crawled on the floor acting unusual,

and tried to intimidate and scare her. It was reported that Anne was turned away at the courthouse door because the court was closed for the holiday break. It was during this break the murder occurred.

As a postscript, the impact of this brutal "trauma" left enduring wounds on Anne's children. She had two daughters, Alexandra and Annie, from a previous marriage. Annie was with the police when they found her mother unconscious in her blood-soaked bed. After the murder, little Tori was adopted by her aunt Mary, who raised her as her own child in Vermont, hoping the distance would help to shield her from the tragedy and the media.

But the damage was done and would not relent. According to news reports, Tori continues to struggle with addiction and has been arrested in Vermont for drug-related crimes. And in September 2009, Annie, who had struggled for so long with the image left in her mind from finding her brutally beaten mother, leapt to her death from the Tappan Zee bridge.

In response to the death of Anne Scripps Douglas and concern about how the court in general addressed domestic violence, My Sisters' Place called together women's organizations from across New York State to gather information on how family courts were addressing domestic violence and to look for areas where reform was needed. Some of these organizations had never been in the same room; for example, the League of Women Voters, the Junior League, and the YWCAs had not sat together to discuss what they were observing.

The need for judicial training on domestic violence and the impact of judicial attitude came to the forefront again with the matter of Lorin Duckman, a Kings County Criminal Court judge who was removed from the bench. Judge Duckman was charged with many violations of his judicial office, including hostility to domestic violence cases, having stated his opinion that domestic violence was an intractable part of certain cultures, and his belief that domestic violence should not be criminalized, as he himself had perpetrated domestic violence in the past. A victim in a case pending before him, Galina Komar, was murdered by her abuser after the judge reduced bail for the defendant and freed him from jail.[25]

Chief Judge Kaye Embraces and Champions Our Cause

After gathering information, identifying areas of concern and weakness, and crafting suggestions for reform, the group called for a meeting with New York's new Chief Judge, Judith Kaye. Judge Kaye granted the meeting. A number of representatives of the group as well as the New York State Office on the Prevention of Domestic Violence presented Judge Kaye with the Women's Agenda for Justice and Safety, a reform agenda for New York's Family Court.

Judge Kaye listened very carefully and promised at the meeting that training would be provided to all of the judges across the state and that she would carefully consider the concerns and suggestions brought to her by the group. In the meeting, she included Chief Administrative Judge Jonathan Lippman and Deputy Chief Administrative Judge Joseph Traficanti. Not long after the meeting, Nicole Brown Simpson was murdered. Her ex-husband O. J. Simpson was named as the prime suspect. The tidal wave of change in how domestic violence was being addressed across the board had finally hit the bloody shore.

Judge Kaye kept her word. She delivered right away on training for the courts by appointing the Family Violence Task Force in 1995 with the charge of developing judicial education on domestic violence.

In September 1998, Hilda Uguna petitioned the Family Court in Westchester County, New York for an order of protection alleging that her husband had threatened to kill her and that he slept with a knife under the pillow. Judge Adrienne Hoffmann Scancarelli was very experienced on the Family Court bench. In fact, she was the supervising judge for all of the family courts in a five-county district.

She denied the request and told Hilda to return to court with her husband on a subsequent date for a hearing. That night, Hilda's husband followed through on his threat and stabbed her to death in front of their 8 month old son and 2 year old daughter. There was a public outcry about the court's handling of this case. The judge told the press she would make the same decision if this were to come before her again. Whether or not she was right on the law, her statement to the press seemed callous. Eventually, the judge was reassigned.

Judge Kaye implemented the Domestic Violence Registry, which served as a statewide repository of orders of protection and warrants. By 2003, the registry had hit 1,000,000 filings. In almost all of her subsequent State of the Judiciary messages after that initial meeting, she reported on the courts' efforts to improve how they handled domestic violence related cases and family justice.

In 1996, Judge Kaye announced the Brooklyn Felony Domestic Violence Court, the first of its kind to serve as a dedicated part to hear domestic violence related felonies. In 1997, she announced the opening of Children's Centers as part of her Family Justice Program. This was something that had been called for in the Women's Agenda as a means of protecting children from hearing about the violent, egregious acts alleged against their father. Having her children out of earshot allowed the victim to be able to be more forthcoming with what she had experienced. Creating Children's Centers was also on the agenda of the New York State Judicial Committee on Women in the Courts and in the laser focus of Judge Betty Weinberg Ellerin. In fact, Judge Ellerin was then, and remains today, a key champion of children's centers in the courts.

Judge Kaye implemented numerous reforms, continually evaluating and refining the response of the judiciary as the court system gained expertise and understanding as to the role it could play in addressing domestic violence.[26] Beginning with expanded access, the children's centers, and then restructuring of the courts themselves, the past 20 years have seen more vigor in response than the 2000 years prior put together. And New York has led the way both nationally and internationally for other jurisdictions seeking to move forward in their response to domestic violence.

One of the suggestions in the Women's Agenda for Justice & Safety was a one family/one judge approach. After it was clear that the legislature was not going to amend the Constitution to allow for a merger of New York's eleven trial courts into a more efficient, streamlined court system, Judge Kaye opened a pilot integrated domestic violence (IDV) court in 2001. This new court would allow one judge to hear the criminal, family and matrimonial cases of one family where there was an allegation of domestic violence. In 2003, the IDV court was expanded statewide. In 2001, she promulgated Rule 17.4 in the Rules of the Chief Judge, which requires relevant judges to receive domestic violence education.

In Judge Kaye's final State of the Judiciary message before her retirement, she stated,

> *Soon after I became Chief Judge, I received a powerful education in domestic violence and the courts: two murder/suicides, one in Kings County, one in Westchester. In each case, the victim had obtained an order of protection, which proved insufficient protection against the intimate partner who murdered her. Today, the court system — indeed, all society — has learned a great deal more about the modern-day scourge of domestic violence.*[27]

Family Justice Center: Centralized Services

In 2005, the New York City Mayor's Office to Combat Domestic Violence, in partnership with the Kings County District Attorney[28] and many service providers, opened New York's first Family Justice Center to offer a central location for a victim to connect with legal and social service providers to get her needs met under one roof. Family Justice Centers have since opened in a number of locations across the state. Many programs created to address domestic violence were started or continue to exist as a result of mandates and funding under the federal Violence Against Women Act (VAWA). Since the passage of VAWA twenty years ago, reports of domestic violence have dropped 64%.[29]

Continuing Expansion of Legal Remedies

In 1999, New York passed a groundbreaking stalking statute which defined stalking as a course of conduct that would place a reasonable person in fear. Under this law, the intention of the accused stalker is not relevant. It's the course of conduct that matters. In fact, the law does not require the victim to actually experience fear. The question that has to be answered is whether or not the alleged stalker's behavior would cause a reasonable person to be fearful based on the context of the behavior and the history. This was a dramatic shift from previous statutory revisions that defined stalking simply as multiple convictions for aggravated harassment within a ten year window.[30]

In 2002, the University of Minnesota, School of Public Health found that 50% of youth reporting dating violence and rape also reported attempting suicide.[31] And now it's clear that the impact of social media and the relative ease of stalking an intimate partner has benefitted young abusers. The Internet and other forms of technology like the GPS tracking available through many cell phones have given abusers of all ages new weapons in their arsenal to use to control their victims.

Domestic violence occurs in same-sex relationships at apparently the same rate as heterosexual relationships. Many victims of all types are reluctant to seek protection through our criminal courts. This may be even more true among the lesbian, gay and transgendered community. In 2009, the Fair Access to Family Court Act was signed into law in New York allowing a person in a same-sex relationship access to a civil Order of Protection in Family Court.[32]

Domestic violence service providers increasingly recognize that prostituted girls and young women are often intimate partner violence victims who need protection from their abusers as well as services and support. We've seen a paradigm shift in our law with the passage of New York's human trafficking law where children once considered "prostitutes" under the law are now considered victims of human trafficking. This law recognizes the importance of holding the patrons, or "johns," accountable for their role in creating a demand for prostitution along with identifying the pimp as a trafficker.

In 2013, Chief Judge Jonathan Lippman announced the nation's first statewide network of Human Trafficking Intervention Courts designed to connect victims to services and to offer them an opportunity to avoid a criminal conviction.[33] In 2015, he hosted the nation's groundbreaking National Summit on Human Trafficking and the State Courts which gathered Chief Judges and their teams from 46 states, the District of Columbia, and four U.S. territories. All returned home with action plans to change their courts' response to human trafficking. In 2015, the Trafficking Victims Protection and Justice Act was strengthened and included the removal of the word "prostitute" in reference to a person charged with prostitution. It also brought the crime of exploiting a child for purposes of prostitution in line with penalties for statutory rape and raised the crime of sex trafficking to a class B violent felony.

In 2015, the Office of Court Administration's Office of Policy & Planning distributed domestic violence lethality bench cards for the Family Court and matrimonial court and began developing a version for the criminal court.[34] This project was developed in collaboration with the Center for Court

Innovation, courts across the state, and stakeholders. These bench cards are breaking new ground in the application of lethality assessment within a court setting. Rather than direct the court as to what action to take, the assessment guide serves as a tuning fork for the judges' ears to remind them of the simple behaviors that have been determined through research to be indicators of lethality or serious risk. The tool offers the judge a quick reference to the statutory authority under which the information may be considered when crafting an order of protection, custody, or support.

We've come so far, and yet we continually have to examine our language to identify old ideas hidden away in terms like "violent homes" or "domestic violence situations." There is no abuser in those terms. Homes and situations are not violent. People are. We talk about domestic violence *between* partners or spouses instead of violence by one against the other.

Our very language sends a message that the victim is somewhat to blame for the violent or controlling behavior of her abuser. Children don't live in a violent home. They live in a home where there is an abuser in residence. Violence against women remains one of the most complex and challenging issues in our society and in our courts today.

Could you imagine a news story regarding a bank robbery where the reporter states, "There was a robbery situation today involving a heated argument between a customer and a bank teller. The customer grew angry when the teller refused to follow the directions in the customer's note. The customer pulled a gun and insisted the teller do what he asked. Witnesses wondered why the teller didn't just close the window and leave when she first read the note. These types of robbery situations are very dangerous and put police officers at great risk when they respond. Obviously, the robber is in need of anger management and credit counseling, and the teller needs to leave the next time she gets a note like this. Her failure to act appropriately placed several witnesses at risk."

All of the effort described here and so much more was guided by the voices of those brave women who trusted strangers with their experience, their lives, and their words of wisdom. Some spoke from their graves and called upon everyone to fight for justice, to never again allow domestic violence to be just another word for life. We were very naïve when we began. We really thought no one knew what was going on behind closed doors and that surely they would respond if they knew. So with no support, we began. We were called names, threatened, and yet we carried on, soldiers unwilling to leave any woman behind.

Some of the leaders in this effort were lesbians who understood the intersectionality of sexism with racism, classism, heterosexism and other forms of oppression. Yet, for so long, lesbians often put aside their own experiences of intimate partner violence because it was hard to understand in the beginning that intimate partner violence *is* domestic violence. Finally, that awareness is catching up, along with our broadening understanding of gender.

Many other parallel achievements and challenges discussed throughout this edition of the *Lawyer's Manual* have occurred over the last forty years: progress in public assistance, housing, healthcare, mental health services, child protection, and more.

It's important that we go back and revisit the journey of this massive social change so that we don't repeat mistakes and so that we honor our teachers, those brave women who whispered in the ear of a stranger through a hotline in the deepest dark or stood before us hoping we could stop the violence when no one else would. We must never forget those upon whose shoulders we stand. This is the risk of a movement becoming a profession. We must cling to the rich tapestry woven from heartache, fear, vulnerability, outrage, courage, and wisdom of those who have gone before. There is no time for re-discovery or re-invention of that which has failed in the past, often leaving a lifetime of struggle and sometimes with deadly consequences.

There are many more barriers to pull down and much learning yet to do. Their remains the need to chip away the hardened layers of an inherited consciousness and to challenge the structure that holds it all in place. We must continue to invite our institutional allies to change that which is not working to bring about a free and just society with equality for all. It's the pH of our souls that we must adjust to allow the seeds of peace, mutual respect, and justice to blossom. We must hear the response "No" as an invitation to a conversation. Change happens at the root. It sometimes takes a tenacious persistence and a quiet determination to find the precious root. Once we do, deep listening is required to know what to do with it.

Truth rings like the clearest of bells in the darkest of nights. Not a deafening, clanging bell, but a never ending, reverberating sound that is haunting in the absence of peace. In the struggle for civil rights, Ella Baker, talking about the killing of black men, said, "We who believe in freedom cannot rest until it comes." And so it is for women seeking freedom from abuse and domination and for those who fight for this basic justice.

Notes

1. Maureen Conrad was a retired social worker who dedicated her life to women's empowerment and served as one of the founding mothers of the Grayson County, Texas Women's Crisis Line in the mid-1970s which began first as a rape hotline.
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9. For a collection of materials related to Houston Conference *see* www.texasarchive.org/library/index.php?title=2013_02597.
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15. Julie Blackman, *Intimate Violence: A Study of Injustice* (Columbia University Press 1989).
16. Interview with Ellen Pence, http://www.powerandcontrolfilm.com/wp-content/uploads/2010/04/transcript-ellen-pence.pdf

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loads%2F2010%2F04%2Ftranscript-ellen-pence.pdf&ei=yrkVYjfLPaIsQSEo4HIBQ&usg=AFQjCNGBY-QYTGLJyN7UA0agxqxxkKc46XQ&sig2=b67EOyg5yfkN_rw-jms5bw&bvm=bv.91665533,d.cWc.

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Section 2
Fundamentals of a Domestic Violence Case

3

Interviewing and Assisting Domestic Violence Survivors

by B. J. Cling & Dorchen A. Leidholdt

Why did you stay?
Why didn't you just leave?
Why did he hit you?
There is no "why."

Don't ask a victim to explain the abuser's conduct.

The Attorney-Client Relationship: Where it Begins

Your first interaction with your client is crucial. If she feels that you are untrustworthy, judgmental, or unable to relate to her experience, she will censor herself and you will not get the information you need to represent her effectively. At the first meeting, you will have an opportunity to gather vital information that may not be available again. Memories dim and bruises fade.

In the course of your relationship with your client, you will give her advice — some that she may not want to hear. If she trusts you, it is far more likely she will be able to hear bad news — such as the fact that some form of visitation between her children and her abuser is probably inevitable — without feeling that you are the enemy. With an attorney-client relationship predicated on trust, she will be far more likely to make sound decisions and act in a way that is in her and her children's interest. Such a relationship may not be easy to achieve, however, particularly since she is emerging from a relationship in which her trust has been repeatedly betrayed.

It is important that you do everything possible to make your first interview a success for both you and your client. This chapter will provide concrete guidance on setting up an interview, interviewing techniques, understanding and recognizing domestic violence, understanding post-traumatic stress disorder, and moving forward with legal and non-legal remedies. Careful preparation and attention to all of these matters will allow you to provide your client with the representation she needs to find freedom from abuse.

Communicating Safely

From the moment a victim takes steps to end abuse, her risk of injury increases (*see* Chapter 4, *Assessing Lethality & Risk: What Do We Know, How Can We Help?*). Many abusers are able to use technology to monitor the movement and communications of the victim. This includes communication with you, the attorney. Your communications with the client could inadvertently alert the abuser that

your client is trying to gain freedom from him. Resources in the notes provide guidance on how to help your client identify these risks and find safe ways to communicate with you.[1]

If the client does not have a secure cellphone that is not on the abuser's account, be careful about telephone contact. Abusers frequently monitor victims' calls on their own phones. Ask if there is a friend or relative with whom you can leave messages without endangering her. If you call her home and someone else answers the phone, do not just hang up. That could create suspicion and trigger retaliation. Instead, ask for someone else and apologize for dialing a wrong number.

It can be helpful for the client to create a new email account with a new password that can be used for communications with counsel and others concerning the case. Her existing email may not be secure from the abuser.

Communicating Effectively

Stretching Further to Connect With Your Client

Survivors of domestic violence often have been mistreated over a long period of time. Although they may not complain, they are likely to be sensitive to negative social cues. On the other hand, many survivors are very responsive to help, especially if it is delivered in a warm, empathic way. Even if you are terribly busy, make an extra effort to answer your client's calls. Your client needs to understand that you value her communications and respect her, even if you can't speak to her every time she calls. Don't express irritation with the client for calling you, even if you think it is too often. Understand that she is going through a frightening process and needs reassurance. If you feel she is calling you excessively, try making appointments to talk with her and setting time limits on calls. Remember that emergencies do happen in domestic violence cases and there may be urgent reasons for her call. Talk with your client about alternative sources of assistance when she is unable to reach you, including calling 911 for help from the police

Some domestic violence victims' lives are so in flux that it is difficult for them to keep appointments. This is especially likely if the abuse was recent or is ongoing or if the victim was forced to flee her home. When you choose the date of the first meeting with your client, explain that punctuality is important and to call in advance if she needs to reschedule. It is helpful to let your client know what your expectations are, and it is important that those expectations be realistic and acknowledge her difficult circumstances, including lack of childcare.[2]

Awareness of the Strength of Your Role

It is very important to understand the disparity in power between you and your client so that it will not inadvertently be used against her. You will probably have knowledge, skills, access, and credibility that she will not. You may very likely have privileges based on race, class, education, gender, facility with the English language, or a combination of these factors that she will not possess.[3]

As her attorney, you will be able to use these privileges on behalf of your client to help her become a full participant in her case, to make her situation understandable to the court, and to enhance her credibility. Take care not to let this power differential work to her disadvantage.

Understanding Legal Issues

It is very important to go into the first interview understanding the primary legal issue, the burden of proof, and what your client will need to establish in order to prevail. Your interview should be structured around obtaining the information you will need to meet the evidentiary burden for the sought-after relief. Chapters elsewhere in this book provide guidance on litigating family offenses (Chapter 9), handling custody and visitation matters where domestic violence is a concern (Chapter

10), and remedies available for immigrant victims (Chapter 22), as well as many other subjects. Familiarity with the range of issues that arise will help you conduct a more productive interview.

Understanding Intimate Partner Violence

In preparation for interviewing your client, learning about the dynamics of domestic violence will help you make the most of your time together. Seemingly unrelated details of your client's experience may begin to emerge as part of a pattern of abuse.

Coercive Control & Intimate Terrorism

"Battered woman syndrome" is no longer the preferred model in understanding the dynamics of domestic violence.[4] One objection to the model was its focus on the victim's mental state. The focus has shifted from the victim's mental state to the abuser's attitudes and behavior. Current scholars such as Evan Stark, Mary Ann Dutton, and Julie Blackman now view "power and control" as the driving force behind intimate partner violence, which Stark characterizes as "strategies of coercive control."[5] The essence of coercive control, Stark argues, is not specific physical violence but a campaign of physical and psychological strategies to bend the victim to the abuser's will.[6]

Also called "intimate terrorism," coercive control involves the abuser's surveillance of his victim and violation of her liberty through control over such daily functions as eating, sleeping, and going to the bathroom. An abuser's coercive control is often subtle, gradual, and may be confused with "romance," slowly escalating until the victim has virtually no privacy or freedom. The abuser's power may be manifested by occasional acts of violence, which demonstrate what the consequences will be if the victim does not follow orders. Since coercive control is generally not recognized by the penal code, which focuses on discrete acts of physical violence that often leave marks, abusers frequently learn that they can engage in coercive control with impunity.

Psychologists and advocates have identified a set of behaviors and attitudes common to abusers. These experts are careful to point out that not all abusers share all characteristics. It can be helpful to review this list with your clients to elicit important information that might not surface otherwise. In the alternative, review with your client the different facets of the Power and Control Wheel, developed by the Domestic Abuse Intervention Program (reproduced in the Appendix). Being able to understand and identify the characteristics of abusers and their strategies of control can be very helpful to your client, diminishing her abuser's authority and lessening her feelings of self-blame.

Behavior often exhibited by abusers includes:

Jealousy and Possessiveness

Jealousy and possessiveness are two of the most common characteristics of abusers. These may be initially interpreted by the victim as signs of her partner's passion and devotion. Soon, however, it becomes apparent that they underlie his acts of domination and control. Jealousy on the part of an abuser can take many different forms, some overtly paranoid. The abuser of one victim hid tape recorders around the apartment in the hope of catching her with a lover. Another abuser forced his victim to lower her eyes whenever she walked outside; he was convinced that she was flirting with every man she encountered. Abusers often accuse their victim of sleeping indiscriminately with everyone from her boss to her best friend.

Controlling Behavior

This hallmark of abuse may be related to jealousy and can permeate every facet of existence. Convinced that his partner is unfaithful, the abuser feels compelled to monitor her every move to prevent her infidelity. He may not let her work outside the home, go to the store, or wear lipstick.

Immigrant victims are especially vulnerable, as discussed in Chapter 22, as they must often contend with abusers who attempt to use their immigration status as a weapon of control.

Quick Involvement and Manipulative Behavior

With an abusive partner, the dating period is often brief and intense. Almost immediately, the abuser expects the partner to meet all of his needs, build her world around him, and submerge her identity in his. Again, this hyper-focus is often initially interpreted by the victim as passion and devotion; eventually she realizes that it is her prison. During the courtship period, abusers often present a smooth facade. Many victims report that at the inception of the relationship, "He was the perfect gentleman."

Abusers are often skilled manipulators who start by tricking their victims into believing that they are devoted, dependable partners. When their victims realize that they were hoodwinked and are finally able to extricate themselves from the relationship, abusers turn their manipulative powers on the agencies their victims turn to for help. Abusers are surprising and consistently adept at deceiving criminal justice, child welfare, and judicial authorities, too often succeeding in having their victims investigated for child abuse or neglect, arrested for fabricated crimes, and tarred as alienating parents. Eventually, abusers often turn their powers of manipulation on their own children, persuading them that mommy is to blame for the fact that the family is no longer together or is the reason why they can no longer live in their old neighborhood and attend their old school.

It is crucial for you, as your client's lawyer, to be aware and on guard of the seeming sincerity of the abuser. Even skilled professionals are often taken in by these master manipulators.

Isolation

Abusers frequently attempt to isolate their victims. He despises her family and tries to persuade her that they are horrible to her. He tells her that she has to choose between them and him. To maintain the relationship, she moves away from her parents and cuts off contact with her sister. He wants her to quit her job and stay home with the kids. He hates her friends and tries to persuade her that they are just using her. He wants her in the home, where she is totally under his control. Any social contact becomes a threat.

When an abuser isolates his victim, he is cutting off her exit routes. This is a strategy that makes a great deal of sense from the abuser's point of view. She has no one to help her understand what is happening to her, to bolster her self-esteem, and to offer assistance when she needs to leave. It is important to note that the abuser may not consciously identify his behavior as a "strategy" but as a "normal reaction to her behavior which questions his authority," more exercising a right than developing a strategy.

Blame and Incessant Criticism

The abuser is never at fault and never accepts responsibility for any of his actions. She is always to blame. She is fat, stupid, too emotional, a terrible cook, a terrible mother, bad in bed, looks like a whore or a hag, and is responsible for his poor work performance, his poor relationships with other people, and above all, his violence to her. The barrage of constant criticism undermines her self-esteem, often rendering her even more dependent on him.

Cruelty to Animals or Children

One victim reported that after she left the relationship, her children told her that during court-ordered visits her abuser would hit and kick the dog. In another case, the abuser became jealous of his victim's much-loved miniature poodle, and, one day in a rage, threw the dog against the wall, killing him.

Abusers are disproportionately likely to abuse their children as well as their partners. Studies show that in approximately half of domestic violence cases, children are also abused. Child abuse may take the form of depriving them of the love and care of the non-abusive parent. This is especially likely when the abuser is an immigrant with strong ties to another country. Service providers to victims report a plethora of cases in which abusers have abducted the children to another country after the victims fled the abuser.

Abusive and Violent Sex

Sexual abuse is a pervasive form of domestic violence. It is important to be alert to evidence of it, although it may not surface initially. Often the victim is reluctant to talk about sexual abuse — either because such abuse is so normalized in the relationship that it is not recognized as abusive or because she feels humiliation and shame about it and believes that she is responsible for it. It is likely that she will not be comfortable discussing sexual abuse until you have established a strong attorney-client relationship with her. You might initiate the discussion by saying something like, "Unwelcome sexual contact and sexual abuse are common in domestic violence. Many victims experience this kind of treatment, and it is not their fault." For in-depth guidance on this aspect of domestic violence, *see* Chapter 7, *Intimate Partner Sexual Assault: An Overlooked Reality of Domestic Violence*.[7]

Verbal Abuse

Abusers usually subject their victims to an unending barrage of verbal abuse. The epithets "bitch" and "whore" are staples of domestic violence, along with threats and obscenities.

Threats go hand in hand with physical abuse. Some abusers control their partners with threats punctuated by an occasional act of violence. Ask your client specifically, "Did he ever threaten you?" One victim was frequently awakened in the middle of the night by her husband, showing her a length of cord or a sash. The implications were clear. During the day, he made frequent, approving references to O. J. Simpson, whose alleged murder of his wife was very much in the news. Frequently he would push or slap her. She lived in terror that he would kill her yet did not believe that she was a victim of domestic violence because the abuse she was subjected to was largely nonphysical.

Rigid Sex Roles

Abusers often demand that their partners conform to rigid sex roles. She is supposed to be passive, obedient, solicitous, pretty, a great cook who always has dinner on the table just when he is ready for it, and sexually available to him whenever he is in the mood. Many abusers want to control the family's finances and discourage or undermine their victims' educational and career aspirations.

Identifying Other Legal and Non-Legal Needs

In the course of the interview, you may discover that your client has other legal needs. It is not unusual for a domestic violence victim to have a range of different legal needs and eventually a variety of legal matters proceeding simultaneously. In many jurisdictions, domestic violence victims can access multiple levels of services through a Family Justice Center.[8] This may be an efficient way to direct your client to the many resources that may be needed to address the challenges she is facing. More information on Family Justice Centers appears in the Appendix.

Other Legal Proceedings

The victim may have a civil order of protection and a custody or visitation matter in Family Court and a criminal case pending in criminal court or Supreme Court. She may also be involved in a matrimonial action and an immigration proceeding. You must be alert to all of these actual or potential matters, and ensure that they are coordinated in the best way possible to advance her interests.

For example, your client wants a divorce but her abuser is stalking and threatening her. Her immediate need is for police action and an order of protection. You will want to advise her about calling the police, and it may be helpful to intervene with the police on your client's behalf.

Or your client wants custody but thinks that there is a pending criminal prosecution against her abuser for assaulting her. It has been weeks since she has talked with the prosecutor. You may need to serve as a liaison between your client and the district attorney's office to make sure they understand that she is cooperating and wants a conviction. That conviction will be very helpful in the custody case and her cooperation may help her regularize her immigration status.

Your client's case may end up in an Integrated Domestic Violence Part. These special inter-jurisdictional courts are addressed in Chapter 14.

Non-Legal Needs

For safety

You will need to help your client assess safety needs and anticipate what to expect from the abuser. Chapter 4, *Assessing Risk and Lethality*, provides more guidance. You may learn that your client is living with her abuser and that the abuse is ongoing. She may tell you that he will ignore an order of protection and may seriously hurt or kill her. You will need to find out if she wants to go into a domestic violence shelter or if there are family members or friends she can move in with. Explore the possibility that an order of protection excluding the abuser from the home may protect her safety and help her review safety precautions such as having her locks changed and installing window guards. If she wants to remain in the home with her abuser, help her understand the risks while exploring strategies to protect her and the children's safety should the abuse resume (alerting a sympathetic neighbor, for example, and developing a plan for quick escape). Be sure that she has important documents in a place the abuser does not have access to.

For counseling

She may tell you that she feels so alone and isolated that she is thinking about going back to her abuser. Help her locate groups for domestic violence victims that can help create a supportive community. Then assist her by making an appropriate referral. The discussion below on Understanding the Effects of Trauma will assist you in supporting your client and recognizing how domestic violence may be having an impact on her day-to-day functioning and emotional life.

For therapy or psychiatric help

She may tell you that she feels depressed and sometimes considers suicide, has recurrent nightmares, and is terrified to leave her home even though she is certain her abuser does not know where she lives. She may have attacks of insomnia or intrusive flashbacks to incidents of abuse, all symptoms of Post-Traumatic Stress Disorder (discussed below). Urge her to get psychological evaluation and treatment and assist her in locating appropriate resources. You may be thinking, "I'm a lawyer, not a social worker." The truth is that this kind of representation requires grappling with more than specifically legal issues. However, no one expects you to be a social worker or a psychologist. There are many multi-service domestic violence agencies throughout New York State that provide shelter, counseling, and other services. They can assist you with information and referrals to meet your client's needs.[9]

For emotional reassurance

Regardless of the specific circumstances, breaking away from her abuser is a difficult emotional task for your client, and she will need emotional support from you. While that is not your main job, you need to be aware of her psychological needs and meet them where possible. For example, at times your client is likely to cry, or be very upset or withdrawn while talking about her circumstances. Be prepared to offer comfort. This may involve simply listening compassionately to her distress. Often, simply listening is reassuring. It's a good idea to keep tissues on hand.

If you and your client are comfortable with this, it is, at times, appropriate to hold a client's hand reassuringly, or put an arm around her shoulder, though you must always ask permission before touching your client. Remember that, even though you are seeing your client professionally, there is always a human element to an interview about a domestic violence survivor's life. Be prepared to be warm and caring in order to make your client comfortable, and later enable you to draw her out. Also, be prepared to hear that she is seeing her abuser again or contemplating re-connecting. It's important to withhold judgment or shock and to return to a discussion around safety planning. To the extent your client trusts you and feels comfortable with you is the extent to which she will be able and willing to tell you the important details you need to know.

The Interview

The First Meeting

The first meeting is a good opportunity to establish certain ground rules with your client and to assure her that you are aware of and will abide by your obligations to her.

Be sure to explain to your client each and every part of the legal process, avoiding legalese whenever possible. Do not pay short shrift to her questions or suggest that she is responsible for the abuse (e.g., "Why did you stay with him for ten years if he was so bad to you?"). You can help empower your client or you can inadvertently undermine her self-confidence and contribute to victim blaming. The client is here now, seeking your help.

Review the statement of the client's rights and responsibilities. Do not just hand the statement to her to read. Discuss it with her. Explain that she will make decisions about objectives and settlement, but that it is your job to make decisions about how best to achieve those goals.

Confidentiality

Explain that communications to you are protected by attorney-client privilege. Describe the privilege in simple lay terms: it means that everything she tells you is in confidence ("between you and me") and that you can disclose what she tells you only if you have first secured her permission. Be careful not to inadvertently disclose client confidences in conversations with the Attorney for the Child, child welfare workers, or forensic experts. If it would be advantageous to disclose certain information about your client to them and it is arguably confidential, get her permission first.

Inform your client that these principles of confidentiality will not apply when she talks with the forensic psychologist, the Attorney for the Child and his or her social worker, the judge's court attorney, the child welfare worker, or anyone other than you or someone from your office working for you. Anything she communicates to this list of professionals will very likely be communicated to the judge in a report. In dealing with them she will have to learn how to be an effective advocate for herself and walk a fine line: she must be able to convincingly and specifically describe the history of domestic violence without sounding embittered, angry, obsessive, or hostile to her abuser's relationship with their children.

Three Effective Techniques

During the interview, take detailed and accurate notes. Explain to your client that you are taking notes because what she is saying is very important and that you do not want to forget the details.

There are three types of interview techniques, and all three may be necessary to get the information you need. They are (1) the open-ended interview, (2) the structured interview, and (3) the questionnaire. In general you should start with an *open-ended interview*. Ask your client to tell her story in her own words. You may guide her somewhat by asking her to focus on certain questions (like the instant incident that precipitated the lawsuit). However, you want her to have the opportunity to speak expansively, if she can. The purpose of this technique is to make the client comfortable, and allow her to build trust in you by telling you her story uninterrupted. Because your client may wander quite a bit, it is fine to bring her back with a gentle question or two. However, give her enough time to unburden herself emotionally. Once you feel that your client is comfortable with you, you can move to the second technique, the *structured interview*.

The purpose of the *structured interview* is to focus your client on concrete details so that she can give you a coherent account of each incident. It is often very difficult for domestic violence victims to remember incidents in detail, or even in chronological order. If you need to know what happened in a particular incident, ask her to start talking about it. As she does, pick out a detail, like the time of day, and ask her what time it was, or what she was doing when it started (e.g. cooking dinner). She will probably give you much more detail, and then if she becomes vague, pick out another detail (like what she was wearing, or what room they were in) and ask about that. As you question her about concrete detail, it helps her remember concretely what was going on, and tell it in much more detail.

The third technique, *the questionnaire*, may not always be relevant. There are various questionnaires that document and rate abuse, usually for severity. Sometimes it can be helpful to give a questionnaire, and then go over it together. It can trigger memories, or focus conversation on how serious or dangerous the abuse really was.

Victims of domestic violence tend to minimize and normalize severe abuse, and this can be a neutral way of finding out about the details and extent of the abuse. However, sometimes it can be experienced as distancing. If it seems awkward or inappropriate to give your client a questionnaire, feel free to bypass this technique.

Obtaining the History of Domestic Violence and Gathering Evidence

Almost all cases require a detailed history of the domestic violence. You need to know (1) when each incident occurred; (2) in an order of protection case, whether the occurrences together or separately constitute family offenses; (3) what kinds of injuries she sustained; (4) what her feelings and reactions were; and (5) what kind of corroborating evidence exists (hospital records, eye-witness accounts, police reports, etc.).

Documenting the Abuse and Preserving Evidence

Ask your client to bring to the first interview all court papers, police reports, hospital records, and appointment slips relevant to the domestic violence, and marriage and birth certificates. New York State Domestic Incident Reports (DIRs), issued by the police when they arrive on the scene of a domestic dispute, contain contemporaneous accounts of the incidents by both your client and the responding police officer and are especially useful.

Remember to be alert to the fact that you may have key evidence in your office that will not be around for your next interview: bruises, red marks, scratches, and torn or bloodied clothing. Preserve that evidence by taking photographs or asking your client to allow you to keep her bloodied, ripped shirt. Ask her if he damaged her property. If so, she should document it either by saving the property

or photographing it. Such evidence will probably enable you to meet your burden of proof at trial. It may also enhance the possibility of a favorable settlement.

If she has the original receipts for property he damaged, she should provide them to you. They can be introduced into evidence in the dispositional phase of her family offense case when she is pursuing restitution.

Ask her about witnesses to the abuse. Even if the beatings happened in private, there may be neighbors who heard her screams or friends who observed her injuries afterward. She may have made "excited utterances" to friends or coworkers. Get the names, addresses, and phone numbers of these individuals, and contact them as soon as possible before their memories fade.

Assessing the Children's Situation

Were the children present? What did they see or hear? How did they react? What changes in their behavior did you observe? The impact of the domestic violence on your client's children will be relevant in almost every kind of representation — from family offense and custody to matrimonial and immigration. Find out what steps your client took to protect the children from the abuse, including by ending the relationship. It may be important to establish that your client knew the domestic violence was harmful to the children and tried to prevent them from being exposed to it.

Remember that until an Attorney for the Child has been appointed you can interview your client's children. Older, verbal children can be a source of valuable and reliable information, such as which parent they prefer to live with or what they observed in their home on a particular occasion. Be sure that you have your client's permission to interview the children and clear any questions you ask them with your client in advance. Also be sure that any questions you ask the children are "open-ended" and that you do not inadvertently lead.

Contested custody cases require that you know everything about your client's relationship with the children: her history of care-taking; the children's social, psychological, and intellectual development; the children's relationship with the abuser; the children's relationship with extended family members; even your client's and her abuser's life histories. Gathering this extensive information may require several interviews.

Meeting your client's children and observing her interaction with them can strengthen your representation, especially if there is an actual or potential custody or visitation case. Seeing her with her children can give you information about her strengths as a parent that will make you a stronger advocate. Problems in the way your client relates to her children may become an issue in court. Swift and appropriate referrals to parenting groups or therapists are important to successful custody and visitation claims later on. *See* Chapter 15, *Litigating Custody and Visitation Cases*, for further discussion.

Ask your client how she disciplines the children. Although the law prohibits only excessive corporal punishment, any corporal punishment that comes to the Attorney for the Child's or court's attention will reflect poorly on your client. Tell her that. And, if she is disciplining the children inappropriately, refer her to a parenting skills course.

Knowing the Worst

Tell your client that her abuser will probably try to make her look bad in court. Explain that you need to know what he is likely to say about her in advance of the court date so that you can quickly respond to his allegations.

Ask her, "What is the worst thing he is going to say about you?" If she responds, "That I'm crazy or that I'm a drunk," you will need to ask specific questions. Ask her if she has had psychiatric hospitalizations or seen a therapist and if so, when, where, why, and for what period of time. Ask her

if she has ever had a drug or alcohol problem. If so, find out when, what the substance was, the extent of her addiction, and whether she was in a program.

Ask her if her children have ever been removed or if there have been any child welfare investigations. Phrase the questions in such a way that your client understands that you are not judging her but are getting information necessary to help her.

Strengthening Your Client's Courtroom Presentation

Evaluate how your client will sound and appear to the judge, Attorney for the Child, and any forensic evaluators, and what kind of witness she will make at trial. How does she tell her story? Is it consistent and believable or is her account vague, confused, and contradictory? Is she easily rattled? Is her affect appropriate or is she blank and numb? Is she so emotional that she cannot stop crying? Does she dress appropriately?

By considering these issues you are not standing in judgment of your client; you are identifying the most effective strategy to help her get the legal remedies she needs. If she would not make a good witness, it might be best to try to settle the case. Or you might want to call an expert witness to explain her demeanor. Or you might be able to work with her to help her learn to present herself in a way that does justice to her case. One client laughed nervously every time she described the abuse she had suffered — behavior that led the Attorney for the Child and judge to doubt her account. When her lawyer gently pointed it out to her, she was able to control her nervous reaction and become an effective witness on the stand.

If court-appropriate clothing is a problem, consider referring her to a program like Dress for Success, which offers domestic violence victims professional-looking clothing for appearances in court.[10]

Prepare the client for meetings with other professionals.

Don't let a client go into any court-related situation (e.g., a meeting with a child welfare caseworker or the Attorney for the Child's social worker) without knowing what to expect and what will be expected of her. Warn her about possible pitfalls, such as openly expressing anger toward her abuser. Explain how important her appearance and demeanor will be in court.

Understanding the Effects of Trauma

Longstanding abuse, especially abuse that follows earlier abuse, often causes psychological problems and trauma. It's important to begin with an understanding that these "problems" were likely valuable coping mechanisms and adaptive strengths at the time in which they were employed. Sometimes challenges arise during interviews that can make representation seem especially difficult. So often these behaviors are symptomatic of post-traumatic stress disorder, and understanding that origin can help you as an advocate reach through that, and assist the client in moving forward.

Victims may also suffer from depression, and fears or paranoia. It is not surprising, for example, that a domestic violence victim might use alcohol and drugs to numb the pain and ward off feelings of despair. Zealous representation means understanding the worst, doing whatever is necessary to help her overcome the worst, and then, if her problems surface in the proceeding, helping evaluators understand their source, the steps she is taking to overcome them, and the strengths she displays in spite of them.

Post-Traumatic Stress Disorder (PTSD)

Domestic violence entails a series of traumas to the victim, which can cause Post-traumatic Stress Disorder (PTSD). PTSD is a diagnosis given to someone who has experienced a traumatic event and

is having a normal reaction to it.[11] With domestic violence, the traumatic event(s) consists of the physical or sexual violence and/or types of coercive control that the abuser has inflicted on the victim. The reactions fall into four categories – (1) *intrusive thoughts of the traumatic event(s)*, (2) *avoidance of these thoughts*, (3) *negative alterations in cognition and mood* and (4) *physiological hyperarousal*. Understanding that PTSD may be part of the picture is helpful in recognizing reactions your client may be having, and may explain why she has difficulty helping you put the information about her abuse in logical order.[12]

For a victim of domestic violence, PTSD reactions might include intense flashbacks and/or nightmares, etc. as a way of dealing with these intense emotional experiences. The victim may block feelings, and thus appear very flat emotionally, and unresponsive. In addition, she may have amnesia about some of the abuse, and difficulty remembering events in order or detail. She may also have disconnected physical experiences of fear (racing heart, difficulty breathing), problems concentrating and significant sleep disturbance.

Your client may seem very subdued and give only sketchy accounts of what has happened to her. This may be due to her tendency to *minimize*. Minimization is a psychological way of getting through very difficult circumstances by understating their significance and impact. Minimization can be very effective in helping a person survive a traumatic event, like a house fire, by helping her walk calmly to safety instead of panicking. Minimization can be a significant obstacle to understanding the gravity of a traumatic experience or how it affected the victim. If your client is minimizing, she will tend to describe the horrific treatment she's received in understated terms, which will have the effect of making the listener think that there was little if any abuse.

Another psychological defense that trauma victims may employ is *dissociation*, a technique that enables them to put feelings about experiencing abuse to the side and completely ignore them while doing something else. Like minimization, dissociation can aid survival, helping a victim to function in the face of tremendous adversity. For example, disassociation helps a mother prepare dinner for her children, or change a diaper, even after having been brutally abused. Dissociation enables a rape victim to endure a sexual assault by experiencing it as though it is happening to someone else.

While disassociation may help a victim survive a crisis, it has long-term negative psychological effects and can interfere with her ability to recall traumatic events that must be described in detail to access protection.

You may find that a client avoids staying on the subject during interviews. This may be the result of a thought disorder, a sign of a psychological problem. Or it may occur because your client wants to avoid painful subjects. It may also be the function of her lack of experience with interviews.

If your client does not respond to your questions, or continually gravitates to irrelevant topics, remind her to listen carefully and confine her answers to what you have asked. If she continues to be unresponsive, gently cut her off and repeat the question.

The client may have *memory gaps* or *amnesia*. This often is a function of repression, another common psychological reaction to abuse. It also may be the result of the repetitive nature of the abuse, because it is hard to remember specifics of events that occur daily or weekly.

Ask your client to bring calendars, diaries, and any records she keeps that will help her place events in time. Clients with children often can remember when events took place by thinking about how old their children were when they occurred. Help her hone in on the probable date by asking her what season the incident occurred in, then help her place it on or around a holiday or birthday during that season. Reassure her that it is very common not to remember the date of events that occurred months or years ago. If she does not keep a record of her activities, tell her that it is a good idea to begin to

keep one so that you will know the exact date and time on which events occur, such as drop-offs and pick-ups for visitation or harassing phone calls.

Sometimes a client may be *excessively self-assertive*. Relieved to be free of an oppressive abuser, she may be determined not to fall under anyone's control again and resists guidance. She may attempt to take charge of her situation, her legal case, and the courtroom, but have little idea of how to go about this effectively.

Clients struggling with issues of self-assertion may ignore your advice to keep quiet in court, reject your advice to comply with a court order, insist on strategies that are counterproductive, and become aggressive and even hostile when you give them bad news. Do not engage, and do not take such behavior personally.

Trauma-Coerced Bonding: When Your Client Wants to Return to the Abuser

Some victims of domestic violence also experience "trauma-coerced bonding."[13] Some victims of abuse remain very attached to an abuser, even though he has harmed her significantly. A victim who is traumatically bonded will have very mixed feelings about leaving her abuser, or prosecuting him for his wrongs against her. This phenomenon, originally called "Stockholm Syndrome,"[14] occurs when there are two factors present. One, the abuser has to have significant power over the victim. This is the case in domestic violence. Second, the abuser has to be at times punishing, but also at times loving and caring towards the victim. The victim is weakened psychologically by the abuse, and comes to see the abuser more and more as the only person who can help or harm her. Working with this client may seem challenging. She may be very conflicted about leaving, and may backtrack at times. This client needs a great deal of emotional support, and gentle reminders of the negatives of her relationship with the abuser when she is feeling that she must return.

Like PTSD, trauma-coerced bonding is the natural outcome of the way in which your client has been mistreated — it is not reflective of her character or underlying mental fortitude. The other chapters in this book addressing topics such as spousal and child support, workplace rights, immigration remedies, intimate partner sexual assault, public benefits and housing, can help you, as the victim's attorney, identify specific solutions for challenges that may be underlying some of your client's extreme fear and contributing to her perception that the only place in the world for her is with the abuser. While pragmatic solutions will not always free your client from deeply private conflict, offering as many paths to safety and independence as you can may help shift her perspective, even if it takes a while. For some clients, leaving is a longer process and you may only see the beginning of it, not the final outcome. Your help is still an essential stepping-stone on her path.

Vicarious Trauma

Although your client is the one who has been traumatized by her experiences with the abuser, hearing about it in detail, and identifying with your client whom you are trying to help, leads to a certain amount of vicarious trauma. In other words, the experience of hearing about your client's trauma has the effect of causing you secondary trauma.

You should anticipate that it will be upsetting to hear about your client's experiences. It is important to be aware of this phenomenon, so that you do not unconsciously keep your client from talking in to avoid upsetting yourself. The best way to counteract this tendency is to maintain awareness that you are likely to get upset. It is important to allow yourself to experience whatever upset you feel, and to seek support for yourself when you do. If you shut this out, you are more likely to let your client avoid important details, and you are also more likely to engage in victim blaming.

It is a natural tendency to distance yourself from the traumatic circumstances of your client's situation. This is because most of us like to feel that these horrible events would never happen to

us. We like to feel that we would have acted differently, protected ourselves better. Because of this tendency, you may find yourself blaming your client for not defending herself or for not leaving sooner.

To avoid acting on these self-protective, but ultimately destructive impulses in ourselves, it is important to seek support from other lawyers and from professionals who are qualified to handle these issues.

Conclusion

The best attorney-client relationships are built on trust and teamwork. When this becomes the dynamic that informs your relationship with your client, there are mutual benefits. Not only will your task be easier and more rewarding, but your client's encounter with the legal system will be a positive experience — one that affirms her value and equips her with the tools she needs to build a safe and independent life. The interview serves as the foundation of all that will follow.

Notes

1. *See* National Network to End Domestic Violence, *Technology Safety,* techsafety.org/resources-survivors (provides Technology Safety Plan; guidelines on cell phone and online safety; safety-related apps; overview of spy-ware).
2. Lack of childcare can also make it difficult for a client to make appointments. Children often accompany on appointments and are watched by someone else in the office or a willing friend. It is not a good idea to bring children, except newborns or sleeping infants, into the interview unless it is confined to a discussion of financial information.
3. Your client may be from a different ethnic or religious group than yours or an immigrant. Your client may a member of the LBGTQ community, or very young. She may have disabilities. It is important both to recognize your own presumptions and to understand the realities of your client's family and community life. Chapters elsewhere in this book address these special concerns.

   Educate yourself about your client's culture or religion, especially about any religious beliefs and cultural customs that may become an issue in court.

   You may have to become your client's cultural interpreter to the court or forensic expert. Avoid scheduling court dates and trial preparation sessions on religious holidays. If you need to schedule trial preparation when your observant client is fasting on a holy day, respect the need to take breaks for prayers and avoid eating and drinking in her presence until it is time to break the fast.
4. "Battered woman syndrome" is a theory developed by psychologist Lenore Walker that identified a constellation of characteristics ostensibly shared by domestic violence victims who have been subjected to battering over a peri- od of time. A central feature of "battered woman syndrome" is "learned helplessness" — the inability of an abuse victim to seek help or escape even when these options are available. *See* Lenore E. Walker in *The Battered Woman* (1979).

   This theory was initially used when trying to explain to a criminal jury why a severely abused woman was acting in self-defense when she killed or injured her abusive partner, "battered woman syndrome" proved detrimental to domestic violence victims in this and other legal contexts. It has been especially problematic for domestic violence victims fighting for custody of their children: if abuse victims suffer from learned helplessness and cannot protect their children? "Battered woman syndrome" also suggests that battered women suffer from psychological pathology which can become a rigid pigeonhole that undercuts a vic- tim's credibility: if she was resourceful, assertive, and a fighter — clearly not suffering from "learned helplessness" — then her story of victimization must not be true.
5. Evan Stark, Anne Flitcraft, *et al*., *Wife Abuse in the Medical Setting: An Introduction for Health Personnel*, Domestic Violence Monograph Series, No. 7 (Washington, D.C., Office of Domestic Violence, 1981); Julie Blackman, *Intimate Violence: A Study of Injustice* (1989).

6. *See* Evan Stark & Anne Flitcraft, *Women and Children at Risk — A Feminist Perspective on Child Abuse*, 10:1 International Journal of Health Services (1988); Linda McKibben et al., *Victimization of Mothers of Abused Children: A Controlled Study*, 84:3 Pediatrics (1989); Lee Bowker, et al., *On the Relationship Between Wife Beating and Child Abuse*, in Feminist Perspectives on Wife Abuse, ed. Kersti Yllo and Michele Bograd (1988).
7. Many victims have experiences of sexual abuse that predate the sexual abuse inflicted on them by their batterer. More recent experiences may trig- ger memories of early sexual abuse that the victim suffered as a child. Unless the history of sexual abuse is relevant, for example, because it will surface in a forensic evaluation in a child custody case or is part of your client's asylum claim, it probably isn't necessary to explore a past and painful prior history of sexual abuse. Such an exploration may not be germane to your case, and may upset your client unnecessarily. It's important to be clear when this information can be useful from a legal perspective, and when it is not.
8. *See e.g.* New York City Family Justice Centers, www.nyc.gov/html/ocdv/html/help/fjc.shtml*;* Family Justice Center of Erie County, www.fjcsafe.org/.
9. Many resources can be found through the NYS Office for the Prevention of Domestic Violence website, abuser.opdv.ny.gov/help/fss/resource.html.
10. At newyork.dressforsuccess.org/.
11. *See* Judith Lewis Herman, *Trauma and Recovery* (1992). Herman compares the trauma of victims of domestic violence to that of combat veterans and survivors of political torture.
12. Under the Diagnostic Statistical Manual (DSM) a person suffering from PTSD has experienced a traumatic event or events, and had various psycho- logical reactions to them, lasting over a period of time. The DSM lists all the possible diagnoses of mental disorders, with detailed descriptions of the relevant symptomatology for each recognized disorder. It is compiled by a professional committee and must be approved by the Board of Trustees of the American Psychiatric Association. The DSM-V is the latest and current version of the DSM and subject to future revision.
13. Chitra Raghavan & Kendra Doychak, *Trauma-coerced Bonding and Victims of Sex Trafficking: Where do we go from here?* 17:2 International Journal of Emergency Mental Health and Human Reslience 223 (2015).
14. Donald Dutton, Ph.D. & Susan Painter, *Emotional attachments in abusive relationships: A test of traumatic bonding theory*, 8:2 Violence and Victims 105 (1993).

4

Assessing Lethality and Risk: What Do We Know, How Can We Help?

by Hon. Janice M. Rosa

Females made up 70% of victims killed by an intimate partner in 2007, a proportion that has changed very little since 1993. In 2007 intimate partners committed 14% of all homicides in the U.S. The total estimated number of intimate partner homicide victims in 2007 was 2,340.

Bureau of Justice Statistics

When a client reveals that she is a domestic violence victim, among the many concerns her situation raises for an attorney is whether she is in grave danger. Many years of domestic violence intervention and advocacy, on social service, medical, police, and judicial fronts, have provided professionals with enough experience to have some sense of what kinds of behavior by the abuser are indicative of a high risk of severe violence. Familiarity with this important body of expertise can help an attorney provide confident and effective advice in a frightening and volatile area.

An attorney will often learn about domestic violence indirectly, as background to some other legal issue the client has presented. Perhaps it is a housing or immigration issue; perhaps it is a custody or divorce matter. A lawyer is trained to process the information provided and mentally fit it into various legal formats — a petition for court, an application to an agency, a letter to a landlord.

A litigant requesting legal help with a non-domestic violence civil matter may sense that the attorney does not want to hear about violence. It is critical to explicitly convey interest and willingness to hear the "whole story," and just as importantly to impress upon the client that her counsel will pass no judgment on any decisions, actions, behavior, or events she discloses. (For a fuller discussion, see Chapter 3, *Interviewing and Assisting Domestic Violence Victims*.)

There is always a great deal of information and subtext that may not even fit into the legal framework. These cases are often convoluted and messy, with conflicted histories that may span years and decades, not just days or months. With a legal mind trained to seek out salient points to create a case, and an unconscious desire to have it fit into neat divisions, it is often tempting to oversimplify a situation. But no matter what the overt agenda is, safety is the first, last, and most important topic.[1]

Her legal consultation may be the first time she has sought assistance or told her story. As a first-line professional, an attorney has a position of trust, and unwittingly may take on the duties of assessing her danger. Meaningful client discussions will occur over multiple meetings, and the information will evolve and even shift over time as the coercive dynamics are revealed.[2]

Fortunately in recent years there have been increasingly valuable assessment tools that can alert counsel — and the client — to danger. Not all lethality indicators for domestic violence victims are obvious. Some may seem counter-intuitive at first.

Studies show that victims seldom overestimate danger and risk of death, and a review of domestic violence homicides shows that about half of the women who were killed actually underestimated their danger.[3] That makes sense. A victim may become inured to her circumstances or use denial and minimization to cope. Asking questions to elicit information about known risk factors can alert a victim to a serious situation, and allow for appropriate action and precaution.

The Risky Side of Risk Assessment — What it is Not

While nothing is foolproof, risk assessment tools can improve our legal responses, and assist a victim in making more informed decisions. Using a proven tool can provide vital information to help the client create a safety plan (preferably, after referral to a trained advocate). Importantly, the information can be employed to underscore risk and danger in pleadings and in argument to the court.[4]

No instrument can predict lethality with certainty. The human variable is constant. Risk is dynamic and can shift by the hour or day or week or event. Consequently, a 'low' score on an assessment one day does not predict what will occur if new events happen the following day. Risk must be reassessed continually; a false sense of security can lead to tragedy if new indicators are not considered. And heavy reliance on any instrument, even one which is detailed and tabulated with scoring, can obscure the larger picture and foster a false sense of security for the victim and the practitioner.[5]

All of the correlations established by study are red flags. However, and most importantly, their absence does not mean the victim is safe. Anything a victim flags as a safety concern should be taken seriously. Women who kill their abusers often describe a different look in their partner's eye or a slight change in the quality of a repeated threat as a sign that she was in more grave danger. There is not always a warning, however. Twenty percent of women murdered by their partners had not been previously assaulted before their deaths.[6]

The Risk of Ignoring Risk

Risk is not formed in a vacuum and seldom with one event. For victims, the context of the perpetrator's words and actions and abuse is everything. A seemingly innocent gesture or word can indicate volumes of threatened harm to herself and loved ones. Context means the *intent* or *purpose* of the batterer who assaults or coerces, together with the *meaning* to the victim who perceives or receives it, and the ultimate *effect* on her actions or behavior.[7]

All professionals in the field agree that an incident-specific inquiry about an event (as for example, a criminal assault filing) often misleads, as it ignores the vital story that wraps around the event. A single incident of past violence in the context of ongoing, non-physical coercive tactics could indicate lethal risk, even though the physical violence is in the past.[8] This may be counter-intuitive for professionals, especially the court, to understand unless the story of continual domestic terrorism is told. To an untrained bench officer, a petitioner who has recently separated from her abuser is perceived to be safer, not more at risk, because proximity to the abuser is reduced. The rising distress and anger of the batterer are not immediately obvious for that judge or referee. Similarly, a serious incident in the past coupled with "only" continuing coercion is often not seen as an emergency to the judicial officer unless someone explains the increasing volatility and danger perceived by the victim today.

Dr. Jacquelyn Campbell devised the original Danger Assessment (DA) tool, basing it on her study of domestic homicides and her clinical work as a nurse caring for victims.[9] Created to be used in confidential social service settings, the measure has been subsequently tested, developed, and validated in various studies to accurately predict lethality for victims.[10] Her program maintains a website, www.dangerassessment.org, that contains comprehensive resources concerning risk assessment as well as detailed guidance on how risk and lethality should be considered by lawyers.

Working with Dr. Campbell, the One Love Foundation has developed an application for smartphones and tablets, entitled *My Plan App*. This interface leads the user through a series of questions concerning the dynamics of a relationship and provides feedback on risk.[11]

Other tools have been developed to ascertain the risk of re-offending, including the Ontario Domestic Assault Risk Assessment (ODARA),[12] DV Mosaic,[13] Domestic Violence Screening Instrument — Revised (DVSI-R),[14] and the SARA[15] for sex offenses, and are being used in the criminal field by law enforcement and probation officers. The Mediator's Assessment of Safety Issues and Concerns (MASIC) is used by mediators.

New York's Domestic Violence Risk Factor Guide for Judges

Campbell's risk assessment tool formed the basis for the 2012 work of a group of New York institutions in creating a bench guide for judges handling civil protective orders in Family Court.[16] This and other assessment tools — which were originally created to be used by professionals outside the legal profession (social service providers, first responders, corrections and probation) — were reviewed and then adapted for use within a court system.

The result of the study and pilot project is the *Domestic Violence Risk Factor Guide for Judges ("Risk Guide")*, a two-sided document available to New York judges and the public. *See* Appendix. It has been approved and adopted by the Office of Court Administration for use by all Family Court judges and court attorney referees who hear cases requesting civil orders of protection. Similar benchcards geared for use in divorce cases before Supreme Court justices and referees, as well as one for the criminal courts, are nearing completion and approval.

The *Risk Guide* inquires about statistically proven risk indicators, relates those factors to the statutory provisions in the Family Court Act, and provides follow up questions. Judges report the *Risk Guide* useful in hinging risk factors to the legal framework they are required to apply, and use it most often in making decisions on specific provisions of orders or in requests for modification and violation hearings.

The *Risk Guide* functions as an excellent template for attorneys or advocates drafting petitions for protective orders. Reference to the *Risk Guide* results in petitions that provide specific, detailed information tying risk factors to statutes, and are more clearly focused on danger items. The *Risk Guide* should be the starting point to highlight crucial points, and to provide all-important context to the abuse conduct.

What Are the Established Risk Factors for Domestic Violence Victims?

The New York State Office for the Prevention of Domestic Violence[17] maintains an excellent website with information, data, and helpful resources for the practitioner. Of particular note is the downloadable document, *Domestic Violence: Finding Safety and Support*.[18] It includes a safety planning checklist for victims that your client may find helpful.[19] Safety planning is a different inquiry from lethality assessment. *Safety planning* is the creation of the steps to take if the abuser's conduct escalates

— identifying a safe refuge that can be reached in an emergency, preparing an emergency bag, compiling essential documents and reserve money to have at the ready if the need to flee should arise.

The site also provides both national and state data on intimate partner violence that is updated regularly. Statistically, certain characteristics of a batterer correlate to higher risk of harm or death and are included in the New York *Risk Guide* bench card.[20] These include the following:

- *Access to firearms*. While the percentage of homicides committed by a partner using a firearm declined from 69% in 1980 to 51% in 2008 — no doubt due to increased statutory confiscation of weapons in these cases — the presence of a firearm was still a major indicator of increased risk to all the members of the household.[21] Women who are threatened or assaulted with guns are twenty times more likely to be murdered by their abuser, a sobering overriding risk.[22]
- *A history of violence*, particularly with increased severity and/or frequency;
- *Past violation of orders of protection*, or *serving probation*;
- *Use of a weapon in a domestic violence incident past* or current or threats to use;
- *Threats to kill the victim or others*. A woman whose partner has threatened to kill her is fifteen times more likely to meet her death at his hands;[23]
- *Threats of suicide*;
- *Sexual violence including forced sex*;[24]
- *Drug or alcohol abuse*. There is a cautionary note here. This is not an excuse for abuse, but rather an accelerant of an already abusive partner, releasing inhibitions, where nearly 80% of the men who killed a partner were problem drinkers in the year prior.[25]
- *Extreme jealousy, stalking behavior, obsession* with victim. In these situations separating from the abuser is particularly dangerous, even without physical abuse.[26]
- *Physical abuse of a child*, particularly if not biologically related;
- *Threats to harm, or injury to, a pet* or domestic animal;
- *Unemployment* or loss of employment;
- *History of violent crime* outside the family;
- *Strangulation attempts*, 'choking', 'cutting off air', 'arm across neck', 'passing out'. These are the common terms victims use to describe a lethal attempt to cut off a person's air supply. *One quarter* of women killed by their partners are strangled to death.[27]

Moving Towards Safety

The social science research and statistical analyses of homicide and attempted homicides over the past decades now inform the work practices of both bar and bench in protecting victims. Advocates can turn to reliable, validated lines of inquiry in probing their clients about potential risks, and have confidence that the information received is a window into the potential for violence in a relationship. Relying on hunches or "intuition" is no longer the only resource for professionals in this field.

Just as in medicine, we have gone from the 'dark ages' of conjecture to more evidence-based practices. But, just as in the medical field, no diagnostic test is a panacea.

As an attorney, gain the client's trust as she finds a safe outlet for her story. Then continue to inquire non-judgmentally as more of the history unfolds and the context of the abuse develops. Finally, resist the ever-present desire to codify, label, and simplify the story, as it is in the nuance and shifting landscape of the story that the real kernels to her safety are found. These you gather up and weave into a story that a trier of fact finds compelling and complete.

Use the *Risk Guide* as a roadmap to lead the client, with the help of an informed advocate and court and the support of the community, to a safe and protected environment for her and her children. In doing so, remember the *Risk Guide* is not a 'safety plan'. This and all other instruments do not, and cannot assess for safety, but they do give us all insight into risk and dangerousness. Use the tools that the social science field has provided to exponentially expand the value of your advocacy. Know that your intervention will protect victims and their children.

Notes

1. Carolyn Rebecca Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?*, 250 Natl Inst of Jus J 3 (2003), www.ncjrs.gov/pdffiles1/jr000250c.pdf.
2. Nancy ver Steegh, et al, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 Marquette L Rev 955, 972 (2012).
3. Jacquelyn C. Campbell et al, *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 Am J Public Health 1089 (2003); Christiana Nicolaidis et al, *Could We Have Known? A Qualitative Analysis of Data From Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J Gen Intern Med, 788 (2003); Jacquelyn C. Campbell et al, *Assessing Risk Factors for Intimate Partner Homicide*, 250 Natl Inst Jus J 14 (2003), www.ncjrs.gov/pdffiles1/jr000250e.pdf.
4. Corey Nichols-Hadeed et al, *Assessing Danger: What Judges Need to Know*, 50 Fam Ct Rev 1(2012).
5. Nancy ver Steegh *et al*, n 2, "[S]creening … entails a bedeviling combination of art and science.." at 977.
6. Carolyn Rebecca Block, *supra* n1.
7. For example, a batterer who calls, sends unwanted flowers and cards to his separated victim *intends* to send a message that he knows where she is. To the victim it *means* that he will follow through on his oft-repeated statements that she can never leave, he will always find her, she is his. And the *effect* on the victim is increased fear.
8. Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 Fam Ct Rev 555, 562 (2010): "…coercive control may be a more accurate measure of conflict, distress, and danger to victims than is the presence of physical abuse."
9. Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, 8 Advances in Nursing Sci 36 (1986). While the popula- tion from which the tool was developed was limited, and some variants within specific populations may have been missed, it is a valid instrument, validated in multiple independent studies since.
10. See website for the DA tool: www.dangerassessment.org/DA.aspx.
11. www.joinonelove.org/get-help/danger-assessment-app/.
12. www.odara.waypointcentre.ca.
13. www.mosaicmethod.com.
14. www.vawnet.org/summary.php?doc_id=2682&find_type=web_sum_GC.
15. www.recoveryzone.com/tests/sex-addiction/SARA/index.html.
16. The 8th Judicial District (comprising the eight most western counties of New York, including the City of Buffalo) identified risk assessment infor- mation for judges as vital. The NYS Office of Court Administration, together with the Center for Court Innovation, used federal OVW funding to support the project.
17. www.opdv.ny.gov.

18. www.opdv.ny.gov/help/fss/contents.html.
19. www.opdv.ny.gov/help/fss/gettingsafe.html#safetyplanning.
20. National Data on Intimate Partner Violence, NYS Office for the Prevention of Domestic Violence, compiled 2011, www.opdv.ny.gov/statistics/nation-aldvdata/intparthom.html.
21. *Id*.
22. Campbell et al, *Assessing Risk Factors, supra* n3.
23. *Id*.
24. *Id*.
25. National Data, *supra*, n 20.
26. Carolyn Rebecca Block, *supra* n 1.
27. *Id.*

5

Police Response: Mandatory Arrest & Primary Physical Aggressor

by Lisa Fischel-Wolovick

Police response to domestic violence has evolved over the past 40 years to reflect the increasing centrality of the justice system in providing remedies and protection to victims of domestic violence. Prior to reform movements, police often failed to enforce criminal assault laws when the victim was the perpetrator's spouse or intimate partner. In 1977, *Bruno v Codd* paved the way for domestic violence legislation. This landmark New York case challenged law enforcement's policy custom of not arresting batterers, and the Family Court's refusal to provide same-day access to victims of domestic violence seeking emergency orders of protection.[1] The New York City Police Department entered into a consent decree that provided for mandatory arrest in cases of domestic violence. However, state-wide reform remained elusive until passage of New York State's Family Protection and Domestic Violence Intervention Act of 1994 ("DVIA"). The DVIA emerged in New York as part of the national trend to combat intimate partner violence.[2] The law operated to reduce police discretion in domestic violence incidents by mandating arrest of perpetrators, a reform carried out in many other states at the time as well.[3]

The DVIA envisioned an informed police response while also allowing for other civil remedies in Family Court that could include orders of custody, supervised visitation, and child support. The mandatory arrest provisions provided for warrantless arrests where law enforcement determined probable cause existed to believe that a felony or misdemeanor had been committed, or a duly served order of protection had been violated. An important role for counsel, in cases where the police did not respond at the time of an incident, is to advocate on behalf of the client for the arrest of a perpetrator. Domestic violence advocacy requires an understanding of the elements of mandatory arrest and the underlying family offenses, addressed in this chapter. Such action can be crucial in supporting petitions for asylum and other instances where a formal record of the abuse is important.

The DVIA also amended the Criminal Procedure Law and the Family Court Act to establish concurrent jurisdiction over family offenses in both Family Court and criminal courts.[4] Criminal court requires the prosecutor to prove its case beyond a reasonable doubt. As a result, the Legislature intended that Family Court, with its lesser standard of proof, could provide safety measures in the absence of an arrest. For more serious cases, the DVIA provided a mechanism for the Family Court judge to transfer a matter the criminal court.[5]

Expansion of the Statutory Definition of a Household

In 1994, the DVIA limited application of its laws to members of households who were related by blood, marriage, or had a child in common. Victims of elder abuse, same sex couples not in legally recognized marriages, the disabled, the unmarried, and childless victims of dating violence were not included in the earlier statutory definition of a household, and could not avail themselves of the Family

Court's civil remedies. For victims of intimate partner violence not included in this limited definition of a household, the only recourse could be found in criminal court, provided the police arrested the perpetrator. Even where the police had made an arrest the District Attorney retained what has been referred to as "quasi-judicial authority" over the decision to prosecute.[6]

In comparison, the 1990s New York City Police Department training curricula utilized a broader definition of a household, and recognized intimate partner violence. The Department's training mandated arrest in cases of elder abuse, dating violence, and same sex relationships where a misdemeanor or felony had been committed. However, this was not part of a state-wide policy, and the available data on whether this city-wide policy increased arrests in intimate partner violence is limited.

In 2008, in response to domestic violence advocacy, the Legislature expanded the statutory definition of a household to encompass couples who have been in an "intimate relationship regardless of whether such persons have lived together at any time."[7] Similarly, in 2010, the Violence Against Women Act was also amended to include recognition of interstate stalking and abuse regardless of sexual orientation and gender.[8]

In New York, the courts determine, on a case-by-case basis, whether the parties are in an "intimate relationship," and thus may avail themselves of concurrent jurisdiction. The Second Department held that in determining whether there was sufficient evidence of an "intimate relationship" to provide the Family Court with subject matter jurisdiction, "the relationship [between the petitioner and respondent] must be direct, not one based upon a connection with a third party."[9] The court further held that a key factor in determination of an intimate relationship between the parties is whether "the relationship …is one of the 'unique or special' relationships that subject persons to greater vulnerability and potential abuse because of their nature."[10]

This broader definition of a household member supports subject matter jurisdiction over dating violence, elder abuse (particularly where the elderly person is abused by a caretaker), the LGBTQ community, the disabled, and in some instances victims of dating violence. Such expansion can also increase the rate of arrest by heightening awareness on the part of law enforcement as to the many manifestations of abuse, regardless of sexual orientation, age, and disability.

The Problem of Dual Arrests

Following passage of the DVIA, an increase in incidents in which victims of domestic violence were also arrested emerged as an unintended consequence of the mandatory arrest provision. A report prepared for the Connecticut Coalition Against Domestic Violence described four typical dual arrest scenarios, where:

a. Both parties have committed family offenses;
b. The victim has justifiably used force in self-defense;
c. The offender files a false cross-complaint; or
d. There is in fact a wrongful arrest without probable cause.[11]

The possibility that the victim of domestic violence will be arrested is disturbing on a number of levels. Wrongful arrest will create a climate where victims become reluctant to call the police again.[12] In terms of community safety, the arrest of the wrong party means that the violence will continue, creating an atmosphere in which entire families become at risk for greater and greater injury.

In response to the problem of dual arrests the New York State Legislature enacted the "Primary Aggressor Law" in 1998, modifying Criminal Procedure Law §140.10 (c) concerning warrantless

arrests. Where there are dueling allegations, law enforcement must now utilize the following criteria to determine who should be arrested:

a. a history of domestic violence,

b. the existence of any prior protective orders; and

c. the relative severity of the injuries to each party.[13]

While the DVIA mandates arrest where the officer has probable cause to believe that a felony, misdemeanor or violation of an order of protection has been committed, it also explicitly provides exceptions to these requirements. Police officers are expressly prohibited from asking battered women if they want the abuser arrested. However, if the complainant spontaneously requests this, officers may use discretion in determining whether to make a misdemeanor arrest. More recently, there were anecdotal reports that rather than ask if the victim wants the abuser arrested, the police will inform her of the consequences of proceeding with a criminal complaint.

Probable cause determinations are more than simple assessments of whether the elements of a crime have been committed. There is a strong subjective component to such determinations. It is in this subjective area that law enforcement officers' biases and beliefs have had an impact on the frequency of dual arrests. In Wisconsin, a study found that attitudes on the part of individual police officers towards the victims of domestic violence were directly related to whether they would arrest the offender or the victim, as well as provide appropriate safety counseling when victims were at risk.[14] This was found to be particularly true where victims were not English speaking, raising significant concerns about the treatment of immigrant victims.

More recently, a National Institute of Justice study of dual arrests found that this problem persists and that police are more likely to make a dual arrest when the incident involves a same-sex couple.[15] However, it is encouraging that those jurisdictions with primary aggressor policies or state laws mandating a primary aggressor assessment reported one-fourth the rate of dual arrests.[16] One domestic violence advocate who represents LGBTQ victims of intimate partner violence described anecdotes where the police were more likely to assume that the violence is mutual, and to refer the parties to Family Court without making an arrest.[17]

Much of the research on dual arrests and police attitudes has emerged in response to the concerns and experience of domestic violence advocates. Monitoring individual accounts of failure to arrest, or dual arrests, and establishing hotlines to obtain further data has been an essential part of legislative lobbying for further reform.[18] Given the safety concerns at stake, with victims of domestic violence left isolated and unprotected, the importance of law enforcement training and research when any new law or policy is implemented is essential.

Expansion of Family Offenses

In 2010, further amendments to the DVIA fully expanded the list of crimes that qualify as family offenses, providing concurrent Family Court/criminal court jurisdiction. Inclusion of these additional crimes as family offenses provides more access to Family Court in cases of domestic violence.[19] Offenses now recognized include *inter alia*, sexual misconduct, forcible touching, sexual abuse in the second and third degrees, assault in the first and second degrees, grand larceny in the third and fourth degrees, identity theft in the first and second degrees and, significantly, criminal obstruction of breathing, and strangulation. In 2013, the Legislature further enacted the crime of an aggravated family offense, pursuant to Penal Law § 240.75 (1), a class E felony, where the defendant had committed previous family offenses. The Legislature intended that aggravated family offenses should be charged where the defendant and complainant were members of the same family or household as defined in

Criminal Procedure Law § 530.11(1).[20] Further, the provisions of CPL 510.30 (vii) (A), regarding bail and remand, were amended to allow the trial judge to consider the defendant's history of intimate partner violence and violations of orders of protection, at arraignment.[21] These amendments were significant in protecting victims from escalating violence during the pendency of the criminal case.

Elements of Family Offenses

Aggravated Harassment in the Second Degree

In 2014, the Court of Appeals in *People v Golb* held unconstitutional Penal Law § 240.30(1), aggravated harassment in the second degree, which proscribed communications by telephone, mail, or other forms of written communication with the intent to annoy, threaten or alarm. The Court found the statute as written to be "…unconstitutionally vague and overbroad."[22] The Court stated that "any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence."[23] It noted that an earlier United States Second Circuit Court of Appeals ruling reached a similar result.[24] By implication, the Court invalidated prosecutions of the more serious crime of Penal Law§ 240.31 (2), aggravated harassment in the first degree, which was predicated upon prior convictions for these lesser offenses.

The Legislature then attempted to correct the constitutional infirmities of aggravated harassment in the second degree by providing specific language proscribing actual threats of physical harm, or harm to property communicated by telephone, electronic means, or mail.[25] Despite this recent legislative action, prosecutors need to use discretion and judgment before charging the more serious crime of aggravated harassment in the first degree.

For domestic violence advocates, it is good practice to screen for threats communicated by telephone or other electronic means. Batterers may not always be physically abusive but can terrorize victims, sending reminders through threatening emails, texts, and phone calls. The Court of Appeal's past rulings on harassment and the First Amendment have addressed the problematic tension that arises when crimes of harassment are intended to "…criminalize conduct, even if speech might be a component of the offense."[26] However, a recent trial court ruling found that it is the act of threatening, not the speech, that may be the subject of criminal prosecution.[27]

The Crimes of Strangulation

In 2010, the New York State Legislature also enacted significant amendments to the Penal Law that criminalized strangulation and added additional crimes to the designated family offenses. These laws included criminal obstruction of breathing or blood circulation pursuant to Penal Law §121.11; strangulation in the second degree pursuant to Penal Law §121.12; and strangulation in the first degree, pursuant to Penal Law §121.13.[28] Inclusion of these new crimes is a result of extensive medical research concerning the dangers of choking incidents, particularly in cases of domestic violence where behavior can escalate over time.

Medical researchers have found that strangulation is highly dangerous.[29] While bruising may not immediately appear, "the general clinical sequence of a victim who is being strangled is one of severe pain, followed by unconsciousness, followed by brain death."[30] Even where such severe injury does not occur, this injury can result in dizziness, nausea, sore throat, voice changes, throat injuries, breathing, and swallowing problems.[31] The medical research has also noted that choking victims may experience neurological symptoms following oxygen deprivation, and may experience physical symptoms such as left or right side weakness, loss of sensation, eyelid droop, loss of memory and paralysis.[32] There is a high correlation between a victim wetting herself as a result of strangulation and subsequent development of neurological damage, including death, yet this is a detail most

victims are reluctant to disclose and few officers would ask about.[33] These symptoms require immediate medical attention and should be part of law enforcement's institutionalized response.

A probable cause assessment, even where the victim is reluctant, should include viewing the injury with the client's consent, screening her level of pain, encouraging her to seek medical attention, and finally, following up in the next few days to determine the extent of her injuries. Further, the co-existence of custody or divorce litigation should not deter law enforcement from arrests and prosecution. Increasingly, the medical profession is trained to assess and document injuries and stress-related illnesses related to domestic violence to insure the health and safety of their patients. It is essential that law enforcement develop and expand collaboration with the medical profession to address this problem. For her attorney, it is important to remember that even if the police may not have made an initial arrest, photographs of the injury, medical follow-up, and advocacy with the police, are essential.

Other Emerging Issues

Sexual assault is now included among the designated family offenses. Arrests on these charges must be monitored to ensure that victims are treated respectfully and that evidence is carefully obtained. A growing number of sexual assault advocates are available in hospitals in major urban areas. It will be important to have this same service available in college towns and universities, as sexual assaults are under-reported, and frequently not prosecuted. Too often, police in college towns are unfamiliar with evidence gathering, and how to interview victims who are struggling with psychological and physical trauma.

Further, the inclusion of identify theft and grand larceny as family offenses are important as abuse takes many forms, including financial.

For the domestic violence advocate and prosecutor there are significant concerns regarding the issue of proceeding in the absence of a victim of domestic violence. (For a fuller discussion of this topic, see Chapter 11, *Prosecuting a Domestic Violence Case*.) In the worst case scenario, battered women can be ordered to testify and held in contempt if they fail to do so. Conversely, a battered woman may recant her testimony for a myriad of reasons, including witness intimidation. A mental health expert can testify to explain her response.[34] Recent incidents in the NFL, where battered women were reluctant to prosecute criminally or seek civil penalties, show that public awareness needs to be raised to better understand the safety issues that may occur if a victim testifies. The question of when public safety must determine whether an arrest is made or a case is prosecuted must always be a factor, while balancing the psychological needs of a traumatized victim. Domestic violence advocates need to maintain contact with their clients who may be struggling against isolation, the batterer's manipulation, and financial concerns throughout the pendency of the civil and criminal cases to ensure their safety.

It is not clear whether the new statutory framework, the expanded view of a household, and new family offenses have resulted in increased arrests in cases of intimate partner violence. The Federal Violence Against Women Act, and the DVIA, call for approximately 20% of the funds allocated to be spent on research regarding the effectiveness of these statutes. It is essential that advocates for victims of intimate partner violence remain part of this research, and remain vigilant in addressing problems such as dual arrest. It is significant that the current research on mandatory arrest indicates that the police are also more likely to arrest where the batterer remains on the scene, and are more likely to arrest both parties when this occurs. While the New York City Police Department has been effective in deploying resources where needed, the police must address incidents in which the batterer flees the scene. Finally, victims of domestic violence need ongoing support from their attorneys who can make referrals for counseling regardless of whether an arrest has taken place.

Elder Abuse

Despite inclusion in the definition of a household, elder abuse remains a difficult crime to prosecute, particularly where the victims may have difficulty recalling the incidents. Careful interviewing of other family members, caretakers, and medical personnel, evidence of medical documentation, and sudden withdrawals of savings may be indicative of identity theft and grand larceny.

In cases where the elderly person is a poor historian and unable to accurately recall the times and dates of the incidents, they remain at risk of elder abuse. For the prosecutor and family court attorney, there are significant symptoms of abuse in the elderly, including bruising and marks on the wrists or ankles, indicating that the victim had been restrained for long periods of time. Medical evidence that the victim did not have access to necessary medication can be documented through collaboration with physicians, homemaker service agencies, and public health nurses. Increasingly, research has indicated that victims of intimate partner violence seek medical treatment not simply in the emergency rooms, but also in relationship to chronic stress related illnesses. These somatic complaints can be found in the elderly, and the general population, and are frequently found in women who are abused. Having clients sign HIPAA releases at intake, and screening to determine if medical attention has ever been obtained for injuries or stress related illnesses, is essential in building a case for prosecution in either criminal or Family Court.

Significantly, civil guardianship proceedings in New York State Supreme Court continue to be the primary forum where safety concerns for the elderly are heard. A guardianship proceeding under the Mental Hygiene Law is a proceeding in which the petitioner seeks to strip the allegedly incompetent person of their rights to determine how they manage their finances, where they will live, and who will care for them.[35] This application should be a last resort. Increasing advocacy for victims of elder abuse to assist them in removing the batterer from their home — without taking away the victim's civil rights — is essential. For more in-depth discussion, *see* Chapter 25, *Abuse in Later Life*.

The Effectiveness of Mandatory Arrest

While researchers agree that arrests in cases of intimate partner violence have risen nationwide, the effectiveness of mandatory arrest must be assessed by reviewing the research on recidivism. The New York State Office of Domestic Violence Prevention conducted an extensive state-wide study of recidivism and the effectiveness of mandatory arrest over an eighteen month period.[36] Despite the phrase "mandatory arrest," researchers found that not all of the incidents surveyed led to arrest. Incidents where only hitting and kicking took place had a relatively low rate of arrest, leaving questions concerning the New York definition of physical injury in misdemeanor assault cases. For the purpose of this study, these cases were classified as "quasi-mandatory arrest," however erroneously that term may be used.[37] Where there were more visible injuries and aggressive behavior, researchers termed these incidents as "aggressive mandatory arrest incidents."[38] Not surprisingly, the research concluded that police were more likely to arrest the suspect in "aggressive mandatory arrest incidents." Despite the fact that the suspects in "aggressive mandatory arrest incidents" were more likely to be arrested, research revealed that the criminal penalties were relatively light. These results indicate the continued need and importance of domestic violence advocacy to help ensure that batterers are arrested and prosecuted fully.

This study also found that aggressive mandatory arrest incidents that resulted in arrests had a lower rate of recidivism. While researchers found that the initial arrest rate ranged from 24% to 57%, the rate of recidivism was considerably lower, at 12% to 27%. In the more aggressive initial incidents the recidivism rate was as low as 11% to 20%. The report concluded that "mandatory arrest, along with the issuance of an order of protection, dramatically affected the rate of recidivism."[39] The study

found that the impact of arrest on recidivism might be even greater if convictions were routinely followed by strict supervision and incarceration upon recidivism and recommended expansion of the mandatory arrest provisions."[40]

Finally, there has been controversy whether preferential arrest statutes should replace mandatory arrest laws. Proponents of preferred arrest provisions argue that this policy works best when combined with adequate law enforcement training on domestic violence, partnership with victim advocates, and effective batterer treatment programs.[41]

Law enforcement training has always been a critical component of mandatory arrest policy. The Primary Aggressor Amendment to the DVIA has helped, but not eliminated, the problem of dual arrests. Further, research indicates that in New York, mandatory arrest has reduced recidivism even when combined with the relatively light criminal penalties described herein. Batterers find the experience of arrest, and the criminal justice system to be a deterrent. Although the research on the effectiveness on batterer's treatment programs remains inconclusive, the research indicates that batterers' programs are "most effective when combined with a coordinated community response that includes accountability to judicial systems."[42] In short, the threat of incarceration remains a significant component in reducing recidivism in batterers. Another key factor envisioned in the DVIA regarding mandatory arrest is the required documentation as the police must complete a Domestic Incident Report which allows for tracking the rate of intimate partner violence incidents and resulting police response.

Proponents of a preferred response argue that mandatory arrest eliminates victim autonomy. Although characterized as mandatory arrest, the DVIA continues to allow law enforcement to exercise some discretion before making arrests in misdemeanor and harassment cases.

Domestic violence laws work best when law enforcement training is conducted in partnership with victim advocates. Interviewing victims of intimate partner violence must be an integral part of law enforcement training. Victims should be treated with empathy so that we do not mirror the behavior of batterers, to avoid re-traumatizing the very people we should be helping.

Conclusion

Since the Legislature's passage of mandatory arrest the rate of homicides in intimate partner violence has decreased.[43] This represents a substantial improvement for victims of intimate partner violence. In 2013, however, "adult females accounted for 80% of intimate partner victims in New York City." Women are still disproportionately at-risk.[44] Further, while data from Domestic Incident Reports and corresponding arrests indicated that arrests in New York State for intimate partner violence have increased, a study has raised questions as to the veracity of the data and police reporting.[45] The question of whether the availability of concurrent jurisdiction has contributed subjectively to law enforcement's probable cause determinations, and resulted in increased referrals to Family Court rather than arrest, requires further study. Family Court cannot replace criminal court, as the penalties and public nature of criminal court are significant deterrents.

The United States Department of Justice's Office of Community Policing encourages collaboration with medical providers and victim advocates. However, in case where there are pending custody, or divorce litigation, allegations of abuse may still be treated with suspicion. Victims of domestic violence are increasingly vulnerable to abuse during the separation as the batterer experiences this as a loss of control. Family law attorneys should be included as part of a team approach to domestic violence. Establishment of integrated domestic violence courts where criminal, matrimonial and Family Court issues regarding the same family can be heard together is an important step. In some cases the collaboration between the prosecutor and the civil attorney is limited, and attempts to discuss the criminal case, and related safety concerns that emerge as part of the family law or matrimonial

litigation, are treated with suspicion. Public safety requires much more in the way of collaboration to insure the well-being of all family members in every aspect of their lives.

Significantly, in the years since the passage of New York's mandatory arrest provisions the face of law enforcement has changed. In 1998, while writing a domestic violence curriculum for the New York City Police Department I had the opportunity to observe classes on domestic violence at the New York City Police Academy. The class was composed of fifty students; two were women, two students were African American and Latino men, and the remaining students were white men.

Since the 1990's, recruitment efforts have resulted in an increasingly diverse police force. While the more recent stop and frisk policy did not encourage a working partnership with the community, other policy and administrative changes helped to promote a change in the NYPD's response to domestic violence. Federal funding for community policing, the hiring of women, minorities, and training on domestic violence have begun to change law enforcement's approach to intimate partner violence.[46]

While the threat of intimate partner violence remains, mandatory arrest continues to be a vital tool in ensuring the safety of the community. It is essential for domestic violence advocates to continue to be heard about the effectiveness and implementation of this important strategy.

Notes

1. *Bruno v Codd*, 47 NY2d 582 (1979).
2. Criminal Procedure Law § 530.11; Family Court Act § 812 (prior to amendment).
3. Criminal Procedure Law §140.10.
4. Criminal Procedure Law § 530.11; Family Court Act § 812 (prior to amendment).
5. Family Court Act § 813.
6. *People v Urbaez*, 10 NY3d 773 (2008); *People v Eboli*, 34 NY3d 281 (1974). *See also* County Law § 700, District Attorney: Powers and Duties; Family Court Act § 812; Prof. Merril Sobie, *Members of the Same Household and Intimate Relationships*, McKinney's Practice Commentary (2013).
7. Criminal Procedure Law § 530; Family Court Act § 812, as amended (2008
8. Charlie Savage, *Gay Couples Gain Under Violence Against Women Act*, NY Times, June 10, 2010.
9. *Matter of Jose M. v Angel*, 99 AD3d 243, 247 (2d Dep't 2012); *Matter of Parrella v Freely*, 90 AD3d 664, 665 (2d Dep't 2011).
10. *Jose M., supra* at 248; *Matter of K.J. v K.K.* 23 Misc 3d 754, 759 (Family Ct, Orange County 2009); *Morales v Roman*, 30 Misc 3d 297, 299 (Family Ct, Bronx County 2010).
11. Steven D. Epstein, *The Problem of Dual Arrest in Family Violence Cases*, Connecticut Coalition Against Domestic Violence, p 1 (October 21, 1987).
12. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce Constraints and Possibilities*, 31 New Engl L Rev 2 (1997).
13. Lisa Fischel-Wolovick, "Primary Aggressor Law: Dual Arrests and Self-Defense," *Lawyers Manual on Domestic Violence: Representing the Victim*, Ronald E. Cohen & James C. Neely (2d ed 1998).
14. David A. Ford, *The Impact of Police Officers' Attitudes Towards Victims on the Disinclination to Arrest Wife Beaters*, paper presented at the Third National Conference for Family Violence Researchers, University of New Hampshire, Durham, New Hampshire. *See also* Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics*, 10 J of Interpersonal Violence 147-148 (June 1995).
15. David Hirschel, *Domestic Violence Cases: What Research Shows about Arrest and Dual Arrest Rates*, National Institute of Justice (2008).

16. David Hirschel et al., *Final Report: Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, National Institute of Justice (2007).
17. Conversation with Brett Figlewski, Esq., then-Senior Staff Attorney, Sanctuary for Families LGBT Initiative.
18. Mary Haviland, *The Family Protection and Domestic Violence Intervention Act of 1995: Examining the Effects of Mandatory Arrest in New York City*, May 2001.
19. Melissa L. Breger et al., *Family Offense Proceedings and Issues of Concurrent Jurisdiction*, 1 New York Law of Domestic Violence 3:2 (3d ed 2013).
20. Penal Law § 240.75, Aggravated Family Offense, Class E felony. William C. Donnino, Practice Commentary.
21. Criminal Procedure Law § 510.30 (vii) (A), Application for recognizance or bail; rules of law and criteria controlling determination; Governor's Legislative Memorandum for L 2012, c 491. *See also* William C. Donnino, McKinney's Supplementary Practice Commentary.
22. *People v Golb*, 23 NY3d 455 (2014).
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6

Firearms Seizure in Domestic Violence Proceedings

by Hon. Mary Anne Lehmann

New York is fortunate to have strict gun control laws. Since passage of the SAFE Act in 2013, enacting strict gun ownership laws, New York has dropped to 48th out of the 50 states for gun deaths. When domestic violence is a factor, however, the lethality rate increases. There were 656 domestic violence homicides in New York from 2003 to 2012, which includes both male and female victims. Of those homicides, more than one-quarter of the victims—30.5 percent—were killed with guns.[1] Nationally, abused women are five times more likely to be killed by their abuser if the abuser owns a firearm.[2]

An order of protection that fails to direct the abuser to relinquish any guns is fundamentally flawed, and in New York, where courts have full authority to order such action, an unnecessary risk.[3]

Batterers pose a lethal threat to the universe that surrounds that victim. It is rare that a victim is alone in his or her plight, dealing with any particular defendant. Often times a defendant will perpetrate violence, not only against the victim but the victim's family who may have sought to shelter her and protect her, against the victim's children who might be present in the home, against a victim's companion animal and against law enforcement officers who might respond to the scene of a domestic violence incident. In New York State, more police officers were injured responding to domestic violence calls than all other calls combined. A police officer is also more likely to be killed in a domestic violence incident than any other type of crime or call. Laws that prohibit the purchase of a firearm by a person subject to a domestic violence restraining order are associated with a reduction in the number of intimate partner homicides.[4]

The courts in New York State, particularly the Town and Village Courts, have a unique opportunity to intervene and secure a certain level of safety by ensuring strict adherence to laws involving firearms surrender. Counsel for the victim may be instrumental in ensuring that the court issues the proper directive in a protection order by alerting their respective judges that firearms are in the household and reminding the court of its responsibility in regard to the surrender of the defendant's license, the ability to possess a license, and the actual firearms.

Under the 1994 Violence Against Women Act as well as the Gun Control Act, it is a violation of federal law to sell a firearm or ammunition if the transferor knows or has reasonable cause to believe that the buyer has been convicted of a misdemeanor crime of domestic violence.[5] From 1998 to 2004, this law barred over 109,000 persons from buying guns. In fact, conviction of domestic violence misdemeanors is the third most frequent reason for denial of gun applications. A person subject to a domestic violence restraining order is also federally prohibited from accessing guns.[6] From 1998 to 2014, this restriction prevented over 460,000 persons from buying a gun.

The Supreme Court, in *US v Castleman*, reaffirmed Congressional intent to prohibit domestic violence perpetrators from possessing firearms, even though acts of domestic violence do not always rise to felony-level assaults:

> [W]hereas the word "violent" or "violence" standing alone "connotes a substantial degree of force," that is not true of "domestic violence." "Domestic violence" is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. See Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 4-9; DOJ, Office on Violence Against Women, Domestic Violence (defining physical forms of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling"), online at http://www.ovw.usdoj.gov/domviolence.htm. [fn5] Indeed, "most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." DOJ, P. Tjaden & N. Thoennes, Extent, Nature and Consequences of Intimate Partner Violence 11 (2000).
>
> Minor uses of force may not constitute "violence" in the generic sense. For example, in an opinion that we cited with approval in *Johnson*, the Seventh Circuit noted that it was "hard to describe… as 'violence'" "a squeeze of the arm [that] causes a bruise." *Flores v. Ashcroft*, 350 F. 3d 666, 670 (2003). But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control. If a seemingly minor act like this draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a "misdemeanor crime of domestic violence."[7]

In practice, seizure and suspension in state court proceedings will be governed by New York law. There are two types of seizures that typically apply when a defendant is charged with a domestic violence case: *mandatory and discretionary*.[8] Both can arise in criminal and family court proceedings.

Criminal Court Provisions

Forfeiture provisions are triggered by violent felony convictions, certain prior violation of orders of protection and stalking convictions. Under Criminal Procedure Law § 530.14, "Suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms ," when a temporary criminal court order of protection has been issued, the court must direct the defendant to surrender any and all firearms if:

the Court has "good cause to believe" that the defendant:

a) has a prior conviction for a violent felony offense (Penal Law § 70.2);

b) has previously disobeyed a prior order of protection and such has involved:

   1) infliction of physical injury;

   2) the use or threatened use of a deadly weapon or dangerous instrument Penal Law § 10.00(12) or (13);

   3) engaged in behavior constituting any violent felony (Penal Law § 70.02); or

c) been previously convicted of stalking 1° (Penal Law § 120.60), 2° (Penal Law § 120.55), 3°(Penal Law § 120.50) or 4° (Penal Law § 120.45).

Additionally, the court must suspend firearms licenses and order the defendant ineligible for them. The suspension order remains in effect for the duration of the order of protection (unless modified or vacated by court).

The order must specify:

1) where such firearms shall be surrendered;
2) the date and time by which surrender must be complete;
3) description of firearms (to the extent possible); and
4) a direction to the police to notify the court of surrender.

When a *final* order of protection is issued, the court must revoke the defendant's firearms license when the conviction is for a felony or a serious offense, as defined in Penal Law § 265.00 (17).[9]

Where a defendant does not meet the elements for mandatory suspension, such as a prior violent felony conviction or violation of an order of protection, the court still has *discretion* to enter the same restrictions.

A discretionary, or permissive, order requires that:

1) a temporary order of protection has been issued; and
2) a finding that the defendant may use or threaten to use a firearm against the victim or witness.

In both mandatory and discretionary suspension and surrender the defendant is entitled to a hearing regarding the suspension of license or surrender of firearms. The hearing must be commenced within 14 days of the date of the order.[10] The court is responsible for notifying local police authorities of the above action taken and immediately notify the state registry and the State Police in Albany.

Family Court Provisions

Family Court Act § 842a mirrors CPL 530.14. When Town and Village courts sit as Acting Family Courts (when Family Court is not in session), the mandatory or permissive firearms provisions for Temporary Orders of Protection apply.

Having been raised in the County of Broome, the author is keenly aware of citizens' sensitivity to surrendering firearms. Broome County is a county that has numerous firearms. It might be fair to say that most households possess at least one long gun, sometimes numerous long guns. Hunting and sport target practicing are notable pastimes in Broome County. One of the local high schools, Harpursville, actually closes on the opening day of hunting season so that the students may hunt with their parents on the first day of the season. Therefore this is a community that cherishes its Second Amendment right to possess firearms.

Such background is helpful to any court or clerk that deals with a defendant who is directed to surrender firearms. While many courts are reluctant to take on the issue because of its volatility and emotion, it would be fair to say that in twelve years on the bench, rarely has a defendant refused to surrender firearms when directed to do so. It is often helpful to explain to the defendant that the law *requires* the surrender and that the court is duty-bound to follow the law. Another consideration that the court can articulate is that while sorting through the case at bar, the court's main consideration that no one gets hurt. Clarify that surrender of weapons is not just for the victim, and the victim's family, but for police officers and in fact for the defendant's own safety.

The Violence Against Women Reauthorization Act of 2005 (VAWA) conditions VAWA grant eligibility on state certification that domestic violence offenders are notified of the requirements of federal and state firearms laws.[11] To satisfy this requirement, the court must tell the defendant:

> If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C. 922(g)(9) and/or New York law.
>
> If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.[12]

A gun left in the hands of a domestic violence perpetrator can be devastating. The ex-wife of convicted sniper John Allen Muhammed had an order of protection against him that disqualified him from purchasing firearms. He had a long documented history of domestic violence against other women as well. But after the court issued its protective order against him, the defendant still continued to purchase firearms, including the long gun used to commit a string of twenty-one shootings in six different states in and around the Washington, D.C. area. He was eventually arrested with a co-defendant in the process of another shooting using a van that had been modified for the purposes of picking off various victim targets. This case terrorized the residents in the D.C. area; people were afraid to pump gasoline for fear of being picked off by a sniper's bullet. Children were kept indoors. Mr. Muhammed's ex-wife stated that all of the notes left by the snipers and the specific shooting sites were messages, designed to intimidate her, surrounding and encircling her home and children and closing in on her as a target. Mr. Muhammed was arrested and charged with a violation of 18 USC § 922 in regards to possession of a firearm.

Restricting a defendant's permit, and the physical firearms themselves, is a very worthwhile effort. This is especially true in cases of domestic violence where the recurrence of violence is highly probable, and likely to grow worse. As counsel, it is imperative to protect the client and all those who surround her by insisting the court include these provisions in its orders, and follow through on them.

Sample Order

At a Term of the City Court of Binghamton
held in the City Hall, Fifth Floor in the City of
Binghamton, Broome County, New York, on
the ____ day of _____, 20__.
PRESENT: HON. MARY ANNE LEHMANN
City Court Judge of Binghamton
STATE OF NEW YORK :: COUNTY OF BROOME
CITY COURT :: CITY OF BINGHAMTON

THE PEOPLE OF THE STATE OF NEW YORK

D E S T R U C T O R D E R

-vs-

Penal Law § 400.05
Defendant Docket No.

An application having been made sua sponte by the court for an Order directing the destruction of evidence against the defendant who has been charged and convicted of_____, in violation of §_____ of the Penal Law, a Misdemeanor, and the defendant having exhausted his appeal rights, the court is satisfied that there is reason to believe that the case against the defendant is closed and has been so since ___(date)_____ and directs that the evidence, _____ (describe firearm) _____declared a nuisance and destroyed, pursuant to §400.05 of the Penal Law of the State of New York.

It is so ordered.

ENTER: Dated, _____

_____

HON. MARY ANNE LEHMANN
CITY COURT JUDGE of BINGHAMTON

Notes

1. Federal Bureau of Investigation, Supplemental Homicide Data (US Dep't of Justice, 2003–2012).
2. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am J Pub Health 1089, 1092 (July 2003).
3. For an in-depth report on the national problem of abuser's gun rights trumping orders of protection, *see* the *New York Times* series on this issue, www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html?ref=opinion.
4. Elizabeth R. Vigdor et al., *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 Evaluation Rev 313, 332 (June 2006).
5. 18 USC § 922(d)(9).
6. 18 USC § 922(g)(8), § 922(d)(8).
7. *United States v Castleman*, 572 US ___, 134 S Ct 1405 (2014).
8. Page reprinted from *The Docket*, NYS Association of Magistrates Court Clerks Inc., Sept. 2009, Hon. Mary Ann Lehmann
9. CPL 530.14 (2)(a).
10. CPL 530.14(2)(b); Family Court Act §842- a(2)(b).
11. 42 USC § 3796gg-4(e).
12. The VAWA 2005 notification provision requires courts to provide notification about state and local laws limiting firearm possession, transfer, ownership, or purchase in domestic violence cases. To satisfy this requirement, the court should state:

    > If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 USC 922(g)(9) and/or New York law.
    >
    > If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

7

Intimate Partner Sexual Assault: An Overlooked Reality of Domestic Violence

by Jill Laurie Goodman
updated by
Lynn Hecht Schafran & Eliana Theodorou

"When you're raped by a stranger you have to live with a frightening nightmare. When you're raped by your husband, you have to live with your rapist."

— A Survivor quoted in David Finkelhor & Kersti Yllo, License to Rape: Sexual Abuse of Wives (1985)

Recognizing Intimate Sexual Violence

Intimate partner sexual assault has long been poorly understood and minimized, but new attention to the dynamics of domestic violence has placed this violence in a new light. Sexual assault is now understood to be one more manifestation of domestic violence, and one that is prevalent. A batterer's brutality and coldness do not stop at the bedroom door. Abusers use sexual assault to maintain power and control over current and former partners, wives and ex-wives, and the mothers of their children.

Acknowledging this reality, and determined to provide victims with the protection they need, New York State recently amended its Family Court Act to include sexual assault as an enumerated family offense. Thus a victim can obtain an order of protection on the basis of these assaults, or include them as an additional ground for issuance of an order of protection. Family Court Act § 812. It is important for an attorney handling domestic violence matters to understand intimate partner sexual assault, know how to interview a client to determine whether this is part of the case, and be familiar with the presentation of an intimate partner sex assault claim.

The Slow Recognition of Marital Rape

The American justice system's response to rape in general, and intimate partner sexual violence in particular, is colored by centuries-old myths regarding women's credibility, and, in particular, rape victims' credibility. Until recently, that suspicion of women was written into statutes themselves. In New York, victims' accounts were considered so inherently untrustworthy that every single element of the crime of rape, including identification, penetration, and resistance, had to be corroborated by some evidence besides the victim's word.[1] Not until 1974 did the New York legislature eliminate most

of these onerous corroboration requirements.[2] The evidentiary burden in rape cases was so insurmountable that in the early 1970s New York courts typically convicted only eighteen defendants of rape per year.[3]

Up until the 1970s, all 50 states had complete marital rape exemptions on the books; the last were eliminated in 1993.[4] In New York, it was the courts, not the legislature, that acted. In 1984, the Court of Appeals decided *People v Liberta*, holding New York's marital rape exemption unconstitutional. Rationales for the marital exemption were, the Court said, "either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny."[5] At the time *Liberta* was decided, 40 states still protected men who raped their wives from criminal sanctions.[6]

Prevalence and Harm of Intimate Partner Sex Assault

Contrary to common assumption, rape is most often committed by someone known to the victim. Increased focus on sexual assault in the military and on college campuses has resulted in greater awareness of acquaintance rape,[7] though victim-blaming and adherence to rape myths remain rampant. Intimate partner rape in the context of domestic violence, however, remains little discussed. Yet sexual violence perpetrated by a spouse or intimate partner is common. The Centers for Disease Control's most recent survey on intimate partner violence found that nearly 1 in 10 women—over 11 million women total—has been raped by an intimate partner during her lifetime.[8] The likelihood that a victim of physical domestic violence will be subjected to sexual abuse and violence by her partner is, unsurprisingly, far greater than for women in the general population.[9] In a 1995 study of marital rape, nearly half the married women who were physically abused reported that rape was a problem of at least equal dimension as other kinds of physical abuse.[10] In a study of 148 women seeking orders of protection for physical violence, nearly 70% reported also being subjected to sexual abuse, though none had listed this abuse in their petitions.[11] Some research suggests that sexual abuse may be the most common form of intimate partner violence.[12]

The trauma of intimate partner and marital rape is underestimated as well. The most pervasive myth about intimate partner sexual violence is that it is not harmful because the victim is used to having sex with the perpetrator. Yet the lasting impact of intimate partner rape can be even greater than that of stranger rape. Intimate partner rape is particularly damaging because it involves a complete betrayal of trust, because it is often part of a larger pattern of abuse and control, and because it is often repeated. A woman raped by her husband is unlikely to tell anyone. If she does report the rape to authorities or confide in friends and family, her word may well be doubted or the impact of her experience minimized.

Victims of intimate partner rape report more serious mental and physical health issues than either victims of stranger rape or victims of domestic violence subjected to physical abuse alone.[13] Particularly alarming, in a study of women seeking orders of protection for physical abuse, 22% of the women subjected to both sexual and physical abuse, compared to 4% of the women subjected to physical abuse alone, reported attempting or threatening suicide within 90 days of applying for the protection order.[14]

Victims of intimate partner rape sustain physical injuries at higher rates than other rape victims, in large part because these victims are often subjected to multiple and frequent assaults.[15] In Diana Russell's groundbreaking study of marital rape, 69% of the women raped by their husbands were raped more than once, and 31% were raped more than twenty times.[16] In a more recent study funded by the National Institute of Justice, 79% of the women in the sample who reported intimate partner sexual assault reported repeated episodes of sexual assault.[17] Women in this study subjected to

repeated sexual assaults reported vaginal and rectal bleeding, sexually transmitted diseases and pelvic inflammatory diseases.[18] Abusive and controlling partners may also refuse to use protection during sex as a way of "ensuring" fidelity, or because they do not want to, exposing their victims to sexually transmitted diseases and unplanned pregnancies. Some perpetrators try to get their victims pregnant in order to cement contact and control through a shared child. In the NIJ study discussed above, 20% of the women reported at least one rape-related pregnancy.[19]

The Spectrum of Intimate Partner Sexual Assault Cases

As detailed in the National Judicial Education Program's web course, *Intimate Partner Sexual Abuse: Adjudicating This Hidden Dimension of Domestic Violence Cases* (open to all, free, at www.njep-ipsacourse.org), intimate partner sexual assault and intimate partner sexual assault cases have many facets, and counsel for domestic violence victims need to be aware of their complexities. The terms "intimate partner sexual abuse" and "intimate partner sexual assault" encompass a continuum of behaviors from verbal degradation relating to sexuality to felony-level sexual assault and torture. Intimate partner sexual assault may be perpetrated "out of the blue"—that is, without prior violence or subsequent physical violence—but more typically it is part of a pattern of physical abuse and coercive control; sometimes it is the first manifestation of that pattern. That control may range from the batterer refusing to financially support his children unless he gets sex the way he wants it when he wants it, to refusing to drive a wife in labor to the hospital "until we have a screw."[20] The case may involve behaviors that seem too bizarre to be believed. In a 2011 New York case,[21] a wife pleaded self-defense in the murder of her extremely violent husband who forced her to enact his fantasies in what the New York Times called "bizarre sexual rituals."[22] The case may involve cultural defenses—the wife rapist who asserts that because in his country of origin or religion a wife may not refuse her husband's sexual demands, he cannot be charged with marital rape under U.S. law.[23] The Intimate Partner Sexual Abuse web course explores the many facets of these cases in thirteen modules covering current interdisciplinary research from law, medicine, and the social sciences, and an opportunity to apply this information in eight interactive civil and criminal case studies.

Risk Assessment: Sex Assault and Increased Danger to Both Victim and Child

Domestic violence cases in which the batterer is also subjecting his victim to sexual abuse are among the most dangerous. A batterer who subjects his victim to sexual as well as physical violence is twice as likely to kill her as a batterer who subjects his partner to physical violence alone.[24] A batterer perpetrating sexual abuse is also more likely to commit other types of dangerous acts indicative of high risk for lethality, such as stalking his victim, threatening to kill his victim, and strangling his victim.[25] Batterers who commit sexual abuse are also more likely to perpetrate all types of abuse against a victim's children.[26] Knowing that a client is being subjected to sexual violence is crucial to understanding her risk of ongoing and future violence.

Why Address Sexual Abuse?

Addressing intimate partner sexual assault is important not only because it is so harmful, but also because as long as it continues your client may be too fragile to cope with the complex legal, emotional, and practical problems domestic violence victims encounter. The victim may need an immediate referral to a rape crisis center. She might also consider contacting the District Attorney's office or the police.

The sexual assault may also be the most serious offense her abuser has committed. Raising the sexual assault in pleadings, motion papers, or oral arguments may be the most effective means of securing the relief she needs, such as an order of protection, custody of her children, permission to proceed confidentially in a lawsuit, or the immigration remedies available to battered women. Strategies for effectively representing immigrant victims of domestic violence are covered elsewhere in this manual.

Knowing about the sexual violence is also critical to understanding the nature of the abuse. It may be fundamental to the methods her abuser uses to maintain power and control and the fear in which she lives.

If the abuser has raped the victim or has forced her to engage in sexual acts that she finds repulsive or painful, if sexual abuse is part of his pattern of abuse, his actions are likely to have a profound effect on how your client behaves. Explaining how much your client fears her abuser can be difficult without presenting the facts of the sexual abuse. Helping the court to understand fully the scope of the abuse may give the victim the best chance of success in securing relief.

Interviewing About Sexual Assault

Even if sexual assault is central to a client's experiences of abuse, she probably will not volunteer information about sexual violence. The abuse may have been intensely painful and humiliating and, for that reason, difficult to discuss. She may be ashamed to talk about sexual matters with a stranger, particularly someone who may be from a different culture, ethnicity, or class. She may have internalized the cultural message that rape by an intimate partner is not real rape. Particularly if she is married, she may believe that her abuser has a right to use her sexually, no matter how much she hates it or how much it hurts, and that she herself is to blame. Perhaps she does not know that rape by her husband is a crime. If she is an immigrant, language barriers and different beliefs about the permissibility of intimate partner sexual abuse may exacerbate all of these difficulties.

When interviewing your client, approach the topic of sexual abuse gently, after establishing rapport and demonstrating that you are not going to judge or second-guess her. Pose factual, non-conclusory, open-ended, questions. Rather than asking if her abuser raped her, a question that hinges on how she understands rape, ask behaviorally-based questions such as whether her abuser has ever hurt her during sex, if she has ever had sex when she didn't want to, if the abuser used threats or force to get her to have sex, or if sex was part of one of the incidents of abuse she has already described.[27] Show her the Power and Control Wheel, a device domestic violence advocates often use in interviewing clients, and ask questions following the spokes of the wheel so that the client can see the sexual abuse in relation to the other kinds of abuse.[28] The Power and Control Wheel will also help her understand that sexual abuse is a common manifestation of domestic violence and that she is not alone. Be prepared to assist her in processing the experience of sexual abuse by making a referral to a trained social worker, a rape crisis center, or a domestic violence crisis center. Be sure that any individual or organization to which you refer her cross-trains its counselors and advocates on the intersection of domestic violence and sexual assault.

As part of the interview, ask whether the abuser used pornography and whether he made her perform acts depicted in pornographic pictures or videos. Many victims report being particularly at risk for sexual abuse after the batterer views pornography, or being forced to enact particularly sadistic scenes from pornographic videos.[29] Find out whether her abuser took pictures or videos of her in sexual poses or involved in sexual acts, since he may seek to introduce these into evidence in a criminal case or to intimidate or blackmail her by threatening to release them.

Ask if he made her have sex with other people—friends or paying customers. It may come to light that a victim of domestic violence is not only being sexually abused by her batterer, but also trafficked.

Traffickers frequently first establish romantic relationships with their victims, then use tactics commonly used by batterers to establish power and control over their victims. Many direct service providers report that once they begin to screen and ask questions, they learn that surprisingly high numbers of victims seeking services for domestic violence are also being trafficked.[30] If the victim is also being trafficked, she will need additional specialized services, and may have additional remedies available to her. Other chapters in this guide discuss the intersection of domestic violence and trafficking in detail, and all attorneys working with domestic violence victims should familiarize themselves with the red flags and warning signs of trafficking.

It is important to keep in mind that a victim's disclosure of sexual assault may be piecemeal rather than linear.[31] We now have extensive neuroscience research showing that the brain stores and recalls traumatic memories differently than non-traumatic memories, so she may sporadically recall and relate bits and pieces of the abuse to which she was subjected rather than in a linear narrative. This should not be misunderstood as the victim making inconsistent statements or fabricating. It is consistent with having been subjected to a traumatic experience.

Sexual Abuse in Civil Litigation

In New York, Family Court Act § 812 sets forth the grounds for issuance of an order of protection. The enumerated offenses include "sexual misconduct, forcible touching, sexual abuse in the third degree, [and] sexual abuse in the second degree as set forth in section 130.60 of the penal law[32]…."

Penal Law §130.20 defines the offense of sexual misconduct:

1. He or she engages in sexual intercourse with another person without such person's consent; or
2. He or she engages in oral sexual conduct or anal sexual conduct with another person without such person's consent; or
3. He or she engages in sexual conduct with an animal or a dead human body.

Sexual misconduct is a class A misdemeanor, as is forcible touching, which is found at Penal Law §130.52 :

> A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire. For the purposes of this section, forcible touching includes squeezing, grabbing or pinching.
>
> Forcible touching is a class A misdemeanor.

Sexual abuse in the third degree arises when the abuser

> subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor. Penal Law § 130.55.

Thus the new amendments to the Family Court Act provide many paths to requesting relief under Article 8. Pressing a claim for sexual abuse, however, whether in Family Court or criminal court, can be difficult for a victim. Her fears are too often well founded, as raising these claims may elicit

challenges to her credibility on the most personal level. Because sexual assault within the relationship indicates a heightened level of risk for the victim, however, it is important for the facts of her case to be presented as completely as possible to the court. The relief granted should reflect the risks she faces. Often attorneys conclude that because the evidence of physical abuse is more than adequate to secure an order of protection, there is no need to add grounds based on sexual abuse. Why put the victim through that when the order of protection will be issued without going into all that, one reasons. Omitting these facts from the case, however, leads to an incomplete presentation. Explaining a victim's fear of sexual abuse may be crucial to the court's understanding her response to her abuser's threats and actions. Moreover, for reasons discussed below, sexual abuse of the victim has serious implications for custody and visitation. In the end, the choice about using the sexual abuse in the litigation has to be the client's, but her attorney should ensure that this is a fully-informed decision.

Sexual abuse may also be pleaded in a matrimonial action as a form of cruel and inhuman treatment, and it may be a cause of action in a tort case. For immigrants who are not lawful permanent residents, providing information about sexual violence may help establish entitlement to immigration relief, such as a VAWA self-petition, a battered spouse waiver, a U Visa, or asylum. These subjects are covered elsewhere in this manual.

Custody and Visitation

> *"[T]he sexual abuse of a parent has been seriously neglected – despite its potentially severe traumatic impact on children and association with greater risk to the safety and well-being of children and adult victims….Intimate partner sexual assault is associated with more severe depression, anxiety, and behavior problems in the children of adult victims as compared to those whose mothers have been physically, but not sexually, abused."*
>
> *- Kathryn Ford, Children's Exposure to Intimate Partner Sexual Assault, 3 Sexual Assault Report 15 (2007).*

Vast social science and neuroscience research documents that exposure to domestic violence harms every aspect of children's development, down to the neuronal level.[33] When there is sexual as well as physical violence the harm is even greater. In the National Institute of Justice-funded study of 148 Houston women seeking orders of protection and their children ages 12-18 cited earlier, the children of mothers subjected to sexual as well as physical abuse showed the same degree of depressive symptoms as age-equivalent children being treated for depression, and significantly more and worse symptoms than the children whose mothers were subjected to physical abuse only.[34] Men who sexually abuse their partners are more likely to perpetrate all types of child abuse, and the escalated risk of lethality for mothers escalates the risk for children as well.[35]

It is critical that judges, custody evaluators, and others involved in custody and visitation determinations be aware of the harm and risk that intimate partner sexual abuse poses to children. However, the credibility problems raised by alleging sexual abuse in custody and visitation cases are acute. The assumption that mothers raise sexual abuse as a ploy to deny fathers access to children is rampant. Many custody evaluators are uneducated about every aspect of domestic violence and believe it does children no harm.[36] Thus, informing the court that intimate partner sexual abuse is an issue in the case may backfire because of this skepticism and ignorance. Practitioners need to know about the heightened risk intimate partner sexual assault poses for children and decide in each case whether to limit the discussion of domestic violence to physical violence only.

Criminal Prosecution of Sexual Assault

Family Court does not have jurisdiction over felony assaults. A victim subjected to an assault of this degree should be counseled about the possibility of pursuing a criminal complaint against the abuser. Misdemeanor assaults can also be prosecuted in criminal court as well as Family Court. The victim may be granted an exclusionary order of protection at the time of the abuser's arraignment. A conviction may effectively convey the message that he cannot get away with harming her or forcing her to live in fear. Ultimately, putting him behind bars may be the best means of keeping her abuser away from her.

If your client does want to proceed with the prosecution, prepare her for the difficulties that may lie ahead. You don't want to scare her to the point that she declines to go forward, but you do want her to appreciate that it will be difficult. She should understand that control of the case will pass to the prosecutor, who represents the state, not the victim, who becomes the "complaining witness." Choices about strategy and the ultimate resolution of the case will be in the hands of the prosecutor, whose perspective and responsibilities differ from those of the victim and her counsel. Explain the process of cross-examination and the fact that defense counsel will seek to undermine her credibility with harsh questioning about every aspect of her case. Assure her that what she is doing is important and that you will support her.

If the client's case is prosecuted, even though she and her attorney will no longer control the proceedings, counsel can be in touch with the assistant district attorney, keep abreast of the status of the case, and participate in decision-making about possible plea bargains and sentences. Track orders of protection issued by the criminal court, and be aware if your client's abuser is in jail or likely to be released. The strategies in civil proceedings should complement those of the prosecution; allegations in different forums must be consistent. Counsel, who probably knows the victim well, may be able to provide details about the non-sexual abuse and help the prosecutor understand the danger the defendant poses to the victim.

Strategies for prosecuting domestic violence cases, including cases involving intimate partner sexual violence, are discussed elsewhere in this volume. In addition, AEquitas: The Prosecutor's Resource on Violence Against Women has an excellent and comprehensive webinar focused specifically on prosecuting intimate partner sexual assault which is archived on its website.[37]

Conclusion

Intimate partner sexual abuse has long been almost invisible. Today we know that it is prevalent, that it takes many forms, and that it has a profound, long-term impact on victims' lives. In the words of a young survivor whose husband ultimately threatened to have her killed, "He was sexually abusive, and I think of all of it, that was probably the most painful, still probably the hardest to get past."[38] Counsel in domestic violence cases need to be familiar with intimate partner sexual violence in all its manifestations and be able to elicit clients' history with sensitivity and care. Having the full picture of the abuse to which a client has been subjected is essential to securing all the services she needs, assessing the risk for her and her children, and effectively presenting this to the court.

Notes

Jane Manning, former Queens County District Attorney, was the prime source of inspiration and wisdom for the original version of this chapter, published in the 5th edition of The Lawyer's Manual on Domestic Violence.

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8

Taking Stalking Seriously

by Hilary Sunghee Seo

Stalking is a federal crime and a crime under the laws of all 50 states. Despite this legislative recognition of the seriousness of stalking, key players in criminal justice and domestic violence advocacy, including police, prosecutors, judges and victims' advocates, and at times the victims themselves, often fail to recognize or perceive it as a distinct crime. Yet stalking behavior is surprisingly prevalent and is a serious criminal justice and public health concern. According to a recent report by the Centers for Disease Control and Prevention, an estimated 15.2% of women (or about 18 million women) and 5.7% of men (or about 6.5 million men) have experienced stalking during their lifetimes "that made them feel very fearful or made them believe they or someone close to them would be harmed or killed."[1] Moreover, an estimated 4.2% of women (or about 5.1 million women) and 2.1% of men (or about 2.4 million men) reported being stalked in the 12 month period before taking the survey.[2]

Stalking demands early attention and intervention because it appears to be significantly correlated with, and may precede, other violent crimes. While more research is needed, studies suggest that stalkers exhibit high frequencies of violence against their targets — with estimates ranging from 20% to 40% of cases, and substantially exceeding 50% in cases where the stalker had a prior, sexually intimate relationship with his victim.[3] Other studies report that weapons are used to harm or threaten stalking victims in one out of five cases and that the behaviors of intimate partner stalkers can escalate quickly.[4]

What is Stalking?

Stalking behavior may manifest itself in a variety of ways, but all stalking has two common features. First, stalking involves repeated victimization of a targeted person. To understand stalking, therefore, a series of acts directed at the victim must be examined together in the context of each other. Second, stalking is a crime that is defined, at least in part, by the fear it instills in the victim.

Typical examples of stalking behavior include following a person; lying-in-wait; repeated phone calls, text messages or postings on social media; sending unsolicited emails, letters and gifts; vandalizing the victim's property; and threatening to harm the victim or the victim's family members or friends. Stalking may begin with acts which, taken in isolation, appear insignificant or coincidental. As the stalker increases the number and types of contacts, however, the actions begin to form a pattern of behavior that is objectively threatening and subjectively frightening to the victim. Stalking victims often suffer profound psychological and emotional harm as a result of the stalking experience.

Stalking and Domestic Violence

Despite the misimpression created by a few, highly publicized cases involving strangers stalking celebrities, the majority of stalking victims know their stalkers in some way. There is a close connection

between domestic violence and stalking. In fact, domestic violence often includes some form of stalking. In the context of intimate relationships, stalking, and the fear, anxiety and uncertainty it causes in the targeted person, become one more tool used by the abuser to exert power and control over the victim.

A national survey by the National Institute of Justice confirmed the links between abusive and controlling behavior and intimate partner stalking. Women with ex-husbands who stalked them were more than twice as likely as women with ex-husbands who did not stalk them to report that their ex-husbands had tried to limit their contact with family and friends (77.1% versus 32.3%), had frightened them (92.2% versus 33.1%), made them feel inadequate (85.5% versus 44.5%), prevented them from knowing about or having access to family income (59.6% versus 20.8%) or prevented them from working outside the home (30.7% versus 13%).[5]

Stalking Laws

This next section provides an overview of New York's anti-stalking laws, highlighting noteworthy features, as well as some recent legislative and judicial developments. It then discusses select federal anti-stalking-related developments that were introduced through the Violence Against Women Reauthorization Act of 2013.

The New York Anti-Stalking Statute

The New York Anti-Stalking Act became law in 1999 and created four new crimes of stalking.[6] In passing this legislation, the New York State Legislature noted that stalking victims in New York "have been intolerably forced to live in fear of their stalkers,… [that] stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them… [and that New York's] law must be strengthened to provide clear recognition of the dangerousness of stalking."[7]

Stalking in the Fourth Degree

Stalking in the fourth degree (Penal Law § 120.45) is divided into three subsections and describes three separate crimes. All of the subsections prohibit a person from (a) intentionally engaging in (b) a course of conduct (c) for no legitimate purpose (d) directed at a specific person when he or she knows — or reasonably should know — that the conduct is likely to cause the targeted person to fear harm or causes harm to such person.

The first subsection of stalking in the fourth degree has the most general language targeting stalking — covering conduct that is "likely to cause reasonable fear of material harm to the health, safety or property of such person, a member of such immediate family or a third party with whom such person is acquainted." Significantly, this subsection does not enumerate individual types of actionable stalking behavior and, unlike the other two subsections, does not specifically require that the defendant previously be warned to cease his or her conduct.

Subsection two covers conduct such as "telephoning or initiating contact with the victim, victim's immediate family or victim's acquaintances" when the defendant knows or reasonably should know that the conduct would cause material harm to the mental or emotional health of the targeted person. Subsection three focuses on stalking in the workplace. Stalking in the fourth degree is a class B misdemeanor.

Stalking in the Third Degree

Stalking in the third degree (Penal Law § 120.50) makes it a crime to, among other things, engage in an intentional course of conduct directed at a victim with the intent to harass, annoy, or alarm the victim, when the conduct is likely to cause the victim to reasonably fear physical injury or other serious harms, either to herself or to the members of her immediate family. Stalking in the third degree is a class A misdemeanor.

Stalking in the Second Degree

Stalking in the second degree (Penal Law § 120.55) is a class E felony and covers, among other things, stalkers of children and stalkers who display, possess and threaten the use of dangerous weapons.

Stalking in the First Degree

Stalking in the first degree (Penal Law § 120.60) is a class D felony and covers stalkers who, in the commission of stalking in the second degree or stalking in the third degree, intentionally or recklessly cause physical injury to the victim or commit a specified sex offense.

Noteworthy Features of New York State Anti-Stalking Statute

There are several features of New York's anti-stalking statute worth highlighting.

First, the course of conduct requirement does not specify a time frame. The series of proscribed conduct can take place over a few hours, the course of a day or over a few months. Moreover, subsection one of stalking in the fourth degree — which is an independent crime, but also may be a crucial building block to making out the elements of the more serious stalking crimes — does not limit stalking behavior to a pre-selected list of actions. The combination of these two features reflects acknowledgment by the legislatures that stalking behavior may manifest itself over time through a pattern of behavior, and in novel and, indeed, ingenious ways.

Second, New York's anti-stalking statute shifts the focus from the stalker's specific intent to annoy, harass, threaten or alarm, to the impact of the stalker's actions on a reasonable person. The stalker's specific intent may be difficult to prove in cases in which the stalker claims that he was acting out of love, concern or some other motive.

Third, some but not all of the least serious charges of stalking require that the stalker be "clearly informed to stop." Typically in stalking cases, even if the victim does not verbally tell the stalker to stop, her behavior and the context taken as a whole would make it eminently clear to a reasonable person that the stalker's attentions are unwelcome and his behavior intimidating and threatening.

Fourth, the statute covers both the victim and his or her immediate family and acquaintances. It defines immediate family as spouse, former spouse, parent, child, sibling or any other person who regularly resides, or has regularly resided, in the household of the victim, a much broader definition than the definition of family used for family offenses. Moreover, the resulting harm is inclusive. For example, the proscribed conduct includes acts likely to cause a reasonable person to fear (i) material harm to his or her "physical health, safety or property" or (ii) that his or her job, business or career is threatened. This is a much broader set of harms than the "fear of physical injury" or "fear of serious physical injury" required by the menacing and harassment statutes. In sum, the comprehensive approach of the stalking statutes makes it possible to sanction stalking at its earlier stages, before it escalates into more violent behavior.

The facts of *People v Stuart*, a New York Court of Appeals case, demonstrate this point well.[8] In *Stuart*, the defendant stalked a young woman named Tracy DiNunzio, a stranger to him, by repeatedly coming into her visual and physical presence.[9] He did this by following her at a close distance, lying in wait for her and suddenly appearing at a close distance when she emerged from stores and buildings, standing close to her and making his presence felt at cafes and stores, and standing outside the window of her gym and her bank and staring at her.[10] During one of their first encounters at a coffee shop, Stuart asked DiNunzio to sit down and have a cup of coffee with him. When she declined, he asked her out to dinner, and when she refused that offer, he presented her with a heart-shaped box of chocolates and a hand-drawn picture of her with her name handwritten at the bottom. DiNunzio testified that she "made it clear" to the defendant that she did not want any further contact with him, but when he insisted, she took his gifts and left the shop.[11] As would be expected of a reasonable person, DiNunzio felt "uncomfortable" and "creeped out" in the beginning, but increasingly felt "very scared," "very unsafe in her neighborhood" and generally very threatened.[12] DiNunzio significantly altered her daily routines to avoid Stuart by, for example, not going out by herself or by staying over at a friend's house more frequently.[13]

It appears from the record that the defendant never overtly threatened DiNunzio verbally or physically. Moreover, although she communicated through her body language that the defendant's gestures were unwelcome, it is unclear whether she told him explicitly to stop. Under New York's harassment and menacing statutes, with the exception of harassment in the second degree, which is only a violation, DiNunzio would have had to show that the stalker intentionally placed or attempted to place her in reasonable fear of physical injury, serious physical injury or death. Given the facts, she probably would not have been successful. She would have had to wait until her stalker escalated his behavior.

Finally, family courts and criminal courts have concurrent jurisdiction over all domestic violence stalking cases in New York State. Courts must consider prior stalking convictions as a factor when deciding whether or not firearms should be ordered surrendered and licenses revoked or suspended.[14] Moreover, certain "bump-ups" in charging may be applied to repeat offenders. For example, a person is guilty of stalking in the third degree if he or she has committed the crime of stalking in the fourth degree against three or more persons for which the stalker previously has not been convicted, or commits the crime of stalking in the fourth degree within ten years of another stalking in the fourth degree conviction.[15]

Recent judicial developments will likely further reinforce the importance of New York's anti-stalking laws for stalking victims in New York. Last year, the New York Court of Appeals invalidated Penal Law § 240.30(1), aggravated harassment in the second degree, as unconstitutionally overbroad and vague.[16] New York Penal Law § 240.30(1) had provided that "[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she… communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail, or any other form of written communication… in a manner likely to cause annoyance or alarm." According to New York State legislative records, the charge of second-degree aggravated harassment was used more than 7,600 times in 2013, and one of its more common uses was in domestic violence cases, where it was used to form the predicate for issuing an order of protection by a court to protect victims.[17] However, to cure the constitutional defect, subsection 1 of the aggravated harassment in the second degree statute has been significantly narrowed, to cover only communications that threaten to cause physical harm or harm to property of another, which a defendant knows or reasonably should know will cause a victim to fear such harm. Given these developments, stalking in the fourth degree, in particular, may prove to be an even more important tool in many common stalking situations.

On the legislative front, some important refinements to the anti-stalking statute have been enacted, in particular, in recognition of the increasing prevalence of cyberstalking. Cyberstalking refers to the use of the Internet, email or other electronic communications to stalk.[18] Cyberstalkers may flood their target's inbox with threatening messages and images, assume the identity of his or her victim by posting information that is humiliating or false about the victim, use information acquired online to further intimidate, harass or threaten their victims in person, by phone or other means, among many other tactics. The New York State Legislature recently signed into law an amendment to stalking in the fourth degree, to expand the definition of what constitutes "following." The amended definition reads, "For the purposes of subdivision two of this section, 'following' shall include the unauthorized tracking of such person's movements or location through the use of a global positioning system or other device."[19] Part of the New York State Assembly's justification for the bill was that one in 13 stalking cases involves electronic monitoring, and GPS tracking is used in approximately 10% of those cases.[20] Cyberstalking that is done through GPS monitoring becomes an even more alarming issue when the stalking is done via a smartphone.[21]

The Violence Against Women Reauthorization Act of 2013

The Violence Against Women Reauthorization Act of 2013 (the "Act"), which was signed by the President and became law in March of 2013, introduced some important changes to prosecute stalkers and aid stalking victims at the federal level.

Among other changes, Section 107 of the Act amends the federal criminal code with respect to the crime of stalking to prohibit the use of any electronic communication service or electronic communication system of interstate commerce to stalk victims and, thereby addresses more fully the elements of technology and brings cyberstalking within the ambit of the federal crime of stalking.[22] The U.S. Department of Justice reports that approximately one in four cases of stalking involves the use of some type of technology, such as email (83%) or instant messaging (35%).[23] Use of the Internet allows for unprecedented and often easy access to personal information, further exacerbating stalking situations.[24]

Another critical piece of the Violence Against Women Reauthorization Act of 2013 is Title VIII: Protection of Battered Immigrants. This section amends the Immigration and Nationality Act to expand the definition of nonimmigrant U-visa (aliens who are victims of certain crimes) to include victims of stalking.[25]

The Act focuses expressly on helping victims who belong to underserved populations, amending the Violence Against Women Act of 2000 to expand the availability of competent *pro bono* legal assistance to victims of domestic violence, dating violence, sexual assault or stalking.[26] The Act also revises grant programs for supporting families with a history of domestic violence, dating violence, sexual assault or stalking, authorizing the Attorney General to make grants to improve the response of the civil and criminal justice system to such families and to train court personnel in assisting such families.[27] Title V of the Act centers on strengthening the healthcare system's response to domestic violence, dating violence, sexual assault and stalking, including comprehensive statewide strategies to improve the response of clinics, public health facilities and hospitals. Title VI amends the Violence Against Women Act of 1994 with respect to housing rights for these victims. It also amends Chapter 11 of the Violence Against Women Act of 1994 to revise the eligibility requirements for transitional housing assistance grants for child victims of domestic violence, dating violence, sexual assault or stalking to specify that any victims are eligible. Through these various provisions, the Violence Against Women Reauthorization Act of 2013 attempts to represent the needs of victims who do not always get the help that they need.

Assisting Stalking Victims

Because stalking behaviors are varied, unpredictable and may involve a combination of criminal and (on their face) non-criminal acts, stalking victims may find it difficult to recognize that they are victims of crimes. It can be difficult for victims to communicate effectively to those around them the level of danger and risk they face. Immigrant victims who are not proficient in English may have an especially difficult time communicating the significance of the stalker's contextualized actions and the fear they engender. Compounding the difficulty is the fact that stalking is difficult to investigate and, in the context of domestic abuse, often eclipsed by more obvious forms of violence, such as physical or sexual assault. In addition, because of the relative paucity of stalking arrests and convictions, police, prosecutors and even judges may lack sufficient training and expertise to recognize stalking behavior.

When you encounter a client whom you believe may be a victim of stalking, you should ask questions, help gather more information, assess the risk, devise a safety plan, and develop a supportive network of trusted friends and family that can help protect him or her. Here are some points to keep in mind:[28]

Assess the Stalker's Characteristics

Stalking victims may not realize that they are being stalked, especially if the stalker is an intimate partner. Perform a simple stalking offender characteristics assessment. Ask whether your client would describe the stalker as jealous or extremely possessive, obsessive or manipulative; as someone who has fallen instantly in love with her or someone who needs to have control over other people; as someone who is unable to take "no" for an answer or someone who quickly and frequently swings from rage to "love"; or as someone who has difficulty distinguishing between fantasy and reality and has a sense of entitlement about the client.

To help assess the stalker's resistance and persistence, ask whether the stalker has been notified either informally by your client, or formally (such as via a protective order, court order, arrest or police notification), that your client does not want him to have any contact with her and whether he has persisted in contacting, threatening and/or engaging in other unwanted behavior after he was notified to stop.

Let the Client's Perception of Fear Guide You

Why do the stalker's actions cause her fear? Remember, context is everything, and she may know best the significance of the stalker's words and actions. If possible, and with the victim's consent, also talk to her friends and family members who are familiar with the situation. Their levels of fear and concern should also be taken into account.

If she is an immigrant and you are not familiar with the cultural norms and practices of her community, try to mobilize the assistance of someone who may be able to help you in deciphering the cultural clues and red flags. A phrase or gesture that does not translate well into English may be widely understood in that culture as a death threat, for example.

Assist Your Client in Identifying Other Types of Past Stalking Behavior to Help Establish a Course of Conduct

Ask whether the stalker has engaged in any of the following behaviors in the past: tracking, following or monitoring her in any way; gathering information about her from her family, friends, Internet, employer, school or other sources; repeatedly invading her life/privacy by initiating unwanted contact, such as, persistently approaching her and asking for dates, meetings or other contact, leaving her notes or unwanted gifts, sitting or standing outside her home or work place, driving by her home or

work place, or waiting next to her car in the parking lot; intimidating or scaring her through sending threatening mail, email or notes or by otherwise making threats, through property damage, or threatening or causing actual harm of pets; significantly and directly interfering with her life, such as by spreading rumors or publicly humiliating her, jeopardizing her job, interfering with her finances or housing; threatening her family or friends; breaking into or entering her home; or physically or sexually assaulting her. The above is not an all-encompassing list, so ask your client about any other behaviors the stalker has engaged in that she believes noteworthy.

Ask your client whether she has done any of the following in the past in response to the stalker's behavior: changed day-to-day routines; changed jobs or work arrangements; obtained a new phone number; asked a friend to escort her to her car or her home; put extra locks on her home or otherwise spent money to make her home safer; sought refuge in a shelter or moved; or bought a personal protection device such as mace or pepper spray.

Map out the client's life (home, job, school, friends' homes, etc.), which may help identify times or places of increased risk for the victim. This could help with safety planning.

Develop a Log

Ask your client to use a calendar or a log to document the "when, where and how" of the stalker's modus operandi. If possible to do, ask her to preserve potential evidence of stalking, by, for example, saving emails or text messages or by taking photographs of damaged property. Of course, any such action should only be taken if it would not compromise her safety. Also ask your client to consider how the stalker may be using cell phones, GPS, computers and other technology to locate, harass and spy on her, her relatives and her friends.[29]

Help Gather Evidence

Collect recorded phone messages, email messages, letters, notes, cards, gifts, domestic incidence reports or police reports, orders of protection, and relevant photos, videos and recordings that will help document the stalker's conduct.

Mobilize Support for Your Client

Encourage your client to contact and confide in trusted friends, family, neighbors and co-workers who can help her monitor the stalker, gather evidence, assess the evolving risk situation, alter her daily routines and keep safe.

Advocate for Your Client with the Police

Discuss with your client the option of reporting the stalking to law enforcement. If your client does so, advise your client to request copies of police reports. If you feel that the police are not taking your client's concerns seriously and is reluctant to arrest the stalker, you may wish to, with the prior consent of your client, advocate with the police directly, either by accompanying your client to the precinct or discussing her case with relevant officers over the telephone. Remind the police to cross–reference so that other precincts are aware of the stalking conduct, and let them know of other reports in other locations.

Discuss Ongoing Safety Planning

Discuss safety options with your client, which may include: changing locks; traveling with others whenever possible; telling others where she is going and when she expects to return; keeping a list of important phone numbers and the location of nearest police stations handy; varying work routes and schedules; keeping money, a suitcase of clothes, backup keys and copies of important papers in a safe place; and keeping her home address and phone number confidential. It may not be advisable

for the victim to change her phone number for several reasons. First, if the offender is calling or texting the victim and this avenue is cut off, it could escalate the offender's behavior by, for example, causing him to show up at her home or workplace. Second, the client would no longer be able to monitor and preserve evidence of the offender's stalking behavior through calling or texting. Instead, what may be preferable is to maintain the phone number (and to take the lowest payment plan possible to save costs) and then to get a new phone number for personal use. In addition, many domestic violence programs provide donated phones to stalking victims.

Assist Your Client in Filing a Family Offense Petition

If your client is the victim of intimate partner stalking such that a family court will have subject matter jurisdiction of her case, you should discuss with your client the pros and cons of obtaining a Family Court order of protection. In Family Court, your client would be in control of her own case and would not have to rely on the criminal justice system to prosecute the case on her behalf. In most cases, on the same day she files a family offense petition, the Family Court judge will hear her case and grant her a temporary order of protection.

Based on the facts of the case, the judge may grant her a "stay away" order of protection prohibiting the stalker from her home, her work place and from coming within a specified distance from her. Depending on the stalker's personality and characteristics, such an order of protection, even while temporary, may afford your client with a strong degree of protection. On the other hand, initiating a case in family court would mean that your client has to have her stalker served and see him repeatedly in court. This may provoke the stalker and have the perverse effect of further compromising her safety. If your client decides to file a family offense petition in family court, you should accompany her to court and assist her in preparing the family offense petition whenever possible and try to find qualified legal counsel who can help her.

Conclusion

While stalking laws at the state and federal levels provide important tools to combat stalking and to protect victims, stalking laws must be enforced to be effective. Crucial at this point is educating law enforcement officers, prosecutors, judges, health care professionals and the general public. Your role as victim advocate can be critical in mobilizing a coordinated, effective and victim-centered response to stalking that can help secure her safety and bring her stalker to justice.

Notes

Ariella Pultman provided invaluable assistance in preparation of this chapter.

1. Matthew J. Breiding, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63:8 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report 7 (2014). Because significantly more women than men are victims of stalking, this article will generally refer to the stalking victim as a "she" and the perpetrator as a "he." As the cited statistics indicate, however, many men are also victims of stalking.
2. *Id.*
3. *See e.g.* J. Reid Meloy, *Stalking and Violence* (John Wiley & Sons Limited 2002) (citing to research in the U.S., Canada and Australia on frequency of stalking violence). The 10 studies cited generally had small sample sets, ranging from 18-175, and estimated frequencies of stalking violence between 21-76%.

4. The National Center for Victims of Crime, Stalking Fact Sheet, *citing to* Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers,* 51 Journal of Forensic Sciences No 1 (2006).
5. Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey,* National Institute of Justice Centers for Disease Control and Prevention (1998).
6. Clinic Access and Anti-Stalking Act of 1999, codified in Penal Law §§ 120.45, 120.50, 120.55 and 120.60.
7. *See* McKinney's 1999 Session Laws, ch 635 § 2.
8. *People v Stuart,* 765 NY2d 1 (2003).
9. Trial transcript of DiNunzio's testimony.
10. *Id.*
11. *Stuart,* 765 NY2d at 3, 4.
12. Trial transcript of DiNunzio's testimony at 63-64, 93, 100-101.
13. *Id.* at 99.
14. Family Court Act § 42-a; Criminal Procedure Law § 30.14; Domestic Relations Law § 40.3.e and 52.9.
15. Penal Law §§ 120.50(1) and (4).
16. *See People v Raphael Golb*, 23 NY3d 455 (2014).
17. Memo accompanying S7869-2013 and A10128-2013, relating to the crime of aggravated harassment in the second degree.
18. National Conference of State Legislatures, www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx.
19. Penal Law § 120.45.
20. New York State Assembly, assembly.state.ny.us/leg/?default_fld=&bn=A07720&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y. According to the National Conference of State Legislatures, as of December 2013, thirty-seven states have passed cyberstalking statutes. A number of these statutes, for instance Illinois and Florida law, specifically define the concept of cyberstalking. *But see Elonis v United States*, -US-, 13S Sct 2001 (2015) (Social media threats and free speech).
21. For example, on September 29, 2014, federal officials announced the arrest of Hammad Akbar, creator of StealthGenie, a popular smartphone application marketed as a tool for catching cheating spouses by eavesdropping on their calls and tracking their locations. *See e.g. Maker of StealthGenie, an app used for spying, is indicted in Virginia*, The Washington Post, www.washingtonpost.com/business/technology/make-of-app-used-for-spying-indicted-in-virginia/2014/09/29/816b45b8-4805-11e4-a046-120a8a855cca_story.html. Critics have called such technology "stalker apps." StealthGenie purports to be completely undetectable once uploaded to a person's phone, and immediately starts allowing the user to monitor the communications from that phone via an online server. On June 4, 2014, the Senate Judiciary Subcommittee on Privacy, Technology and the Law held a hearing during which Senator Al Franken (D-MN) presented his bill S.2171, the "Location Privacy Protection Act of 2014." In his opening statement Senator Franken said that "stalking apps" can be found online in minutes, and abusers use them to stalk thousands of women around the country. Senator Franken cited a study conducted by the National Network to End Domestic Violence that found 72% of victim services programs across the country had encountered victims who had been tracked through a stalking app or a stand-alone GPS device.
22. *See* 18 USC §2261A(2), which states: "Whoever—(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service **or electronic communication service or electronic communication system of interstate commerce**, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261 (b) of this title." Clause (i), (ii), or (iii) of paragraph (1)(A) covers the victim, such person's immediate family member or spouse or intimate partner.

23. DOJ's Bureau of Justice Statistics, www.bjs.gov/index.cfm?ty=tp&tid=973.
24. National Institute of Justice, www.nij.gov/topics/crime/stalking/Pages/welcome.aspx.
25. Immigration and Nationality Act (8 USC §1101(a)(15)(U)(iii)).
26. Section 103, www.congress.gov/bill/113th-congress/senate-bill/47/text.
27. Section 104, www.congress.gov/bill/113th-congress/senate-bill/47/text.
28. Derived from the Stalking Offender Characteristics Assessment developed by the Unity House of Troy, Inc. and Understanding Stalking Laws, presented by Lisa A. Frisch, Executive Director, The Legal Project, Victim Assistance Academy, Center for Women and Government & Civil Society; and the Stalking and Harassment Assessment Risk Profile (SHARP).
29. *The Use of Technology to Stalk, http://tech2stalk.org/*.

9

Litigating Family Offense Proceedings

by Nicole Fidler & Dorchen A. Leidholdt

An order of protection is an order from a court instructing a domestic violence victim's abuser to refrain from engaging in certain behavior toward the victim, and in some cases the victim's children. There are two types of orders of protection — civil and criminal. Victims can seek a civil order of protection by filing a family offense petition in Family Court.[1] A victim may receive a criminal order of protection if she[2] files a police report against the abuser. Both types of orders help to deter the batterer from continuing the abuse; this chapter focuses on representing victims in their pursuit of civil orders of protection in Family Court. Representation by counsel is critically important — studies have shown that represented victims of domestic violence have a much higher likelihood of securing an appropriate order of protection than those that appear on their own behalf. And while pundits often disparage the effectiveness of orders of protection, research indicates that a final civil order of protection can be a powerful tool in deterring repeat incidents of domestic violence.[3]

Introduction to Orders of Protection

Who May File For an Order of Protection?

The District Attorney's office may seek a criminal order of protection against a person who has been charged with a crime, regardless of that person's relationship to the victim. A civil order of protection, however, may only be sought if the abuser and the victim hold a relationship that fits into one of the following categories: (i) spouses; (ii) former spouses; (iii) parent and child; (iv) persons related by consanguinity or affinity; (v) persons who have a child in common regardless of whether such persons have been married or have lived together; or (vi) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together.[4] If the relationship does not fit into one of these categories, the court does not have subject matter jurisdiction to hear the family offense case and the petition will be dismissed.

The categories set forth in section 812(1) of the Family Court Act are relatively straightforward, with the exception of the last category, those in an "intimate relationship," which was added in 2008 after decades of lobbying. This category requires a court to determine, on a case-by-case basis, whether the parties are or were in an "intimate relationship." The Family Court Act suggests factors that courts may consider when deciding whether the parties are or were in an intimate relationship: (i) the nature or type of the relationship, regardless of whether it is sexual in nature; (ii) the frequency of interaction between the parties; and (iii) the duration of the relationship.[5] The Act also specifies that "[n]either a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an 'intimate relationship.'"[6]

When arguing for or against a finding that an intimate relationship exists for purposes of establishing subject matter jurisdiction, it is crucial to look at the case law addressing the issue. Courts have

found that parties who have dated or who have engaged in a sexual relationship — either at the time of the petition or in the past — have an intimate relationship for purposes of section 812(1).[7] Parties who are merely friends are unlikely to be able to establish an intimate relationship,[8] and parties who have no "direct relationship" with one another and who "are only connected through a third party" do not have an intimate relationship pursuant to section 812(1).[9] Thus, if parties are connected only through a child that is not their common child or through a current/former paramour, courts will generally decline to find an intimate relationship.[10] On the other hand, if a court finds that there is "frequent contact" between the parties, it may find an intimate relationship, even if the contact is only on account of a third party (*e.g.*, a child).[11] For example, in *Matter of Winston v Edwards-Clarke*, the court held that the petitioner — the fiancée of the respondent's ex-husband — and the respondent had an intimate relationship based on the court's finding that there was "frequent contact between the [parties] in order to arrange for the [respondent's] visitation with her children."

The parameters of what constitutes an intimate relationship continue to evolve, and so it is important to always review current case law before presenting arguments on the issue in your case.

What Crimes are Considered Family Offenses?

Pursuant to section 812(1) of the Family Court Act, a victim is entitled to an order of protection if she can prove one or more acts that constitute any of the below family offenses.

Assault

- Section 812(1) includes assault in the second degree (Penal Law § 120.05), assault in the third degree (Penal Law § 120.00), and attempted assault (Penal Law § 110.00). Note that the list of family offenses does not include assault in the first degree, which remains the exclusive purview of the criminal courts.

Criminal Mischief

- Destruction of or damage to property has long been a common domestic violence tactic. Typical examples of destructive behavior by abusers include the destruction of cellular phones, disabling phones by pulling cords from the walls, destroying furniture or other household items, breaking windows in a home or car, breaking doors or disabling locks, vandalizing vehicles or intentionally involving a vehicle in an accident. In 2007 the New York Legislature finally recognized the prevalence of this behavior in domestic violence cases and added criminal mischief as a family offense. The Legislature did not specify any degrees when it added "criminal mischief" to the list of family offenses, but a strong argument can be made that the Legislature intended the "criminal mischief" addition to encompass all degrees. (Penal Law §§145.00, 145.05, 145.10, 145.12.)

Disorderly Conduct

- Section 812(1) includes disorderly conduct (Penal Law § 240.20). For purposes of Article 8, "disorderly conduct," has a broader definition than it does in the Penal Law—it includes disorderly conduct that takes place in private.[12]

Harassment

- Section 812(1) includes harassment in the first degree (Penal Law § 240.25) and second degree (Penal Law § 240.26), as well as aggravated harassment in the second degree (Penal Law § 240.30). Consider alleging aggravated harassment in the second degree if the abuser makes threats over the telephone, e-mail, or through other electronic means. Note that if the abuser has committed harassment in the first degree, it is elevated to aggravated harassment in the second degree if the abuser has previously been convicted of harassment in the first degree within the past 10 years.[13]

Menacing

- Section 812(1) includes menacing in the second degree (Penal Law § 120.14) and third degree (Penal Law § 120.15). If the abuser ever showed your client a weapon, you should consider alleging menacing in your petition.

Reckless endangerment

- Section 812(1) includes reckless endangerment as a family offense. Although it does not specify degrees, a strong argument can be made that both degrees—first (Penal Law § 120.25) and second (Penal Law § 120.20) —are family offenses.

Strangulation[14]

- Section 812(1) includes criminal obstruction of breathing or blood circulation (Penal Law § 120.11) and strangulation in the first degree (Penal Law § 120.13) and second degree (Penal Law § 120.12). Strangulation is one of the most prevalent, and one of the most lethal, forms of domestic violence. Just 11 pounds of pressure applied for 10 seconds can render someone unconscious. With continued pressure, death can occur within minutes. Ten percent of the violent deaths in the U.S. each year are carried out by strangulation, with women killed by strangulation six times more often than men. Strangulation can also cause severe non-lethal injuries—especially brain damage and stroke. Although strangulation has long been recognized as a risk factor of lethality in domestic violence cases, it did not become recognized by New York State's penal code until 2008. Criminal obstruction of breathing or blood circulation is a misdemeanor offense that is established by evidence that the person applied pressure on the throat or neck or blocked the nose or mouth of the victim; no proof of injury is required. Strangulation in the second degree, a felony offense, requires proof of stupor or loss of consciousness, and strangulation in the first degree requires proof of serious physical injury.

Identity theft

- Section 812(1) includes identity theft in the first degree (Penal Law § 190.80), second degree (Penal Law § 190.79), and third degree (Penal Law § 190.78). Advocates for victims have found that perpetrators often steal their victims' identities as a tactic of retaliation after their victims have left the abusive relationship.

Grand larceny

- Section 812(1) includes grand larceny in the third degree (Penal Law § 155.35) and fourth degree (Penal Law § 155.30).

Coercion

- Section 812(1) includes coercion in the second degree as set forth in Penal Law §§ 135.60(1)-(3). Note that coercion in the second degree pursuant to Penal Law §§ 135.60(4)-(9) is not considered a family offense.

Sexual Misconduct Offenses

- Sexual abuse is ubiquitous in domestic violence, yet far less likely to be reported than other forms of physical abuse. You should always specifically ask you client about sexual abuse, as it is not something she will necessarily volunteer during your interview. Be aware that clients do not always recognize sexual abuse. For example, a married client who was forced by her husband to have sex against her will may not realize that she has been sexually abused. Although it is important for you to be aware of sexual abuse in your client's history, you may not want to include it in the family offense petition if your client is not comfortable testifying about it in court. For further guidance, see Chapter 7, *Intimate Partner Sexual Assault*.

  Despite the prevalence of sexual abuse in domestic violence cases, there were no sex offenses included in the list of family offenses until December 15, 2009, when the New York Legislature added four misdemeanor-level sex offenses: (i) sexual misconduct (Penal Law § 130.20); (ii) forcible touching (Penal Law § 130.52); (iii) sexual abuse in the 3rd degree (Penal Law § 130.55); and sexual abuse in the 2nd degree as set forth in Penal Law § 130.60 (1). Sexual misconduct is sexual intercourse or oral or anal sexual conduct without the victim's consent. Forcible touching and sexual abuse in the second and third degrees relate to forms of sexual contact without consent. Note that sexual abuse in the second degree for purposes of family offense proceedings is limited to the conduct specified in subsection one of Penal Law § 130.60 ("[a] person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is [] [i]ncapable of consent by reason of some factor other than being less than seventeen years old").

Stalking

- Section 812 includes stalking in the first degree (Penal Law § 120.60), second degree (Penal Law § 120.55), third degree (Penal Law § 120.50), and fourth degree (Penal Law § 120.45). A conviction for stalking requires proof that the abuser engaged in a course of conduct—one incident is not enough. For a full discussion of this significant offense, see Chapter 8, *Taking Stalking Seriously*.

Courts cannot exercise jurisdiction if a family offense petition does not allege acts constituting at least one of these family offenses.[15] Note that it is not necessary for the acts alleged in the petition to have occurred in New York for New York courts to have jurisdiction over the family offense proceedings.[16]

Preliminary Considerations

Whether Seeking an Order of Protection is in Your Client's Best Interests

It is important to always consider, and discuss with your client, whether seeking an order of protection is in her best interest. While an order of protection can deter domestic violence, initiating a court case for one may bring a victim into contact with the abuser and increase the danger she is in. There are several things you and your client should review before making this determination.

Safety Concerns

You should discuss safety concerns with your client. Abusers often thrive on exerting power and control over their victims. When an abuser is served with a family offense petition and a temporary order of protection [TOP] (assuming a TOP was issued when the petition was filed), and thus discovers that his victim is taking back that power and control, he may retaliate against your client despite the TOP in place.

During your first meeting, talk to your client about how she believes the abuser will react when he finds out she has filed for an order of protection, whether the abuser has access to weapons (a fact which should be included in the family offense petition, *see infra*), and whether the abuser has access to your client's apartment. If there are safety concerns, discuss what your client can do to address those concerns before deciding whether to file for an order of protection and during the pendency of the litigation. For example, your client may want to move into a confidential domestic violence shelter before seeking an order of protection (or at least before the abuser is served with the family offense petition and TOP). For further guidance, see Chapter 4, *Assessing Lethality and Risk*.

Disclosure of Confidential Location

If your client is in a confidential location (*e.g.* a domestic violence shelter or an address unknown to the abuser), it is possible that initiating a family offense proceeding could disclose that location to the abuser. There are, however, a number of ways to prevent such disclosure.

First, you should ask the court to keep your client's address confidential pursuant to Family Court Act § 154-b(2)(a), which states that "the court may upon its own motion or upon the motion of any party or the child's attorney, authorize any party or the child to keep his or her address confidential from any adverse party… ." If your client is living in a domestic violence shelter, the address of the shelter is automatically considered confidential and protected from disclosure;[17] simply include in the family offense petition that her address is a "Confidential Domestic Violence Shelter." If she is not living in a shelter, append to the family offense petition a confidential address affidavit and a proposed confidential address order, and state in her petition that her address is a "Confidential Location."

Second, the New York Secretary of State has implemented a cost-free service known as the Address Confidentiality Program to protect victims of domestic violence against disclosure of a confidential address by establishing a substitute address.[18]

Upon certification as an ACP participant, the participant will be provided with an ID card bearing her name, unique ID number and the substitute address, which is a Post Office box in Albany, New York. The participant uses this substitute address in all dealings with state and local agencies, which are required by law to accept this address. The Secretary of State then forwards all mail to the participant's actual address. For service of process, ACP participants designate the Secretary of State.

Third, for a New York City petitioner who would like to keep confidential the county in which she currently lives, consider filing the family offense petition in a different borough. For example, if your client and the abuser lived in Manhattan together at the time of the abuse, but your client has since fled to a confidential location in Brooklyn and does not want to reveal that she is living in Brooklyn, she can file for an order of protection in Manhattan instead of Brooklyn. A more detailed discussion of venue options appears below.

Finally, the abuser may attempt to follow her after court appearances to discover where she is living. If this is at all a concern, your client should wait at the courthouse for ten to fifteen minutes after the abuser leaves before exiting. She may also consider going to a coffee shop or some other location first before heading directly home.

Retaliatory Litigation

Discuss the possibility of retaliatory litigation or other similar retaliatory actions by the client's abuser after he realizes a family offense case has been initiated against him. Retaliatory litigation can come in several forms. First, an abuser may file for his own order of protection against your client, or he may encourage someone else, such as his current paramour, to file for an order of protection against your client. The latter approach should not be permitted on jurisdictional grounds (see discussion, *supra*, on the definition of "intimate relationship").

Second, if the client has a child in common with your abuser, he may seek to establish paternity (if paternity is not already legally established) and file a custody and/or visitation petition. Even if the abuser has never shown much interest in their child in the past, he may nonetheless initiate custody/visitation proceedings as a way to seek revenge and/or a way to continue controlling and harassing your client. Once a custody/visitation proceeding is initiated, the court will likely grant visitation to the abuser. Your client must comply with the court's visitation order or risk being found in contempt (or even losing custody of her child). These visits provide yet another opportunity for the abuser to continue harassing and controlling her. For further guidance, see Chapter 15, *Litigating Custody and Visitation in Domestic Violence Cases*.

Finally, the abuser may try to initiate criminal proceedings against her by filing a false or exaggerated police report (see Chapter 5, *Police Response: Mandatory Arrest and Primary Physical Aggressor*). Or, he may make a false or exaggerated child abuse allegation to child protective services (see Chapter 16, *Child Welfare Cases and Investigations Involving Domestic Violence*).

Should Your Client Pursue a Criminal Order of Protection, Civil Order of Protection, or Both?

Once you and your client agree that it is in your client's best interests to pursue an order of protection, you should determine from which forum you will seek an order — criminal, civil, or both.

Concurrent Jurisdiction

Before the 1995 implementation of the Family Protection Domestic Violence Intervention Act, victims had to decide whether to seek a civil order of protection in Family Court or pursue criminal prosecution and an order of protection in criminal court—they could not do both. This was known as the "choice of forum" rule. Family Court and the criminal court now have concurrent jurisdiction over crimes that are considered family offenses.[19] A victim is permitted to pursue both a civil order of protection in Family Court and a criminal order of protection in criminal court based on the same incident or set of incidents.[20]

Both types of orders of protection may deter the abuser from continuing the abusive/harassing behavior. But there are reasons why one forum may be better suited to your client's situation.

Advantages and Disadvantages to Proceeding in Family Court

A victim can seek a civil order of protection by filing a family offense petition in Family Court. By filing the petition, she becomes a party (the Petitioner) to the litigation. This means that she needs to appear at each and every court date, which could ultimately be many dates over an extended period of time. Your client should be prepared to take time off of work and, if desired, organize childcare for every court appearance.[21] Your client will also have contact with the abuser at these court dates. She may have to stand in line with the abuser to enter the courthouse, sit in close proximity to him or her in the courthouse waiting area, and stand near him when appearing before the judge. This could be traumatizing if your client is not ready to face the abuser, and is something you should make sure your client is prepared for before filing a petition in Family Court; you can also

take precautions to minimize these unwelcome experiences for your client, investigating and making your client aware of all courthouse services for domestic violence victims.[22]

As a party to the action, your client has much more control in a civil proceeding than she does in a criminal proceeding. She can withdraw her family offense petition at any time, decide what evidence to introduce at trial, and decide what relief to request. In criminal proceedings, all of these decisions are in the sole discretion of the District Attorney's office.

Your client may have a better chance of getting a final order of protection in Family Court than in criminal court because the standard of proof is lower in Family Court. Family offenses in Family Court must be proven by a "fair preponderance of the evidence" as opposed to the stricter criminal "beyond a reasonable doubt" standard. A civil order of protection includes more options for relief, including restitution of up to $10,000 for expenses such as doctor's bills, destruction of property, and missed work. When your client files a family offense petition in Family Court, she can request at the same time a temporary order of support or a temporary order of custody.

Advantages and Disadvantages to Proceeding in Criminal Court

A victim can attempt to initiate a criminal prosecution by calling the police, or going to a police station and making a complaint. If the abuser is arrested, the prosecutor will request that the victim receive a temporary order of protection [TOP] at the abuser's arraignment.

Under New York State's mandatory arrest law, the police must make an arrest where there is probable cause of a family offense felony[23] or a violation of an order of protection. They must also make an arrest where there is probable cause of a family offense misdemeanor,[24] unless your client voluntarily states that she does not want the abuser arrested. If that happens, it is within the officer's discretion whether to make the arrest, unless the officer believes that your client is in imminent danger, in which case the officer must arrest the abuser.

Police are most likely to make an arrest where the domestic violence incident was relatively recent. However, if several weeks have passed since the last abusive incident and your client has not yet made a complaint to the police, it may be difficult to convince the police that they have probable cause to make an arrest. You may want to accompany your client to the precinct, or speak with the police over the telephone, to facilitate the process. If you are not successful in convincing the police to make an arrest, you will need to pursue an order of protection in Family Court. For further guidance, see Chapter 5, *Police Reponse: Mandatory Arrest and Primary Aggressor*.

If the police make an arrest and a criminal prosecution follows, your client is a complaining witness; she is not a party to the prosecution and the prosecutor is not her attorney. Thus, she does not need to appear on every adjourn date; she need only appear to testify before the Grand Jury or at trial. As a result, a criminal prosecution is often far less burdensome for domestic violence victims than a civil proceeding. Moreover, a criminal prosecution can be less intimidating because a victim will only see the abuser on a very limited number of occasions in court. Of course, as a non-party, the victim has no control over the litigation, which can be a very significant negative to proceeding in criminal court. All decisions are made by the District Attorney's office.

With respect to TOPs, your client is likely to get more stringent protective provisions (*e.g.* a provision excluding the abuser from their home) in a criminal proceeding. This is because there are fewer due process concerns—at a criminal proceeding, the defendant (*i.e.*, the abuser) appears before the court at arraignment with an attorney and has an opportunity to be heard before the TOP is issued. In Family Court, by contrast, the initial application for a TOP is made *ex parte*, and judges are reluctant to grant stringent protective measures on an *ex parte* basis.

Finally, although criminal prosecution may send a stronger signal to the abuser than a civil order of protection because of the threat of incarceration and a criminal record, initiating a criminal prosecution

may make your client uncomfortable. She may not want to have the abuser put in prison, particularly if the abuser is the father of her children and is paying child support — support she may not get if he loses his job because of a criminal conviction.

Which Venue Should Your Client Elect?

The family offense petition can be filed in any Family Court in the county (i) in which the allegations took place; (ii) in which the family or household resides; or (iii) in which either party resides.[25] If your client is living in a domestic violence or homeless shelter, you can file in the county in which the shelter is located.[26] When determining the venue, you should consider both the convenience and the safety of your client.

For purposes of a family offense case, the venue residency requirement should be interpreted broadly.[27] In *E.G. v D.B.*, for example, the parties had lived in Pennsylvania for nine years before the wife fled to New York to escape her husband's abuse. While in New York she stayed, alternately, on a friend's couch in Manhattan and at a gallery in Manhattan where she sometimes worked and which her husband owned. The wife filed a family offense petition in New York County, and her husband moved to dismiss on grounds of improper venue. Citing the legislative history of section 818 of the Family Court Act, the court found that, for purposes of venue, victims are not required to "prove home ownership or that they are leaseholders [] in New York," and that regardless of whether the wife fled to the gallery or "stayed on a friend's couch in a Manhattan apartment, she… resided [in New York County] at the time she filed the family offense petition" and had thus satisfied residency requirements for purposes of determining venue pursuant to section 818.

Drafting the Family Offense Petition

Statute of Limitations

Article 8 of the Family Court Act contains no statute of limitations.[28] Prior to 2010, some courts, particularly in the First and Second Departments, required that an incident be "relatively contemporaneous" with the filing of the family offense petition in order to warrant an order of protection.[29] In August 2010, however, the New York Legislature amended the Family Court Act to make clear that "a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing."[30]

Facial Sufficiency

Section 821 of the Family Court Act sets forth the basic information required in a family offense petition. The Family Court website includes template family offense petition forms that can be used as a guide in drafting petitions.[31] If you are an approved domestic violence advocacy group, you can also make use of New York State's Family Offense Advocate Program, an electronic system designed to make it easier for advocates to assist victims in drafting and filing family offense petitions.

Key to ensuring that the family offense petition is facially sufficient is inclusion of (i) factual allegations that make out each and every element of at least one family offense and (ii) specificity sufficient to give the respondent notice of the allegations such that he can defend against them. If the petition is not facially sufficient, the judge may refuse to grant a TOP or may dismiss the petition entirely. In the alternative, opposing counsel may serve a Demand for a Bill of Particulars, requiring provision of specific factual information about the claims alleged in the petition.[32]

The allegations in the petition should clearly and specifically describe the perpetrator's acts that make out the family offense and the consequences of each act — destruction of property, injuries sustained, and/or pain and suffering. The petition should avoid conclusory statements about the abuse (*e.g.* "Respondent threatened Petitioner").[33] Instead, the petition should include specific factual allegations about the abuser. For example:

- "Respondent cut Petitioner's hand with his keys causing her to bleed profusely and causing pain. The laceration took several weeks to heal and Petitioner still has a scar."
- "Respondent put both of his hands around Petitioner's neck and applied pressure for approximately 15-20 seconds, preventing Petitioner from breathing and causing pain. Petitioner had bruising around her neck and experienced pain for several weeks after this incident.
- "Respondent shouted words to the effect of 'I'm going to hire a crack addict to kill you,' leaving Petitioner in fear for her life and the lives of her children."
- "Respondent swung his fists at Petitioner's face, causing Petitioner to fear that Respondent was going to punch her."

When describing threats or other verbal abuse use the qualifying phrase, "words to the effect of," so your client is not locked into precise wording that she could be cross-examined about later. For example, "As Respondent was punching Petitioner he yelled words to the effect of 'you will never be safe.'" Remember that if the incidents are not alleged, your client will be precluded from testifying about them at the fact-finding hearing.

Each act constituting a family offense that occurred during the last few years should be alleged in the family offense petition. You should begin the petition with the most recent incident of abuse and move backwards in time. To meet the facial sufficiency requirement, at least one of the acts constituting a family offense must include an indication of date, time, and place. If possible, every incident should include a specific date, time, and place. Your client, however, may not always be able to remember these specifics, particularly if she is highly traumatized or if the abuse occurred over and over again. When interviewing your client, try to help her determine dates by asking context questions — for example, What was the weather like when the incident occurred? Was the incident around a child's birthday, a holiday? Was it cold outside? Was it dark outside? Judges typically understand that domestic violence victims may have difficulty remembering specific dates, and they will often permit petitioners to locate an incident in the month or season and year in which it occurred. Note that dates in the petition should always be preceded by the words "on or around" or "in or around" so your client is not locked in if she does not have precise recall. For example:

- "On or around February 2, 2015, at approximately 10 AM…"
- "On or around February 2, 2015, in or around the morning…"
- "In or around February 2015… "
- "In or around the winter of 2015… "

As you interview your client to gather facts to include in the petition, remember that she may not at first be able to articulate the abuse in a way that fits within the definition of a family offense. She might be minimizing the incidents of domestic violence, which is one way that traumatized victims often try to cope with memories of their abuse. She may also be embarrassed to discuss the worst parts of the abuse with you, especially if the abuse was sexual. You may need to gently tease out the details of the abuse through context questions. For example, your client might focus on the fact that the abuser called her names like "bitch" or "whore," but not disclose any physical abuse. Try to

ask questions about the incident that slowly reveal the full story: How did he sound when he was calling you names? How loud was his voice? Describe his facial expressions? What was he doing while he was cursing at you? How far away was he from where you were standing? Did he touch you? How did he touch you? And so on.[34]

Aggravating Circumstances

If a court finds that aggravating circumstances exist, your client is entitled to the longest possible order of protection available in Family Court — five years. As a result, the petition should include any facts that might make out aggravating circumstances. Aggravating circumstances are defined in section 827 of the Family Court Act, and include:

- physical injury or serious physical injury to the petitioner caused by the respondent;
- use of a dangerous instrument against the petitioner by the respondent;
- a history of repeated violations of orders of protection by the respondent;
- prior convictions for crimes against the petitioner by the respondent;
- exposure of any family or household member to physical injury by the respondent; and
- like incidents, behaviors, and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

With respect to alleging physical injury, note that the Penal Law defines "physical injury" as "impairment of physical condition or substantial pain" and defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."[35] However, it is important to always review current case law interpreting these definitions before presenting arguments on physical injury in your case.

Finally, if the petition does not specifically allege that aggravating circumstances exist, you are still permitted to argue later in the proceedings that such circumstances exist.[36]

Presence of Children

The presence of your client's children during the abuse supports an assertion of aggravating circumstances, and thus should be included in the petition's allegations. Including this fact used to put your client at risk of a child protective services investigation, potentially resulting in your client being charged with civil neglect for "failure to protect" the child. However, this risk has greatly decreased since the 2004 Court of Appeals decision in *Nicholson v Scoppetta*, which found that exposure of children to domestic violence is not enough to establish neglect or removal of the children from the home.[37] Nonetheless, if you include these types of facts in your petition, stress any protective measures your client took during the incident.

Firearms

Section 842-a of the Family Court Act requires that courts suspend any firearm license (or order the respondent ineligible for a firearm license) possessed by the respondent and order the immediate surrender of all firearms when the court has good cause to believe that (i) the respondent has been convicted of a violent felony[38]; (ii) the respondent has violated a prior order of protection by inflicting physical injury, using or threatening to use a deadly weapon or dangerous instrument, or carrying out a violent felony; and (iii) the respondent has a prior conviction for stalking in the first, second,

third, or fourth degree. The court is also required to revoke the respondent's firearm license (or order the respondent ineligible for a firearm license) and order the immediate surrender of any or all firearms if the court finds that there is a substantial risk that the respondent may use firearms against those protected by the order.

If the abuser owns a firearm, or has access to firearms (*e.g.*, he lives with family or friends who own firearms), you should include that information in the family offense petition. You should also include any information you have about the abuser's prior convictions (particularly if they fall into any of the categories set forth in section 842-a) or order of protection violations. See Chapter 6, *Firearms, Domestic Violence, Orders of Protection*, for further discussion.

Requesting Relief

Duration

A final order of protection can be issued for two years or five years.[39] A five-year order of protection is available only upon a finding by the court on the record that (i) aggravating circumstances exist or (ii) the conduct alleged in the petition violated an already existing valid order of protection.[40] If you believe you can establish either of these requirements, request that the court issue your client a five-year order of protection.

Protective Provisions

An order of protection may include provisions imposing "reasonable conditions of behavior" on the respondent.[41] Some commonly requested provisions prohibit the respondent from:

- Committing any family offenses against the petitioner;
- Contacting the petitioner by telephone, email, text message, or other electronic communications, including social media; and contacting the petitioner through third parties, or by any other means;
- Staying away from petitioner, petitioner's home, petitioner's job, and/or petitioner's school (commonly known as a "stay away order"); and
- Excluding petitioner from the parties' residence (commonly known as an "exclusionary order").

An exclusionary order is an extremely helpful order for your client, as it prevents her having to flee her home and enter a domestic violence shelter (which may not always have available space), or homeless shelter, or find some other form of safe housing. Even if your client has already fled her home, the court can still issue an exclusionary order, allowing your client to safely return to her home.[42] Courts will issue exclusionary orders if your client lives with the abuser and if the court believes that she is in danger. This generally requires allegations in the petition of recent physical violence.

Although not as common, courts can also order:

- Probation for up to one year;
- Participation in a batterer's accountability program;
- Custody for the duration of the order of protection;
- Restitution of up to $10,000 for expenses such as doctor's bills, destruction of property, and missed work;
- Reasonable counsel fees; and
- Protections for pets or companion animals.

Include in the petition all good-faith requests for the broadest possible protections for your client. If you think you can establish aggravating circumstances — request a five-year order of protection. If your client lives with the abuser — request that he be excluded from the residence. Request that the abuser stay away from any place where your client is concerned that he or she may be in danger — home, work, school, children's daycare, etc.

Client's Children

You can also request that the order of protection provisions include your client's children, subject to any court-ordered visitation (*e.g.,* "stay away from the child, the child's home, and the child's school, subject to court ordered visitation").

Amending a Family Offense Petition

Most victims of domestic violence go to Family Court on their own, without an attorney, to seek an order of protection. Victims may not want to wait until finding an attorney to file, or may not be able to afford an attorney and be unaware that free legal services may be available to them. As a result, it is not unusual to start representing a client after the initial family offense petition has already been filed. When this happens, strongly consider amending your client's petition to make sure all relevant incidents are included and described in such a way as to make out all relevant family offenses. Remember that your client will be precluded from testifying about any family offense not alleged in the petition. As you draft your client's amended petition, try to avoid, if possible, making any assertions inconsistent with the original petition. The original petition can be brought in at trial to impeach your client's credibility if it contains prior inconsistent statements.[43]

You are permitted to amend a family offense petition as of right (*i.e.*, without having to seek the court's permission) within 20 days of service. Note that you are only entitled to one amendment as of right — you will need to get the court's permission to amend a second time, even if the 20 days have not yet expired. After 20 days, you may only amend by leave of the court or with consent from opposing counsel. If opposing counsel consents to your amendment, you should file a stipulation documenting the consent. If you need to seek leave of court, you can generally do so by making an oral application, although some judges will ask you to proceed by Notice of Motion or Order to Show Cause. Courts are fairly liberal in granting requests to amend petitions — the CPLR instructs courts to "freely" grant such requests.[44]

Litigating a Family Offense Proceeding

Filing the Petition

Once you have prepared the family offense petition, you must have it signed by your client and notarized. There is no filing fee for family offense petitions. Accompany your client to court to file the petition, as she will have to go before the intake judge on the same day that the petition is filed (or possibly the following day if the petition is filed late in the day). This can be a daunting experience for someone who has never been in court before, and your client may not be able to advocate for the relief she needs on her own.

In addition to bringing several copies of the petition to court, bring any police reports, medical records, photographs of injuries, or other evidence of the abuse. After filing the petition in the petition room, you will wait to be called to see the intake judge. While waiting, review the allegations in the family offense petition with your client in case the judge questions your client about the abuse alleged.

Request the intake judge to issue a TOP requiring the abuser to stay away from your client, her home, and, if relevant, her workplace and school. The TOP should be granted if the intake judge

finds "good cause" to issue the order.[45] If the parties live together, unless your client wishes otherwise, request that the TOP include a provision excluding the abuser from their residence. Be prepared to present argument on why an exclusionary order is necessary to keep your client safe. Because domestic violence usually is an escalating pattern of abuse, it is highly unlikely that it would be safe for your client to continue to live with the abuser after serving him with a temporary order of protection and initiating a court case against him. In requesting protections for your client, be clear and specific in what you want. The terms of the TOP need to be very clear; otherwise, your client could have trouble enforcing it.

Remember that during this initial *ex parte* court appearance you are permitted to make an application for emergency child support.[46] If you plan on asking for emergency child support, it is helpful (although not necessary) to bring the respondent's most recent tax return, most recent W2 form, or latest pay stub. The court can also direct, as part of the temporary support order, that a medical support execution be issued and served on the respondent's employer.[47] The court will also entertain an application for a temporary order of child custody or an order that the respondent not interfere with the care and custody of the children. See Chapter 17, *Representing the Victim in Child and Spousal Support Cases* for further guidance.

Although infrequently done, courts can issue an arrest warrant for the abuser if the court believes that (i) the petitioner or the child is in danger; (ii) the respondent has failed to obey the summons; (iii) the summons cannot be served; (iv) would be ineffectual; or (v) aggravating circumstances exist. Courts are most likely to issue such relief when the violence has been severe, resulting in injury to the petitioner or children, and/or when the respondent is likely to flee the jurisdiction or flout the authority of the court.

Service

The respondent must be served personally with the family offense petition and the TOP (if one was issued) at least 24 hours before the next court date. There are four options for effecting service: (i) through the court; (ii) by a private process server or a friend or relative of your client who is over 18 years old (never your client); (iii) going to a police precinct and asking the police to effect service, or (iv) requesting that the sheriff's office serve the papers.

If you go with the second option — process server, friend or relative — the person serving the summons, petition and TOP will need to provide a notarized affidavit of service. This person can serve the petition and TOP any day of the week, at any time of the day or night. If you want the police to effect service, your client should go to the precinct where the respondent lives or works with a description of the respondent and a photo if she has one, and information about his location. The police are legally required to attempt to serve the respondent on six consecutive tours of duty. Your client, if comfortable doing so, can accompany the police to the respondent's home and wait in the patrol car until the respondent is served. If a police officer effects service, he or she needs to complete a Statement of Personal Service, which need not be notarized. You may want to accompany your client to the precinct to serve the respondent. While the police have a legal duty to attempt to effect service repeatedly, not all officers are aware of this obligation, and accompanying the police to identify the abuser, something some officers insist on, can be traumatic for the victim. Finally, if you want the sheriff's office to serve the papers, you must send all papers that need to be served to the sheriff's office in the county where the service is to be made. The sheriff's office should not charge a fee for serving order of protection papers, and they will provide you with a signed statement regarding service to bring to court. If you know the whereabouts of the abuser, having the police or the sheriff's office effect service is your best option.

If the respondent is in another state when he is served, the court does not have personal jurisdiction over the respondent unless (i) the acts giving rise to the family offense petition occurred within the New York State *and* (ii) the petitioner is a resident of or domiciled in New York State or has substantial contacts in the state.[48]

The First Adjourn Date

At the first adjourn date the court will primarily be concerned with whether the respondent has been served. Make sure you bring the affidavit of service to give to the judge (call your client beforehand and remind her to bring the affidavit to court).

If the respondent has been served but fails to appear, you have two options. The first option is to ask the court to issue a default judgment, in which case your client will be granted a two-year order of protection. The second, and better option, is to request that the court conduct an inquest. An inquest involves a direct examination of your client, so be sure to prepare her in advance. She will take the stand and testify about the allegations in the petition. If you have photographs or certified medical records, introduce them into the record as evidence. You should also make a brief closing argument, summarizing the facts and the law, requesting relief, and explaining why the requested relief is appropriate and necessary. By requesting an inquest, you are ensuring that there will be findings of fact on the record regarding the abuse. This is particularly useful in subsequent custody and visitation proceedings if the client and the abuser have children in common, because courts must consider domestic violence when determining the best interests of the child. It is essential if you are seeking a five-year order of protection, as five-year orders may only be granted upon certain findings of fact on the record (*i.e.*, aggravating circumstances or violation of a valid order of protection). Always pursue an inquest instead of a default judgment unless your client is averse to testifying and/or will be a terrible witness.

Exploring Settlement

Many courts will attempt to persuade the parties to settle a case, often by scheduling conferences between the parties and the judge's court attorney, and by making comments in court. Many family offense proceedings do settle, and this may be the best option for some clients. Because settlement limits your client to a two-year order of protection, which may not protect her adequately, you should not settle prematurely, but rather should examine the circumstances and determine if settlement truly is the best option for your client.

Settling Petitioner's Family Offense Petition

The respondent may want to consent to the issuance of an order of protection instead of having to deal with multiple court appearances and admit to wrongdoing. Be aware that consent to the issuance of an order protection is not an admission of guilt and there will be no findings of fact against the respondent. This means that your client can only obtain a two-year order of protection—five-year orders of protection require certain findings of fact on the record (*i.e.*, aggravating circumstances or violation of a valid order of protection). An order awarding restitution, placing the respondent on probation, or ordering the respondent to attend a batterer's accountability program, also all require findings of fact, and these are not available on a consent order. If your client is not seeking relief that requires findings of fact, and believes that a two-year order of protection will be sufficiently protective, then settling should be seriously considered, especially if your client is concerned about coming back to court repeatedly and missing days of work, if your client is afraid to testify about the abuse, or if you have concerns about how your client will appear on the stand.

If you are confident in your client's ability to testify and carry her burden, and your client and the abuser have children in common, you may want to refuse to settle and insist on a fact-finding hearing.

Findings of fact in family offense proceedings constitute proof of domestic violence that courts must consider in making child custody/visitation determinations.[49] You also may want findings of fact if your client is undocumented and would like to pursue a U-Visa, which is a federal immigration remedy available to victims of certain types of criminal activity, including domestic violence. Because family offenses are sections of the penal code, a family offense proceeding is an investigation of criminal activity. If the court finds that family offenses have been committed, the presiding judge (or supervising judge) will likely agree to sign a U-Visa certification form, which your client can then use to apply for a U-Visa.

Settling Cross-Family Offense Petitions: Avoiding Mutual Orders of Protection

If there are cross-family offense petitions, the court may propose settlement by having both parties consent to mutual orders of protection. This is almost always a bad resolution for victims. The abuser may try to have your client arrested and/or use the cross-order of protection to argue in any subsequent custody, visitation, or matrimonial action that the abuse was mutual. At one point, courts would routinely issue mutual orders of protection — even when no cross-petition was filed. Section 154-c(3) of the Family Court Act now specifically prohibits a judge from issuing conditions against a party unless a petition or counter-claim has been filed.

The Fact Finding and Dispositional Hearings

Family offense proceedings are divided into two parts: the fact-finding trial and the dispositional hearing. Some judges combine the two phases into one, so ask the court before the trial starts if it will be scheduling two separate hearings or combining the proceeding.

Preparing for the Fact Finding Hearing

The Family Court Act does not contain any provisions regarding discovery and, as a result, the discovery procedures in the CPLR apply "to the extent that they are appropriate to the proceedings."[50] The First and Second Departments consider Article 8 proceedings to be special proceedings under the CPLR. Parties in special proceedings are not entitled to broad discovery, and thus courts generally limit discovery in family offense cases to demands for bills of particulars, medical records, and, in some limited instances, interrogatories. In addition to using these limited discovery tools to gather evidence, it is critical to also gather evidence by other means. Below are some of the most common types of evidence you should be gathering and preparing for trial.

Testimony of witnesses

Identify potential witnesses early on, get their contact information, and interview them. If you think they would make good witnesses, call them at trial. Witnesses are often family members or friends of your client, and, as a result, opposing counsel may argue bias; these witnesses can be very effective, however, if they are properly prepared. Do not despair if you cannot find witnesses to testify. Domestic violence usually takes place in private and most judges understand that fact. Your client's testimony is, of course, the most important evidence. Prepare your client well for the direct and cross-examination. Interview your client thoroughly, use the information you gather in the interview to draft direct examination questions, review them with your client, and practice asking them to her, listening carefully to her answers and guiding her to ensure that her answers are fully responsive. Be prepared to address any "bad" facts in your client's story.

Medical records

Medical records, if properly certified, can be introduced into evidence without a custodian. Hearsay portions of medical records are admissible only if the statements were necessary to diagnose or treat the patient, but note that statements in medical records that identify a domestic violence victim's abuser are considered germane to the victim's diagnosis and thus should be admissible.[51]

Photographs

If your client is bruised or has any evidence of physical injury, be sure that it is photographed as soon as possible. These photographs can be extremely powerful corroborating evidence. You should also have pictures taken of any destruction to your client's property.

Tangible evidence

Items such as torn clothing; a knife; a sling for a fractured arm, etc. can be entered into evidence at trial.

Electronic communications

If your client is being harassed by telephone, have her record the calls or save the threatening voicemails, e-mail, text messages, or social media messages.

Expert testimony

Evidence of battered woman syndrome or psychology has been held admissible in a family offense proceeding. Consider calling an expert to address the credibility issues raised by a victim's reluctance to seek help, reluctance to leave the abuser, or explain illegal acts committed while under the control of the abuser.

Prior statements

If you are representing the respondent, make every effort to obtain all prior statements made by the petitioner. Try to obtain medical records, 911 calls, and police reports that contain statements by the petitioner, especially the Domestic Incident Report, which provides space for the petitioner's account of the domestic violence incident. Consider ordering the minutes of the Petitioner's *ex parte* application for an order of protection. All of these contain potential impeachment material for cross-examination.

The Fact-Finding Hearing

To make out a family offense, each element of the offense must be proven by a fair preponderance of the evidence.[52] The basic elements of each offense are set forth in the New York Penal Law, but consultation of case law is often necessary to fully understand the evidence required to prove certain elements of each offense.

Your client will need to testify about each of the incidents alleged in the petition. Ask her foundational questions to get her feeling comfortable, and to establish her credibility. Avoid asking any leading questions. Although opposing counsel may not object to leading questions on your direct, it is still better if your client can tell her story without you providing prompts. This is one of the reasons why it is so important to practice with your client before trial.

Evidence introduced at the fact-finding phase must be material, competent, and relevant. Hearsay is inadmissible, but statement evidence is often critical to your client's case, so be prepared to argue why one or more hearsay exceptions apply to allow the statements to come in.

Be prepared to cross-examine the respondent and any of the respondent's witnesses. If they exist, use prior criminal convictions or prior Family Court findings to impeach the respondent or his witnesses.

Think carefully in advance about the possible defenses he will offer — fabrication, accident, or self-defense — and prepare cross-examination questions to challenge those defenses.

Finally, be prepared to give a short closing argument. Explain why your client was credible and the respondent incredible. Specify which family offenses your client made out and how they were established, and marshal any evidence introduced at the fact finding hearing that supports your client's allegations.

The Dispositional Hearing

The dispositional hearing should begin immediately after findings of fact are made in the fact-finding hearing. However, you will often have to specifically request a dispositional hearing. If the court is resistant to holding a dispositional hearing and taking additional evidence, you should cite to *V.C. v H.C.*, 257 AD2d at 35, which found that a petitioner must be permitted to present any evidence relevant to disposition that has not been presented to the court during the fact-finding. At the dispositional hearing, all material and relevant evidence is admissible, regardless of competence.[53] This means that hearsay is admissible.

Post-Disposition Issues

Violation of an Order of Protection

Family Court orders of protection can be enforced both criminally and civilly. If your client has an order of protection and the abuser violates it, your client should report the violation to the police immediately. Abusers who violate an order of protection are subject to mandatory arrest under New York law. If the abuser violates the order of protection by committing the family offenses of menacing, stalking, assault, aggravated harassment, and/or harassment in the first degree, he may be charged with felony criminal contempt.

You can also request a contempt order from Family Court by filing a petition alleging a violation of an order of protection. Family Courts are authorized to, among other things, sentence an individual who has violated an order of protection to a jail term not exceeding six months.[54] Courts may impose consecutive 6-month sentences for each violation of an order of protection.[55] If the respondent is facing a sentence of incarceration, however, the Family Court must apply the "beyond a reasonable doubt" standard of proof when determining if the order of protection was violated and if new family offenses were committed. If jail time is not requested, however, the "fair preponderance" standard continues to apply.

Because a Family Court finding of contempt for a violation of an order of protection is punitive in nature, double jeopardy protections apply.[56] Thus, if the abuser receives a contempt finding in Family Court, a criminal contempt proceeding based on identical conduct may be precluded on double jeopardy grounds.[57]

Extending an Order of Protection

When an order of protection expiration date nears, victims may request an extension of their order, for a reasonable period of time, by making a motion to the court. The extension should be granted upon a showing of good cause or upon consent of the parties.[58] Importantly, no new abusive incidents need to have occurred for the court to find good cause to extend the order.[59]

Your motion should include a history of the domestic violence, including any findings of fact from the original proceedings. Note, however, that findings of fact are not necessary — an extension may be granted even if the original order of protection was issued on consent.[60] The motion may also include a detailed account of any criminal proceedings and criminal orders of protection; other

proceedings where the domestic violence was an issue — custody, visitation, and/or divorce proceedings; frivolous litigation filed against your client by the abuser; and ongoing issues between the parties and/or ongoing contact, such as court-ordered visitation. It must also include an affidavit from your client articulating her continued fear that the abuser may perpetrate new acts of domestic violence if the order is not in place. The court is not required to hold an evidentiary hearing on the motion to extend, but the court may decide to take testimony on disputed issues of fact.[61]

Notes

1. If an order of protection has not already been issued from the Family Court, victims may seek an order of protection in Supreme Court as part of a divorce action. See Domestic Relations Law § 240 (3). It is preferable to seek an order of protection in Family Court if possible, as Family Court judges tend to be more familiar with family offense petitions and typically preside over many more family offense proceedings than Supreme Court judges.
2. Both men and women are victims of domestic violence, just as both can be perpetrators of domestic violence. However, since the majority of cases involve women as the victims and men as the perpetrators, this chapter employs feminine pronouns to refer to victims and masculine pronouns to refer to perpetrators.
3. *See* Larry Zalin, *Protection Orders Curb Partner Violence, But Few Seek Them*, www.washington.edu/news/2003/01/02/protection-orders-curb-partner-violence-but-few-seek-them/.
4. Family Court Act § 812(1).
5. *Id.*
6. *Id.*
7. *See e.g. Matter of Jose M. v Angel V*., 99 AD3d 243, 247 (2d Dep't 2012).
8. *See Matter of Tyrone T. v Katherine M*., 78 AD3d 545, 545 (1st Dep't 2010) ("Petitioner's claim that he was the boyfriend of respondent's sister, and a friend of respondent, was insufficient to establish an 'intimate relationship'…").
9. *See Matter of Cambre v Kirton*, 2015 N.Y. App. Div. LEXIS 6109, *2-3, 2015 NY Slip Op 06242, 1-2 (2d Dep't July 22, 2015).
10. *See id*. (no intimate relationship where petitioner and respondent, the former girlfriend of petitioner's fiancé and the mother of petitioner's fiancé's child, were connected only through the fiancé); *Matter of Johnson v Carter*, 122 AD3d 853 (2d Dep't 2014) (no intimate relationship where respondent and petitioner, the former boyfriend of respondent's girlfriend and the father of respondent's child, were connected only through the child); *Matter of Welch v Lyman*, 100 AD3d 642, 643 (2d Dep't 2012) (no intimate relationship where petitioner and respondent, the maternal grandmother of the petitioner's son, were connected only through the child).
11. *See Matter of Winston v Edwards-Clarke* 127 AD3d 771, 773 (2d Dep't 2015).
12. *See* Family Court Act §812(1).
13. *See* Penal Law § 240.30.
14. Note that "strangulation" and "choking" are sometimes used interchangeably. However, when external force is used to restrict airflow, the correct terminology is "strangulation." Be aware, however, that some clients, courts, and practitioners will sometimes refer to an incident involving "choking" when they really mean "strangulation." "Choking" occurs when a foreign object, such as food, internally obstructs the airway. "Strangulation" is the external obstruction of another's breathing or blood circulation either manually or with the assistance of a ligature or other device.

    See www.empirejustice.org/issue-areas/domestic-violence/case-laws-statues/criminal/strangulation-and-domestic.html.
15. Always review § 812(1) for the most current list of family offenses. As we continue to learn more about the abusive behaviors of domestic violence perpetrators, additional family offenses could be added to the statute.

16. *See E.H. v D.B.*, 2008 NY Misc LEXIS 4966, at *14-16 (Fam Ct, NY County, July 30, 2008).
17. *See* Family Court Act §154-b(2)(a).
18. Your client may also want to apply to the New York Department of State's Address Confidentiality Program. *See* www.dos.ny.gov/acp/.
19. *See* Criminal Procedure Law § 530.11; Family Court Act § 812.
20. *See* Criminal Procedure Law § 100.07; Family Court Act § 813.
21. Family Court buildings have childcare centers for parties with scheduled case.
22. Safe Horizon (www.safehorizon.org), a non-profit organization that helps victims of crime and abuse, provides a safe space in the Family Courthouses for victims to wait for their court appearances so that they do not need to face their abusers in the court's waiting area.
23. Felony family offenses include assault in the second degree, attempted assault in the second degree, criminal mischief in the first, second, and third degrees, grand larceny, identity theft in the first and second degrees, reckless endangerment in the first and second degrees, stalking in the first and second degrees, and strangulation in the first and second degrees.
24. Misdemeanor family offense include assault in the third degree, attempted assault in the third degree, coercion in the second degree, criminal mischief in the fourth degree, criminal obstruction of breathing or blood circulation, forcible touching, harassment in the first degree, aggravated harassment in the second degree, identity theft in the third degree, menacing in the second and third degree, reckless endangerment in the second degree, sexual abuse in the second and third degree, sexual misconduct, and stalking in the third and fourth degree.
25. Family Court Act § 818.
26. *Id.*
27. *See E.H. v D.B., supra* n. 16.
28. Some courts and practitioners have argued that Article 8 is governed by the CPLR, which provides for a six-year statute of limitations. *See* CPLR 213(1).
29. *See e.g. Leslie G. v Simon B.*, 33 Misc 3d 1235 (A) (Fam Ct, Kings County 2011).
30. Family Court Act § 812(1).
31. *See* www.nycourts.gov/forms/familycourt/familyoffence.shtml.
32. Similarly, if your client is the respondent in an order of protection case, the first thing you should do is scrutinize the petition to see if it makes out a family offense and gives your client sufficient notice to prepare a defense. If it does not, move to dismiss or serve a Demand for a Bill of Particulars.
33. *See e.g. Matter of Ellen Z. v Isaac D.*, 47 Misc 3d 389, 392 (Fam Ct, Queens County 2015) ("conclusory and unsubstantiated assertions in a family offense petition are insufficient").34. For more on interviewing domestic violence victims, *see* Chapter 3, *Interviewing and Assisting Domestic Violence Victims.*
35. Penal Law §§ 10(9)-(10).
36. *See V.C. v H.C.*, 257 AD2d 27, 35 (1st Dep't 1999) (petitioner need not "specifically state in the petition that 'aggravating circumstances' exist… [t]here is certainly no such requirement in the statute.").
37. 3 NY3d 357, 368 (2004). See Chapter 16, *Child Welfare Cases and Investigations Involving Domestic Violence*, for additional guidance.
38. *See* Penal Law § 70.02 for list of violent felonies.
39. Prior to 2003, an order of protection could only be issued for one year or three years.
40. *See* Family Court Act § 842.
41. *Id.*
42. *See V.C. v H.C.,* 257 AD2d 27, 33 (1st Dep't 1999) ("There is no logical rationale to limit the power of the court by prohibiting it from excluding a resident abusive spouse merely because the victim of the abuse has been forced by the abuser to flee their common home. Such a holding would reward the worst of abusers, ., those whose behavior was so violent or threatening that it forced their family members to

leave home, with automatic possession of the home, and would obviously frustrate the intent of the statutory scheme, which seeks to protect, not punish, the victims of domestic violence.")

43. *See Allen v Black*, 275 AD2d 207, 209 (1st Dep't 2000) (vacating order of protection issued by Family Court in part because the petitioner testified that the respondent had a gun—a fact that was absent from her the petition and thus caused the court to question her credibility).
44. *See* CPLR 3025(b).
45. *See* Family Court Act § 828(1).
46. *See* Family Court Act § 828(4).
47. *See* Family Court Act § 828(4).
48. Family Court Act § 154(c).
49. *See e.g.* Domestic Relations Law § 240(1)(a) ("Where either party to an action concerning custody of or a right to visitation with a child alleges… that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party,… and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction.")
50. Family Court Act § 165 (a).
51. *See People v Ortega*, 15 NY3d 610 (2010).
52. *See* Family Court Act § 832
53. *See* Family Court Act § 834; *see also V.C. v H.C.,* 257 AD2d at 35.
54. See Family Court Act § 846-a.
55. *See Walker v Walker,* 86 NY2d 624, 630 (1995) (allowing Family Court to impose three consecutive 6-month jail terms for violations of an order of protection).
56. *See People v Wood*, 95 NY2d 509 (2000).
57. *Id.*
58. *See* Family Court Act § 842.
59. *See id.* ("[t]he fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order"); *see also Matter of Ellen Z. v Isaac D.*, 47 Misc 3d 389, 393 (Fam Ct, Queens County 2015) (extension "may be granted whether or not domestic abuse has been perpetrated while the order of protection has been in effect").
60. *See Matter of Ellen Z. v Isaac D.*, 47 Misc 3d at 393 (granting two year extension of order of protection issued on consent).
61. *See Matter of Juanita D. v Mario D.*, 35 Misc 2d 719 (Fam Ct, Queens County 2012); *Matter of Ellen Z. v Isaac D.*, 47 Misc 3d at 393-94.

Section 3
Domestic Violence in the Courts

10

Representing Victims of Domestic Violence in Supreme Court Matrimonial Actions

by Hon. Emily Ruben

One of the most valuable services an attorney can provide a married victim of domestic violence is a divorce. Psychologically, after a divorce she is no longer legally bound to the batterer, no longer under his control. A divorce provides closure, a chance for a new start, a chance to get on with her life. Pragmatically, a divorce often resolves the economic issues of the marriage, such as the distribution of marital property and debt, child support and maintenance. It will allow a woman to take stock of what she has and to go forward. When the parties have minor children, final orders of custody and visitation are included in the divorce judgment.1 The court will also include final orders of protection in a divorce judgment or a decision denying a divorce.[2]

Divorce law in New York State is different from that in most other states. Family law issues are adjudicated in two different courts, which creates a uniquely bifurcated system. The Family Court is a court of limited jurisdiction, and the judges of that court do not have the power to determine the status of a marriage or distribution of marital property. A divorce proceeding can only be brought in Supreme Court. Both courts have jurisdiction to determine the ancillary issues of a marriage (support, custody, orders of protection, etc.). While some cases avoid this bifurcation by being heard in Integrated Domestic Violence courts, a majority of divorce proceedings remain in dedicated Matrimonial Parts of Supreme Court.

Until October of 2010, New York was one of the few remaining states that still required fault grounds for a divorce. A divorce based on irreconcilable differences did not exist in New York, and the only way to obtain a "no-fault" divorce was if both parties entered into a written, properly authenticated agreement and abided by the agreement for at least a year. For victims of domestic violence, a separation agreement was often not a viable option. That all changed in 2010, when the New York State Legislature added the ground of "irretrievable breakdown" to the list of divorce grounds in New York.[3]

Grounds

The vast majority of divorces are now obtained on the ground of irretrievable breakdown of the marriage although the other grounds are still available to litigants. When a battered woman comes to an attorney's office seeking a divorce, one of the first decisions that needs to be made is what ground to use. The choices include: irretrievable breakdown, cruel and inhuman treatment, abandonment of at least a year's duration, confinement of the defendant in prison for three or more years, adultery, or living apart pursuant to a valid separation agreement or judgment of separation for a year or more.[4]

To obtain a divorce on the ground of irretrievable breakdown of the marriage, all that is needed is a sworn statement, in the form of a verified complaint, of one party to the marriage averring that the marriage has irretrievably broken down for a period of six (6) or more months. There is no defense

to this cause of action. The simplicity of this new cause of action has rendered the other causes of action virtually obsolete.

That said, there may still be times when an attorney, in consultation with her client, should consider pleading the ground of cruel and inhuman treatment either on its own or with irretrievable breakdown.

To obtain a divorce on the ground of cruel and inhuman treatment, the client must prove that her husband's treatment of her so endangers her physical and mental well-being that cohabitation with him is "unsafe or improper."[5] Generally, the complaint should clearly allege a course of conduct over a period of time and, where possible, recite the specific times, dates and places of the conduct. It should detail physical or psychological harm suffered that required medical treatment or caused emotional or physical pain and suffering. It should describe any history of police intervention and list any orders of protection obtained with the date, court and docket number. Finally, when the conduct complained of occurred in the presence of others, especially the parties' children, that should be described as well.[6]

The verified complaint will have to include more than one "serious" instance of cruelty.[7] The Court of Appeals has mandated that a distinction be made between long and short term marriages, requiring a substantially higher standard of misconduct in marriages of long duration.[8]

Although cruel and inhuman treatment seems the most obvious ground in a complaint for a victim of domestic violence, it is often not the right one or the only one to use. It is not uncommon for such a client to prefer the far more innocuous ground of irretrievable breakdown because she fears that allegations of cruel and inhuman treatment might incite further violence.[9] On the other hand, a cruel and inhuman treatment cause of action could positively affect a custody battle and make the plaintiff more sympathetic in the eyes of the court.

Timing issues could also inform the use of grounds other than irretrievable breakdown of the marriage. In a marriage of less than six months duration, the ground of irretrievable breakdown will not be available and a victim of abuse in such a short-term marriage may not want to wait to file for divorce. In that situation, cruel and inhuman treatment could well be the only viable ground available to the victim. Also, the residency requirements imposed by the Domestic Relations Law § 230 could influence the ground chosen.[10] Domestic Relations Law § 230 requires that one of the parties reside continuously in New York State for two years, or continuously for one year if other conditions are met including that the "cause of action occurred in the state." At least one trial level court has held that the ground of irretrievable breakdown of the marriage cannot be considered a cause that occurred in the state.[11]

Accordingly, the implications of each ground should be carefully reviewed with the client. If a decision is made not to allege cruel and inhuman treatment, the client is not precluded from later moving for an order of protection in the divorce proceeding or from amending her complaint to include this cause of action if the situation changes. On the other hand, if an attorney plans to move for an order of protection for the client in Supreme Court, a well-developed and detailed cruel and inhuman treatment cause of action in a complaint can certainly buttress such a motion.

On its face, Domestic Relations Law § 210 seems to prohibit actions for divorce based on cruel and inhuman treatment that occurred more than five years before the action was commenced. Prior to the enactment of the irretrievable breakdown ground, this often posed a real problem for a victim of domestic violence who fled her batterer more than five years prior to the commencement of an action and had had no contact with him since then. Fortunately, the courts interpreted the five year provision of Domestic Relations Law § 210 to be a statute of limitations and not a condition precedent to bringing an action.[12] Because a statute of limitations is an affirmative defense that the defendant must plead and prove, if the defendant defaults, or appears and fails to plead the statute of limitations affirmative defense, that defense is waived.[13]

Accordingly, even if all instances of cruel and inhuman treatment occurred more than five years prior to the commencement of an action, it is not frivolous to commence a divorce based on a cruel and inhuman treatment cause of action. If the defendant defaults or appears and fails to plead the statute of limitations affirmative defense, as is fairly common in many cases where there has been a long separation and issues of finances and custody have previously been resolved, the divorce will be granted. The court or a clerk cannot reject a set of uncontested divorce papers because the instances of cruelty alleged occurred more than five years prior to the commencement of the action.

Importantly, fleeing a marital residence because of violence can be used as an affirmative defense to a batterer's abandonment cause of action, even if it occurred more than five years prior to the commencement of the action and could not serve as the basis for a cause of action because the opposing side raised the statute of limitations affirmative defense.[14]

Once a decision has been made to commence a divorce action and a cause or causes of action have been selected, an additional strategic decision must be made. Should the defendant be served with a summons with notice or with a summons and verified complaint? Because a summons with notice states only the cause(s) of action and the ancillary relief requested, it is far less likely to incite further violence or opposition than service of a fully developed complaint containing grounds other than irretrievable breakdown. On the other hand, if the plan is to commence the divorce action simultaneously with or shortly before moving by order to show cause for an order of protection, it might be advisable to commence the action with a detailed complaint, which would be an exhibit to the order to show cause.

Orders of Protection

An order of protection is an injunction that may prohibit a person from engaging in certain offensive and illegal behavior or direct that person to stay away from specific people and places. In the context of a divorce case, an order of protection in either Family Court or Supreme Court can contain the same terms and conditions and will be issued when a "family offense" has been committed. In New York, a battered spouse can obtain an order of protection in three different forums — Criminal Court, Family Court and Supreme Court. Domestic Relations Law §§ 240 and 252 are the statutes that authorize the Supreme Court in any matrimonial action to issue an order of protection. Because neither of these statutes provides any standards or criteria for determining whether to grant an order of protection, courts have consistently held that the standard to be used is that provided in Article 8 of the Family Court Act.[15] However, the procedure for requesting an order of protection in Supreme Court is governed by the Civil Practice Law and Rules and not the Family Court Act. Accordingly, in Supreme Court a request for an order of protection is made in a summons with notice, a complaint or by motion, not by petition. Domestic Relations Law § 240(3) authorizes the court to grant an order of protection even if the other relief demanded in the divorce action is denied, as long as the other relief was not denied because of lack of jurisdiction.

In the Supreme Court, a party to a matrimonial action can seek an order of protection in several different ways. A plaintiff can include an order of protection as part of the ancillary relief she requests in her summons with notice or her verified complaint. A defendant can request one in her answer. Putting the request for an order of protection in the initial pleading assures that this issue will be adjudicated at the trial of the case. If more expeditious relief is needed, as will usually be the case, the party seeking an order of protection may also move for pendente lite relief by either notice of motion or order to show cause. For obvious reasons, this relief is most frequently sought by order to show cause.

When a client who needs an order of protection and a divorce first consults with an attorney, a strategic and pragmatic decision must be made regarding the best forum to obtain the needed relief. An order to show cause from the Supreme Court, with a temporary restraining order granting an order of protection, could be served on the defendant simultaneously with the summons and complaint or summons with notice commencing the divorce. Alternatively, the commencement of the matrimonial action could be put on hold while an order of protection is sought in Family Court. A third option is to proceed simultaneously in both forums, seeking an order of protection in Family Court and a divorce in Supreme Court. Domestic Relations Law § 252 explicitly authorizes either the Supreme Court or the Family Court to entertain a request for a temporary order of protection or an order of protection when a divorce action is pending in Supreme Court.

A likely outcome of an order of protection petition filed in Family Court after the commencement of a matrimonial action is that the Family Court judge will adjourn its hearing, continuing any temporary order of protection, to allow the parties time to make a motion in Supreme Court for the relief.[16] A similar result is likely even if the order of protection proceeding in Family Court was commenced before the divorce action if the Family Court proceeding is not resolved or close to resolution when the divorce action is commenced.

Unfortunately, the perception of some judges is that domestic violence victims are manipulating the system and trying to get an unfair advantage when they seek an order of protection in Family Court after commencement of a divorce case. This is especially true if the party is represented by counsel in both forums and initiated both proceedings.

So, which forum should you choose for obtaining an order of protection when representing a married victim of domestic violence? The answer to this question will depend on the specific circumstances of each case, and most of the remainder of this article will be devoted to examining the pros and cons of seeking an order of protection in Family Court and in Supreme Court.

As stated earlier, Article 8 of the Family Court Act provides the standard for granting orders of protection in both forums.[17] Nevertheless, at least in New York City, a litigant is more likely to obtain a temporary order of protection from the Family Court. This may be because of the higher volume of cases in Family Court and the fact that the procedure for obtaining orders of protection is more routinized and does not require the drafting of lengthy papers or the services of an attorney. Family Court is far more litigant-friendly. An intake judge will usually hear the victim plead her case directly within hours of her filing her petition. In Supreme Court, a compelling affidavit from the party seeking the relief is often not enough. The court will require corroborating affidavits and/or documentary evidence (e.g., prior orders of protection, police reports, medical records, photographs of injuries).[18]

Family Court and Supreme Court order of protection practices have been aligned for more than 15 years. Domestic Relations Law §§ 240(3) and 252 mandates that a party moving for an order of protection in Supreme Court, as in Family Court, shall be entitled to file her motion or pleading on the same day she first appears in court. Furthermore, the Supreme Court, like the Family Court, is now required to hold a hearing on the motion for a temporary order of protection on the same day or the next day that the court is in session.

The duration of a temporary order of protection, which is generally granted ex parte, differs, at least in New York City. Because of the Family Court's overwhelming case load and the fact the Family Court judge who issues a temporary order of protection may not be the judge before whom the case will be returnable, the return date for a hearing on the order of protection petition is often several weeks in the future. If the petitioner has been granted a temporary order, this is a positive factor, and in Family Court it is likely to be granted if the allegations in the petition support a family offense. If she is denied temporary relief, the long return date may work to her detriment.

In Supreme Court, the judge who signs the order to show cause and decides whether or not to grant a temporary ex parte order of protection is generally the judge who will hear the case. Supreme Court judges have greater control over their calendars and are likely to make the motion returnable within a week or a few days. A party who has been excluded from the marital residence by a Supreme Court justice on an ex parte basis can expect a far more expeditious hearing than one ordered ex parte to stay away from the home of his spouse by the Family Court. Similarly, a party who has been denied temporary ex parte relief can expect her motion to be returnable in a relatively short period of time.

Perhaps more significantly, the duration of a final order of protection differs in each court and the Supreme Court is the friendlier forum on this count. The duration of a final order of protection is very limited in Family Court. The term of a final order of protection in Family Court is generally two years. The term can be extended to five years only if the conduct alleged in the petition is in violation of a valid order of protection or the court makes a finding of aggravating circumstances.[19] On the other hand, Domestic Relations Law §§ 240(3) and 252 both provide: "The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order." Thus, at least when the parties have minor children, an order of protection in Supreme Court can clearly last as long as eighteen years. Because the Domestic Relations Law is silent on the duration of an order of protection when there no longer are or never were any minor children, the duration of a final order of protection is entirely within the discretion of the Supreme Court justice. In cases of severe violence, Supreme Court justices can, and do, issue lifetime orders of protection or orders that will be in effect far longer than the five-year maximum obtainable in Family Court.[20]

Domestic Relations Law §§ 240(3) and 252 authorize inclusion of language prohibiting or suspending firearms licenses and ordering restitution in orders of protection issued pursuant to those statutes. The terms available in a Supreme Court order of protection are consistent with those available in a Family Court order of protection.[21]

Another distinction between the two courts is that only a Supreme Court justice can issue an order of exclusive occupancy.[22] An order of exclusive occupancy is an order that awards possession of the marital residence to one party. It is a form of property distribution over which the Family Court has no jurisdiction unless the issue is directly referred to it by the Supreme Court.

However, the Family Court can obtain virtually the same result by issuing an order of protection directing the respondent to stay away from the home of the petitioner. The Supreme Court can also issue an order of protection with a stay away provision. When possession of a leased residence or ownership of real property may be an issue, it is important to seek both an order of protection and exclusive occupancy in the Supreme Court. The police cannot enforce an order of exclusive occupancy as they can an order of protection, and an order of exclusive occupancy will preclude partition of marital real property.

When a married client with minor children has been the victim of serious domestic violence and there is some basis to fear she might be charged with neglect for failing to protect the child(ren) from the batterer or for their exposure to the violence, it might be prudent to move for an order of protection in Supreme Court rather than in Family Court. Family Court judges regularly use the Administration for Children's Services (ACS) to investigate the parties and their home environments in Article 10 abuse/neglect proceedings and in Article 6 custody, guardianship and adoption proceedings. Consequently, they are far more likely to call upon ACS to investigate domestic violence and a possible failure to protect charge than are Supreme Court justices, who do not have ACS caseworkers and attorneys at their immediate disposal.

Since domestic violence is a factor to be considered in custody determinations, it may be in the interest of the battered spouse to have the same judge adjudicate all orders of protection and custody

issues. Unlike a request for an order of protection, which technically can be made in either Family Court or Supreme Court even after the commencement of a divorce action, a custody petition brought in Family Court after the commencement of a divorce action will be dismissed.[23] Some Family Court judges will routinely dismiss custody proceedings even if they were commenced in Family Court before the commencement of a divorce action. Accordingly, when a divorce action has been commenced in Supreme Court and custody is disputed, an order of protection should be pursued in that forum as well.

Historically, practitioners have preferred Family Court orders of protection over Supreme Court orders because Family Court orders were more easily recognized by the police and were routinely submitted to the statewide registry while Supreme Court orders were not. This is no longer the case. Pursuant to Domestic Relations Law § 240(3)(d), the chief administrator of the court has promulgated uniform temporary order of protection and final order of protection forms to be used in Supreme Court.[24] These forms were designed to be compatible with the computerized statewide registry, and Supreme Court participation in the registry program is mandatory. When a Supreme Court justice grants a temporary or final order of protection, the attorney representing the victim of domestic violence should provide the court with a completed form for signature to ensure that the proper form is used that the order will find its way to the state registry.

Another reason that Family Court orders of protection seemed more desirable was that police officers could serve them and the police officer's affirmed certification regarding the service was sufficient proof of service. However, since 1996, Domestic Relations Law § 240(3-a) has authorized the same type of service of Supreme Court orders of protection that have been issued "on default." Domestic Relations Law § 240(3-a) also allows "any associated papers… including the summons and petition or complaint" to be served by the police at the same time. The officer's affirmed certification of service is sufficient proof of service. When preparing an order to show cause for an order of protection in Supreme Court, an attorney should request that the court order service pursuant to Domestic Relations Law § 240(3-a). This should allow for the same simplified and safe service and notice as provided by the Family Court Act.

Finally, only an order of protection requested pursuant to Domestic Relations Law § 252 can require that the party who is the object of the order pay reasonable counsel fees and disbursements incurred by a person protected by the order to obtain or enforce it. This provision can be invoked by either the Family Court or the Supreme Court if a matrimonial action is pending. In the same way that Family Court judges might be more liberal about issuing temporary orders of protection because they are more accustomed to them, a Supreme Court justice is likely to award more generous fees because counsel fee applications are more routine in that forum.

Court Conferences and Referrals

Parties in contested matrimonial actions are required to appear in court for preliminary conferences, compliance conferences, and pre-trial conferences.

These conferences are often conducted outside of the formal courtroom in smaller rooms. This means that a victim of domestic violence may well be put in the position of sitting in very close proximity to her batterer. However, Supreme Court justices are becoming more sensitive to issues of domestic violence and may be amenable to an attorney's request to waive the requirement of a victim's presence during all conferences or, at a minimum, agree to conduct the conference in the courtroom with court officers present. In the Family Court in New York City, victims of domestic violence have the option of waiting in Safe Horizon offices located in each courthouse.

When custody and visitation are disputed issues, both Supreme and Family Courts sometimes rely on court-employed social workers who meet simultaneously with both parties, court-sponsored parental education programs, parenting plans and mediation to assist in the resolution of these conflicts. Attorneys representing victims of domestic violence in custody and visitation disputes in either court should, with their client's permission, promptly inform the court that their client is a victim of domestic violence. The court system acknowledges that mediation, parental education programs, parenting plans and meetings between both parties and a social worker are generally inappropriate and potentially dangerous where domestic violence has been present. The Office of Court Administration provides regular training for Family Court judges and matrimonial Supreme Court justices, and counsels them not to make referrals to such programs when the existence of domestic violence is brought to their attention.

Conclusion

There are no simple answers to the question of how best to represent married victims of domestic violence. This article has touched on only a few of the many factors that should be taken into consideration in trying to answer that question. These decisions cannot be made in a vacuum. It is extremely important that an attorney representing such a client fully explain to her the possible ramifications of different strategies and carefully listen to her concerns and the specific facts of her situation.

Notes

1. Domestic Relations Law §§ 236(b), 240.
2. Domestic Relations Law §§ 240(3), 252.
3. Domestic Relations Law § 170(7) ("The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce").
4. Domestic Relations Law § 170.
5. Domestic Relations Law § 170(1).
6. Care should be taken when alleging that abuse occurred in the presence of minor children. While such an allegation strengthens the cause of action and will be a consideration in a custody dispute, it could also prompt the judge to instigate a child welfare investigation that could end in a finding of neglect based on failure to protect the children within the meaning of child protection laws.
7. *Brady v Brady,* 64 NY2d 339 (1985); *Wikiera v Wikiera,* 233 AD2d 896 (4th Dep't 1996); *Meier v Meier,* 156 AD2d 348 (2d Dep't 1989), *lv dismissed,* 75 NY2d 946 (1990).
8. *Brady*, 64 NY2d at 339.
9. Domestic Relations Law § 170(7).
10. Domestic Relations Law § 230.
11. *Stancil v Stancil*, 2015 NY Slip Op 25045 (Sup Ct, NY County 2015).
12. *Figueroa v Figueroa*, 66 Misc 2d 257 (Sup Ct, Queens County 1971).
13. *See also Maryon v Maryon*, 60 AD2d 623 (2d Dep't 1977) ("In an undefended matrimonial action there is no requirement that the plaintiff must negate any defense which might possibly have been raised by the defendant").

14. *Tabib v Tabib*, 56 AD3d 460 (2d Dep't 2008); *Jeffrey v Jeffrey*, 172 AD2d 719 (2d Dep't 1991).
15. *Jennifer JJ v Scott KK.*, 117 AD3d 1158 (3d Dep't 2014); *Weiner v Weiner*, 27 Misc 3d 1111 (Sup Ct, NY County 2010); *G.K. v L.K.*, 20 Misc 3d 1138(A) (Sup Ct, Kings County 2008); *Ahmed v Ahmed*, 180 Misc 2d 394 (Sup Ct, Nassau County 1999); *Roofeh v Roofeh*, 138 Misc 2d 889 (Sup Ct, Nassau County 1988).
16. *T. v T.*, 107 Misc 2d 672 (Fam Ct, NY County 1981).
17. *Ahmed*, 180 Misc 2d at 394; *Roofeh*, 138 Misc 2d at 889.
18. *Peters v Peters*, 100 AD2d 900 (2d Dep't 1984).
19. Family Court Act § 842.
20. Weiner, 27 Misc 3d at 1111.
21. Family Court Act §§ 841, 842.
22. Domestic Relations Law § 234.
23. *Harley v Harley*, 129 AD2d 843 (3d Dep't 1987); *Poliandro v Poliandro*, 119 AD2d 577, 578 (2d Dep't 1986), *lv dismissed* 68 NY2d 908 (1986); *James A.T. v Denise M.T.*, 3 Misc 3d 1064 (Fam Ct, Orange County 2004).
24. These forms are available from New York State's Unified Court System, http://www.courts.state.ny.us/forms/.

11

Prosecuting a Domestic Violence Case: Looking Beyond the Victim's Testimony

by Elizabeth Cronin

Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace.

Kofi Annan, Secretary-General of the United Nations

A woman is lured to a rooftop by her ex-boyfriend who wants to "talk" about their relationship. She wanted to believe that they could get back together but she had left him many times because he had beaten her so often. She knew in her heart he loved her, but she finally felt strong enough to tell him their relationship was over and they both should move on. She entered the building, passing a boy on the staircase and went to the roof where her ex was waiting for her. He closed the door as she stepped out onto the roof.

He told her that it would never be over — that if he couldn't have her, no one would. He took out a hammer and began striking her on the head, fracturing her skull, splattering blood and brain matter onto the roof. As she fell to the ground, he fled, leaving her alone and critically injured. She miraculously was able to scream and neighbors called the police who found her near death. Through sheer will and quick medical intervention, she lived to see him arrested.

One in four women will experience domestic violence during their lifetime.[1] In New York State, in 2013, there were 84,577 **reported** domestic violence victims according to the New York State Division of Criminal Justice Services. Those numbers are likely significantly higher because most domestic violence goes unreported.[2] In fact, domestic violence is one of the most unreported crimes in the country.[3] Criminal violence is a serious public health issue,[4] and is incredibly costly — exceeding $5.8 billion each year, $4.1 billion for direct medical and mental health services.[5] Domestic Violence costs are estimated at a staggering $8.3 billion in annual expenses.[6]

Domestic violence is also a social and criminal justice issue. Yet prosecution of these cases has always been a challenge. For many years, intra-familial violence was viewed as a private issue, not something for law enforcement to address except perhaps as temporary crisis intervention.

Despite the reality that domestic violence is a crime, police traditionally responded by making arrests only as a last resort; they preferred to allow the individuals to work it out with or without social service intervention.[7] Even the American Bar Association recommended that police attempt to quell domestic "disputes" without resorting to arrest.[8] Victims were not encouraged, and in some instances, not allowed, to pursue criminal charges against their abusers. Those who did often faced a hostile system filled with untrained professionals. Police, judges, medical responders, even prosecutors, were often uneducated in the social and psychological dynamics of abuse and grew easily frustrated with victims who were uncertain about pursuing charges.[9] Victims were rightly concerned that orders of protection, if they could even get them, were nothing more than pieces of paper. In New York, as late as 1962, domestic violence cases were ordered transferred to family court from criminal court.[10]

The tide against treating domestic and family violence cases as non-criminal offenses finally began to turn in the 1970s and 1980s. Police departments were facing civil lawsuits from domestic violence victims,[11] and the civil rights and women's rights movements invited activism and participation.[12] Congress passed the Violence against Women Act (VAWA) in 1994[13] which allocated $1.6 billion to fight violence against women by, among other things, providing funds to educate police, prosecutors and judges, support battered women's shelters and, perhaps most critically, mandating arrest for domestic violence crimes. That same year, the New York State Legislature passed the Family Violence and Domestic Violence Intervention Act of 1994 amending Criminal Procedure Law §140.10 to include mandatory arrests for particular domestic violence crimes.[14] This mandatory arrest policy was unique, especially for its time: for all other crimes in New York, police "may" arrest a person, but this new statute obligated police to make the arrest.[15]

As a result of mandatory arrest laws, many prosecutors adopted "no-drop" policies, designed to frustrate efforts by victims to withdraw charges. As deputy bureau chief of the Domestic Violence Bureau in the Westchester County District Attorney's Office, I saw innumerable cases where women attempted to withdraw criminal charges against offenders and sometimes did everything they could to thwart prosecution efforts. My experience mirrored what the literature shows: that women attempt to withdraw charges for a myriad of reasons. Victims in family violence and interpersonal violence cases frequently tried to withdraw the charges.[16] Reasons underlying this hesitation included fear of retaliation, being threatened, financial dependence, the complexity of children-in-common, and the view that any action would not make any difference.[17] Many, too, were entrenched in the cycle of violence and continued to stay with, or return to, their abuser. Even women with orders of protection would take the offender back, especially if the abuser apologized and promised never to hurt them again.

Prosecutors officially represent the State, and therefore have discretion to proceed or drop charges based on lack of evidence or lack of cooperation of the victim.[18] Unlike in the civil context, the individual has no technical power to drop criminal charges.[19] Obviously, the no-drop policy takes the burden off the victim in deciding whether to move forward with the prosecution.[20] But prosecutors must decide if expending limited resources on cases where the victim is uncooperative makes sense, particularly if little physical or corroborative evidence exists to support prosecution. Moreover, some advocates oppose no-drop policies, viewing it as an intrusion by the criminal justice system into the victim's autonomy.[21] Further, questions have been raised about whether the victim herself is actually in a better position to evaluate whether the no-drop policies further endanger her through retaliation by the abuser.[22]

Notwithstanding the above, prosecutors in New York continue to adhere to no-drop policies and therefore need to know what to do if they wish to proceed in the absence of the victim. According to the National Institute of Justice, most domestic violence cases are disposed of with a plea.[23] The Report also found that although domestic violence cases rarely proceed to trial, those that do routinely result in convictions.[24] Victims have found that the court experience gave them a sense of control, motivated them to end the abusive relationship and ultimately made them feel safer.[25]

Fear of proceeding through the criminal justice system appears to be at least somewhat alleviated when expertise and support are strong, as found in specialized prosecution offices and courts with increased advocacy.[26] New York recognized this and implemented Domestic Violence Courts in 1996, adding the Integrated Domestic Violence Courts in 2001.[27] The DV courts provide contact with a victim advocate, which can be a critical step in gaining the trust and cooperation of victims.[28]

Working in tandem with the victim is the best course. Doing so with a victim advocate, either through the police department, prosecutor's office or through a victim assistance provider, will likely make cooperation more likely. Many prosecutors will still face the situation where a victim who initially agreed to press charges changes her mind. She may fully recant or claim that she was misunderstood or misspoke.[29] The assistant DA may find that the victim has faced emotional appeals from the abuser or his family, loneliness, threats of suicide by the offender, fear of financial insecurity or desire to keep the family together.[30]

The prosecutor must now decide how, or whether, to proceed without the victim's testimony. District Attorneys often support the practice as a last resort to not only protect the victim, but the community.[31] From an evidentiary standpoint, the case is treated like a homicide — the jury will never hear from the victim herself but will still have sufficient evidence to convict.[32] The prosecutor has the ability to do so. Building a strong case may encourage the abuser to plead guilty. Most domestic violence cases lead to misdemeanor charges such as assault, harassment, and stalking. Prosecutors will need to be flexible and creative in considering what charges to bring. If there are no physical injuries, other crimes should be considered, such as criminal mischief for destruction of property, burglary or criminal trespass or criminal contempt for violation of an order of protection.[33]

When there are felony charges at issue, the prosecutor can apply to the court for a material witness order. This can force the victim into court if there is reasonable cause to believe that the victim possesses material information but is not amenable or responsive to a subpoena.[34] Such orders are available only where an indictment is pending, a felony complaint was filed or the case is in the Grand Jury. Prosecutors should be cautious in proceeding down this highly controversial path. Victim advocates have been vocal in opposing the practice as an abuse of power and re-victimization of the victim.

Successfully prosecuting a domestic violence case without the victim requires enlistment of first line responders such as law enforcement and the medical community. If prosecutors will not have a victim's testimony, it is essential to collect as much other evidence as possible. Some physical evidence that might otherwise be ignored or lost must be collected. Having multi-disciplinary teams is an excellent way to ensure that all stakeholders are working together and understand the challenges. This should include in-service training for responders and providers.

Photographs of the Victim's Injuries and Crime Scene

Photographs can be very compelling evidence even when a victim cooperates with a prosecution. In the absence of the victim, they may be the best demonstrative evidence of the extent of the injuries. It is essential that photographs be taken as soon as possible after the injuries are inflicted. This will not only provide a great visual record of the injury, but can assist in corroborating when the injury occurred, which may be relevant to a defense such as alibi. With the advancement of technology, images can be taken instantaneously. Police, emergency rooms, emergency responders and victim assistance providers should have equipment such as digital cameras and tablets readily available to take photos immediately.

New York allows introduction of photographs to document injuries such as bruising and "red marks." Witnesses with expertise are allowed to testify whether marks were "fresh."[35] Even photographs

that may be inflammatory are admissible if the probative value outweighs the potential for prejudice.[36] As long as the photographs are not offered to "arouse the emotions of the jury and prejudice the defendant," they should be admitted.[37] A proper foundation must be laid by the witness who viewed the item photographed, establishing that the photo accurately depicts how the item, scene or person appeared when it was taken.[38]

Photographs can be offered to prove an element of the crime charged, to assist an expert witness and even to disprove a possible defense. For example, photographs of a victim's injuries taken at the outset and then at different times during the healing process can be relevant in a felony assault charge to show the victim has suffered a permanent disfigurement such as scarring.[39] Moreover, where a victim has been strangled, police can return a day or so later to photograph any bruises that did not appear immediately following the attack.[40] If bruises do appear, prosecutors may want to consider filing additional assault charges. Photographs can be used to prove the intent of the defendant to cause physical injury or to counter a defense of consent.[41] They may also be relevant to the severity of the injuries.[42] Photographs of significant injuries to a victim's face, for example, could negate any colorable justification defense.[43]

The use of crime scene photographs can also be very compelling. Pictures of smashed and broken items, blood, and torn clothing can provide persuasive evidence of a struggle or corroborate a charge of criminal mischief.

Photographs may also be helpful for expert witnesses, particularly medical providers who can rely on the photographs to formulate an opinion.[44] An expert can testify about the colors of bruising or the state of healing to narrow the time frame of the occurrence and eliminate a defense. An expert may also be able to form an opinion that bruises form a particular pattern such as thumb and fingerprints on the victim's neck to establish a strangulation charge.[45]

An issue currently being debated is use of body cameras worn by police. While the debate has focused on the use of the cameras to monitor the conduct of police officers, they can also be effective in the collection of evidence. Police arriving on the scene may be able to document the victim's injuries, the defendant's conduct, recording an immediate statement from the victim, and showing the condition of the scene.[46] However, there are still a number of privacy and safety concerns that need to be addressed. Questions remain about the privacy and confidentiality of victims and their families: what if children are present; should cameras be turned off when the victim has been raped or is naked? How can law enforcement keep the videos from becoming public or exploited for entertainment purposes, as happens with dashboard cameras in police vehicles? Use of body cameras can extend the public eye into people's homes and therefore there should be strict rules about their use.[47]

Strangulation is rightfully getting more attention by those dealing with domestic violence cases. In one study, 68% of victims seen in hospital emergency rooms reported being strangled in addition to other abuse.[48] Women who report being strangled by an abusive partner are more likely to be killed by the abuser. Strangulation often occurs late in the abusive relationship and thus represents a higher risk for death.[49] Evidence corroborating strangulation is difficult to secure. Regular photography may not depict bruising and ligature marks, particularly if the victim is only seen by medical or police personnel immediately following the injury. Ultraviolet and infrared photography are useful tools in documenting injuries that might otherwise be unseen to the naked eye, specifically contusions and bruises.[50] Such a photograph can show details of an injury that might otherwise go undetected. This may be particularly useful on individuals with darker skin.[51]

New York has very strong anti-strangulation laws. Under the misdemeanor criminal obstruction of breathing or blood circulation, Penal Law § 121.11, there is no requirement of proof of physical injury.

Moreover, strangulation in the second degree, a class D violent felony, allows for the introduction of non-physical injury evidence such as the victim losing consciousness.[52]

Aside from utility as evidence at trial, photographs can be essential in obtaining a plea. In one case I prosecuted, a husband stabbed his wife to death in the bathroom. His defense was that she came at him with a knife and in wrestling it away from her, she was accidentally stabbed. During jury selection, defense counsel took graphic photos in to his client in the lock-up. The defendant pleaded guilty to second degree murder about twenty minutes later.

Crime Scene Investigation

Proper crime scene investigation and collection of evidence can be critical to a successful prosecution of a domestic violence case, particularly if the victim refuses to testify. Evidence collection may include taking photographs, seizing physical evidence such as clothing, and recording testimonial and documentary evidence.[53] As always, prosecutors must follow the rules on evidence collection such as obtaining consent or a search warrant. Without consent, police must ordinarily obtain a search warrant, but exigent circumstances may exist that would create an exception to the warrant requirement.[54] Therefore, if a neighbor calls police to report screaming and what sounds like someone being injured, police may be able to enter the premises without a warrant, but must remember they do not have the right to do a full search. In those situations, an officer should be posted for evidence preservation and a warrant obtained.

If the police are called to the scene and allowed into the home, the victim can consent to a search. It is more likely that a victim will be cooperative at that time. Once the victim's safety is ensured, officers may take photographs of the victim and the scene, including blood, smashed glass, broken furniture. All visible evidence should be memorialized in the reports. Damage to property leaves tangible evidence that may be instructive on the level of rage of the offender. Not only may this be evidence of physical abuse of the victim, but may also be used to establish elements of burglary, criminal mischief or assault. Moreover, police should ascertain whether the victim already has an order of protection because there may be valuable evidence to establish a criminal contempt charge against the abuser.

Important evidence, sometimes overlooked, includes information that can be supplied by friends, neighbors, family and co-workers. Statements about threats, observations of abusive or controlling behavior, the offender's presence when there is a stay-away order, reports of the abuser showing up to the victim's job or calling repeatedly, and observation of the victim's physical condition over time can be critical evidence where a victim becomes uncooperative.

The offender's own statements can be excellent evidence against him. As the Supreme Court noted, "[t]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[55] Prosecutors should always be mindful to make sure they serve and file the CPL 710.30 so that statements of the defendant are not precluded at trial. A detailed written statement, signed by the abuser, or statement videotaped by law enforcement would be optimal. These should include as much information as possible about the immediate incident and any prior incidents. Police should also be careful to document any injuries they observe on the defendant that would be consistent with the abuse of his partner. Law enforcement should be mindful of the importance of documenting self-defense injuries (i.e., scratches on the defendant). These injuries can be photographed and as with other evidence, his fingernails can be scraped, or police can obtain swabs of other serological evidence either with his consent or with a warrant.

Prosecutors must remember that less than a full confession can still be highly useful in a prosecution against a domestic violence offender. A defendant will often admit to certain things that, in his mind,

are exculpatory but which will actually strengthen the case. In a child sexual abuse case I prosecuted, a father stated that he was helping his pre-pubescent daughter learn how to use tampons and his finger accidently slipped inside her vagina. This corroborated her statement that he abused her and it was patently absurd that a child her age would be using tampons, especially since medical reports established she was not menstruating.

A victim or other person can obtain a statement from an offender with or without police involvement. If possible, such a conversation should be recorded. While there is no absolute prohibition in New York from making and using such statements provided one of the parties to the conversation knows it is being recorded, prosecutors and law enforcement must be mindful of both Penal Law § 250 and CPLR 4506.[56] The authenticity of the recording must be established by the person who made it.[57] It is also worthwhile to obtain recordings of voicemails or texts left on the victim's cellphone. If a victim becomes uncooperative after getting the statement from the offender, it may present a challenge to introduce the tape into evidence. Prosecutors should also be mindful that an abuser can use these same techniques against the victim. A victim who contacts the defendant can be recorded recanting or asking him to return to her.

Social media can be an excellent source of evidence. As the saying goes, nothing really goes away once it is posted on the Internet.[58] Offenders may post information and photographs on their Facebook accounts, Twitter, Instagram, blogs and others that may be relevant and admissible against them in a criminal case.[59] According to the International Association of Police Chiefs, 96% of police departments surveyed use social media and more than 80% use it to help solve crimes, primarily Facebook and Twitter.[60] For example, an offender who has an order of protection against him might post something showing that he has visited the victim or attempted to. It might also be used to disprove an alibi. Likewise, if the victim claims that she scratched his face and a photo on Facebook shows him with a facial laceration, it could prove useful in the case against him. Incredibly, many suspects post items admitting to their criminal conduct such as posing with a weapon which could be very relevant especially if the victim told investigators she was assaulted with a weapon.

Of course, there are complicated legal and ethical issues associated with the procurement and use of social media. Prosecutors must be aware of what the law and rules are concerning how the information is obtained and whether it is content or non-content and who has standing to challenge the evidence.[61] Be very mindful of the prohibition against attorneys and their agents gaining access to a person's social media site through false pretenses.[62]

Cell phones, which today are ubiquitous, are valuable tools for law enforcement. Many victims of domestic violence are also victims of stalking and harassment through communication on their cell phones. Some offenders are able to use smart phones to track their victims through GPS technology.[63] Law enforcement can obtain warrants and subpoenas to gather information from the cellular companies such as call detail records on individual subscribers, and "tower dumps" on all calls from a particular base station. Moreover, a cell phone location can be identified through "pings" because cellular companies keep track of the location of subscribers' phones by scanning and "registering" phones nearest a base station.[64] "Pings" can benefit law enforcement either to aid them in finding a missing victim or establishing the location of an offender, especially if there is an alibi claim.

Cellphone records may also be relevant to establish the number of calls made to the victim or the timing of calls to support intimidating a witness or tampering charge. This information could also be useful as evidence of the victim's fear of the offender.

Hearsay Exceptions

Hearsay evidence can be critical in a domestic violence case, particularly where the victim is unable, or unwilling, to cooperate. Often, hearsay is offered through a 911 call by the victim or a third party. Generally, because a 911 call is made as events unfold, it may be admissible as an exception to the hearsay rule because it is less likely that the caller had time to fabricate a story. A "spontaneous declaration" is made while the speaker is "under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled."[65] The trial court will consider the sudden and violent nature of the crime, the extent of any injuries inflicted including pain and any emotional trauma that might suggest a lack of "studied reflection."[66]

In many domestic violence prosecutions, victims are unwilling or unable to cooperate, leaving prosecutors to attempt to rely on the victim's statements.[67] Domestic violence victims are more likely to recant "or refuse to testify than are victims of any other crime."[68] Prior to 2004, New York courts would often allow in 911 tapes and other excited utterances or present sense impressions as clear exceptions to the hearsay rule provided that the statement was made contemporaneously to the event relying on the unavailability of the witness and indicia of reliability test under *Ohio v Roberts*.[69] However, in 2004 the United States Supreme Court decided *Crawford v Washington*[70] which raised important issues regarding the right of confrontation under the Sixth Amendment. *Crawford* concerned whether a statement given by a witness was "testimonial" and therefore inadmissible unless the defendant had an opportunity to confront the speaker. This might arise in a domestic violence case, for example, if the victim was being questioned by law enforcement. Ultimately, most prosecutors considered 911 calls not to be testimonial since they were not in response to police questioning. Indeed, emergency calls by victims are often made by individuals who are in immediate danger and are calling for assistance,[71] not in response to interrogation. *Crawford* specifically left "for another day" any effort to actually define "testimonial" except to note that the victim's statement to police in that case was clearly testimonial.

Initially after *Crawford*, prosecutors found that courts were dismissing more domestic violence cases due to evidentiary problems related to the decision.

Statements made by victims at the scene proved especially problematic. Some courts determined that such statements were "per se testimonial,"[72] because police are there to gather evidence and take statements. Other states considered whether the statements were made under more formal arrangements and thereby lost their spontaneity.

Then the Supreme Court issued *Davis v Washington*, 547 US 813 (2006), to directly address the question of what testimonial means. The Court determined that statements are non-testimonial when the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Known as the "primary purpose" test, the Court made a distinction between statements taken in the middle of an ongoing emergency, such as a 911 call, and where the questions posed are about resolving the immediate emergency, not to gather information about other facts. The Court pointed out that a 911 call could "evolve" into testimonial statements depending on the questioning.

The Court has continued to address issues involving *Crawford*. While leaving dying declarations essentially intact, the Court found that out-of-court testimonial statements made by a victim before being murdered by her abuser were not admissible under the forfeiture by wrongdoing exception.[73] Nevertheless, when officers responding to a shooting questioned the victim about who shot him, as well as where and when it happened, the questions were primarily concerned with meeting an ongoing emergency. Thus they met the hearsay exception under *Crawford* and their admission did not violate the confrontation clause.[74]

What about the use of hospital or medical records that contain statements of the victim? Is that information testimonial under *Crawford* and *Davis*? Generally, the courts have found that if the statement is in response to an inquiry of medical personnel whose primary objective is to determine the mechanism of injury, to render a diagnosis and administer medical treatment, the statement may be admitted.[75] For example, a doctor may testify that a domestic violence victim stated that she had been strangled with a belt. The doctor diagnosed the victim with asphyxiation and provided a safety plan for her. In denying a defense request to redact those references, the court found that the question is whether it is relevant to medical diagnosis and treatment; the safety plan can be an important part of treatment.[76] In New York, these statements would fall under the business record exception.[77] Business records are deemed trustworthy because they reflect routine business operation, and the person making the entry has the responsibility of keeping accurate records. Hospital records are considered particularly trustworthy.[78] However, prosecutors must be mindful that some reports do fall within the purview of *Crawford*, such as lab reports that will require the testimony of the witness.[79]

In essence, lower courts must make the following assessment for out-of-court statements:

1) Is the statement testimonial by analyzing the primary purpose of the statement and whether it was made during an emergency;
2) if yes, can the statement still be admitted because the witness is unavailable and the defendant had a prior opportunity for cross-examination; and
3) may the statement be admitted under an established exception to the Confrontation Clause (i.e., dying declaration or defendant's actions that created forfeiture by wrongdoing)?

There may also be opportunities for prosecutors to offer prior statements or prior testimony of a victim who is no longer available. For example, it is possible to offer the Grand Jury testimony of a victim who becomes unavailable as the result of conduct by the defendant.[80] The Court of Appeals has held that out-of-court statements, including Grand Jury testimony, of an unavailable victim or witness may be admitted in the People's direct case if the defendant procured her unavailability through his own conduct.[81] The People would be required to establish through clear and convincing evidence that the unavailability was due to the misconduct of the defendant.[82]

Evidence of Prior Acts of Violence

Evidence of prior domestic violence and abusive behavior may be admitted in the People's case in chief where offered to prove a specific element of the charge, but not to show that the defendant has a propensity to commit the crime. Commonly known as *Molineux* evidence,[83] such evidence can be critical in a domestic violence case where the victim is unable or unwilling to cooperate or where there are no other witnesses to the actual act. Also known as *Ventimiglia*,[84] this exception allows the introduction of prior bad acts of the offender if the prosecution can establish that the evidence is being offered to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) common scheme or plan; or (5) identification.[85]

Trial courts have also allowed such evidence to be introduced to show a destructive pattern of behavior toward women who have attempted to sever ties with the defendant,[86] to establish an element of the crime charged such as forcible compulsion in a rape case or to complete the witness's narrative.[87] Importantly, this evidence can also be sought to negate a defense of not responsible by reason of mental disease or defect,[88] justification or intoxication,[89] or to rebut a defense of extreme emotional disturbance.[90] Courts have allowed testimony from witnesses, such as co-workers,

Prosecutors should make an application to the trial court prior to trial through a motion in limine and make an offer of proof. It may also be helpful to prepare a memorandum for the court explaining why the evidence is crucial to the case and what facts and law support the application. In addition to an offer of proof, the court may order a pre-trial hearing and allow the prosecutor to call witnesses.[91]

Course of conduct evidence can also be used to support charges such as stalking or harassment.

Expert Testimony

Unfortunately, even today there are misconceptions about the dynamics of domestic violence. Victim reactions may require expert testimony. Unlike "fact" witnesses, expert witnesses may be permitted to testify either about their own observations when the conclusions to be drawn by the jury depend on facts which are not within the knowledge or "ken" of the average juror.[92] Opinion testimony by an expert witness should be admitted where "the conclusions to be drawn 'depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence'" of a jury.[93] Introducing an expert can thwart the myth of how a person "should" behave especially because a domestic violence victim's behavior may be confusing, counterintuitive or illogical to a jury.[94]

An expert may be allowed to testify about important dynamics that arise in domestic violence cases, such as rape trauma syndrome, battered woman syndrome, failing to seek aid or attention following the attack, and learned helplessness.[95] Such testimony may be offered to explain a victim's behavior that jurors would generally not understand. An expert can put the defendant's actions in context, particularly on the issue of control and its coercive effect on the victim.[96] Of course, whether to allow an expert witness to testify rests in the sound discretion of the trial court.[97] Moreover, an expert will not be permitted to draw the ultimate conclusion of the guilt of the defendant or as to whether the victim's version of events is correct.[98] A very helpful guide to introducing expert testimony can be found in a 2007 NDAA publication.[99]

It should be noted that experts may sometimes rely on documents that are not introduced into evidence, such as an autopsy report or paternity test, in formulating their opinion and explaining their assumptions for that opinion. Because they are not being offered for their truth, this would fall outside the parameters of *Crawford*.[100]

Prosecutors must be prepared to make an offer of proof regarding the expert's qualifications and the crux of the testimony. To introduce an expert, the prosecutor must show that the proffered testimony is relevant, will assist the trier of fact to understand the evidence or a fact in issue, and that the witness is qualified through knowledge, skill, education, experience or training to offer an opinion. In addition, they should be cautious about not asking the expert to draw conclusions about whether the expert believes the victim, or whether the victim suffers from domestic violence. The prosecutor can limit the testimony to the issue (i.e., battered woman syndrome) and then weave the facts in during summation. "Battered woman syndrome" evidence should be introduced only with great caution. As noted in Chapter 3, *Interviewing Domestic Violence Victims*, this early theory sought to explain why women felt unable to leave an abuser. More recent literature avoids focusing on the emotional state of the victim and instead focuses on the violence of the abuser and its inevitable, and fairly consistent, traumatic effect upon the victim.

If the prosecutor seeks to introduce a new type of syndrome or science that has not been previously accepted by New York courts, it may require a more robust offer of proof or even a *Frye* hearing.[101]

Criminal Contempt and Other Charges

There are a variety of charges, including many felonies, that may arise from domestic violence and which can be brought without the victim's assistance.

In most cases, victims of domestic violence have obtained orders of protection, either from the criminal or family courts. Violations of these orders are separate crimes and law enforcement may be able to make an arrest even if the victim refuses to cooperate.[102] Witnesses who observe the defendant where he is not permitted to be or overhear him contact the victim can be called to testify, and other evidence such as telephone or internet records, surveillance video from commercial areas or the victim's place of employment or photos of the defendant's car or belongings at the victim's residence can be compelling evidence.[103] This often occurs at the victim's place of employment when the defendant repeatedly calls there. Prosecutors should also consider stalking charges even without the victim's testimony should there be sufficient evidence through other witnesses or evidence.[104]

Domestic violence cases also often involve property damage. Charges may be brought for burglary, criminal trespass and criminal mischief. Other possibilities include criminal possession of a weapon,[105] tampering with a witness, resisting arrest, and obstructing governmental administration.

> *She recovered from her devastating head injuries, but as time passed, she became less cooperative with the prosecutor. By the time of trial, she had become hostile and when called to testify, tried to protect the defendant and claim it was self-defense. The prosecutor had to have the victim declared a hostile witness and cross-examine her with prior inconsistent statements.*

> *The prosecutor was able to use the defendant's statements to police, the testimony of the boy in the stairwell, the victim's excited utterance to police when they found her near death, medical testimony and expert testimony regarding battered woman syndrome. In the end, he was convicted of attempted murder in the second degree.*[106]

Notes

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4. Linda L. Dahlberg & James A. Mercy, *The History of Violence as a Public Health Issue*, 11:2 AMA Virtual Mentor 167 (Feb. 2009).
5. National Center for Injury Prevention and Control, *Costs of Intimate Partner Violence Against Women in the United States*, Centers for Disease Control and Prevention (2003).
6. Robert Pearl, M.D, *Domestic Violence: The Secret Killer that Costs $8.3 Billion Annually*, Forbes (Dec. 5, 2013).
7. *See* International Association of Chiefs of Police, *Training Key 16: Handling Disturbance Calls* (1967).
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9. Even in New York, rape against a spouse was not recognized until the Court of Appeals decided *People v Liberta*, 64 NY2d 152 (1984) (finding the marital exemption for rape and sodomy unconstitutional).
10. www.nycourts.gov.
11. *See Thurman v Torrington*, 595 F Supp 1521 (D Conn 1984) (plaintiff wife sued town based on violation of her constitutional rights by nonperformance of duties by police officers).
12. *History of Battered Women's and Civil Rights Movement*. Joint project of the California Department of Health Services, Maternal and Child Health Branch, Domestic Violence Section, and Interface Children Family Services (Sept. 1999), at www.icadvinc.org.
13. Pub L No 103-322, codified in various sections of USC (Title IV of VAWA, encouraged states to adopt the mandatory arrest policies and criminalized interstate domestic violence; the VAWA of 2000 improved the tools available to law enforcement and reauthorized grants and strengthened federal statutes). In 2000 VAWA was also extended to include teenage victims of domestic violence.
14. L 1994, ch222.
15. Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16:1 Pace L Rev 97 (1995).
16. Melissa Mourges, Martha Bashford & Audrey Moore, *Dropped Charges Do Not Mean Dropped Cases: Going to Trial in a DV Case Without the Victim's Testimony*, 53:2 Judges' J 24 (Spring 2014): "Virtually every domestic violence website sponsored by a police department, prosecutor's office, victims' agency or criminal attorney lists 'Can I Drop the Charges in a DV cases?' among its most frequented asked questions."
17. *See* Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges*, National Institute of Justice, NCJ 225722, Special Report at 39-40 (June 2009).
18. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution*, 63 Fordham L Rev 853, 856-57 (1994).
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21. *See e.g.* Erin Han, Note, *Mandatory Arrest and No-Drop Policies v Empowerment in Domestic Violence Cases*, 23 B C Third World LJ 159 (2003).
22. Corsilles, *Mandatory Arrest, supra* at 857.
23. Klein, NIJ Special Report, supra at 36.
24. *Id.*
25. *Id.* at 38-39.
26. *Id.* at 40.
27. *See* www.criminaljusticeny.gov
28. Not all counties in New York have DV or IDV courts. *See* opdv.ny.gov/statistics/nydata/2013/pubsafety.html.
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33. Penal Law §§ 140 *et seq,* 145.
34. CPL 620.20.

35. *People v Marra*, 96 AD3d 1623,1626 (4th Dep't 2012).
36. *People v Acevedo*, 40 NY2d 701, 704-05 (1976); *see also People v Pobliner*, 32 NY2d 356, 359 (1973).
37. *People v Wood*, 79 NY2d 958 (1992). *See also People v Alvarez*, 3 AD3d 456 (1st Dep't 2004)(even large color photographs of a homicide victim, including autopsy photos, were held to be admissible despite claims by the defense they were too inflammatory).
38. *See People v Byrnes*, 33 NY2d 343, 347 (1974).
39. *People v Nieves*, 279 AD2d 351 (1st Dep't 2001).
40. *New York Police Make DV House Calls Long After an Arrest*, 9 National Bulletin on Domestic Violence Prevention 19 (2014) (Quinlan Publishing Group).
41. *People v Wright*, 192 AD2d 875 (3d Dep't 1993)(rape and sodomy prosecution).
42. *People v Webb*, 184 AD2d 920 (3d Dep't 1992)(photographs showing tears and cuts to victim's face and head relevant to defendant's intent and severity of victim's injuries).
43. *People v Reid*, 2 Misc 2d 1012 (Sup Ct, Monroe County 2004).
44. *People v Ponce*, 213 AD2d 725 (2d Dep't 1995).
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53. Gosselin, *Heavy Hands, supra*.
54. *See People v Levan*, 62 NY2d 139, 145 (1984); *Matter of Leroy M.,* 65 AD3d 500-01 (1st Dep't 2009).
55. *Bruton v United States*, 391 US 123 (1968).
56. *See also People v Capalongo*, 85 NY2d 151 (1995). A parent may consent to record a conversation on behalf of a child if the child was present but unable to assist (*see People v Clark*, 19 Misc 3d 6 (App Term, 2d Dep't 2008); *but see People v Heffner*, 187 Misc 2d 617 (County Ct, Rensselaer County 2001) (parent cannot consent for child).
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79. *See Melende-Diaz v Massachusetts*, 557 US 305 (2009)(drug report); *see also Bullcoming v New Mexico,* 564 US __, 131 S Ct 2705 (2011) (DWI BAC report).
80. *People v Smith,* 29 Misc 3d 1056 (Sup Ct, Kings County 2013).
81. *People v Bosier*, 6 NY3d 523 (2006).
82. *People v Geraci*, 85 NY2d 359 (1995).
83. *People v Molineux*, 168 NY 264 (1901).
84. *People v Ventimiglia*, 52 NY2d 350 (1981).
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86. *People v Burkett*, 101 AD3d 1468 (3d Dep't 2013).
87. *People v Pham*, 118 AD3d 1159 (3d Dep't 2014).
88. *People v Santorelli*, 49 NY2d 241 (1980) (evidence of uncharged conduct by defendant may be admitted if it has a tendency to disprove his claim that he was insane when he committed the crime).
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101. *Frye v US*, 293 F 1013 (DC Cir 1923).
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12

Compensation for Domestic Violence Victims: Tort Remedies and Beyond

by Betty Levinson

Almost forty years ago, as domestic violence was first recognized as an issue of national concern, an abundance of legal texts and law review articles addressed the challenges for attorneys representing the growing number of women willing to speak about the most private and painful aspects of their lives. Symposia, conferences and training programs were presented in New York, providing guidance about representing clients and litigating the issues in a rapidly growing area of law.[1] A generation of lawyers, many of whom were activists in the civil rights and women's movements, sought to define, protect, and advance the rights of domestic violence victims.

Recognizing Public Responsibility: *Bruno v Codd*

In 1977, a group of 12 "battered wives" sued the NYC Police Commissioner, Director of the Department of Probation, and Family Court Clerks for declaratory and injunctive relief, alleging that a variety of policies denied them protection from their abusive husbands. The case, *Bruno v Codd*,[2] was settled with a consent decree, embodying the first giant step in New York to dramatically alter police and courthouse procedures and better address the legal needs of clients.

As the attorney for *amicus curiae* in *Bruno v Codd*, a contributor to an earlier edition of this Manual, as well as counsel to many battered women during my 35 years of legal practice, including the plaintiff in *Nussbaum v Steinberg*,[3] this article is a welcome opportunity to reflect upon the evolving case law, including decisions rendered after my retirement, and to share thoughts with those working in this challenging, often frustrating, and deeply gratifying area of work.

In the decades following *Bruno*, attorneys in New York and across the country sought to develop remedies, criminal and civil, to address the destructive consequences of domestic violence. Because substantive and procedural laws are jurisdiction-specific, tort, divorce, and civil rights cases — which often have overlapping issues — were pursued in different venues, often leading to disparate results.

Private Causes of Action: Tort Claims against the Abuser

Much has been written about the economic harm caused by domestic violence and the use of tort causes of action to obtain relief for victims.[4] The intentional torts typically asserted-assault, battery and the intentional infliction of emotional distress (IIED),-are all problematic because of New York's one-year statute of limitation, CPLR 208.[5] For many victims, bringing suit within one year is not tenable. The emotional damage suffered as the result of domestic violence can sometimes be more painful and long-lasting than physical injuries, often continuing for many years.[6] For a client who is moving forward to a violence-free life, reliving these experiences may be at cross-purposes with the process of her recovery. If she is a mother, she may have reasonable concerns that revelations about violence in the home will have negative implications in child custody litigation.

With the hope of easing the harsh restrictions of CPLR 208, advancing public understanding about domestic violence, and helping a severely abused victim to obtain compensation for her injuries, a tort action was commenced on behalf of Hedda Nussbaum after the expiration of the statute of limitations. The evidentiary hearing on whether her action was time-barred was nationally televised. Upon receiving evidence of plaintiff's severe physical and psychological injuries, including testimony from two psychiatric witnesses, the court found that she was "unable to protect her legal rights because of an overall inability to function in society,"[7] allowing her to pursue what would otherwise have been untimely claims.

In *Chen v Fisher*,[8] both parties' claims for divorce were coupled with plaintiff wife Xiao Yang Chen's tort action, alleging assault, battery and fraud. The action was commenced while the divorce action was pending. The parties had previously filed family offense petitions in Family Court, which were consolidated with the divorce and later withdrawn, without prejudice, in the divorce proceeding. The parties were granted dual divorces on cruelty grounds but they did not exchange general releases. Following settlement, defendant's motion to dismiss the tort action was granted on the grounds of *res judicata* and the Second Department affirmed. With a thorough discussion about joinder, severance, and *res judicata*, the Court of Appeals reversed.[9] Plaintiff, in her tort action, was exercising the rights she had earlier reserved "without prejudice." It is for this reason that *Chen* is anomalous — an exchange of general releases is typically made upon the settlement of litigation. Given this background, unless a client is willing to defer a divorce for the long period of time it may take to litigate a tort claim, and unless the anticipated damages are significant and the defendant is capable of satisfying a judgment, joining matrimonial and divorce causes of action is rarely a fruitful option.

Despite optimism among those representing domestic violence victims — both *Nussbaum and Chen* had the benefit of respected *amicus curiae* — it appears that neither has inspired subsequent successful tort actions, *Nussbaum* likely because the injuries suffered were so extreme and *Chen* because the lack of general releases makes it a procedural oddity.[10]

In addition to claims for assault and battery, domestic violence victims frequently ask about suing their abusers for "emotional distress." For many, there is an understandable disconnect between the everyday meaning of this phrase, which in common parlance is accurately descriptive, and the legal requirements of proving "the intentional infliction of emotional distress (IIED)." Despite enthusiastic references to this remedy in popular magazines, tabloid TV shows, and blogs, "emotional distress" tort actions are unsuccessful in New York unless the conduct "shocks the conscience" and only if it occurs between unmarried parties.[11]

In *Allam v Myers*,[12] Miryam Allam, a French national, sued her American ex-husband for torts arising from domestic violence. Some of the acts occurred during the parties' brief marriage and some did not. On defendant's motion to dismiss, the trial court dismissed the IIED claims that occurred during the marriage or were duplicative of other tort causes of action. It found that many of plaintiff's allegations of defendant's five-month premarital campaign of physical abuse, death threats and other intimidation satisfied the "outrageousness" requirements of IIED pleading. It also noted that compensation for emotional distress flowing from a traditional tort is compensable. At trial, the verdict sheet did not require an apportionment of damages between the claims for assault, battery, and IIED. An award of $200,000 was returned for pain and suffering and $300,000 in punitive damages. Defendant moved for a new trial and/or a reduction of the $500,000 award. The court declined to disturb the verdict for pain and suffering. It found that although punitive damages were appropriate, that the proper amount would be $200,000, a reduction of $100,000.[13]

Matrimonial Claims: Establishing "Egregious Fault" to Warrant Equitable Distribution Favoring Domestic Violence Victims

In July 1980, New York enacted the Equitable Distribution Law,[14] changing New York from a "title" state, in which the record owner of property acquired during the marriage — frequently the husband — received it upon divorce. The new law was viewed as a great achievement for women, which it was in many ways, especially where there were assets to be divided. The new notion of marriage as an economic partnership was especially welcomed by homemakers, whose nonmonetary contributions to the creation of the marital estate had previously gone unrecognized.

Amidst all this good news, matrimonial litigants, abuse victims included, were increasingly persuaded to withdraw actions based on cruel and inhuman treatment, to stipulate to the benign "wink-wink-fault" grounds of abandonment and constructive abandonment, and to be satisfied with a more or less equal division of assets via equitable distribution. For those who could or would not settle on such terms, in many cases wealthy parties disputing child custody and property issues, lengthy and expensive trials ensued. As a result, marital fault, including that arising from domestic violence, was too often given a back seat in the courtroom.

In the mid-1980s, *Blickstein v Blickstein*[15] and *O'Brien v O'Brien*,[16] became the authorities routinely cited in support of the proposition that fault should not be considered in dividing marital property unless it was "egregious" and "shocked the conscience." The court opinions in neither matter include any reference to domestic violence.

In *Blickstein*, the issue was whether the trial court erred in awarding the wife 100% of the marital estate in consideration of the "fault" ground — abandonment — on which the divorce was granted to her. The Second Department court adopted the trial judge's view that without this factor, it would have divided the assets 60% to the wife and 40% to the husband. And that is precisely what the Court of Appeals chose to do.

In *O'Brien*, the central issue was whether the value of the husband's medical license should be equitably distributed. He had sued for divorce on the grounds of cruel and inhuman treatment and constructive abandonment and his wife counterclaimed on the grounds of cruelty. A divorce was granted, unopposed, on the grounds of constructive abandonment. The husband argued on appeal that the trial court "erroneously excluded evidence of defendant's marital fault." However, because he had withdrawn his counterclaim and consented to the entry of judgment against him, his claim was rejected. Given the bad name being attached to fault, it is not surprising that the *O'Brien* court, in its groundbreaking holding that a medical license constituted distributable marital property, gave it little attention:

> *. . . marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues [citations omitted].*[17]

In the cases that followed, the standards of "egregious" and "shocks the conscience" have not significantly changed.

In *Brancoveanu v Brancoveanu*,[18] the husband attempted to have his wife, Mariana, murdered by a hit man. The court divided certain marital assets 40% to the husband and 60% to the wife, and declined to give defendant, an attorney, any share of the value of plaintiff's dental practice.

In *McCann v McCann*,[19] the husband breached repeated promises, made both before and during the marriage, that the parties would have children. He engaged in ongoing deception, including a four-year delay in undergoing a minor surgical procedure to enhance the possibility of conception, which he had successfully achieved in his first marriage. When it did not work, plaintiff, then age 45, received medical advice that she was capable of conceiving and carrying a child to term, but defendant would not consider *in vitro* fertilization and then refused sexual relations. By then, the wife was infertile by reason of age. The court found that although the husband's conduct was "morally reprehensible" and revealed a "blatant disregard for the marital relationship" it did not rise to the level of justifying an unequal division of assets because it did not "callously imperil… the value our society places on human life and the integrity of the human body."[20]

In *Havell v Islam*,[21] a brutally violent husband, was sentenced to prison term for his murderous barbell attack on his wife, had inflicted severe and permanent injuries. For this and other atrocious behavior, the court awarded her 95% of their $13 million marital estate.

In *DeSilva v DeSilva*,[22] the same judge awarded 100% of a far more modest estate to a wife repeatedly assaulted and verbally abused by her husband, who was arrested several times during the marriage and had altercations with members of her family as well as strangers. The husband, pro se, had a violent verbal outburst at the conclusion of his testimony, in the presence of the trial judge, which no doubt contributed to this outcome.

In *Levi v Levi*,[23] a finding of egregious conduct was based on the husband's conviction for conspiracy to bribe the judge who had earlier presided over the parties' divorce action. The court awarded the wife 100% of the parties' sole marital asset, their residence. This behavior is without doubt shocking, but the line between its affront to the dignity of the court and its impact as a "blatant disregard of the marital relationship" seems blurred, with the former perhaps being perceived as more egregious than the latter.

In *Howard S. v Lillian S.*,[24] an action for divorce and the tort of fraud, the Court of Appeals affirmed the lower courts' decisions on pretrial discovery, which had been sought for the purpose of demonstrating that the wife's conduct was sufficiently shocking to warrant consideration in the equitable distribution phase of the action. The claim was based on her adulteries and alleged concealment that one of the parties' children had been fathered by her lover. The Court refused to permit discovery because adultery, in and of itself, "does not fit within the legal concept of egregious conduct."[25] It held, "Absent… extreme circumstances, courts are not in the business of regulating how spouses treat one another." One surely could argue otherwise, which the dissenting justice does, taking the view that adultery in particular circumstances may constitute "egregious" misconduct sufficient to be considered in the distribution of marital property.

In *Eileen G. v Frank G.*,[26] the issue was the plaintiff's entitlement to pretrial discovery in a fault-ground divorce action, namely the defendant's sexual abuse of plaintiff's then eight-year-old granddaughter and plaintiff's daughter, age 12. Defendant's request for a protective order was premised on the grotesque argument that "because the injury to the plaintiff was solely psychological, and that conduct was directed to a third party, such conduct should never be considered." Plaintiff's request for discovery was granted.

To justify a greater equitable distribution award to a matrimonial domestic violence victim, injuries are generally severe. In making decisions about whether to pursue this remedy, counsel and clients should be aware that the vast majority of domestic violence incidents do not result in extreme or permanent physical injury. Although courts are not bound by the Penal Law section under which a spouse has been arrested or convicted, it is also true that most domestic assaults are not considered serious.

In New York, the majority of domestic violence arrests are considered of minor import. In 2013, the most recent year in which statistics are available, the percentage of misdemeanor arrests in New York County, as opposed to felonies, was 73%; in Suffolk County, 97%; in Albany County, 92%, and in Onondaga County, 95%.[27] There has been some legislative success in upgrading certain forms of abuse, such as strangulation in the second degree,[28] but as of February 2013, of the 19 people tried on this charge, none was convicted.[29]

Damages under Gender-Based Violence Laws

Some clients have sought economic redress by way of federal and local laws prohibiting gender-based violence. Such efforts have not been particularly fruitful. The Violence Against Women Act (VAWA) created a cause of action for federal civil damages against perpetrators of gender-based violence in 1995, but this provision was later declared unconstitutional.[30] In 2002, the New York City Council created a private civil cause of action for victims of gender-based violence, New York City Local Law No. 73 § 8-902. Since then, only two reported cases have cited it, one principally addressing the retroactivity of the law[31] and the other an issue regarding the timeliness of an action.[32]

Federal and State Civil Actions Against Municipal Defendants: Overcoming Immunity

Claims against municipal defendants for personal injuries, negligent torts, "failure to protect" and "failure to train" arising out domestic violence incidents have grown increasingly difficult to prove both in both state and federal courts. Whether employing theories of negligence or alleging violations of the Equal Protection and Due Process clauses of the United States Constitution, pursuant to 42 USC § 1983, efforts to obtain relief by these means are daunting.

Actions Against Police for "Failure to Protect"

In *Conde v City of New York, et al*.,[33] Danielle DiMedici had earlier been kidnapped by her former boyfriend. Several days after he released her, in fear of his threats to kill her and her extended family, with whom she resided, they began receiving 24-hour protection, with half-hourly police visits from the Police Department. After eight days, the family was advised that the level of care was being downgraded to "special attention." About 36 hours later, the boyfriend returned, killed Ms. DiMedici, her grandmother, wounded several family members, and then committed suicide. The lower court granted the City's motion for summary judgment, which was affirmed by the Second Department, holding that "special attention" did not create the "special duty" or "special relationship" necessary to create tort liability. To do otherwise "would impose a quasi-insurer's liability upon the municipality in clear contravention of firmly-established precedent and sound public policy." Despite a persuasive dissent, the Court of Appeals refused to hear the case.

Action Against Police for Repeated Failure to Arrest Batterer

In *Okin v Village of Cornwall-on-Hudson Police Department, et al*.,[34] Michele Okin, an unmarried cohabitant, sued municipal defendants and individual police officers, claiming due process and equal protection claims pursuant to 42 USC § 1983.[35] Over a period of 15 months, her boyfriend, a local tavern owner, had inflicted extensive and serious injuries on her. The officers responded more than a dozen times, but never arrested the abuser, allowing the violence to continue. The Circuit Court dismissed plaintiff's equal protection claims, but allowed her due process claims, holding that she had raised triable fact: did the police defendants' failure to adequately respond to her complaints embolden and encourage her partner's domestic violence? The court reasoned that if the police

failed to act upon knowledge gained in their domestic violence training, such could constitute a denial of plaintiff's due process rights, thus defeating a qualified immunity defense. The Circuit also restored plaintiff's claims against the Village of Cornwall because she had properly raised the question of whether it had failed to adequately train its police officers. After the Circuit Court's decision, the parties reached a settlement. It is under seal.[36]

Police Failure to Protect Wife Against Abusive Police Officer Husband

In *Pearce v La Bella* and *Pearce v Estate of Officer Joseph A. Longo, Jr. et al.*,[37] Kristin Longo, the wife of Joseph Longo, a Utica police officer, repeatedly informed his superiors, including defendant LaBella, his partner, close friend, and supervisor, about her husband's violent behavior. In particular, she reported that he had threatened while holding his service revolver, to kill himself and their family. She also requested that he receive counseling because of his mental instability.

LaBella had surreptiously taken a civil service test and been improperly appointed as chief of police by defendant Utica Mayor Roefaro. La Bella repeatedly discouraged Ms. Longo from obtaining an order of protection and provided many assurances that she would be protected and that her husband's gun would be confiscated. In fact, he was not disciplined, his gun remained in his possession, and his mental status was never evaluated. After a Family Court appearance in which Ms. Longo was awarded exclusive possession of the marital residence, her husband returned home, stabbed her to death, and killed himself. Their eight-year-old son discovered their bodies.

The District Court found that the estate was entitled to proceed on its § 1983 claims against the police chief, police department, mayor, and city. It also found that it had sufficiently pleaded a violation of Ms. Longo's substantive due process claims, and that defendants' claims of qualified immunity were without merit. However, it granted defendant's motion to dismiss on plaintiff's equal protection and conspiracy causes of action. In a decision dated March 1, 2011, the Court of Appeals reversed in part and remanded, finding that Mayor Roefaro was entitled to a qualified immunity defense because:

> [T]here was no allegation that he knew or should have known of the danger that Joseph Longo posed to Kristin Longo, or knew or should have known that La Bella would be ill-equipped to supervise an officer like Joseph Longo.

In early April 2011, Mayor Roefaro announced that he would not seek a second term as mayor. His "close friend," Daniel LaBella, announcing his own resignation as Utica's Public Safety Commissioner, stated that the mayor had "been doing some soul searching for quite some time."[38] In December 2013 the case was settled for two million dollars.[39]

Claims for Wrongful Prosecution: Absolute Prosecutorial Immunity

The issue of absolute immunity was raised in *Giraldo v Kessler*,[40] in which Karla Giraldo, the girlfriend of a New York State Senator, sued the Queens County District Attorney, individual assistant district attorneys, police officers, a representative of Safe Horizon, and medical professionals for various torts and violations of 42 USC §§ 1983, 1985-1986, arising from her detention and interrogation about an assault by her boyfriend. The District Court denied the defendant prosecutors' motion to dismiss based on absolute prosecutorial immunity but dismissed plaintiff's federal and tort claims. The Second Circuit vacated and remanded, holding that the prosecutor's actions were proper and shielded by absolute immunity.

"Special Relationship": The Challenges of Establishing Duty to Protect

In *Valdez v City of New York*,[41] a jury verdict of $9.93 million for Theresa Valdez, a domestic violence victim, was vacated and the complaint dismissed. Despite plaintiff's having spoken to a police officer familiar with the prior violent behavior of boyfriend, and having followed his instructions to return

home with her children, coupled with his assurance that the boyfriend would be arrested, the Court of Appeals affirmed. The court held that she had no reason to rely on the representation that her boyfriend would be apprehended because she did not receive a phone call confirming the arrest. As a result, there was no "special relationship" to support a finding of liability. Valdez was decided by a divided court and stands as a major impediment to those seeking recompense for the failure of the police department to provide reasonable protection.

In *Bawa v City of New York et al.*,[42] the administrator of the estate of Sonia Jacinth Taylor, asserted claims for wrongful death, negligent infliction of emotional distress, and deprivation of constitutional rights, all arising from decedent's murder by her son. The police had been summoned to Taylor's residence on prior occasions, including the day of her death. Given the relevant facts and circumstances, the motion court held that the requisite "special relationship" had been created. The Second Department reversed, finding that the defendant police officers had exercised reasonable professional judgment, cloaking them with immunity.

In *Coleson v City of New York*,[43] plaintiff was stabbed by her husband in front of a car wash. Before the assault, her seven-year-old son saw his stepfather chasing his mother with a knife. Afterward, he saw her lying in a pool of blood. He did not see the actual assault because he was hidden in a broom closet by a car wash employee. Plaintiff sued the city and police department, alleging a negligent failure to protect and negligent infliction of emotional distress. The First Department affirmed.[44] The dissent refers to Justice Lippman's dissenting opinion in *Valdez*, where the question of whether a municipal defendant can ever be held liable appears to be answered in the negative.[45] The Court of Appeals modified,[46] noting questions of material fact as to whether there was a special relationship between plaintiff and the city and, importantly, that this is a factual question for the jury. On remittitur, the First Department reinstated plaintiff's cause of action for negligence.[47] The court also noted that the defense of governmental function immunity is unavailable unless the defendant establishes that the action taken resulted from discretionary decision making.

The Importance of Careful Pleading

In *Weaver v City of New York*,[48] plaintiff sued for state and federal claims, for the torts of false arrest, malicious prosecution, IIED, and failure to intervene in violation of 42 USC § 1983, after she and boyfriend were arrested, apparently on his false claim that she was the "primary aggressor." In criminal court, all charges against her were dismissed. The District Court's decision on defendants' motion to dismiss is a primer on the importance of careful pleading. Fortunately for plaintiff, the court scoured a poorly drawn complaint, to ascertain what not readily apparent claims may have been alleged. The court dismissed various causes of action (including IIED) Because no discovery had yet taken place, it was unable to assess the validity of claims for malicious prosecution, failure to intervene, a *respondeat superior* defense theory, or the issue of qualified immunity. Plaintiff's false arrest cause of action was limited to only those officers present when she was charged but her failure to name all of the police defendants in her notice of claim was found not to be a fatal error.

Conclusion

With a few exceptions, the cases reveal public policies inconsistent with advancing the rights of domestic violence victims. Municipalities do not want to pay money damages for the errors of police departments, state judges fear becoming deluged with fault-oriented trials, and federal courts disfavor burdening their dockets with civil rights actions against local police departments. Fiscal concerns predominate, as evidenced by the anxiety expressed in *Valdez*, that the city is not a "liability insurer," and by *O'Brien's* concern that the issue of marital fault "may involve the courts in time-consuming procedural maneuvers relating to collateral issues."

Most tort attorneys do not accept cases without a reasonable expectation of a large award, to be shared according to a contingency fee agreement. Most civil rights attorneys are paid on full or partial contingency fee arrangements and only accept cases that will yield substantial money damages or at least create precedential value. Most matrimonial attorneys do not make themselves available to litigate unless they are paid for their time.

Despite such realities, or perhaps because of them, attorneys wishing to be of use have much work to do. What has been received as judicial wisdom in the past, should, in appropriate instances, be challenged. When such action is unwise, clients need to know that, too. Openly sharing such knowledge is the best way to exercise one's best professional judgment.

The hurdles a domestic victim must vault to obtain judicial relief are very high. That most attorneys conduct their practices as described should not obscure the fact that many are willing and eager to take on challenging cases, for reasonable fees or on a pro bono basis, continuing efforts to achieve better results in the future.

More and more members of our communities believe that domestic violence does "shock the conscience." With patience, careful observation, and collaborative work with those in the helping professions, domestic violence lawyers will be able to identify those areas of the law which are most amenable to reform and do their very best for clients in the meanwhile.

Times change, legislation is amended, cases are overruled, and new law is made. As always, smart and dedicated attorneys develop new strategies, designed to meet circumstances as they evolve. It is with such expectations that these thoughts are delivered into your hands, for good use in the future.

Notes

1. *Symposium on Reconceptualizing Violence against Women by Intimate Partners: Critical Issues*, Alb L Rev (1994-1995); Betty Levinson, Chair, *Handling the Domestic Violence Case* (Practising Law Institute, 1998, 1999, and 2000), *Domestic Violence in Legal Education and Legal Practice: A Dialogue Between Professors and Practitioners, 11:2 Brook J L and Pol'y (2003)*; Fordham Law School Annual Forum on Domestic Violence, now in its 18th year.
2. 47 NY2d 582 (1979).
3. 269 AD2d 192 (1st Dep't 2000).
4. *All in the Family, Tort Litigation Comes of Age*, 28 Fam LQ 3 (1994); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 Md L Rev 1268 (1996); Clair Dalton, *Domestic Violence, Domestic Torts, and Divorce: Constraints and Possibilities*, 31 New Eng L Rev (1997); Lee Elkins & Jane Fosbinder, *New York Law of Domestic Violence*, Ch 5 (West Group Press 1998); Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 Or L Rev 945 (2004); Jennifer B. Wriggens, *Domestic Violence in the First-Year Torts Curriculum*, 54 J Legal Ed (2004); Lauren M. Gambler, *Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence*, 87 NYU L Rev 1918 (2012); Elizabeth M. Schneider (with Cheryl Hanna, Emily Sack & Judith G. Greenberg), *Domestic Violence and the Law: Theory and Practice [with Teacher's Manual]*, Ch 13 (Foundation Press 3rd ed. 2013); Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 Kan L Rev 695 (2014).
5. CPLR 208. The statute of limitation for the negligent infliction of emotional distress is three years. CPLR 215. If a criminal action has been brought for the conduct that would give rise to the tort, the victim has one year from the time the criminal case is concluded to commence an action. CPLR 215(3) and CPLR 215 (8).
6. *See* Judith Herman, *Trauma and Recovery* (Basic Books 1992), a good source for understanding the impact of trauma.
7. 269 AD2d 192 (1st Dep't 2000).

8. 12 AD3d 43 (2d Dep't 2004), rev'd 6 NY3d 94 (2005).
9. The final outcome in this action is not on record and is unclear. Counsel for amicus curiae in the Court of Appeals has no knowledge of the outcome of this case and counsel for the plaintiff did not respond to inquiry.
10. *A Domestic Violence Lawyer with a Big Idea* (October 20, 2014). www.ozy.com, describes the domestic violence work of a young California attorney. Her motivations are admirable. However, the question of how to balance the human cost of low-fee or no-fee legal work in taking on high-risk cases, with minimal political impact, must be realistically addressed.
11. *Weicker v Weicker*, 22 NY2d 8 (1967).
12. 906 F Supp 2d 274 (SD NY 2012).
13. The District Court's opinion regarding the kind of medical evidence New York requires to prove IIED is instructive, as is its reasoning on the computation of damages.
14. DRL § 236 B.
15. 99 AD2d 287 (2d Dep't 1984).
16. 66 NY2d 576 (1985).
17. *O'Brien v O'Brien*, 66 NY2d 576 (1985).
18. 145 AD2d 395 (2d Dep't 1988).
19. 156 Misc 2d 540 (Sup Ct, NY County 1993).
20. One can only speculate about this result had the judge been a woman.
21. NYLJ, Jul. 30, 2001 at 25, col. 2 (Sup Ct, NY County), *aff'd* 301 AD2d 339 (1st Dep't 2002).
22. 2006 NY Misc LEXIS 2489, at *1 Sup Ct, NY County, Aug. 18, 2006).
23. 46 AD3d 520 (2d Dep't 2007).
24. 14 NY3d 431 (2010).
25. The court refused to permit discovery, but the dissenting opinion highlights differing views taken in such matters. The First and Second Department require a matrimonial litigant to make a motion to obtain discovery on the issue of fault while the Third and Fourth Departments favor liberal discovery without the necessity of motion work.
26. *Eileen G. v Frank G.*, 34 Misc 3d 381 (2011).
27. *See* www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm.
28. Penal Law § 121.12.
29. Julie Besonen, *A New Crime, but Convictions Are Elusive*, NY Times (Feb. 16, 2013) www.nytimes.com/2013/02/17/nyregion/choking-someone-is-now-a-felony-but-convictions-are-elusive.html.
30. *United States v Morrison*, 529 US 598 (2000).
31. *Cadiz-Jones v Zambretti*, 2002 NY Slip Op 30135 (U)(Sup Ct, NY County).
32. *Cordero v Epstein*, 22 Misc 3d 161 (Sup Ct, NY County 2008).
33. 24 AD3d 595 (2d Dep't 2005).
34. *Okin v Village of Cornwall-on-Hudson*, 577 F3d 425 (2d Cir 2009).
35. The extensive facts are best gleaned from the District and Circuit Court opinions.
36. Conversation with plaintiff's attorney, Dec. 26, 2014.
37. 766 F Supp 2d 367 (ND NY 2011), 473 Fed Appx 16 (2d Cir 2012).
38. Dan Miner, *Utica Mayor Roefaro Says He Will Not Seek Second Term* (April 6, 2011) www.uticaod.com/article/20110406/News/304069884/?Start=1.
39. Steven Hughes, *$2 million settlement reached in Longo lawsuit* (Dec. 18, 2013) www.uticaod.com/article/20131218/News/131219329/?Start=2.
40. *Giraldo v Kessler,* 694 F3d 161 (2d Cir 2012).
41. *Valdez v City of New York*, 18 NY3d 69, 83-84 (2011).

42. *Bawa v City of New York*, 31 Misc 1210 (A) (Sup Ct, Queens County 2011), rev'd 94 AD3d 926 (2d Dep't 2012), lv denied, 19 NY3d 809 (2012).
43. 2012 NY Slip Op 33713 (U) (Sup Ct, Bronx County, Feb.16, 2012).
44. *Coleson v City of New York*, 106 AD3d 474 (1st Dep't 2013).
45. Another discouraging footnote is the jury's finding plaintiff contributorily negligent, as a result of which it awarded her only 50% of the damages proved. This was presumably pursuant to a jury charged based on *Morales v County of Nassau*, 94 NY2d 218 (1999), which exempts those with orders of protection from the provisions of CPLR 1601 and 1603 regarding joint and several tort liability.
46. 24 NY3d 476 (2014).
47. 125 AD3d 436 (1st Dep't 2015).
48. *Weaver v City of New York*, 2014 WL 950041 (ED NY, March 11, 2014, No. 13-CV-20[CBA/SMG]).

13

The Rights of Domestic Violence Victims in Criminal Proceedings

by Christina Brandt-Young

Victims of crime have never been recognized as full-fledged parties to a criminal prosecution. In recent decades, there has been a movement to ensure that the victim has a voice, and rights that somewhat approach those of the defendant. This chapter briefly explains the rights of crime victims in federal cases under the federal Crime Victims' Rights Act of 2004 as well as the more limited rights of crime victims in New York State prosecutions. The victim's attorney can use these laws so that the criminal process becomes transparent and comprehensible to the victim, and can help the victim assert his or her rights, however limited, as opportunity or need arises.

Federal Rights

Domestic violence crimes are more likely to be prosecuted in state court than in federal court; however, federal prosecutions do arise in cases of trafficking or other interstate crime. The rights of crime victims in federal court are strong and are covered here briefly for purposes of comparison with those in New York State.

In a federal criminal prosecution, a "victim" of crime is anyone directly and proximately harmed by the commission of a federal offense.[2] If the victim is under 18, not competent to make legal decisions, incapacitated, or deceased, the court can appoint the victim's guardian, family, or any other suitable person to represent the victim's rights.[3]

The victim has certain rights in federal court proceedings:

a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

   1) The right to be reasonably protected from the accused.

   2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

   3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

   4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

   5) The reasonable right to confer with the attorney for the Government in the case.

6) The right to full and timely restitution as provided in law.
7) The right to proceedings free from unreasonable delay.
8) The right to be treated with fairness and with respect for the victim's dignity and privacy.[4]

In a federal prosecution, the victim can represent his or her own interests either personally or via an attorney.[5] Victims should be aware that the Department of Justice provides a system that notifies victims by e-mail of court developments in federal cases.[6]

The procedures for asserting the victim's rights are simple. The victim can assert these rights by motion in the defendant's criminal case.[7] If the trial court denies the victim's request, he or she can make a motion for mandamus in the appropriate federal Court of Appeals.[8] The proceedings should not be stayed or continued for more than five days for the purpose of asserting the victim's rights.[9]

Despite the clear and accessible procedures available for asserting these rights, there are also significant limitations. The victim cannot demand a new trial if any of these rights was denied in the existing one.[10] A victim cannot move to reopen a plea or sentence because any of these rights was denied, unless he or she previously made an attempt to assert the right, the attempt was denied, the victim has petitioned the Court of Appeals for a writ of mandamus within 14 days, and in the case of a plea, the plea was not to the highest offense charged.[11] There is no private right of action to enforce these rights.[12]

The principal takeaway of the rights of federal crime victims is that the procedures for asserting them are clear and specific. The victim can assert his or her rights directly or through an attorney, by motion, and has the right to appeal denials of his or her requests. This may not be done in a way that significantly delays the case. The federal courts do permit victim participation in criminal cases without material change to the roles or duties of prosecution, defense, or judge.

New York Rights

New York has a statute regarding the rights of crime victims in criminal proceedings. Some rights of victims are stronger in New York than others, particularly securing an order of protection, challenging discovery requests that unnecessarily invade privacy, presenting a victim impact statement at sentencing, and winning awards of restitution and reparation. Unfortunately, unlike the federal statute, the New York statute does not confer the ability to file motions to assert a victim's rights.

New York's Fair Treatment Standards for Crime Victims

New York law gives victims many of the same rights that victims in federal court have, and the state definition of a crime victim is similar to the federal one. Article 23 of the New York Executive Law sets out New York's Fair Treatment Standards for Crime Victims. A "victim" is defined for purposes of the Fair Treatment Standards as "a natural person against whom an act defined as a misdemeanor or felony by the Penal Law or section 1192 of the Vehicle and Traffic Law has been committed or attempted," where a criminal accusation or Family Court petition has been filed; the phrase also includes "immediate family of a homicide victim or the immediate family or guardian of a minor who is a crime victim."[13] Depending on the particular right in question, different definitions of the term may apply.

In prosecuting violent and some other felony offenses,[14] the district attorney is obliged "to obtain the views of the victim regarding disposition of the criminal case by dismissal, plea of guilty or trial."[15] The prosecutor should also consult with the victim about pretrial release and sentencing alternatives.[16]

Failure to do so, however, "shall not be cause for delaying the proceedings against the defendant nor shall it affect the validity of a conviction, judgment or order."[17]

Section 646-a of the Executive Law sets out a summary of the Fair Treatment standards applicable to courts. Crime victims have the right to compensation and services; to routine notification of judicial proceedings; to be protected from intimidation and to have the court, where appropriate, issue protective orders; to submit, where appropriate, a victim impact statement for the pre-sentencing report and the parole hearing. When a defendant is being sentenced for a felony, the victim may exercise the right to make an oral statement to the court at the time of sentencing; request restitution through the district attorney; and be kept apprised of the defendant's incarceration status.[18] In the case of particular serious crimes like violent felonies, the court shall consider the views of the victim "regarding discretionary decisions relating to the criminal case, including, but not limited to, plea agreements and sentence,… the release of the defendant in the victim's case pending judicial proceedings upon an indictment, and… the availability of sentencing alternatives."[19] However, "[t]he failure of the court to consider the views of the victim or family of the victim shall not be cause for delaying the proceedings against the defendant nor shall it affect the validity of a conviction, judgment or order."[20]

While the Executive Law is expansive in listing the items regarding which the court must consider the views of the victim, it lacks the federal law's clarity about how the court will be informed of those views. Consequently, the victim is heavily dependent on the prosecutor, both for obtaining notice of new events in the court proceedings, and for transmitting information back to the judge in those limited cases where the victim has a right to participate and be heard.

Basic and very helpful information about the charges, pretrial release, motions, past and upcoming court dates, and attorneys for the prosecution and defense can be obtained from the New York court system website.[21] The New York City Department of Correction[22] and the New York State Department of Corrections and Community Supervision[23] provide online inmate lookup services. Additionally, information about an offender's incarceration status in the New York City Department of Correction, New York State Department of Corrections and Community Supervision, and 60 county correctional facilities can be found on VINE.[24]

Orders of Protection: Including Children

New York criminal courts routinely make orders of protection in domestic violence cases. However, a frequent problem in New York City is that orders of protection may cover an adult victim, but not the defendant's children in common with the victim or other family or household members. Some prosecutors and courts claim to have a policy of not including children unless they are named victims in the criminal complaint. This may not be adequate to protect the family, as the defendant may use children to convey threats or intimidation to the victim.

Since the victim has little to no opportunity to make any request directly to the judge about the order of protection, education of the prosecutor may be the victim's only option. It is easier to get a comprehensive order at the first request than to change an order later, but victims often have limited access to prosecutors at the earliest stages of a case, so trying to change an existing order may be unavoidable.

The Criminal Procedure Law provisions providing for orders of protection in both family offense and non-family-offense cases are not limited to victims and witnesses. They envision that the court might make a temporary or final order of protection in favor of the immediate victim of the crime, any witness to the crime, any family or household members, and/or their companion animals.[25] The only threshold is "good cause."[26] Some of the purposes of an order of protection are to protect witnesses and victims from intimidation or retaliation, to deter the defendant from further abuse, and to provide

a platform for holding offenders accountable for further abuse.[27] The prosecutor should be informed of any facts making it probable that the defendant will issue threats or intimidation to or through family or household members or companion animals, as well as of the victim's desire for a more comprehensive order of protection.

Discovery of Victim's Records

The Criminal Procedure Law provides standing for a victim to challenge discovery if he or she alleges that other factors outweigh the usefulness of discovery. Those factors might include simple embarrassment or annoyance, or important policy concerns like encouraging uninhibited communication with health professionals so that victims can obtain the services they need. Victims must stay in close contact with their service providers, and closely monitor developments in the court, to protect these interests.

The victim is an important witness in domestic violence prosecutions, and sometimes a defendant's discovery requests may violate the victim's privacy. New York courts often do not recognize any individual proprietary interest in some sorts of business records, like an individual's bank records.[28] Domestic violence crimes can involve physical or psychological harm to the victim, and proper proof may legitimately require the testimony or records of medical or other care providers. Discovery requests about these sensitive records can easily be drafted in ways that are overly broad or invasive. For tips on responding to privacy concerns, see the website of the National Crime Victims Law Institute.[29]

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New York criminal law provides a specific statutory right to challenge discovery about oneself on the basis of privacy concerns. The Criminal Procedure Law provides the victim a route to quash invasive subpoenas and ask for a protective order for the relevant records. Specifically, "upon motion of… any affected person," the court may issue a protective order denying or limiting discovery "for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person… *or any other factor or set of factors which outweighs the usefulness of the discovery*."[30] The victim's attorney may be able to quash the subpoena entirely and obtain a protective order for the records; the judge may review the records *in camera* to determine whether they contain any relevant material that must be disclosed to either side.[31]

Notice

A threshold problem of challenging discovery is that the victim may not receive notice that the discovery has been requested or provided. As in civil cases, both the prosecution and defense have the right to sign their own subpoenas for documents without the additional signature of a judge.[32] It is only when the subpoena is for the records of a governmental entity, then the defense must obtain a judge's signature for the subpoena and notify the prosecution.[33] Certainly the entity that holds the records receives notice of the subpoena. If the victim is not the holder of the records, neither the Civil Procedure Law and Rules nor the Criminal Procedure Law requires notification of the victim.

In the case of health-related records, the Health Insurance Portability and Accountability Act of 1996[34] ("HIPAA") rules relating to notification of the patient regarding disclosure of medical records

are complex. A health care provider can disclose records pursuant to a court order without any notice to the patient.[35] Thus, because the victim is not required to be served with a judge-signed criminal court subpoena,[36] he or she may be unaware that records have been ordered released.

The prosecutor may ask the victim to sign a release for his or her records under HIPAA. The victim might agree, failing to realize that these very personal records may someday be seen by the defendant or the judge.

When a subpoena for health records of the victim is signed only by an attorney and is not court-ordered, pursuant to HIPAA the medical care provider should not disclose the record unless it "receives satisfactory assurance" that the party seeking the records has either made reasonable efforts to notify the victim, or has sought a protective order for the records.[37] However, not all health care providers are aware of or comply with these rules, so the net effect may be that the victim's service providers might disclose private records without the victim ever being notified.

There is no foolproof way to prevent this situation. The victim can take certain steps to try, including (1) bringing the prosecutor relevant certified records instead of signing blanket releases for all records of a service provider; (2) checking in frequently with the prosecutor to ask whether there has been any discovery into the victim's records; (3) attending all court dates to make the same inquiry of the court; and (4) asking all service providers to notify the victim if the service provider receives any discovery requests.

Privilege

The victim's specific basis for challenging a subpoena depends on the type of record, but the Criminal Procedure Law requires a showing that some factor outweighs the usefulness of the discovery. In domestic violence cases, privilege is often conferred to encourage uninhibited disclosure by a victim for the purpose of obtaining necessary professional assistance.[38] Applicable privileges include those between patients and their health care workers,[39] social workers,[40] and/or rape crisis counselors.[41] Records resulting from these relationships will often be protected.

In New York, subpoenas for mental health records must be court-ordered, and may be issued only after a court has made a finding that the interests of justice outweigh the need for confidentiality of the records.[42] If the victim has had no notice before such a subpoena was issued, he or she should move to quash under Criminal Procedure Law section 240.50 and seek a protective order for the records.

Likelihood of Containing Exculpatory Material

A defense subpoena should be quashed if the defense does not make a preliminary showing that the material sought is reasonably certain to contain information which is material to the defense or contains any exculpatory material.[43] The defendant cannot merely assert that the documents "carry a *potential* for establishing relevant evidence …; instead, a defendant must put forth 'some factual predicate' which would make it reasonably likely that documentary information will bear relevant and exculpatory evidence."[44] Disclosure is improper when the demand is framed in general, not specific, terms, and represents a fishing expedition into the files and records of nonparty witnesses or is "simply for the purpose of gaining information to impeach the general credibility" of a witness.[45]

Victim Impact Statements at Sentencing or Parole

The victim of a crime has a right to make a statement to the court before sentencing and parole decisions. Communicating with the judge before sentencing can be significant in a victim's healing process and empowering generally. The methods and timelines for doing so depend on whether the case is a felony or a misdemeanor, and the victim should be closely aware of procedural developments in the case so that he or she can assert the right when the moment arises.

The right to be heard at sentencing was formalized in section 380.50(2) of the Criminal Procedure Law in 1992.[46] Before that, "no statute or decision of [the Court of Appeals] precluded a sentencing court from hearing remarks by victims to assist the court in exercising its broad discretion over sentencing—and many courts routinely did. Indeed, at the time the legislation was passed, it was viewed by some as unnecessary… ."[47]

However, even now, there are many cases in which a victim impact statement does not occur especially when charges are less serious or where the sentencing occurs early or suddenly as the result of a plea. If the victim knows in advance that he or she wants to make such a statement, it is a good idea to notify the prosecutor as early as possible. Depending on the situation, the victim might send a letter to the judge, copied to all parties, early in the case, informing the court of the victim's interest in making an impact statement. If resources allow, the victim or the victim's representative might attend all court dates in order to ensure that the victim is notified of when the issue must be raised. The defendant has a right to advance notice that the victim intends to make such a statement and should be included in communications on this subject.

The content of the victim impact statement depends in part on whether the victim has testified at a trial. In the case of a plea, the victim impact statement may be the victim's only opportunity to communicate directly with the court. Even after trial, the victim impact statement may be the court's only opportunity to hear from the victim in a fashion that is unmediated by the interests of the prosecution and the defense. The statement should, at a minimum, (1) explain the greater context of the crime, since the judge may only know about it from a criminal complaint that is designed to have as little detail as possible; (2) describe the practical, emotional, and economic effects of the crime on the victim and his or her family or household; (3) explain what the victim thinks is a fair sentence; and (4) provide detailed information about restitution and reparation, which are described in more detail below. Guidance on preparing an effective victim impact statement can be found on the website of the National Crime Victims Law Institute.[48]

Timing and form of victim impact statements in misdemeanor cases

In misdemeanor cases in New York, the victim does not have a right to make his or her victim impact statement orally, which means it must occur in writing. The simplest way to do this is to include it in the pre-sentence report prepared by the Department of Probation, if there is one. A pre-sentence report is required for felonies and for misdemeanors leading to nonconsensual probation, imprisonment for 180 days or more, or consecutive sentences aggregating 90 days or more, and is permissible whenever the court wants to order one.[49] However, it can be waived if, for example, the jail sentence will be time served, or the defendant consents to probation.[50] If the pre-sentence report is not required or is waived, the victim still has the right to submit a written victim impact statement where "the court determines that such information would be relevant to the court disposition."[51] Of course, this depends on the court knowing the victim wants to make such a statement. The victim impact statement included in this report "shall include an analysis of the victim's version of the offense, the extent of injury or economic loss and the actual out-of-pocket loss to the victim[,] and the views of the victim relating to disposition."[52]

Timing and form of victim impact statements in felony cases

In felony cases in New York, the victim is permitted to make an oral impact statement at the time of sentencing in addition to a statement in the pre-sentence report.[53] In order to make an in-person statement, the victim must request the permission of the court at least ten days prior to the sentencing date.[54] The statute envisions that the prosecutor will give notice to the victim at least 21 days before the sentencing.[55] However, it also provides that even if the victim has not received "timely" notice—presumably 21 days—the court may either adjourn sentencing for seven days, or proceed with

sentencing if the victim and the defendant have each received "reasonable" notice.[56] Failure to give notice to the victim does not affect the validity of a sentence imposed without hearing from the victim,[57] so it is in the victim's interest to stay informed about the progress of the case and assert his or her rights as early as possible.

Timing and form of victim impact statements in parole hearings

Victims also have the right to make impact statements in parole hearings.[58] The statement can be written, audiotaped, or videotaped.[59] Victims of violent felonies as defined by the Penal Law section 70.02, certain A-1 felonies, homicide and related crimes, and rape and related crimes also have the right to meet with parole board members personally to make their victim impact statements.[60] Victims can submit a form, obtainable on the website of the New York State Department of Corrections and Community Supervision, requesting to be notified in advance of parole hearings so that they can submit a victim impact statement.[61]

Drafting (and in felony cases, delivering) the victim impact statement can be intensely rewarding. Although the timing and procedure of doing so occur within specific frameworks that may be unfamiliar, good communication with the prosecutor should help the victim assert this right. In any case where the victim requests it, and in any violent felony case[62] or any of the felonies related to homicide, the Criminal Procedure Law specifically directs the district attorney to inform the victim of the final disposition of the case by letter within 60 days.[63]

Restitution and Reparation

In New York, prosecutors and judges are mandated to consider criminal restitution and reparation to the victim of economic losses caused by the crime. Victims can also attempt to obtain financial compensation from the New York State Crime Victims Compensation Board or in a civil suit against the defendant. These options are not mutually exclusive, and developing a strategy depends on the victim's needs, the victim's willingness to participate in multiple court cases, timing, and the helpfulness of the prosecutor.

For those who prefer to obtain restitution and reparation directly from the criminal defendant, the Penal Law section 60.27 grants victims the right to seek restitution and reparation in the criminal sentencing phase. Restitution compensates the victim for the fruits of the offense, and reparation compensates the victim for the actual out-of-pocket loss to the victim caused by the offense.[64] This includes expenses incurred because of deliberate harm to service animals aiding victims with disabilities.[65] Generally restitution is limited to fifteen thousand dollars in the case of felonies or ten thousand dollars in the case of any other offense,[66] but victims may seek restitution over these amounts for return of the victim's property and actual medical damages incurred.[67] A court must inquire into the defendant's ability to pay restitution and reparation,[68] and the order must be limited accordingly.

Courts address with restitution and reparation at sentencing. As noted above, in the case of a misdemeanor, the issue of restitution can and should be raised in the pre-sentence report or victim impact statement,[69] so as to give the defendant notice of the issue. In a contrast to other rights of crime victims, the Penal Law specifically directs the district attorney to advise the court of the victim's views on restitution during sentencing.[70] If the district attorney has not done so but the victim impact statement indicates that the victim wants restitution, "the court *shall require, unless the interests of justice dictate otherwise*,… that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss."[71] The court must make a specific finding as to the victim's actual dollar losses, and if this cannot be determined from the district attorney's presentation and/or the victim impact statement at sentencing, a separate hearing must be held on this issue.[72] If the court does not make such an order, it must clearly explain on the record why.[73]

While prosecutors and judges are mandated to consider restitution and reparation, as a practical matter, asserting the victim's right to restitution and reparation depends on notifying the prosecutor in time for sentencing. Participation in the pre-sentence report, if any, is important in this regard. Because plea bargains are sometimes negotiated early and quickly, the victim may not have a lot of notice before sentencing. If the victim has identified specific items for restitution or reparation, it is a good idea to notify the prosecutor as early in the case as possible. Collect bills, receipts, insurance statements, and other documentation of the victim's monetary losses and expenses and be ready to hand them over to the district attorney. Preparation and being alert to developments in the criminal proceedings are important. For guidance on documenting and requesting restitution, see the website of the National Crime Victims Law Institute.[74]

Crime victims in New York can seek compensation from the New York State Office of Victim Services, also known as the Crime Victims Compensation Board. This state-funded program compensates crime victims for "medical and burial expenses, loss of earnings or support, counseling costs, crime scene clean-up expenses, the cost to repair or replace items of essential personal property, reasonable court transportation expenses,… [and] the cost of residing at or utilizing the services of a domestic violence shelter," as well as limited attorney fees.[75] Forms are available on the Office of Victim Services' website,[76] as well as in police stations and other sites for reporting crime.[77] This is a good option for many victims, as compensation can be requested on an emergency or ongoing basis, rather than only at the end of criminal proceedings. Additionally, the state is not limited by the ability to pay as a criminal defendant may be. If the Crime Victims Compensation Board has paid any of the victim's losses, a criminal court may order the defendant to make restitution or reparation to the Board itself.

Restitution obtained in the criminal case does not limit the victim's ability to seek additional damages in a civil tort suit or in a family offense proceeding.[78] Civil tort suits have certain advantages over criminal restitution and reparation. Damages for emotional pain and suffering are available in a civil tort suit, unlike a criminal case. Moreover, the defendant's ability to pay is irrelevant to the damages awarded in a civil tort suit. If the defendant fails to pay civil damages, enforcement falls to the victim, whereas enforcement of a criminal restitution order is the responsibility of the prosecutor, and the consequences will be more severe. Whether to seek restitution at all and in which forum is a decision the victim should make as early as possible.

The rights to criminal restitution and reparation are among the strongest rights a crime victim has in New York, because the Legislature has given very clear directions to both the prosecutor and the judge to address them. Yet restitution and reparation are not regularly pursued in domestic violence prosecutions. Early communication with the prosecutor and preparation with relevant receipts and documents are the best tools for improving this trend. The conscientious victim's attorney can help the victim to participate in the criminal proceedings as much as the law, circumstances, and the victim's own preferences permit, to the benefit of the victim's healing and to justice itself.

Notes

1. United States Justice for All Act of 2004, Pub L 108-405, 118 Stat 2260 (effective Oct. 30, 2004).
2. 18 USC § 3771(e).
3. *Id.*
4. 18 USC § 3771(a).
5. 18 USC § 3771(d)(1).
6. U.S. Department of Justice, "Victim Notification System," *available at* www.notify.usdoj.gov/index.jsp.
7. 18 USC § 3771(d)(3).

8. *Id.*
9. *Id.*
10. 18 USC § 3771(d)(5).
11. *Id.*
12. 18 USC § 3771(d)(6).
13. 22 NYCRR § 129.2(c).
14. *See* Penal Law § 70.02.
15. Executive Law § 642(1).
16. *Id.*
17. *Id.*
18. Executive Law § 646-a(2).
19. Executive Law § 647(1); *see also* 22 NYCRR § 129.3(c): "The court shall consider the views of the victim or family of the victim, as appropriate, concerning the release of the defendant in the victim's case pending judicial proceedings upon an indictment or petition, and concerning the availability of sentencing or dispositional alternatives such as community supervision and restitution from the defendant."
20. Executive Law § 647(1).
21. New York State Unified Court System, "Webcrims—Public," iapps.courts.state.ny.us/webcrim_attorney/.
22. New York City Department of Correction, "Inmate Lookup Service," a073-ils-web.nyc.gov/inmatelookup/pages/common/find.jsf.
23. New York State Department of Corrections and Community Supervision, "Inmate Population Information Search," nysdoccslookup.doccs.ny.gov/.
24. New York Statewide VINELink Home Page, www.vinelink.com/vinelink/siteInfoAction.do?siteId=33004.
25. CPL 530.12, 530.13.
26. CPL 530.12, 530.13.
27. *See e.g. People v Foster*, 87 AD3d 299, 305 (2d Dep't 2011).
28. *See e.g. Congregation B'Nai Jonah v Kuriansky,* 172 AD2d 35, 37 (3d Dep't 1991).
29. National Crime Victims Law Institute, *Privacy: Responding to Subpoenas and Privacy: Sealing and Redacting Documents*, law.lclark.edu/live/news/22657-pretrial?.
30. CPL 240.50(1) (emphasis added).
31. *See e.g. People v Robinson*, 87 AD2d 877 (2d Dep't 1982).
32. CPL 610.10(3); 610.20; CPLR 2307.
33. CPL 610.20(3), CPLR 2307.
34. Pub L 104–191, 110 Stat 1936 (1996).
35. *See* 45 CFR 164.512(e)(1)(i).
36. *See id.; see also* CPL 610.40 (subpoena served on person who holds the records, not the person who is the subject of the records); CPLR 2303(a) (same).
37. 45 CFR § 164.512(e)(1)(ii), (iii).
38. *See e.g. Matter of an Application to Quash a Subpoena Duces Tecum in Grand Jury Proceedings*, 56 NY2d 348, 352 (1982); *Perry v Fiumano*, 61 AD2d 512, 519 (4th Dep't 1978).
39. "… [A] person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." CPLR 4504(a).
40. CPLR 4508(a).
41. CPLR 4510.
42. Mental Hygiene Law § 33.13(c)(1).

43. *See People v Gissendanner*, 48 NY2d 543, 550 (1979).
44. *Matter of Constantine v Leto*, 157 AD2d 376, 378 (3d Dep't 1990), *aff'd* 77 NY2d 975 (1991) (citing *Gissendanner*, 48 NY2d at 550) (emphasis added).
45. *People v Scott,* 212 AD2d 477, 478 (1st Dep't 1995); *In re Roberts (Sheltering Arms Childrens Service)*, 138 AD2d 238 (1st Dep't 1988).
46. L 1992, ch 307.
47. *See People v Hemmings*, 2 NY3d 824 (2004), for discussion of victim impact statements in New York.
48. National Crime Victims Law Institute, *Crafting Victim Impact Statements* and *Right to be Heard at Sentencing*, law.lclark.edu/live/news/22671-post-trial?preview=1.
49. CPL 390.20.
50. *Id.*
51. CPL 390.20(4)(b); *see also* 22 NYCRR § 129.3(c) (in misdemeanor cases, "[t]he court shall consider the views of the victim… concerning the availability of sentencing or dispositional alternatives such as community supervision and restitution from the defendant").
52. CPL 390.30(3)(b).
53. CPL 380.50(2)(b), 390.20.
54. CPL 380.50(2)(b).
55. CPL 390.50(2)(b).
56. *Id.*
57. *Id.*
58. CPL 440.50(1).
59. *Id.*
60. *See* 9 NYCRR § 8002.4(d)(5).
61. *See* New York State Department of Corrections and Community Supervision, "Victim Impact Unit - Request for Victim Notification," www.parole.ny.gov/victimimpactrequest.html.
62. As defined by Penal Law § 70.02.
63. CPL 440.50(1).
64. Penal Law § 60.27(2).
65. Penal Law § 60.27(11).
66. Penal Law § 60.27(5)(a).
67. Penal Law § 60.27(5)(b).
68. Penal Law § 65.10(2)(g).
69. CPL 390.20(4)(b); 390.30(3)(b).
70. Penal Law § 60.27(1).
71. *Id.* (emphasis added).
72. Penal Law § 60.27(2).
73. Penal Law § 60.27(1).
74. National Crime Victims Law Institute, *Financial Recovery: Compensation & Restitution,* law.lclark.edu/live/news/22671-post-trial?preview=1.
75. New York State Office of Victim Services, *Services: Victim Compensation*, ovs.ny.gov/victim-compensation.
76. See 2013ovsclaimapplication.pdf, at ovs.ny.gov/victim-compensation.
77. Executive Law § 625-a(1).
78. Penal Law § 60.27(6); Family Court Act § 841(e) (limit of $10,000).

14

The Integrated Domestic Violence Court: New York's Successful Experience

by Hon. Daniel D. Angiolillo

Domestic violence cases are different from other crimes of violence. The violence is inflicted upon a person who has had a familial relationship with the defendant, most often rooted in love. While traditional criminal cases often arrive before the court as controversy over a completed act — such as a robbery that occurred at 9:15 in the evening on March 3 of the prior year — a domestic violence case most often presents as a tapestry of shifting and evolving issues that require a very wide range of response from litigants, counsel, and the court. A criminal assault that brought a petitioner to court may quickly lead to a visitation matter, child support, and a divorce filing; a party may need mental health or substance abuse intervention, or a child may have pressing educational challenges stemming from trauma. The ability of the integrated domestic violence (IDV) court to understand how all these facets of the parties' lives are interconnected and to respond in a flexible, knowledgeable and timely manner makes the lives of the litigants safer and more settled.

Frequently, actions by the victim in a domestic violence case may appear illogical or irrational to someone not familiar with the dynamics of domestic violence. The victim may request to have the charges dismissed, or to have the stay away provision in an order of protection deleted, or retain counsel for the defendant, or post $75,000 bond for the defendant by securing her home as collateral. Those actions would be a rare occurrence in a non-domestic violence case; however, these are commonplace events in domestic violence cases. Courts around the country appreciate that the handling of domestic violence cases must be different.

This book reflects many years' experience on the part of advocates and lawyers representing victims. This chapter will share, in small part, the accomplishments of highly responsive leadership within the New York State court system and mobilization of the judiciary and personnel, working to adjudicate as effectively as possible the thousands of domestic violence cases that now flow in.[1]

Specifically, this chapter will present an operational review of the IDV court as it was formed in Westchester County. During its nascent years, the IDV court had the benefit of greater resources and financial support. However, after years of financial constraints, the court system and its collaborative agencies are asked to perform with less support. Notwithstanding financial impediments, an IDV court, through collaborative efforts and enhanced technological applications, can achieve its mission.

Overview of the Integrated Domestic Violence Court

The first domestic violence court dedicated to handle felonies became operational in Kings County in 1996, with the Hon. John Leventhal presiding. Since that time, specialized courts have expanded rapidly, a reflection of their success. Combined felony and misdemeanor domestic violence courts commenced in 1999, and in 2001, integrated domestic violence (IDV) courts were introduced. I served as the original presiding judge of the Westchester County IDV court from 2001-2005, one of three

pilot courts in New York State.[2] The court gradually expanded its reach to include felony and misdemeanor domestic violence cases as well as related or concurrent Family Court and matrimonial cases and became the first of its kind IDV court in the country.

The philosophy and approach of a dedicated domestic violence court are not grounded in widget counting, but rather in deliberate, labor-intensive management of cases, with victim safety and offender accountability at the forefront. The court maintains a different mind-set: sensitivity to the issues involving domestic violence. It approaches each case in a non-conventional manner. The court is comprised of many moving parts and through collaborative effort with many different community agencies, referred to as stakeholders, an expansive stakeholder network has been formed. Although an IDV court is considered a problem solving court and lumped together with other problem solving courts such as a drug treatment court, mental health court and veterans court,[3] an IDV court is clearly different. An IDV court is not a court focused on court-supervised treatment; the mission and goals of the court do not include treatment, but rather victim safety and offender accountability. An IDV court is an accountability court.

A victim advocate, an employee of a local domestic violence service provider, would reach out to the victim on every case, to offer assistance with the legal process, housing and medical needs, and attempt to determine whether the order of protection had been violated. Representatives from various community agencies would be present in court to assist with referral, evaluation, treatment and compliance with alcohol, substance abuse, and mental health programs. Protocols were developed with these and other agencies, including the Batterer's Intervention Programs utilized by the court, to ensure the submission of accurate and timely reports.

The Case Manager/Resource Coordinator, a court employee, serves as a conduit for all reports from these various agencies. The reports received by the Case Manager are provided to the prosecution and defense counsel, and also reviewed and analyzed by the Case Manager to assist the court subject to rules of confidentiality. The Case Manager, aided by court system technology applications, collects all this information from the different stakeholders and transforms it into knowledge for the court. With this knowledge, the court is in a better position to render more informed decisions. A defendant entering the domestic violence court will also encounter assistant district attorneys dedicated just to domestic violence prosecution. Expertise in these courts is high.

A key component of the New York State domestic violence court model is frequent judicial monitoring of a criminal defendant, both pre- and post-disposition. A defendant at liberty will be required to make more frequent court appearances so that offender accountability is maintained. This approach sends a strong message to the defendant that the case is being taken seriously, and that this court is different. Defendants sentenced to probation or a conditional discharge are required to make periodic court appearances post-disposition for status reports to verify compliance with the final order of protection and all mandated programs.

The additional goals of the IDV court include the safety and well being of the parties' children, the sharing of information among the related cases, and ensuring informed decisions and consistent orders of protection. Sharing of information is a great innovation of the IDV courts.[4] Historically, there was little communication among judges presiding over related Family Court, criminal and matrimonial cases. Rarely would a criminal court judge exchange information with a Family Court judge or a matrimonial judge about a related domestic violence case and vice versa. Nor was there a flow of information among the attorneys on related domestic violence cases.

With the integrated domestic violence court, judicial coordination is now a component of the coordinated community response to domestic violence. The presiding justice in the IDV court need not reach out to a Family Court judge to consult and coordinate an order of protection on a related domestic violence case or to share other information, because the justice has both cases in the IDV

court and is in possession of the pertinent information on the related cases. For example, when a defendant enters a plea of guilty to a domestic violence incident, the plea allocution will include questions as to whether the parties' child was present at the time of the criminal conduct, and if so, to what extent the child observed the domestic violence.[5] Information as to whether the child was an observer or a direct recipient of physical injury, is certainly relevant in determining a subsequent Family Court petition for visitation. With more information there is more knowledge, and with more knowledge more informed and, one hopes, better court decisions. Similarly, the attorneys on these related domestic violence cases now have more information and knowledge regarding the related case. With more knowledge there is better advocacy.

When the related Family Court and matrimonial cases are transferred to an IDV court the cases are not consolidated, but rather retain their identity and maintained on separate Family Court, matrimonial and criminal calendars. Related cases are not merged.[6] This avoids having from six to seven attorneys or more appearing at a court appearance and attempting to bargain away the criminal case to settle a divorce and/or visitation issue.[7] Each transferred case is "subject to the same substantive and procedural law as would have applied to it had it not been transferred."[8]

It is imperative that the IDV court judge maintain objectivity. The judge must not give the appearance of bias toward the victim of domestic violence. A criminal defendant, or any observer of the court, should not fear that constitutional rights are being diminished. Practices such as referring to a victim as "complainant" rather than "victim" before a determination of guilt, providing both sides the opportunity to fully argue their respective position, and offering respect and fairness to both sides balances and restores confidence in a court system that may appear to be slanted towards a victim.

Initial Appearance on the Criminal Case in the Integrated Domestic Violence Court

Prior to the initial appearance in the IDV court upon a transfer of a felony or misdemeanor criminal case, or arraignment upon an indictment, court staff check the New York State Domestic Violence Registry, the Family Court Database, the Matrimonial Database. Information collected from this internal court procedure is reviewed and analyzed prior to the initial appearance of the defendant, and assists the court to determine bail, avoid issuance of conflicting orders of protection.

If the check of the matrimonial database identifies a related matrimonial case, the Administrative Judge of the Judicial District issues an order transferring the matrimonial case from the matrimonial part of the Supreme Court to the IDV court for determination.

New York State bail criteria in CPL 510.30 does not specifically list domestic violence history as a criterion to be considered, but subsection (2)(a)(I) of that provision states that a court must consider and take into account "the principal's character, reputation, habits and mental condition." It is based upon these factors that prior domestic violence history, when weighed appropriately, may become relevant in setting bail. The search of the domestic violence registry will reveal all prior orders of protection, temporary and final, issued in favor of or against the named defendant as well as the court of origin, thus providing the court with valuable information. Of course, both the prosecutor and the defense counsel will be advised of this prior domestic violence history during the bail hearing so that each side will be given an opportunity to fashion its respective arguments effectively.

In addition to setting bail, a temporary order of protection is issued as a matter of course in every criminal case, along with other conditions and mandated programs, such as alcohol/substance abuse/mental health programs; domestic violence education classes known as Batterer's Intervention Programs; and a daily call-in bail program. If a temporary order was issued by the local court prior to the transfer of the case to the IDV court, that court will be notified of the issuance of a temporary

order by the IDV court. The local court is requested to vacate its order in order to avoid any potential conflict during the pendency of the case should police agencies have occasion to check the registry and enforce the order.

Alcohol, substance abuse or mental health evaluations and treatment will be mandated by the court if a history presents itself or if the facts of the underlying charges support such court intervention. In Westchester, a county agency known as TASC (Treatment Alternatives for a Safer Community) will accept referrals from the IDV court. The TASC Agency will then arrange for the evaluation of the defendant and oversee any recommended treatment program.

Batterer's Intervention Programs are considered in some but not all cases. If the allegations include some form of physical assault, a written referral will be made to either one of two Batterer's Intervention Programs in Westchester County. A referral to a Batterer's Intervention Program prior to disposition is appropriate as a condition of bail or of the temporary order of protection.[9] Additionally, some defendants are required to call the Monitored Release Program, a county agency, on a daily basis as a condition of bail. If a representative from the Monitored Release Program is not present in the IDV court to accept a referral directly, then a written directive is given to the defendant.

If a defendant is given a written referral to the TASC Program, the Monitored Release Program or a Batterer's Intervention Program, he is ordered to call the particular agency within twenty-four hours in order to register and make the appropriate scheduling arrangements. A defendant is warned:

> Noncompliance with any of these mandated programs will result in your bail being increased possibly to an amount that you may not be able to make. If this were to occur, you will be housed at the Westchester County Jail awaiting disposition of this case. Noncompliance will result in your case being advanced on the court calendar. We will not wait until the scheduled court date to address noncompliance. In other words, noncompliance will be addressed immediately. If you fail to appear, a warrant will be issued. Do you understand everything I have said? Do you have any questions?

It is not uncommon for defense counsel to request a dismissal of all the charges based upon counsel's conversations with the complainant. In many cases the complainant speaks to defense counsel and conveys her desire to have the charges "dropped" so that her relationship with the defendant will return to its pre-court status. The complainant will often attend criminal court sessions without being directed to do so by the District Attorney's Office. When this occurs, defense counsel will suggest to the court that the complainant be placed under oath and questioned about her desire to "drop the charges." Although such a procedure may appear reasonable to those not familiar with domestic violence issues, the complainant is not placed under oath, nor questioned by the court, but rather directed to proceed to the District Attorney's office to schedule an appointment so that she can be interviewed by a District Attorney staff member outside the presence of the defendant. The court will not recess at that point for the Calendar Assistant District Attorney to speak to the complainant. To have the complainant sworn in open court in front of the defendant places undo pressure on the complainant and would enhance the defendant's control over the complainant. The better practice is to have the complainant speak freely to a representative from the District Attorney's office with the defendant not present. The Victim Advocate is also available, if necessary, to assist the complainant reaching out to the District Attorney's office.

Whenever a defendant attempts to direct his attention away from the court by turning to the complainant or by motioning toward her in the courtroom, he is immediately redirected by either the court or a court officer. The court should always be cognizant of a defendant's attempt to exert power and control over the complainant.

A search of the Family Court and matrimonial databases provides the IDV court with more than mere basic information as to whether a Family Court or matrimonial case needs to be transferred to the part. For example, an existing Family Court order of visitation should be considered as early as the initial appearance on the criminal case when issuing a temporary order of protection or, if not then, at some later point during the criminal proceeding. After learning of the existence of a related Family Court final order of visitation, IDV court staff will inform the attorneys, and in particular the Attorney for the Child on the Family Court case, of the recently filed criminal charges. After reviewing this information, each Family Court attorney is in a better position to decide whether to seek modification of the final order of visitation.

In one case, a Family Court judicial hearing officer had issued a final order of unsupervised visitation. No more than two weeks later, the father of the subject child (age five) was arrested and charged with endangering the welfare of a child and criminal contempt in the second degree. The father had allegedly violated a Family Court order of protection by approaching an automobile in which the subject child and child's mother were seated, yelling and cursing at the mother and frightening both of them. The Family Court matter was considered a "closed" case when the Family Court database was checked by the IDV court staff, as the parties were not required to return to Family Court.

Several weeks after the father's arrest, no petition by the child's mother to modify the final order of unsupervised visitation was forthcoming. At that point, the Family Court attorneys were notified by a staff member of the IDV court of the newly filed criminal charges of endangering the welfare of a child and criminal contempt and the related underlying allegations. This information was provided to the attorneys for their consideration, without any directive, suggestion or command by the court. The Attorney for the Child took it upon himself to file a Family Court petition for modification on behalf of the child. After the transfer of the petition for modification to the IDV court, visitation was temporarily changed from unsupervised to supervised with additional restrictive conditions. It is unlikely the Attorney for the Child would have brought the petition for modification but for the information conveyed to him by the IDV court. As for the child's mother, it is clear that she had no intention of seeking modification of the unsupervised visitation notwithstanding the recently filed criminal charges. To reiterate, the guiding principles of the IDV court are not limited to victim safety and offender accountability, but include the concern and safety of the subject child/children as well.

Orders of Protection

Prior to creation of the Westchester County Domestic Violence court, a request for and issuance of an order of protection in criminal court was treated in a simple, perfunctory manner, whether the restraining order related to a non-domestic violence or a domestic violence case. The Assistant District Attorney made an application for an order of protection, the order was signed by the court, handed to the defendant for signature and the next case on the calendar was called. For domestic violence cases, some limited cautionary words, e.g., "stay away from [complainant]," may have been added.

Today's approach is significantly different. In keeping with the goals of victim safety and offender accountability, a clear and concise message is conveyed to the defendant: that an order of protection prohibits certain conduct and that violation thereof has consequences. It is very important for a defendant to understand what he can and cannot do vis-a-vis the complainant, and that any conduct in violation of the order of protection may result in the filing of new criminal charges, as well as incarceration. The class "D" felony of aggravated criminal contempt, Penal Law § 215.52, specifically requires as an element "actual knowledge" of the order of protection on the part of defendant. Therefore, whether for purposes of prosecution or bail adjustment, it is important that a defendant has a clear understanding of the order of protection, its restrictions, and consequences.

The following recitation is utilized:

> I have signed this Order of Protection. You have signed it acknowledging receipt and you now have a copy of the Order. It is important for you to understand what you can and cannot do and what will happen if you violate this Order. This Order prohibits you from having any contact whatsoever, either directly or indirectly, with the complainant. You must stay away from her home, school, business, place of employment; you may not write any letters, make any telephone calls or send any e-mail to her; you may not have any contact with her and you may not have any friend or relative or anyone else contact her on your behalf. This is a court Order and only the court can change, modify or vacate the Order. Therefore, in the event she calls you and invites you to meet with her, do not accept the invitation. To do so would be a grave mistake. If you were to meet with her, you would be in violation of this Order of Protection. If she calls, I suggest you speak to your lawyer and let your lawyer take whatever action is deemed appropriate. Again, she is not in a position to change, modify or vacate the Order. If you see her on the street, turn around and go in the other direction. Do not have any contact with her whatsoever. Do you understand everything I've said to you? Also, if you violate this Order of Protection, new charges will be filed against you — Criminal Contempt charges. These new charges will be separate and apart from the charges that are presently before the court and any incarceration on the new charges will be in addition to this case. Furthermore, if you violate this Order of Protection, your bail on this case will be increased, possibly to an amount you cannot afford and, if so, you will be housed at the Westchester County Jail awaiting the disposition of this case. Do you understand everything I have just said to you? Do you have any questions for me?

If the order of protection is a final order, the termination date of the order is highlighted. Depending on the facts and circumstances of the particular case, it will be important that the defendant is cognizant that crossing state lines in violation of an order of protection or possessing any type of hand gun, rifle or other firearm during the pendency of a protection order is a federal offense.[10]

Preliminary Proceeding on the Family Court Case in the Integrated Domestic Violence Court

Before a Family Court case is transferred to the integrated domestic violence court, it must be identified as appropriate for transfer. Transfer is limited to a Family Court petition for custody, visitation, family offense, paternity and/or support which is related to an active criminal domestic violence case. The term "active" is not limited to a pending criminal case, but also includes a post-disposition case, i.e., when a defendant is serving a sentence of probation or a conditional discharge.

At the preliminary proceeding on a Family Court case in the IDV court, the Attorney for the Child, if appropriate, and the attorneys for petitioner and respondent are provided with copies of relevant documents from the criminal case. For example, the Family Court attorneys will receive a copy of the criminal accusatory instrument, the criminal order of protection, and any status reports from mandated programs, such as treatment programs, Batterer's Intervention Programs or other related reports that are not confidential. Generally speaking, the set of attorneys on a Family Court case will not be the same as those attorneys in the criminal case and will not usually be privy to this criminal court information. The Family Court attorneys will also be given a status summary of the criminal case, which would include a plea and sentence update and the next criminal court date. With this

added information, the attorneys are in a more informed position to advocate for their respective client. Attorneys on a related matrimonial case also receive pertinent criminal case information upon transfer of the matrimonial case to the IDV court.

In attempting to resolve a Family Court case, the attorneys in the IDV court will know from this additional criminal court information what conduct is specifically barred by the criminal order of protection and whether a modification of that order is necessary before resolution of a Family Court custody/visitation petition. Occasionally, Family Court attorneys will seek immediate modification of the criminal order without realizing that the court must afford the attorneys on the criminal case, and in particular the District Attorney, an opportunity to be heard. When the District Attorney is eventually heard on a modification application in connection with a custody or visitation petition, the District Attorney customarily consents to modification provided that specific language is added to the criminal order of protection, such as: "Subject to Order of Visitation issued by the IDV Court." When added to the criminal order of protection, this language eliminates any conflict between the criminal and Family Court orders.

Offender Accountability: Probation Supervision

The collaborative effort of the IDV court with the Probation Department of Westchester County can be characterized as superb. From the start of the Domestic Violence court in 1999, the Probation Department has been a cooperative partner in the planning, development and operation of the court. The Probation Department has been willing to listen to constructive suggestions and is never reluctant to vocalize a Probation Department perspective. In addition to attending planning meetings and ongoing stakeholders meetings, a Supervising Probation Officer meets with a court staff member on a regular basis to ensure that the flow of information between the Probation Department and the court is timely and accurate.

The Domestic Violence Unit of the Probation Department understands the principles of victim safety and offender accountability and assists the court in achieving these goals. Probation officers trained in the dynamics of domestic violence have been designated to contact the victim and prepare Victim Impact Statements and Pre-Sentence Investigation Reports, and to supervise probationers sentenced by the court. These officers are assigned to domestic violence cases only, and they attend domestic violence training programs continually. Domestic violence cases require probationers to be supervised differently from probationers on non-domestic violence cases. To ensure offender accountability, a set of special conditions of probation for domestic violence is imposed on every domestic violence probation case, whether a felony or misdemeanor, in addition to the standard general and specific conditions. The special domestic violence conditions address the order of protection, provide information about available batterer intervention programs as well as alcohol, substance abuse and mental health resources, and disclose information regarding mandated programs, and firearms restrictions. Today's special conditions also address, inter alia, cyber stalking, posting of photographs of the victim on social media, "spyware," GPS, and On-Star.

Most importantly, every probationer is required to make periodic court appearances during his probationary period. These court appearances, known as Compliance Dates, provide the court with a status report as to the probationer's progress on probation. The probationer therefore reports not only to the Probation Department but to the court as well. On these Compliance Dates the offender's probation officer will submit a written progress report if unable to attend court.[11] The period of time between Compliance Dates ranges anywhere from two weeks to six months, depending on the probationer's progress. Progress Reports assist the court in monitoring the offender by providing an update on the probationer's attendance at domestic violence education classes, participation in alcohol and substance abuse treatment programs, compliance with probation reporting and compliance

with the protection order. Periodically, over the course of probation, the probation officer will contact the victim to assess victim safety and convey relevant information to the court.

Judicial monitoring is a key component of the New York State model for domestic violence cases. A strong, clear and concise message is given to the offender that this court takes the case very seriously and is maintaining a watchful eye. Depending on progress, a subsequent Compliance Date may be shorter or longer than the previous date. At the conclusion of each Compliance Date, the probationer is advised of the next court date verbally and in writing. A written Compliance Order tells the offender that a warrant of arrest may be issued for non-appearance, restates the applicable mandated programs, and reinforces the message that this court takes this case seriously. The probationer is also told that he can use the order as a reminder of the next court date in order to avoid any misunderstanding. The probationer is given a Spanish translation of the Compliance Order, if applicable. It is emphasized to the probationer that non-compliance before the next court date will result in his case being advanced on the court calendar. The probationer is told:

> In the event of non-compliance, the court will not wait until the next court date. If informed that you have stopped reporting to the Probation Department, stopped attending the domestic violence classes or alcohol and substance abuse programs, or violated the Order of Protection or another condition, your attorney will be contacted and your case will be advanced — that means your case will be placed on the court calendar immediately. The court will not wait until the scheduled compliance date to address your non compliance. If you fail to appear, a warrant will be issued for your arrest. Do you understand what I have said? Do you have any questions?

In order to achieve offender accountability, it is important that a domestic violence court adhere to the principle that any non-compliance be addressed in an expeditious manner and that the offender is aware of the court's intention

Collaborative Effort: The Division of Parole

In collaboration with the New York State Division of Parole, a protocol was developed that requires a previously sentenced integrated domestic violence court offender, when discharged to parole or post-release supervision as a condition of release, to report to the court within a specified period of time. At the required appearance the court reviews any orders of protection and release conditions, emphasizing the limitations and restrictions, and the consequences of violating the order.

The same recitation delivered at the time of sentence for a final order of protection is restated so that the parolee has a complete understanding of the restrictions placed on his liberty. It is crucial for the parolee to understand that a violation of the final order of protection will result in return to state prison as a parole violator, and that a new separate and distinct charge of criminal contempt may be filed. Additionally, the IDV court will review and emphasize any other significant conditions of parole such as domestic violence education classes or alcohol/substance abuse/mental health treatment programs.

Collaborative Effort: Warrant Squad and Department of Corrections

An example of what can be accomplished when partners collaborate to address mutual concerns is the "priority status" of integrated domestic violence court warrants. Warrants of arrest issued by the IDV court are given priority status by the Warrant Squad of the Westchester County Department of Public Safety. The IDV court warrants are processed within hours of issuance rather than the usual

two to three day warrant processing period for non-domestic violence cases. In fact, it is common to have a warrant issued, processed and executed and the defendant returned to court within twenty-four hours of the defendant's nonappearance.

The warrant of arrest is transmitted to the Warrant Squad and the hard copy of the warrant is in their possession soon thereafter. The Warrant Squad will enter the warrant into the New York State and national police information systems. As soon as practicable, the Warrant Squad will attempt to execute the warrant by going to the defendant's most recently known addresses. Additionally, members of the Warrant Squad have a specific understanding of the dynamics and volatility of domestic violence cases, reinforcing the urgency of a prompt return of the defendant to the court.

Another example of collaboration with a Westchester county agency is the protocol developed with the Department of Corrections regarding an inmate's visiting or communicating with a party that is prohibited by an order of protection. Before the protocol, inmates on domestic violence cases often received visits from a protected party in an order of protection. Also, inmates have communicated by either telephone or in writing with protected individuals in violation of an order of protection. The Department of Corrections is alerted of the existence of every order of protection issued by the IDV court when a defendant is remanded to the Westchester County Jail. This information is entered into the jail's database and can be accessed by a correction officer in the visitor's lobby. Upon a visitor's request to visit an inmate, the database is checked in order to identify inmates that are prohibited by an order.

In cases where an inmate has telephoned a party from the jail in violation of an order of protection, the court notifies the warden or commissioner and provides telephone information pertaining to the protected party. The jail places a "block" on the protected party's telephone number(s), preventing the inmate from contacting the "blocked" number(s).

If an inmate is communicating by writing in violation of an order of protection, the court contacts the jail and provides the pertinent information. The court will also admonish the inmate about losing jail time credit if the prohibitive conduct does not cease. Jail officials in turn review the loss of jail time credit procedures with the inmate.

Collaborative Effort: Child Support Enforcement Unit

A protocol developed between the IDV court and Department of Social Services (DSS) assists the agency in its efforts to enforce child support.

It was recognized that some of the defendants within the court's jurisdiction were also subject to existing orders of child support. In many of these cases, the order of child support was in favor of the same victim in the pending criminal case. Furthermore, it was determined that the Office of Child Support Enforcement of DSS was actively attempting to locate some of these defendants in connection with child support enforcement procedures.

Under the protocol, the IDV court would impose routine payment of child support as a condition of probation or conditional discharge whenever post-sentence judicial monitoring became a component of the criminal deposition. In this regard, the court exercised its post-sentence powers and assisted the Child Support Enforcement Unit (CSE Unit) in its efforts. The IDV court also notified the CSE Unit of each court compliance date when post-sentence judicial monitoring was imposed. In response, the CSE Unit would forward all pertinent child support information to the court. With this information, the presiding judge could then take any appropriate action upon the offender's appearance in court.

To accomplish this collaborative effort, the IDV court and the CSE Unit became creative because each had different databases that could not be linked at the time. This cooperative effort between

the IDV court and DSS has again proven that collaboration can benefit various segments of the domestic violence community.

Other Benefits of the Integrated Domestic Violence Court

From its inception, the benefits of the integrated domestic violence court have been strikingly obvious. The "one family/one judge" concept has simplified the court process for litigants, reduced the number of appearances in multiple courts, addressed conflicting orders of protection, and provided an extraordinary amount of information for the court and the attorneys. Examples of the benefits of the court are numerous and occur on a daily basis.

As stated earlier, related criminal, family and/or matrimonial cases are not consolidated. They retain their own identity, appear on separate calendars, and often have different attorneys because of specialization in the legal community. The exchange of information therefore from one case to a related case benefits not only the court, but the attorneys and litigants as well.

Information related to a Family Court or matrimonial case has helped the IDV court render more informed decisions in the context of a criminal case. For example, an application to delete the "stay away" provision in a criminal final order of protection was granted over the District Attorney's objection, based upon, *inter alia*, a Family Court home study report that recommended liberal visitation. An application permitting a defendant to attend his daughter's pre-school graduation was granted over the District Attorney's objection, based upon specific and pertinent facts known in the Family Court proceeding. In another criminal case, a defendant's application to modify an order of protection to permit telephone contact with his two sons was denied based upon information from the Attorney for the child in the matrimonial action.

A criminal defendant's application to reduce bail was denied based upon the court's knowledge of a related Family Court petition. In that case, defense counsel argued for reduced bail, citing defendant's seven-year residence and employment in Westchester County, his employer's presence in court, and a letter of support from defendant's landlord. The complainant was also in court to "drop" all the charges according to defense counsel. The complainant had spoken to defense counsel prior to court and expressed a desire not to pursue the charges. The People argued for substantial bail.

The IDV court staff searched the New York State Domestic Violence Registry and the Westchester County Family Court database, both of which revealed a history of domestic violence. The related Family Court petition for custody was reviewed by the court and the attorneys. The petitioner/complainant in the criminal case referenced in her petition prior orders of protection issued on her behalf, the defendant's alcohol abuse, his assaultive conduct against her, and the claim that she was "fearful" of the defendant. After all these facts came to the court's attention, as a result of the natural flow of information from the Family Court case to the criminal case, the bail application was denied.

An example of how the exchange of information flows from a criminal case to Family Court case involved a Pre-Sentence Investigation Report. In deciding whether a father would be permitted unsupervised visitation on a Family Court petition, the court disseminated to the Family Court attorneys the "evaluative analysis" section of the Pre-Sentence Investigation Report prepared by the Westchester County Department of Probation in connection with the father's criminal case. Information sharing is subject to rules of confidentiality, specifically CPL 390.50 (2). The "evaluative analysis" pointed out that the father was under the influence of alcohol at the time of his interview with the Probation Department and that the father's denial of alcoholism combined with his emotional desire to see his children created "a recipe for disaster." After considering this information, the request for unsupervised visitation was denied.

In another Family Court case, a father's petition for temporary custody of his child was denied even though the child's mother was serving a sentence at the Westchester County Penitentiary. But for the court's knowledge of the facts and circumstances of the father's criminal case, his application for temporary custody in all likelihood would have been granted.

The case that became known as the "classic" example for describing the benefits of the integrated domestic violence court of Westchester County occurred during the early months of the court. At the preliminary proceeding in the IDV court on a Family Court case involving cross-petitions for custody and visitation, the three attorneys (counsel for the mother, father and child) agreed that they had arrived at a very reasonable resolution and requested a bench conference to discuss the particulars with the court. The first words at side-bar were, in substance, "We have settled the entire matter. We've worked out a schedule for supervised visitation. This will be real quick." Without knowledge of certain facts from the criminal case the suggested proposal would certainly appear reasonable. Information related to the criminal case, i.e., two TASC reports, a Victim Advocate Report, criminal court complaint and criminal court temporary order of protection, presented the proposed settlement in a different light.

The TASC Reports indicated that the father had not been compliant with the criminal court mandated alcohol treatment program and that he appeared intoxicated at a treatment session. In fact, a blood alcohol reading taken at that particular session revealed a blood alcohol content of .345 of 1%.[12] The TASC Report also indicated that a referral to an in-patient treatment program would be required and failure to cooperate would result in his discharge from the TASC program. The Victim Advocate report indicated that the mother would not agree to visitation unless the father completed alcohol treatment and became "sober." At that point the attorneys were informed by the court that the father's failure to cooperate with the TASC program would likely result in a bail increase on the criminal court case, resulting in possible incarceration. The three attorneys together withdrew their proposed settlement calling for supervised visitation and suggested that the Family Court matter be adjourned for an update on the father's cooperation with the recommended in-patient treatment program. At the conclusion of the court session, the father was directed to report to the in-patient treatment program or, alternatively, have his bail increased. By sequel, the criminal case was thereafter disposed of with a sentence of ten months incarceration for the father.

Conclusion

This is an innovative and especially exciting time for the New York State trial courts. Because of *judicial coordination*, litigants on related Family Court, criminal and matrimonial cases no longer appear in three different trial courts but rather in one court - the integrated domestic violence court, also known as the "one family/one judge" court. A trial judge in New York is no longer limited to only a piece of a family's story involving domestic violence. Piecemeal resolutions, which have the potential for judges in different courts to issue inconsistent or conflicting orders, are a thing of the past. The clear and concise message is zero tolerance for domestic violence.

The integrated domestic violence court has been met by general acceptance and approval by members of the bar. One attorney for the child reported that information from the criminal case became "invaluable' when advocating for his client on a Family Court visitation petition and at the conclusion of the Family Court case, the attorney informed the court that without the criminal court information it would have been "like shooting in the dark."

New York courts have adapted very effectively to meet the challenge of becoming a central piece of our community's response to the unacceptable presence of domestic violence within.

Notes

1. Through the leadership and initiative of New York State's former Chief Judge, the Honorable Judith S. Kaye, a novel approach was envisioned to streamline the judicial process by having all domestic violence issues involving one family heard and determined in one court, before one judge (known as the "one family/one judge court).
2. As of June 1, 2015, there are 42 IDV courts in New York State and since their inception, IDV courts have handled over 174,000 cases and served nearly 33,000 families, www.nycourts.gov/courts/problem_solving/idv/home.shtml.
3. *See* www.nycourts.gov/courts/problem_solving/PSC-Flyer4Fold.pdf.
4. The sharing of information is subject to rules of confidentiality, e.g., Domestic Relations Law §254, Family Court Act §154-b, CPL 390.50(2), 22 NYCRR § 205.5.
5. A plea allocution is taken on all crimes, as well as all violations in the IDV court.
6. *See* 22 NYCRR § 141.5 (a).
7. The lawyers in a Family Court and/or matrimonial case are usually not the same lawyers on a related domestic violence criminal case.
8. *See* 22 NYCRR § 141.5 (b).
9. *See People v Bongiovanni*, 183 Misc 2d 104 (Sup Ct, Kings County 1999); *Halikipoulos v Dillon* 139 F Supp 2d 312 (ED NY 2001); and *Weiner v State*, 27 Misc 3d 1203(A)(Sup Ct, Suffolk County 2010); *but see Oliver v Gross*, 121 AD3d 1116 (2d Dep't 2014), *leave to appeal granted* 25 NY3d 902 (March 31, 2015) involving a writ of prohibition to prohibit a judge from requiring TASC as a condition of pretrial release.
10. *See* 18 USC § 922; Robert F. Nicolais, *State and Federal Statutes Affecting Domestic Violence Cases Recognize Dangers of Firearms*, 71:8 New York State Bar Journal (Nov. 1999).
11. Before financial constraints and budget cutting, the offender's probation officer appeared in court on nearly all the Compliance Dates to provide a progress report.
12. .08 of 1% or greater of alcohol is considered intoxicated under Vehicle and Traffic Law §1192.

Section 4
Children and Domestic Violence

15

Litigating Custody and Visitation in Domestic Violence Cases

by Kim Susser

*Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.**

Custody and visitation disputes occur frequently in cases with a history of domestic violence. For victims, such disputes often mean renewed abuse by the batterer. In the course of legal proceedings, victims may be pathologized or stigmatized; their parental fitness may even be questioned. These "high-conflict" contested custody or visitation cases can only be understood within the context of a family's history of domestic violence. When attorneys and judges understand the dynamics of domestic violence, they are less likely to misconstrue the effects of abuse as indicia of the victim's parental unfitness or instability, and are better able to make appropriate custody and visitation determinations based on the best interest of the child.

The American Psychological Association recognizes that victims of domestic violence are at a disadvantage in custody cases if the court does not consider the history of violence:

> [B]ehavior that would seem reasonable as protection from abuse may be misinterpreted as signs of instability. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization. Terms such as "parental alienation" may be used to blame the women for the children's reasonable fear of or anger toward their violent father.[1]

This tendency to regard allegations of domestic violence with skepticism and disbelief, coupled with misinterpretation of victims' behavior, is the primary reason that custody cases are so challenging for attorneys representing victims. Battered women need help to present themselves in ways that do not undermine their credibility, whether in court or during interviews with attorneys or other professionals. A traumatized victim, in the stress of the courtroom, may revert to responses learned from living in a hostile environment, such as "becoming agitated, over-emotional or stupefied into silence." Attorneys and judges often "react negatively to such behavior, particularly if the abusive partner appears calm, collected and sure of himself."[2]

Many judges and attorneys do not fully understand the impact of battering on parenting. The belief that any negative impact on the children ends once the parties have separated is simply wrong.[3] The parenting style of men who abuse their partners has been shown to be authoritarian and rigid,[4] marked by the same controlling behavior that is associated with domestic violence.[5]

**L, 1996, ch 85 at 273-74*

Even though courts now recognize and treat domestic violence as unlawful when considering criminal, family offense and child protective cases, this view does not carry over to child custody and visitation cases.[6] The unequivocal data revealing the negative impact battering has on children is too often minimized or ignored in the context of a custody or visitation proceeding. The notion that an abusive parent is better than no second parent is a powerful force in determining visitation and often outweighs safety considerations. It is rare that a final order of suspended or supervised visits is entered.

Too often a court, after finding aggravating circumstances on an Article 8 family offense proceeding, will then grant the abusive parent liberal contact with the child when considering the Article 6 custody and visitation petition. In reversing a lower court award of custody to one father the Appellate Division noted, "the Family Court gave inexplicably little weight to its own findings regarding the father's domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties' child."[7] Even where proof of past harm is substantial, there is little acknowledgement of the potential for future harm — physical or emotional. Litigating a custody trial can be arduous and challenging. Attorneys for victims need to make arguments, write motions, introduce expert testimony, go to trial and appeal losses in order to educate the judiciary about the harm to children exposed to violence.

At the same time, attorneys for domestic violence victims should consider carefully whether even initiating a custody case is the best course of action. If the victim has de facto custody of her children and the abuser is not likely to disrupt the arrangement, it may not be necessary or a good idea to file for legal custody.

And, of course, be sure paternity has been legally established before seeking custody. If the child's father lacks standing to pursue custody, your client is already the legal custodian of the child and need not endure the rigors of a custody proceeding (For further discussion of paternity proceedings, see the chapter in this volume on Child Support). Finally, consider whether initiating a family offense case may prompt the abuser to file a retaliatory petition for custody or visitation. A court proceeding could lock your client, and the children, in a time-consuming, costly, and exhausting court battle that drags on for years and forces her into contact with the very person she wants to escape.

The Legal Context

Because the legal standard for both custody and visitation in New York State is "the best interest of the child," these issues are addressed together here. Courts have generated a large body of case law regarding weighing of factors, including domestic violence, in making best interest determinations, but there is little predictability of outcome. Factors include the child's preference; the parent's stability; primary caretaker status; parental fitness, including abandonment, neglect, substance or alcohol abuse, and mental illness; willful interference with visitation rights; nature of the parent-child relationship; religious beliefs; and the parties' relative financial positions. Judicial understanding of domestic violence, as noted above, can also affect the outcome.

In 1996, the New York State Legislature attempted to create more consistency in judicial response to domestic violence victims and their children involved in custody and visitation disputes by requiring courts to consider proof of domestic violence. The statute states, in pertinent part, that where there are allegations of domestic violence in any action for custody or visitation, "and such allegations are proven by a preponderance of the evidence, the court *must* consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section" [emphasis added].[8]

The Legislature made these specific findings regarding domestic violence:

> [T]here has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases.… The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence.
>
> Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.…
>
> Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore. . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family.[9]

Although the Legislature rejected the rebuttable presumption against awarding custody to a batterer that many other states adopted,[10] the law was meant to impose restrictions on visitation and custody for the parent found to have committed violence against the other parent. The legislative history plainly states that domestic violence "should be a weighty consideration."[11] Furthermore, since mandatory consideration of domestic violence is the only factor specifically codified as part of a best interest analysis, arguably it should be given more weight than factors identified in the decisional law. In 2009, the Domestic Relations Law (DRL) and Family Court Act (FCA) were further amended to require courts to include and state on the record how such findings, facts and circumstances of domestic violence factored into the custody decision.[12]

This legislative history is a persuasive body of material that can be used in several ways during litigation. First, it can be cited during oral argument when the court is determining temporary orders of custody and visitation. (The issuance of a temporary order is a critical juncture as temporary orders can last months and quickly turn into the "status quo.") The victim's attorney can also ask the court to take judicial notice of the findings at any point during a hearing, and they can be used in lieu of expert testimony on the effects of domestic violence on children. The legislative history provides material for cross-examination of experts; an expert's credibility could be seriously undermined if he or she is not familiar with the psycho-social research referenced in the legislative findings. Finally, they can be cited in any written motion, answer or summation.

Court decisions that have been reported since 1996 indicate that some judges deciding custody cases are giving considerable weight to domestic violence, often over the recommendation of an expert or position of the child's attorney.[13] In *E.R. v G.S.R.*, for example, the court declined to accept either the expert's recommendation, because he "skims over the many episodes of domestic violence," or the law guardian's, because she "discounted the history of domestic violence."[14] The Second Department has reversed and remanded cases when lower courts failed to consider the mother's allegations of domestic violence perpetrated against her by the father.[15]

Appellate courts ruling since the passage of the 1996 domestic violence custody law have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.[16] Courts have considered acts of domestic violence in determining a parent's fitness for custody.[17] Domestic violence has been held to be a factor in relocation cases[18] and as a basis for ordering supervised visitation;[19] it also supports a finding of "extraordinary circumstances" in cases in which a non-biological party seeks custody.[20] Courts view violence committed by a parent against a new spouse as an important concern.[21] New York has adopted the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)[22] elevating the importance of domestic violence in determining jurisdiction

over custody issues (For further discussion of UCCJEA, see Chapter 18 of this manual). Violence is also cited as a factor constituting changed circumstance in a modification proceeding.[23]

In 1998, the custody and visitation provisions of the DRL and FCA were further amended to prohibit courts from granting custody or visitation to any person convicted of murdering the child's parent.[24] Under this statute, the court is not permitted to order even temporary visitation pending the final determination of custody or visitation.[25] Exceptions include situations where a child of suitable age and maturity consents to such an order and where the person convicted of the murder can prove that it was causally related to self-defense against acts of domestic violence perpetrated by the deceased.[26]

Domestic violence is increasingly weighed by judges presiding over custody and visitation cases, but always in relation to the other "best interest" factors, sometimes in ways that are helpful to victims and other times in ways that are decidedly problematic. It is critical for attorneys representing victims of domestic violence to develop litigation strategies that ensure the court consider traditional "best interest" factors with awareness of the harm domestic violence brings to victims and their children. In the following section, those factors will be identified and suggestions provided for addressing them in the context of domestic violence custody litigation.

Moral, Emotional and Intellectual Development

Courts have generally found that batterers are poor role models for children. The court in *Rohan v Rohan*[27] accorded significant weight to the father's history of violence against the mother, stating that the batterer's "reprehensible behavior demonstrate[d] his unfitness to be a parent."[28] His violent history, the court found, proved that he was "manifestly unsuited for the difficult task of providing [the child] with moral and intellectual guidance."[29] In *Spencer v Small*,[30] the Appellate Division, affirming an award of custody to the mother, found that the father's "failure to acknowledge the traumatic environment" he created for his children because of his volatile temper revealed "a character which is manifestly ill-suited to the difficult task of providing young children with moral and intellectual guidance."[31]

In *Farkas v Farkas*, a groundbreaking decision that preceded the 1996 legislation, the court recognized that children who witness domestic violence often emulate such behavior in their own relationships. The court reasoned that "a man who engages in physical and emotional subjugation of a woman is a dangerous role model from whom children must be shielded."[32] In *G.K. v L.K.*, the court noted, "plaintiff's view of the role of women is of extreme concern to this court and what he will teach his male children about women."[33]

In *Roberto A.M. v Esmeralda M.*, a modification case in which the father had custody of the two boys, the court acknowledged his "extensive involvement" in the children's lives, yet accorded great weight to the domestic violence he perpetrated against the mother and awarded her custody:

> [I]t is crystal clear to this court that he [the father] has not provided for the children's emotional development. On the contrary, he has repeatedly thwarted efforts to promote their emotional stability. The incidents of domestic violence against the mother which were witnessed by the children, the corporal punishment used by the father resulting in black and blue bruises, pulling the children out of therapy after only eight (8) session immediately upon the completion of the Family Court matter, failing to sign the counseling form provided by the school, failing to advise the paternal father that corporal punishment is prohibited by court order yet leaving the children in his care on a regular basis is simply not acceptable. Such decisions and actions by the father have clearly had on impact on these children.[34]

Significantly, the Supreme Court in *Roberto A.M.* held that "incidents of domestic violence override the positive qualities of the father's parenting," thereby according domestic violence the weight the Legislature intended.[35]

These judicial decisions are supported by a growing body of literature by social scientists and legal experts alike who have concluded that it is impossible for abusive parents to provide proper moral, emotional, and intellectual guidance to their children. The consensus is that violence is a learned behavior; it is "cyclical and self-perpetuating. Children who live in a climate of violence learn to use physical violence as an outlet for anger and are more likely to use violence to solve problems while children and later as adults."[36] Studies, like those cited in the legislative history of DRL § 240, suggest that girls who have been exposed to or who have experienced violence in their families may be at greater risk for violence in their own relationships.[37] More conclusively, it has been demonstrated that boys who are exposed to violence in their homes are at major risk of becoming batterers.[38]

Stability

Generally, courts have held that continuity of care and a stable home environment is in the child's best interest.[39] This factor can be problematic for battered mothers who have had to flee their abusers. The preference for maintaining a stable environment with custodial continuity is not absolute.[40] In *Rohan v Rohan*, the Appellate Division held that, given the father's history of domestic violence, the Family Court's reliance upon the factor of maintaining stability as the principle ground for granting physical custody to the father was misplaced.[41] The court concluded that, in light of the father's egregious acts of spousal abuse, his claim that the mother consented to his assumption of custody was "unworthy of belief."[42] The court also noted that the family court's award of custody had the undesirable effect of rewarding the father's abusive conduct.[43]

In *Rutz v Rutz*,[44] the Court exhibited a nuanced understanding of the dynamics of domestic violence. It held that the father had been the source of instability and had engaged in behaviors harmful to the children, both before the separation with his episodes of anger, degradation and domestic abuse towards the mother in the presence of the children, and also following the separation in having the children pray for the parents' reconciliation.

Children's Wishes

Although not controlling, the express wishes of the child should be accorded considerable weight when the child is of a sufficient age and maturity to articulate his or her needs and preferences to the court.[45] (*See* discussion of Attorneys for Children, below.) The wishes of the child, even a child of more than sufficient age and maturity, are not dispositive however, when those wishes appear to be the result of exposure to domestic violence.

In *Wissink v Wissink*,[46] the Appellate Division analyzed the weight to be accorded a child's wishes when there is domestic violence in the home. In that case, the law guardian supported the father as the custodial parent, despite ample evidence of his violence against the child's mother, because that was what his sixteen-year-old client said she wanted. The Appellate Division found that, given the findings of domestic violence, the law guardian had a duty to further examine the underlying reasons for the child's wishes.[47]

In any context (and particularly where domestic violence exists), assessment of the wishes of the child is complex and nuanced. In determining how much weight to accord a child's wishes concerning contact with a parent or living arrangements, a court must regard those statements in light of developmental limitations on decision-making. Research shows a wide range of development regarding

children's ability to decide, depending on their age, but most children do not have the capacity to make reasoned decisions. Children between six and ten years old are still developing abstract thinking and cannot reliably estimate time, space or distance. Courts give increasing weight to a child's wishes as they grow older, but even in adolescence children lack the emotional maturity to make reasoned decisions.

Despite perhaps having the intellectual maturity to make a decision, the adolescent brain is still developing, and adolescents are highly susceptible to outside influence. Maturity is multi-dimensional and assessing emotional maturity is difficult.[48] Adolescents' choices may reflect an emotional preoccupation with what is positive rather than a considered weighing of both positive and negative.[49] Relying on child development research, Justice Kagan held in declaring mandatory life imprisonment without parole for juveniles a violation of the Eighth Amendment, "mandatory life without parole precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity and *a failure to appreciate risks and consequences*"(emphasis added).[50]

Therefore, experts instruct, "children should be given voice, not choice."[51] It is important for lawyers for parents and children alike to remind the judge that it continues to be the court's responsibility to make a best interest determination, regardless of the child's age or maturity, and the child's wishes are but one factor in that determination. Children are not in the position to determine their own needs or best interest.

Prior Agreement

Prior agreement of the parties is another factor courts consider in deciding custody. It is not uncommon, however, for a victim of domestic violence to agree to a custodial arrangement that is not in the child's interest, or in her own, in an attempt to placate the abuser. In this situation, the victim's attorney must argue that she ought not be bound to any agreement that occurred without representation, or under duress, or that is not in the child's best interest. The parties cannot seek to enforce an agreement that does not comport with the child's best interest.[52]

Victims may also settle because of pressure from the court or their attorney. Sometimes they believe it is better for their children to settle. These flawed reasons can be uncovered and explained with persistent and direct questioning, as well as an explanation from the victim of what she was thinking at that time of settlement and why the terms are not in the longer-term interests of the children.

Primary Caretaker

Courts place considerable emphasis on the stability and continuity that the primary caretaker parent offers the children.[53] Since it is often the victim of domestic violence who is the primary caretaker of the children, if the court is reluctant to address the issue of domestic violence, it may help to rely on the primary caretaker factor. Whether or not your client was the primary caretaker, you should always elicit testimony about this issue. Testimony should focus on either your client's role as the primary caretaker or explain why she was prevented from performing this role.

Spousal Abuse and Parental Unfitness

In addition to being a factor in determining the best interest of the child, spousal abuse must also be considered in assessing parental fitness. In a 1986 report, the New York Task Force on Women in the Courts urged legislators to enact a law making domestic violence evidence of parental unfitness a basis for visitation termination or a supervised visitation requirement. Courts have repeatedly found spousal abuse indicative of parental unfitness.[54]

Friendly Parent

Whether the parent encourages the child's relationship with the other parent is often a weighty factor in custody determinations. Court decisions have held that it is inimical to the child's best interest to interfere with the visitation rights of the non-custodial parent.[55] The "friendly parent" factor is also applied to the non-custodial parent. For example, an attorney may try to use this factor to limit the child's visitation with a parent who disparages the custodial parent to the child.

More often, however, the "friendly parent" factor is used against domestic violence victims who want to restrict the other parent's visitation because they are aware of that parent's propensity for violence. (See discussion below, *Parental Alienation*.) Several decisions, however, recognize that victims might indeed have meritorious and legitimate reasons for wishing to limit contact. For example, the court recognized in *Roberto A.M. v Esmeralda M*. that "the father's claim that the mother will not speak with him does have some merit, but notification itself does not have to be verbal. Given the history of violence and abusive behavior it would not be appropriate for the court to fault the mother for refusing to speak with the father."[56] In *R.L. v J.L*., the court found that "the mother's reluctance to communicate with Father other than by text messages is not an attempt to alienate him from this child, rather it is the reasonable result of acts committed by Father against Mother including domestic violence, having her arrested, and his filing of numerous police reports against her."[57]

Addressing the tendency of abusers to use custody proceedings for manipulative purposes, the court in *Rutz v Rutz* noted:

> Research shows that … abusive ex-partners are likely to undermine the victim's parenting role… while the father claims to encourage the children to have a strong relationship with their mother and is seeking sole custody at the request of his children, he is doing so in order to resume a place of control in the life of the mother, by making himself a middle man to whom she must go to maintain her relationships with the children.[58]

Trial Practice

Joint Custody

Courts have long held that joint custody to parents with an antagonistic and embattled relationship is contrary to the child's best interest, and therefore improper.[59] Courts also recognize the power and control dynamic inherent in domestic violence and that an award of joint custody would only increase the abuser's opportunities to maintain control.[60] Nonetheless some courts pressure parties to agree to joint custody in an attempt to resolve the case quickly. Attorneys who represent domestic violence victims should cite the case law in response to any proposed settlement that includes joint custody. Citing case law is an easy way to protect your client from being blamed for not agreeing to such a "reasonable" disposition.

As an alternative to joint custody, courts have devised an alternative for "embattled" parents, referred to as "spheres of influence" or "zones of responsibility." In these cases each parent is awarded final decision-making in a specific area, such as religious, medical or educational decisions. Child-rearing, however, is rarely so easily divided; one area of decision-making is likely to color another. It is difficult to choose extra-curricular activities without knowledge or information regarding education and medical issues, and vice-versa.

At least one court has held "the existence of domestic violence is a factor that must be considered by the court with respect to decision-making determinations, and mitigates against an award of either

joint custody, 'zones of responsibility' or any other form of shared custody."[61] The mother sought sole legal custody and an order limiting the husband's parenting time to supervised visitation. The father sought joint custody or, in the alternative, joint legal custody with "spheres of (final) decision-making…." Applying *Braiman* and DRL § 240(1)(a), the Court found that the husband had violated his wife's and his child's physical and psychological boundaries, lacked insight, and exercised poor judgment in his relationships with them, and awarded sole custody to the mother.

In other cases, however, the courts have found that the domestic violence did not rise to a level that precluded split decision-making[62] or the violence had ended and therefore split decision-making was acceptable.[63]

Orders of Protection

An order of protection issued on consent in a family offense case is not sufficient to prove domestic violence in a custody case.[64] Attorneys who anticipate a contested custody or visitation case should resist succumbing to pressure from the judge or court attorney to accept a batterer's offer to consent to the order.

Instead, as long as your client has sufficient evidence to meet the burden of proof, and there are no other issues that might prevent testifying, especially issues that go to credibility such as mental illness or substance abuse, the attorney should probably request a fact-finding hearing on the family offense case. A judicial finding of domestic violence can be essential to limiting visits and winning custody, especially when the findings specify that the child was subjected to or witnessed the batterer's violence (though the legislative history of DRL § 240 specifically notes that witnessing the violence is not required in order to consider it).

In determining whether to file a family offense petition, attorneys need to consider whether the abuser will retaliate by seeking custody or visitation. Often the abuser files for custody or visitation within days of having been served with the family offense petition. If this happens, consider filing an answer to the petition to help the court understand the issues and facts favorable to your client early on in the case. If the abuser obtains a temporary order of custody, you will have to file an order to show cause to modify or a writ of habeas corpus for the return of the child. Temporary orders are often in place for up to a year or more if a custody case is pending. These motions are not only critical tools for achieving a speedy return of the child during the pendency of the case but also provide an important opportunity early on in the case to convey to the court the victim's experience of the violence, the impact on the children and other relevant facts and evidence before the trial.

Children as Witnesses

The impact of domestic violence on children has been the subject of much academic and legal discussion. Often, children are the primary or sole witnesses to incidents of violence in their homes. As a result, they may be a valuable resource for information, or potential witnesses at a hearing.

While a child's testimony may be important, most judges will not call the child as a witness and put him or her in the middle of a custody or visitation dispute. However, in developing your litigation strategy, try to understand the child's position, learn what the child witnessed and how the domestic violence affected him or her. Such knowledge may help you better understand the strengths and weaknesses of your case and assist in fashioning a settlement. If the child is not represented by counsel or the attorney for the child gives you permission to speak with the child, he or she can be interviewed like any other witness. Once the child has been assigned an attorney, however, it is unethical to communicate with him or her without their attorney's permission.[65]

If the child has information that is pertinent and unavailable elsewhere, consider requesting the appointment of an attorney for the child in order to articulate the child's wishes and provide information

to the court. The attorney will advocate for the child's position and can also assist the victim's case by offering additional witnesses to the court in the presentation of the child's case. The attorney for the child will also be able to cross examine witnesses for both the petitioner and respondent and may be able to elicit further information not obtained through the direct examination. If the batterer acts or speaks inappropriately during visitation or custodial periods, the attorney for the child can monitor via interviews with their client, report to the court and make the appropriate motions to protect the child from any harassment or badgering. Courts usually give more weight to these arguments if they come from the attorney for the child rather than parent's counsel. On the other hand, an attorney for the child may minimize or ignore allegations of domestic violence. (*See* discussion of *Attorneys for Children*.) Consider all possibilities before requesting the appointment of an attorney for the child.

If the child wishes your client to have custody or for a visitation arrangement your client believes is safe, and the child is a credible and reasonably articulate witness, move for the child to be interviewed by the judge in the judge's chambers, referred to as an "in camera" interview, or *Lincoln* hearing.[66] This type of testimony offers the court the child's perspective without the trauma to the child of having to confront the violent parent. It also spares the child cross-examination by the batterer's counsel.[67] Such a motion to the court should be supported by facts about the emotional harm the child would sustain should he or she be forced to testify in open court, and any other danger that might result from the child testifying. It is considered error to hold the in camera interview off the record and without the attorney for the child present.[68]

Other counsel will not be present during the interview but likely will be given an opportunity to give the court or attorney for the child a list of questions or issues to be posed to the child.

Another option for including the child's voice is to elicit it through your client. Section 1046(a) of the Family Court Act establishes that hearsay statements made by children pertaining to possible abuse or neglect are admissible as evidence in a proceeding under Article Ten if they are corroborated. Case law holds that such statements are also admissible in custody and visitation proceedings if corroborated.[69] Therefore, children's statements pertaining to domestic violence are admissible in custody and visitation cases, because domestic violence can constitute abuse or neglect. You may elicit from your client any of the child's reactions and statements regarding any incident of violence he or she observed or heard.

Attorneys for Children

Because of the great weight courts give to their positions, it is critical to understand the duties and role of attorneys for children (previously referred to as law guardians) in custody and visitation cases when domestic violence is an issue. The child's position can be the determinative factor in the disposition of the case.

Historically, there have been two approaches taken by attorneys who represent children — the strict advocacy approach and the substituted judgment approach. Strict advocacy is when the lawyer advocates for the child's wishes, regardless of whether the lawyer considers those wishes to be in the child's best interest. Substituted judgment is when the lawyer substitutes his or her own judgment for the child's. Determining which approach is more appropriate formerly depended on factors such as the age and maturity of the child, the facts of the case and the predilection of the individual attorney. Since 2007, however, when Chief Judge Kaye created Rule 7.2 of the Rules of the Chief Judge, the default approach is strict advocacy. The rule states in part:

> [I]f the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and

> may recommend to the child a course of action that in the attorney's view would best promote the child's interests.

The rule stems from and is supported by the Statewide Law Guardian Advisory Committee (LGAC), established by the Office of Court Administration in 1996, which endorsed the strict advocacy approach except in cases in which the law guardian fears that the child's position would place the child in harm's way. It also supports the notion that, even when the attorney is substituting his or her own judgment, the child's wishes ought to be made known to the court.[70]

In 1994, the New York State Bar Association (NYSBA) also set forth standards and commentary for law guardians in custody and visitation cases, which recognize two critical dimensions of law guardian representation. The first is the inherent conflict that may emerge between the child's stated wishes and what the law guardian believes to be in the child's best interest. The second is that the appearance of neutrality gives the law guardian's position great weight.

NYSBA posited that it is the lawyers' responsibility to "avoid actions or positions based on preconceived notions about sexual, racial or class roles or stereotypes and seek to protect the child's interests without trying to impose the attorney's own value system or sociological theories on the child or family."[71] This statement holds particular significance in domestic violence cases. The dynamics of domestic violence and its impact on children have been recognized and codified by the legislature and case law; it is not a sociological theory that attorneys can choose to discount as contrary to their own beliefs. Attorneys for children, like many people, may have preconceived notions or stereotypes about domestic violence that should be overcome. The NYSBA standards thus establish that law guardians must investigate facts, participate fully in the proceedings, and take a position.[72] Referring to these standards, you may ask that an attorney for the child be appointed on any concurrent family offense case so that he or she can participate in those proceedings in order to understand the history and severity of domestic violence and its impact on the child.

Courts have also addressed the role of the attorney for the child. In *Koppenhoefer v Koppenhoefer*, the Appellate Division held that the failure of the attorney for the child to take an active role in the proceeding was grounds for vacatur.[73] Conversely, once appointed, courts "cannot thereafter relegate the [Attorney for the Child] to a meaningless role."[74]

In *Wissink v Wissink*,[75] the attorney for the child supported the father as the custodial parent because that was what his client said she wanted. This position appears to comply with the strict advocacy approach mandated by the Chief Judge's Rules. However, the attorney for the child ignored the history of domestic violence perpetrated by the father against the mother and did not understand the dynamics. The Appellate Division made clear that it was the responsibility of the attorney for the child to understand the dynamics of domestic violence, to apply that understanding to the adolescent girl's denigration of her abused mother and her stated desire to reside with her abusive father, and to advise the court accordingly.

Lawyers for domestic violence victims have reported that attorneys for children assigned to represent their client's children have too often disregarded the domestic violence in spite of the statutory mandate and have viewed their clients' allegations as suspect, even in the face of strong evidence supporting the victim's account. When the law guardian's bias is clear, it may be necessary to move to recuse him or her. Such an effort may be an uphill battle, however. In *Eli v Eli*,[76] the court denied a motion for the recusal of the law guardian based on bias, holding that disqualification will only be granted upon a showing of one or more of the following: (1) the law guardian's violation of the Code of Professional Responsibility; (2) a violation of the Rules of Judicial Conduct; (3) a dereliction of the law guardian's duties to the children or the court; or (4) the law guardian is unqualified pursuant to the standards imposed by law, the judiciary, or court administrators.

Other times attorneys for children give undue weight to the rule that they should strictly advocate for even their young client's wishes without examining the possibility of outright or subtle manipulation by the abuser. They may not understand the dynamics of power and control and its impact on children, thus taking their wishes at face value. Many do not heed the case law requiring them to examine why a child may wish to live with an abusive parent.[77]

Attorneys representing children often request an interview with each parent as part of their investigation. Like any other lawyer wishing to speak with a party who is represented by counsel, the attorney for the child must first have the consent of that party's attorney. Together with your client, you need to decide whether to agree to this interview and whether you need to be present. Your decision will depend heavily on your client's ability to tell her story coherently and the extent to which you believe the child's attorney understands the dynamics of domestic violence. As explained above, many attorneys for children view allegations of domestic violence as suspect while prioritizing the child's relationship with the non-custodial parent even when that parent is an abuser. When deciding whether to permit the attorney for the child to interview your client, balance the danger of appearing to be hiding something against the likelihood of your client enlightening the attorney about her history with the abuser and their child. Generally, it is best to permit your client to meet with the attorney for the child. If you are concerned that she will not be a good advocate for herself or that the attorney does not understand domestic violence, attend the interview with her.

Either way, you must prepare your client for her interview. The victim must understand that the purpose of the interview is to help the child's attorney decide what position to take, whether they need to substitute judgment, and that any information shared with the attorney can be reported to the judge.

Domestic violence victims often mistakenly assume that just because the attorney for child represents the child, he or she will support the child's best interest, and that position would be consistent with the victim's. What the attorney for the child views as the child's best interest, however, may differ from what the victim perceives as the child's best interest. Moreover, the child's attorney needs a basis to substitute her own judgment for the child's if the attorney believes the child's position is not consistent with his or her best interest.

In many cases the history or severity of domestic violence may warrant the child's attorney to substitute judgment. Together with your client, decide which facts should be highlighted for the child's attorney. Go through her history with her so she can tell her story coherently, highlighting the most significant aspects, such as the impact the violence had on the children and safety considerations. Help her understand that her answers should be child-centered rather than self-centered. Tell her to bring police or hospital records with her to corroborate the violence, but remind her that the most important information is her own account of it. Warn her that overemphasizing the domestic violence can backfire by making it appear that she is obsessed with the negative aspects of her relationship with the other parent or hostile to him. Work with your client on her affect and demeanor so that she can describe the domestic violence she endured without appearing to be overly emotional, angry, or exaggerating. She must tell the child's attorney that she understands the importance of the relationship between the other parent and the child, but simply wants the child to be safe.

Forensics

Along with the position taken by the attorney for the child, the conclusions of forensic reports, also known as psychological evaluations or mental health studies, are likely to profoundly influence the outcome of the custody or visitation case. Although judges are encouraged by the Appellate Division to be independent,[78] they are also encouraged to order, and accord significant weight to, forensic reports.[79] Courts tend to rely heavily on experts.

Case law precedent requires forensic evaluators to address domestic violence, although it is not uncommon for evaluators to minimize its impact on the child. In *Wissink v Wissink*,[80] the Appellate Division reversed an order of custody to the father and held that "the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea [the child] expressed her unequivocal preference for the abuser while denying the very existence of the domestic violence that the Court found she witnessed."[81] The court found that the forensic evaluation failed to adequately address the reasons the teenager expressed a desire to live with her abusive father and directed the lower court to order a comprehensive psychological evaluation.

A New York City study supports the notion that some evaluators minimize domestic violence, and that in fact it is the evaluator's knowledge of domestic violence, especially risk factors for continuing abuse, that predict the court outcome in regard to the safety of the parenting plan. In other words, the experts' knowledge of domestic violence is a better indicator of a safe outcome than the duration or severity of the violence.[82]

Section 722C of the County Law permits use of experts paid by the City. Most experts are chosen from lists provided by the 18-B panel, and choices are generally made by reputation in the community. Social science research, case law and anecdotal evidence all suggest that it is crucial to investigate any expert being considered for appointment, not just by getting a copy of the curriculum vitae or resume, but by speaking with the expert and specifically asking what his or her experience has been with domestic violence. For additional information, speak to other advocates and practitioners to see if they have had experience with the expert.

Prepare your client for her interview with the forensic evaluator much in the same way that you prepared her for the interview with the attorney for the child. This preparation is of critical importance to the outcome of the case. Work with your client so that she is able to recount clearly and without an angry or overwrought affect the history of the domestic violence and to demonstrate her commitment to her emotional and physical safety and that of the child. At the same time, unless the batterer was abusing the child or involved in activities that posed a direct threat to the physical safety of the child, she must also communicate her awareness of and support for the child's relationship with that parent.

Explain to your client that although the expert is a doctor, he or she is not the client's therapist — this is not the time to explore her feelings or unburden herself of her conflicts — and that her discussions with the expert are not confidential. A good expert will observe each parent interact with the children separately; prepare your client for this possibility.

You may wish to contact the expert directly and offer to provide court documents, such as an Administration for Children's Services report or an Investigation and Report ["I&R"] from Probation. You can offer to provide the expert with literature about domestic violence.[83] Since many experts do not know about the law mandating consideration of domestic violence in custody and visitation cases, consider providing them with a copy of the statute that contains the legislative history section replete with social science research on the impact of domestic violence on children, even where they are not the direct targets of the violence. Remember to send your adversary and the child's attorney a copy of any written communication you have had with the expert. Many courts however now require attorneys to sign a document limiting access to the report and the forensic.

If the forensic report ignores or minimizes the domestic violence, is hostile to your client, and/or makes inappropriate recommendations, you will need to prepare to cross-examine the expert. There is a host of psycho-social literature on the impact of domestic violence on children which you may use as material for this task. Introduce this literature into evidence by asking the court to take judicial notice of the legislative history, and then ask the expert whether domestic violence was considered in his or her recommendation and what weight it was given in light of its established negative impact on children. When cross-examining an expert who performed personality tests, be aware that domestic

violence victims tend to score higher on the "paranoia scale" of the Minnesota Multiphasic Personality Inventory (MMPI) than others because the scale measures not only paranoia but fear in general.[84] When domestic violence victims have been administered such tests, attorneys frequently find that the experts misinterpret the data or fail to understand how experience as a domestic violence victim can skew the results.

You must obtain impeachment material for your cross-examination of the expert.[85] One of the richest sources of such material is likely to be the expert's own notes. Although lower courts have denied pre-trial disclosure of the notes of forensic experts,[86] there is no appellate ruling on the issue of obtaining such data and there are strong arguments to be made in favor of such disclosure.[87]

Some courts have held that special circumstances need to exist in order to obtain notes and raw data.[88] One trial court, engaging in comprehensive analysis of the due process issue, held that special circumstances are not necessary:

> This Court fails to understand how a party can show bias on the part of the evaluator or a deficiency in the report without the careful review of the raw data and notes of the forensic evaluator. Otherwise, the litigator is limited to cross examination of the forensic evaluator and a forensic report without knowing which questions to ask and without being able to properly establish to the Court … any deficiencies in the report or bias on the part of the evaluator. The Court is tasked with applying a certain amount of weight to the conclusions in a forensic report, and it is the parties' job to bring any deficiencies in the report to the Court's attention and same cannot be properly completed, or attempted, without the raw data and notes available during trial preparation.[89]

The American Psychological Association (APA) has established fourteen guidelines for forensic evaluators in custody cases, which can be very valuable in cross-examination. The guidelines require that the expert gain specialized competence, engage in culturally informed, nondiscriminatory evaluation practices, use multiple methods of data gathering and maintain written records, and determine the scope of the evaluation based on the nature of the referral question.[90] Many experts in domestic violence custody cases do not use multiple methods of gathering data, such as interviewing collaterals. Experts in domestic violence cases often do not limit the scope of their evaluation to the assigned task but instead attempt to mediate. Thanks to the recommendations of the Matrimonial Commission, courts now issue more specific orders delineating the role the forensic should take; this somewhat ameliorates the problem of overreach by the evaluator.[91] The guidelines also require the expert to "gain specialized competence" in conducting child custody evaluations. This includes an understanding of applicable law, child development, substance abuse, and domestic violence.

If the attorney concludes that cross-examination will not be sufficient to undermine the expert's recommendation, an additional expert may be retained by the client. However, if the judge will not permit the expert to examine the child a second time, this may not be particularly helpful. A motion for funds to retain an additional expert may be made pursuant to Section 722C of the County Law.

Parental Alienation

The issue of parental alienation often arises in domestic violence cases.

Frequently, the abuser or his attorney will accuse the victim of communicating messages to the child that alienate him or her from the abuser. The victim's efforts to protect herself and her children may be misinterpreted by courts, lawyers, and experts as parental alienation. Psychological theory[92] does not support this interpretation, and the attorney for the victim should vigorously challenge it via oral argument or preliminary motion. A majority of courts that have considered the issue have declined to recognize the purported syndrome as a valid psychological phenomenon. Unfortunately, despite

vigorous effort by advocates and experts to educate about this fictional syndrome, litigants continue to assert "parental alienation" as grounds for seeking change in custody.[93]

Visitation

The initial temporary order for visitation will likely determine the course of visitation throughout the case. Visitation is easily expanded, but courts rarely cut back on previously approved contact. Therefore, the schedule of visits between the abusive parent and the child should start slowly, expanding gradually, if all goes well, from supervised visits, to several hours of unsupervised visits, to full days, and then to overnight and weekend visits.

Often in cases involving allegations of domestic violence, the visitation is initially supervised. This arrangement protects the child and the custodial parent. There are many possibilities for supervised visitation: supervision by staff or volunteers at an agency providing this service, or by friends or relatives of one or both parents. The decision about which kind of supervised visitation is best requires an exploration of a variety of factors. For example, would a report to the court be helpful? If so, supervised visitation at a reputable agency,[94] where trained staff supervise the visits, is preferable. Such agencies supervise visits either free of charge or for a small fee; visits are usually held once a week for one hour; and supervisors usually provide a written report to the court. If the batterer has abused the child or poses an ongoing danger to the victim, visitation should be supervised by professionals at an agency. Be sure that the agency will protect your client's safety by ensuring that she does not encounter her abuser when she brings the child and leaves with him or her.

Is supervision necessary for the long term? Agencies that specialize in supervising visits typically will supervise for a limited period of time, such as during the pendency of the court case. If long-term supervision is what is needed, supervision by a mutually agreed upon friend or family member, if available, may be an alternative, if safety considerations have been addressed. If visitation is unsupervised, the exchange should be conducted at a safe place, either a police precinct or a public location, such as a popular fast food restaurant or a library. Some judges and lawyers believe that an exchange at the police precinct is harmful to a child. If the visitation exchange should take place at a police precinct in order to protect your client's safety, cite the literature and case law demonstrating that exposure to domestic violence is harmful to children and point out that it would be far more damaging to the child to be exposed to domestic violence than to be exposed to the police. Practically speaking there is a dearth of supervised visitation programs. This reality can lead to consideration of family members of the abuser who might otherwise have been considered not reliable.[95]

Although theoretical support exists for the proposition that visitation ought to be supervised when there has been a finding of domestic violence,[96] obtaining a final order for supervised visits is difficult and usually requires evidence that the batterer engaged in conduct that placed the child at the risk of significant harm or continues to be violent to your client. Obtaining an order suspending visits between the batterer and the child is even more challenging, usually requiring such wrongdoing as sexual abuse of the child, repeated physical violence directed at the child, and severe substance abuse or mental health issues. Importantly, in *Matter of Laura A.K. v Timothy M*. and *Lightbourne v Lightbourne*,[97] the Appellate Divisions held that supervised visitation is not a deprivation of meaningful access. Expert testimony will likely be needed to obtain an order of permanently supervised or suspended visits.

Modification of Custody/Visitation Orders

Batterers often continue their abuse through incessant litigation.[98] If your client is harassed by her abuser filing new petitions for custody or visitation after the case has been decided, argue that modification of the custody or visitation order requires a showing of change of circumstances. In *David W. v Julia W*.,[99] the court held that to "automatically grant a hearing to a non-custodial parent

would simply facilitate a disgruntled party in harassing his or her spouse compelling the latter to expend considerable time, money, and emotional anguish in resisting the loss of custody."

Conclusion

Although the New York State Legislature and appellate courts require factfinders to give significant weight to domestic violence in custody and visitation matters, litigating these cases continues to pose challenges to lawyers representing victims. In spite of powerful legal precedent and the social science research that supports it, victims and advocates still encounter lawyers, judges, and experts who downplay the significance of domestic violence, fail to understand its impact, and stereotype or blame victims. Attorneys for domestic violence victims can overcome these challenges by educating themselves about new developments in domestic violence law and social science literature, understanding how domestic violence implicates the traditional "best interest" factors in custody law, developing strategies to bring information about domestic violence and the law to the key decision makers, and helping their clients negotiate a court system that too often is confusing and insensitive to victims. While effective representation of domestic violence victims in custody and visitation cases requires knowledge, sensitivity, and hard work, such litigation can be uniquely rewarding. Just as the threatened loss of her child often instills the greatest fear in the battered mother, preventing such a loss may constitute the greatest gift.* L 1996, ch 85 at 273-74.

Notes

1. *Report* of the American Psychological Association Presidential Task Force on Violence and the Family (1996) at 100 (*hereinafter APA Report*).
2. Evan Stark, *Building a Domestic Violence Case, in Lawyer's Manual on Domestic Violence: Representing the Victim*, eds. Anne M. Lopatto & James C. Neely (Appellate Division, 1st Dep't 1995).
3. L1996, ch 85.
4. Diana Baumrind, *Child Care Practices Anteceding Three Patterns of Preschool Behavior*, 75:1 Genetic Psychology Monographs 43-88 (1967).
5. Lundy Bancroft & Jay Silverman, *The Batterer as Parent* (SAGE 2002); Evan Stark, *Coercive Control* (Oxford Univ Press 2007).
6. See Joan Meier, *Domestic Violence, Child Protection and Child Custody: Understanding Judicial Resistance and Imagining the Solutions*, Am Univ J of Social Policy, Gender and the Law (2003).
7. *See Matter of Rodriguez v Guerra*, 28 AD3d 775, 777 (2d Dep't 2006).
8. L 1996, ch 85.
9. L 1996, ch 85 at 273-74 (emphasis added).
10. Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 Alb L Rev 1345, 1350 (1997); *see also* Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute's Model*, 37 Fam & Conciliation Cts Rev 393, 395 (1999); see e.g. Ala Code 1975 § 30-3-131; Ariz Rev Stat Ann § 25-403 (West Supp 1999); Ark Code Ann § 9-13-101(c) (Michie 1997); Colo Rev Stat Ann § 14-10-124 (1.5) (West 1999); Del Code Ann Tit 13, § 705A (Supp 1998); Fla Stat Ann § 61.13(2)(b)(2) (West Supp 1999); Haw Rev Stat Ann § 571-46(9) (Michie Supp 1998); Idaho Code § 32-717B(5); La Rev Stat Ann § 9:364 (West Supp. 1999); Minn Stat Ann § 518.17(2)(d) (West Supp 1999); Nev Rev Stat § 125.480(5) (2008); NJ Rev Stat Ann § 458:17 (1993); NM Cent Code § 14-09-06.2(1)(j) (1997); Okla Stat Ann Tit 10 § 21.1(D) (West 1995); Tex Fam Code Ann § 153.004 (West 1996); Wash Rev Code Ann § 26.09.191 (2)(a)(iii) (West 1997); Wis Stat Ann § 767.24(2)(b)(2)(c) (West 1993); Wyo Stat Ann § 20-2-113(a) (Michie 1999).
11. L 1996, ch 85.

12. Domestic Relations Law § 240; L 2009, ch 476.
13. *See E.R. v G.S.R.*, 170 Misc 2d 659 (Fam Ct, Westchester County, 1996); *see also* J.D. v N.D., 170 Misc 2d 877 (Fam Ct, Westchester County, 1996); *Roberto A.M. v Esmeralda M.*, 28 Misc 3d 1239(A) (Sup Ct, Kings County 2010).
14. *E.R. v G.S.R., supra* at 666-67.
15. *Clarke v Boertlein*, 82 AD3d 976 (2d Dep't 2011); *Wissink v Wissink*, 13 AD3d 46 (2d Dep't 2004); *Samala v Samala*, 309 AD2d 798 (2d Dep't 2003); *Finkbeiner v Finkbeiner*, 270 AD2d 417 (2d Dep't 2000). In particular, the court gave inexplicably little weight to its own findings regarding the father's domestic violence against the mother and his startling lack of judgment on several occasions with respect to the parties' child (*see Matter of Rodriguez v Guerra, supra* 28 AD3d at 777).
16. *See* Lee Elkins and Jane Fosbinder, *New York Law of Domestic Violence* 591 (Thomson/West 2005).
17. *See Farkas v Farkas*, NYLJ July 13, 1992, at 31 Col1 (Sup Ct, NY County); *Rohan v Rohan*, 213 AD2d 804 (3d Dep't 1995).
18. *See, e.g. Mitchell v Mitchell*, 209 AD2d 845 (3 Dep't 1994); *Olmo v Olmo*, 140 AD2d 677 (2d Dep't 1988).
19. *See, e.g. Anonymous G. v Anonymous G.*, 132 AD2d 459 (1st Dep't 1987).
20. *See, e.g. Peters v Blue*, NYLJ, June 23, 1997 at 29 (Fam Ct, NY County); *Pratt v Wood*, 210 AD2d 741 (3rd Dep't 1994).
21. *See Neail v Deshane*, 19 AD3d 758 (3rd Dep't 2005); *see also Kaplan v Chamberlain*, NYLJ, Sept. 17, 1993 at 27 (Fam Ct, NY County); *T.I. v P.S.*, June 5, 1995 at 31 (Fam Ct, NY County).
22. Uniform Child Custody Jurisdiction and Enforcement Act § 207; Domestic Relations Law § 76.
23. *Roberto A.M. v Esmeralda M., supra* 28 Misc 3d at 1239(A) ("It is apparent to this court that the children have experienced escalating violence in the home. These findings lead this court to believe that there is a sufficient change in circumstances that were not foreseen and it is in the best interests of the children that a modification of the custody and access schedule be granted."); *Garcia v Scruggs*, 44 AD3d 660, 661 (2d Dep't 2007) ("the allegations in the modification petition that the father continued to have no involvement in the child's life, … and the existence of a temporary order of protection based upon an allegation of domestic violence, were sufficient to warrant a hearing to determine whether a modification of the joint custody award was in the best interests of the child.")
24. *See* L 1999, ch 378.
25. *Id.*
26. *Id.*
27. 213 AD2d 804 (3d Dep't 1995).
28. *Id.*
29. *Id.; see also Costigan v Renner*, 76 AD3d 1039 (2d Dep't 2010).
30. 263 AD2d 783 (3d Dep't 1999).
31. *Spencer, supra,* 263 AD3d at 785.
32. *Farkas v Farkas*, NYLJ, July 13, 1992 at 31, col 1 (Sup Ct, NY County).
33. *G.K. v L.K.,* 20 Misc 3d 1138(A) (Sup Ct, Kings County 2008).
34. *Roberto A.M. v Esmeralda M., supra.*
35. *Id.*,emph added; *see also W.Y. v. I.V.*, 26 Misc 3d 1227(A) (Fam Ct, Richmond County 2010) (fact that Father was able to engage in these acts of violence then deny responsibility for them…indicates to this Court "a character that is manifestly unsuited" for long term parenting of Christopher, despite that the children lived with the Father for several years).
36. L 1996, ch 85.
37. Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 240 Cornell J L and Pub Pol 221 (1994).
38. APA Report, *supra* at 37.

39. *Moorehead v Moorehead*, 197 AD2d 517, 519 (2d Dep't 1993) (court found that the parties were "equally able to care for their children" and therefore, stability was of central importance; court also considered the young ages of the children who were 1.5 and 2 years old.)
40. In *Moorehead*, the court found that a long-term custody arrangement may be disrupted if it would serve the best interest of the child. *Id.* at 519-520. *See also Roberto A.M. v Esmeralda M., supra* (despite residing with the father the court awarded custody to mother because father undermined the children's emotional stability).
41. 213 AD2d at 806; *see also Supangkat v Torres*, 101 AD3d 889, 890 (2d Dep't 2012) (the lower court gave undue weight to the mother's temporary housing situation).
42. *Id.*
43. *Id.; see also Labow v Labow*, 86 AD2d 336 (1st Dep't 1983). In reversing a trial court's transfer of custody from the mother to the father, the court cited the trial court's failure to consider the father's manipulative yet apparently successful technique of bringing about a change in custody by failing to comply with court orders and the impact that this technique would have on the child's thinking. "It hardly seems to be in the best interests of a child for him to learn the efficacy of such a technique and to observe it practiced by his father and approved by the court."
44. 45 Misc 3d 1210(A) (Fam Ct, NY County 2014).
45. *Koppenhoefer v Koppenhoefer*, 159 AD2d 133 (2d Dep't 1990).
46. 310 AD2d 36 (2d Dep't 2002).
47. *See also W.Y. v I.V., supra; G.K. v L.K.*, 20 Misc 3d at 1138(A), *supra* ("This court must view the oldest child's wishes to live with plaintiff in the context of what he has been told and his immersion by plaintiff and plaintiff's family in a family dispute designed to denigrate and humiliate defendant, and isolate her from her children").
48. *See generally,* Benjamin D. Garber, *Developmental Psychology for Family Law Professionals* (Springer 2009)
49. *See* Barbara Jo Fidler, Catherine Grace Hannibal & Hon. Jane Pearl, *"Interviewing Children in Family Law Disputes,"* presentation co-sponsored by FamilyKind and the New York Chapter of the Association Of Family and Conciliation Courts (AFCC-NY) (March 20, 2015).
50. *Miller v Alabama*, 567 US —, 132 S Ct 2455 (2012).
51. *See* Barbara Jo Fidler, Nicholas Bala, & Michael A. Saini, *Children Who Resist Postseparation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (Oxford Univ Press 2013).
52. *Eschbach v Eschbach*, 56 NY2d 167 (1982); *Roberto A.M. v Esmeralda M., supra.*
53. *Hall v Keats*, 184 AD2d 825, 827 (3d Dep't 1992); *Diane L. v Richard L.*, 151 AD2d 760, 761 (2d Dep't 1989); *Moon v Moon*, 120 AD2d 839, 839 (3d Dep't 1986).
54. *See Farkas v Farkas, supra; Rohan v Rohan, supra,* at 806; *Acevedo v Acevedo*, 200 AD2d 567 (2d Dep't 1994).
55. *Entwhistle v Entwhistle*, 61 AD2d 380 (2d Dep't 1978); *Bliss v Ach II*, 56 NY2d 995 (1982).
56. *Roberto A.M. v Esmeralda M., supra.*
57. *R.L. v J.L.,* 34 Misc 3d 1236(A) (IDV Sup Ct, NY County 2012).
58. *Rutz v Rutz,* 45 Misc 3d 1210(A) (Fam Ct, NY County 2014).
59. *Braiman v Braiman*, 44 NY2d 584, 589-92 (1978); *Forsyth v White*, 266 AD2d 743 (3d Dep't 1999).
60. *Rutz v Rutz, supra* 45 Misc 3d at 1210(A); *G.K. v L.K., supra.*
61. *C. B. v J. U., 5* Misc 3d 1004(A) (Sup Ct, NY County 2004).
62. *C.C.W. v J.S.W.,* 15 Misc 3d 1140(A) (Sup Ct, Monroe Cty 2006).
63. *Matter of Gerald H. v Qui Yinh H.,* 30 Misc 3d 1238 (Fam Ct, Queens County 2011).
64. Domestic Relations Law § 240, which references the Family Court Act, requires that a finding of domestic violence be based on a preponderance of the evidence in order for the judge to have to consider the

domestic violence in determining the best interest of the child. An order entered on consent does not meet this standard.

65. *Cooperman v Cooperman*, NYSBA Opinion 656, DR 7-104(a)(1) of Professional Responsibility.
66. *See Lincoln v Lincoln*, 24 NY2d 270 (1969).
67. *Id.*
68. Family Court Act § 664(b); CPLR Rule 4019; *see Fleishman v Walters*, 40 AD2d 622 (4th Dep't 1973); *Matter of Buhrmeister v McFarland*, 235 AD2d 846 (3d Dep't 1997); *Matter of Kathleen OO*, 232 AD2d 784 (3d Dep't 1996); *Matter of Sellen v Wright*, 229 AD2d 680 (3d Dep't 1990).
69. *LeFavour v Koch*, 124 AD2d 903 (3d Dep't 1986) (custody); *Albert G. v Denise B.*, 181 AD2d 732 (2d Dep't 1992) (termination of visitation).
70. The Statewide Law Guardian Advisory Committee, Law Guardian Program Administrative Handbook, at 2-3.
71. NYSBA Standards; *see also* Appellate Division First Department, Office of Attorneys for Children Administrative Handbook (Jan. 2015) at www.courts.state.ny.us/courts/AD1/Committees&Programs/CounselChildren&Parents%28LG%29/index.shtml
72. *Matter of Brown v Simon*, 123 AD3d 1120 (2d Dep't 2014). *See also* Nancy Erickson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 Fordham Urb L J 817 (2000), for a thorough review of the standards and how the consideration of domestic violence expands the role of the law guardian.
73. *Koeppenhoefer v Koeppenhoefer*, 159 AD2d 113 (2d Dep't 1990).
74. *Figueroa v Lopez*, 48 AD3d 906, 907 (3d Dep't 2008) (internal citations omitted).
75. *Wissink, supra*, 301 AD2d at 36; *see also W.Y. v I.V.*, 26 Misc 3d 1227(A) (Fam Ct, Richmond County 2010)(court declines to follow recommendation that custody be granted to father. *See Berstell v Berstell*, 272 AD2d 566 (2d Dep't 2000) (forensic evaluation consisted of two sixty-minute interviews of each party and a one hour parent-child observation; time spent was simply not sufficient to allow analysis necessary to fully understand the impact of domestic violence in this case); *Xiomara M. v Robert M., Jr.,* 102 AD3d 581, 582 (1st Dep't 2013) (the court reasonably rejected the recommendation of its appointed forensic psychologist; see *Matter of Kozlowski v Mangialino*, 36 AD3d 916 [2nd Dep't 2007])(expert did not sufficiently weigh impact of domestic violence on petitioner's emotional and psychic state; expert disproportionately blamed petitioner for problems in the parties' relationship while ignoring her explanations, and relied too heavily on reports of the paternal grandparents, who had themselves made false reports of abuse and neglect against petitioner).
76. *Eli v Eli,* NYLJ, Nov. 12, 1998 at col 30 (Sup Ct, Suffolk County); *see also Stien v Stien*, 130 Misc 2d 609 (Fam Ct, Westchester County 1985).
77. *See Matter of Brown v Simon*, 123 AD3d 1120 (2d Dep't 2014); *Carballeira v. Shumway*, 273 AD2d 753 (3d Dep't 2000).
78. *Wissink, supra.*
79. *See Alanna M. v Duncan M.,* 204 AD2d 409 (2d Dep't 1994).
80. *Wissink, supra.*
81. *Id.*
82. Michael S. Davis, Chris S. O'Sullivan, Hon. Marjory D. Fields, Kim Susser, *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs and Recommendations of Professional Evaluators* (Report submitted to National Institute of Justice, 2009).
83. Some of the relevant literature includes: APA *Report, supra;* American Bar Association Commission on Domestic Violence, *The Impact of Domestic Violence on Your Legal Practice*, 1996, ch 5; *The Impact of Spousal Abuse on Children*, Marjory D. Fields, 3 Cornell J Law and Public Policy, No. 2 1994; Ann Jones, *Next Time, She'll Be Dead: Battering and How to Stop It* (Beacon Press 2000); Lundy Bancroft and Jay Silverman, *The Batterer as Parent* (SAGE 2011).

84. Lynne Bravo Rosewater, *Clinical and Courtroom Application of Battered Women's Personality Assessments,* Domestic Violence on Trial: Psychological And Legal Dimensions of Family Violence, ed Daniel Jay Sonkin, (1987).
85. CPLR 3120; *see also Kessler v Kessler,* 10 NY2d 445 (1962).
86. *Ochs v Ochs,* 193 Misc 2d 502 (Sup Ct, Westchester County 2002); *Feuerman v Feuerman*, 112 Misc 2d 96 (Sup Ct, NY County, 1982); *Nicholson v Nicholson*, 4 AD3d 347 (2d Dep't 2004).
87. Tippins, *Custody Evaluations, Part 4: Full Disclosure Critical,* NYLJ, Jan. 15, 2004 at 3.
88. *C.P. v A.P.,* 32 Misc 3d 1210(A) (Sup Ct, NY County 2011).
89. *J.F.D. v J.D.*, 45 Misc 3d 1212(A) (Sup Ct, Nassau County 2014).
90. 65:9 *American Psychologist* 863 (2010).
91. Matrimonial Commission Report to the Chief Judge of the State of New York, February 2006 at 46, available at www.nycourts.gov/ip/matrimonial-commission/.
92. The American Psychological Association determined that "although there are no data to support the phenomenon called parental alienation syndrome, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization. Terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father." *Report on Violence and the Family* at 40, 100.
93. Proffered expert testimony on parental alienation syndrome has failed to persuade most New York courts. *See People v Fortin*, 184 Misc 2d 10 (Cty Ct, Nassau County 2000); *People v Loomis* 172 Misc 2d 265 (Crim Ct, NY County 1997). That court also noted that in Florida such testimony was not generally accepted under the *Frye* rule; *see also Darla N. v Christine N.*, 289 AD2d 1012 (4th Dep't 2001); but see *Zafran v Zafran*, 28 AD3d 753 (2d Dep't 2006); P.M. v S.M., 17 Misc 3d 1122(A) (Sup Ct, Nassau County 2007); *Matter of F.S.-P. v A.H.R.*, 17 Misc 3d 390 (Fam Ct, Nassau County 2007); *J.F. v L.F.,*181 Misc 2d 722 (Fam Ct, NY County 1999) (finding natural parental right to visitation with children that exceeds any property right).
94. www.svnetwork.net/standards.asp.
95. Samantha Moore, Kathryn Ford, *What Courts Should Know When Working With Supervised Visitation Programs*, Center for Court Innovation (2006) www.courtinnovation.org/sites/default/files/Supervised%20Visitation.pdf.
96. Some states, though, have a presumption that the abusive parent have only supervised visits unless the presumption is rebutted by showing fitness to have unsupervised visits, for example by completing a batterer's education program.
97. 204 AD2d 325 (2d Dep't 1994); 179 AD2d 562 (1st Dep't 1992).
98. Susan L. Miller and Nicole L. Smolter, *Paper Abuse: When All Else Fails Batterers Use Procedural Stalking*, 17 Violence Against Women 637 (originally published online 28 April 2011).
99. 158 AD2d 1 (1st Dep't 1990).

16

Child Welfare Cases and Investigations Involving Domestic Violence

by Jill M. Zuccardy

Discussion of the involvement of child welfare agencies in the lives of children whose parent is a victim of domestic violence must begin with Nicholson v Scoppetta.[1] This 2004 Court of Appeals decision radically changed the legal landscape for domestic violence victims who find themselves involved in a child protective services investigation or Family Court child neglect or abuse case. The decision was the culmination of federal class action litigation that began in 2000, on behalf of battered women and their children, challenging removal of children from their mothers' custody solely or primarily because the mothers were victims of domestic violence.

Prior to the *Nicholson* litigation, child protective service agencies in New York and throughout the country routinely charged battered mothers with child neglect, claiming that the mothers, although themselves victims, "failed to protect" their children from exposure to domestic violence. The Administration for Children's Services (ACS), the child protective services (CPS) agency in New York City, went so far as to charge victims with child neglect for "engaging in domestic violence" in the presence of their children, as if the perpetrator and the victim were equally culpable for the domestic violence. In *Nicholson*,[2] battered mothers and their children sued New York City and state officials, alleging that ACS's policies and practices in domestic violence cases involving domestic violence violated their constitutional rights.

After a two-month trial involving more than 40 witnesses, a federal district court ruled that ACS policy and practices in child welfare cases involving domestic violence were unconstitutional; condemned the ACS practice of prosecuting battered mothers for child neglect when they have "done nothing but suffer abuse at the hands of another"; and concluded that the ACS practices in cases involving domestic violence harm children much more than they protect them from harm.[3] The federal court noted that "children's welfare, the state interest which is so often the great counterweight deployed to justify state interference in family affairs, has virtually disappeared from the equation in the case of [the ACS] practices and policies regarding abused mothers."[4] On appeal, the Second Circuit certified questions of state child welfare law to the New York Court of Appeals, which the state court answered in *Nicholson v Scoppetta*.[5] That decision clarified the legal standard for neglect generally, for all parents regardless of the behavior charged.

Attorneys and advocates working with victims of domestic violence, or with victims alleged to have perpetrated domestic violence, who find themselves involved with child protective services, must become familiar with the legal standards — and the legal nuances — regarding child neglect. Many attorneys and advocates whose practices focus on more "traditional" family law, such as custody, visitation, orders of protection, child support, feel in unfamiliar territory when clients are confronted with a report to CPS, or a child neglect proceeding under Family Court Act Article 10. In truth, attorneys and advocates armed with knowledge of child welfare law and the dynamics of domestic violence

are ideally situated to help victims who are involved with CPS, and to help foster a protective rather than punitive approach to working with parents and children affected by domestic violence.

The Legal Standard for Neglect

The Family Court Act defines a neglected child as, in pertinent part, a child under eighteen years of age:

> (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care;
>
> (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or
>
> (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court.…[6]

Although Family Court Act Article 10, which governs child welfare proceedings, contains specific provisions related to physical punishment, alcohol abuse and substance abuse, the words "domestic violence" do not appear in the statute. When a perpetrator of domestic violence is accused of child neglect or maltreatment, or when a victim is accused of "failure to protect" a child from exposure to domestic violence, the alleged action (or inaction) falls under the auspices of Article 10's catch-all phrase "inadequate guardianship." That is, the parent is accused of a general failure to exercise a minimum degree of care "by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof.…"[7]

Notably, the statute addresses not only the risk of physical harm, but also risk of emotional harm to children. Pursuant to the statute, "impairment of emotional health" and "impairment of mental or emotional condition" include:

> a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy.

The *Nicholson* court emphasized that to support a finding of neglect there must be proof of serious harm or potential harm, and the harm must be "near or impending, not merely possible."[8]

Although a body of literature discusses the deleterious effects on children of living in a home where there is domestic violence,[9] it cannot be presumed that a child is suffering impairment that rises to the statutory level necessary to justify the government's intrusion into the family. In assessing whether the government has authority, against the wishes of a parent, to intervene in a family through child protective services, the standard is "impairment," not "best interests" as it would be in a custody or visitation case between parents. The distinction is an important one.

Such impairment, if established as contemplated by the statute, "must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child"[10] in order to support a finding of neglect toward the child." The statutory standard is minimum degree of care, "not maximum, not best, not ideal."[11]

Thus, the court must perform a three-prong inquiry: (1) did the child suffer harm or risk of harm; (2) did the parent exercise "a minimum degree of care. . . under the circumstances then and there existing"; and (3) if both (1) and (2) are shown, is there are a causal link between the harm or potential harm and the parent's actions or inactions? The petitioner, usually the local child protective services agency, must prove each element by a preponderance of the evidence.

The above standards for a finding of neglect apply in all child welfare cases. In *Nicholson*, the Court also addressed specifically how these standards should be applied in child welfare cases involving domestic violence. First, the Court was clear that the law does not permit a finding of neglect based only on the fact that the child has been exposed to the domestic violence, holding that "[e]xposing a child to domestic violence is not presumptively neglectful."[12] Thus, the first prong of the inquiry — harm or the substantial risk of harm must be met by particularized evidence. With regard to the second prong, the Court held that courts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, "under the circumstances then and there existing"?[13] Thus, when assessing whether a domestic violence victim's actions or inactions failed to exercise a minimum degree of care as defined by the statute, the inquiry must be detailed and specific. The court must consider risks attendant to leaving; to staying and suffering continued abuse; to seeking assistance through government channels; to criminal prosecution against the abuser; relocation, along with consideration of the severity and frequency of the violence, and resources and options available to the mother. While the Court in *Nicholson* noted that its ruling "does not mean that a child can never be 'neglected' when living in a home plagued by domestic violence," the court also recognized that a neglect finding against a battered mother based on domestic violence was appropriate only under a constellation of circumstances which clearly established, among other things, ongoing harm to the children and a parent's failure to recognize the harm.

It is difficult to precisely gauge the effect of *Nicholson* on child welfare policy and practice, because cases handled in a more nuanced and less punitive fashion are less likely to come to the attention of advocates and attorneys. However, review of the case law since *Nicholson* indicates that courts are applying a higher bar than before in deciding whether to remove children or to find that a victim of domestic violence has been neglectful.[14] For example, in *In re David G.*, a Kings County Family Court refused to allow removal of children from their mother, who was a victim of domestic violence at the hands of their father, and chastised the agency for failing to "explore measures short of removal [from the mother] to avoid the potential risk to the children posed by the father," and for failing to take any steps to hold the perpetrator of the abuse accountable for allegedly violating a temporary order of protection issued in the case. The court found that the agency acted in contradiction of the "public policy embodied in the case and statutory law by keeping the family together when possible to do so safely and helping the non-offending parent protect herself and her children while holding the offender accountable."[15] In *In re Raven H.*, the Fourth Department reversed a lower court finding of neglect where it found that the petitioner "established 'two facts only: that [respondent] has been the victim of domestic violence, and that the child[ren have] been exposed to that violence,' and therefore failed to establish that respondent is 'responsible for neglect.'"[16]

A finding of neglect against a victim of domestic violence may be more likely where there are concurrent findings of other types of neglect, or where there is proof of actual impairment of the child from repeated exposure to the violence.[17] For example, the Third Department upheld a finding of neglect against a victim of domestic violence in *In re Celine O.*,[18] identifying a constellation of circumstances in support of that finding:

> The testimony here established that respondent's boyfriend began physically abusing her shortly after he moved into her home. While the altercations occurred outside the children's immediate presence, the children could hear "major arguments" and "serious yelling," saw respondent's injuries and feared

> for her safety. The abuse was severe enough that, after one particular incident, respondent sought medical attention and called the police from the emergency room. Although respondent promised the responding police officer that she would take the kids to a shelter, she instead returned home to her boyfriend, whereupon he again physically assaulted her. Just a few days later, while the children were in school, respondent left with her boyfriend and drove with him out of state without notifying the children or arranging for their care. The son called the police after he found a note that respondent had left under his pillow directing him to call 911, which he understood to be related to the domestic violence. The children were left unattended, with little food in the house, until the following day when petitioner intervened. That respondent attempted to minimize these incidents indicates that she lacked insight into the effect her actions had on the children's emotional and physical well-being.

Nicholson has not prevented findings of neglect against perpetrators of domestic violence.[19]

The CPS Investigation

There are two ways that a parent who is a victim of domestic violence may come to the attention of CPS. In some jurisdictions, the Family Court will institute a court-ordered investigation as part of a custody, visitation or family offense case. The role of the CPS caseworker is to collect information and issue a report to the court. More typically, a battered mother comes to CPS attention through a complaint to the State Central Register of Child Abuse and Maltreatment (SCR), operated by the New York State Office of Children and Family Services.

Mandated reporting to the SCR is not triggered merely because a child has witnessed domestic violence[20] and, if such a report is made, the SCR should not accept the complaint. When the complaint is accepted, it is sent to the local CPS office for investigation. CPS must commence its investigation within 24 hours and make face-to-face contact with the child, parent and other household members.[21] The extent of that contact may depend upon the severity of the allegations and safety information in the complaint. CPS caseworkers must offer services to the family, but they also must inform parents that they are not required to participate in services unless they are ordered to do so by a court.[22] CPS has 60 days to complete its investigation, and often will keep the investigation open for the entire period.

If the parent has notice that a complaint has been made, it can be helpful and reassuring for a parent to know in advance what types of questions the CPS caseworker may ask and to be prepared with responses. The interview with the parent will address the allegations in the report; there are certain "routine" areas of inquiry as well. The CPS caseworker will likely ask for the name of the child's pediatrician, and request the parent sign a HIPAA release so that the caseworker may speak to the doctor. If the parent has proof of immunization in the home, it is helpful to have it ready to show the caseworker, along with information regarding health insurance. The caseworker will ask for information about the child's school or day care, and possibly the name of the child's teacher or day care provider, as well as any special needs that the child has or services that the child receives. The caseworker will likely ask about sleeping arrangements, income and employment and may ask to check the cupboards or refrigerator to see if there are basic food supplies in the home. The caseworker will likely ask how the parent disciplines the child. A parent also may be asked what she likes most about being a parent, what she finds to be the biggest challenge and whether she has family and a support system in her life. The caseworker also may ask the parent about her own health and mental health history, as well as any services that the parent receives, and may ask for releases as to those service providers. While it is rarely, if ever, advisable to decline to sign releases for the child's doctor or service providers, it is less "risky" for the parent to decline to do so, especially at this first interview, until the parent has an opportunity to discuss with her advocate or attorney whether disclosure of

confidential communications, particularly therapeutic communications, will negatively impact her ability to benefit from the services going forward. It may be that the parent decides to sign a limited release, so that the fact of services can be confirmed, but not the content.

Advocacy During a CPS Investigation

A parent may refuse entry into, and inspection of, the home by a CPS caseworker,[23] but in most circumstances asserting that legal right is not advisable. If access is not granted, the caseworker may summon the police, seek a warrant or ask the Family Court to authorize access or even removal based solely on the allegations. Once the CPS investigation goes forward, it is more feasible for a mother to decline continued home inspections, especially if the abuser and not the mother is alleged to be placing the child at risk, and she may instead offer to bring the child to the CPS office for interviews. When a mother is residing in a confidential domestic violence shelter, an attorney should oppose CPS entry into and inspection of the "home." A domestic violence shelter is a government-licensed and inspected facility and is already confirmed to be a safe and appropriate environment for children. The risks of a breach of confidentiality are too high to justify revealing the location to CPS caseworkers and supervisors. The address of the shelter also will appear in CPS records, access to which the abuser is entitled by law. Revealing the address puts not only the subject of the investigation at risk but also endangers other residents and their children.

If an attorney knows that CPS intends to interview the mother, the attorney may attend the interview or identify someone else — preferably a social worker, but also a paralegal or intern, or family friend — to attend the interview. While an attorney may be present at an interview in the home, many CPS caseworkers feel uncomfortable proceeding in the presence of an attorney, especially if the attorney tries to participate rather than merely observe.

The attorney should develop a contingency plan with the mother if the allegations could lead to the children being removed, either with or without an opportunity for the mother to be heard in court. The mother should identify relatives or friends who could take the children in the short term. The attorney should explore whether the mother would be willing to go into a domestic violence shelter or relocate to the home of a friend or relative in the short term if it is a way to avoid removal of her child. These decisions may need to be made quickly and, as frightening as it may be for the mother, the attorney should explore them as early as possible in the investigation.

CPS must interview the mother at a separate location from any interview with the abuser. The CPS caseworker should not merely ask the abuser to step into the other room while she queries a mother about his violent tendencies. CPS also must provide an interpreter if needed; a battered mother cannot be expected to discuss difficult family issues in a language in which she is not fully conversant or to use a friend or neighbor to translate. A child should never serve as interpreter.

During the interview, a battered mother may feel anxious about what, and how much, information to share. If she discloses serious abuse in the home, she risks having her child removed, having a neglect case filed against her or having the CPS caseworker take precipitous action, such as confronting the abuser, which will increase danger. On the other hand, if the mother minimizes the violence, CPS may conclude that the mother is unwilling or unable to take steps to protect the child.

A battered mother is best served by simply telling the truth. While she should not mistake the CPS caseworker for a confidante and should not volunteer extraneous information, she should be straightforward in response to specific questions. She should avoid advocating for the abuser or providing excuses for his behavior. She should not try to protect the abuser or align herself with him based on the mistaken impression that this will cause CPS to close the case. In most investigations involving allegations of domestic violence, the interests of the mother and the alleged abuser are not aligned and presenting a united front may result in removal of the child from both parents. Further,

CPS caseworkers have access to records of abuse in the home by police, the courts, the hospital or other service providers. It does not serve the mother to back-peddle from any prior reports.

The focus should be on providing information necessary to establish that the child is currently safe and that the abused parent has taken, and will continue to take, steps to keep the child safe. Letters from service providers or proof of involvement with social services are helpful. An abused parent is not required to accept CPS mandates.[24] However, if the mother disagrees with the safety measures suggested by CPS, she should be prepared to articulate an alternate safety plan. If the CPS agency has a domestic violence specialist, the attorney should reach out to the specialist — or ask the caseworker to — if any problems arise.

The attorney and mother should identify CPS tools or resources that could help the mother. CPS can bring the power of the government to bear against the abuser. CPS has the authority to apply to the court to exclude the abuser from the home, advocate with the police to have the abuser arrested or file a neglect case against the abuser. CPS also serves as a resource for referrals to, for example, counseling, child care, Head Start programs, housing and culturally and linguistically appropriate services. It is imperative that dialogue with the victim be the center of any CPS intervention to avoid the unintended consequence of increasing danger.

The most challenging scenario is one in which the mother wants to reconcile or remain with the alleged abuser. Whether CPS seeks removal or files a neglect petition will depend on factors such as the frequency and severity of the abuse, the abuser's relationship to the child and the abuser's willingness to become involved with services. While it is the attorney's role to advocate the mother's position, a mother who wishes to reconcile or remain with an abuser must understand the pitfalls of this course of action, particularly the potential for removal of her children should another incident of violence occurs. An attorney for a mother in that situation should encourage her to develop a well thought-out safety plan that she can share with the CPS caseworker and to pursue an order of protection which, while allowing the parties to continue to live together, restrains the abuser from verbal or physical abuse against her and the child.

An attorney may also provide information to, or advocate directly with, CPS as long as there is no pending Family Court case. The attorney should ask whether the caseworker intends to file in court or seek removal, so that the attorney may be present if such a filing occurs and may request a hearing *before* a removal. If the attorney believes that removal or any other legal action is forthcoming, the attorney may ask the caseworker to provide contact information for a CPS attorney. The mother's attorney also may contact the CPS legal services unit directly. If removal or court action appears imminent, the attorney should notify the CPS legal services unit in writing that the attorney represents the mother and must be informed of any court filings.

Challenging an Indicated Report

At the conclusion of the investigation, CPS marks the report "indicated" or "unfounded" and notifies each subject of the report of the outcome. A finding of indicated means that CPS has determined that "some credible evidence of the alleged abuse or maltreatment exists."[25] The record of an indicated report remains at the SCR until ten years after the eighteenth birthday of the youngest child named in the report.

If a case is marked "unfounded," no further action is required. To challenge the indicated report, the client, or attorney, must send a letter to the New York Office of Children and Family Services (OCFS) requesting a copy of the documents on file with the SCR; administrative review of the determination and amendment to unfounded; and a fair hearing if the determination is not amended at administrative review. *The request for a fair hearing must be made within 90 days, even if there is*

a Family Court neglect case pending; the 90 day statute of limitations to challenge an indicated report is not tolled by the pendency of a case under Article 10. The attorney also should request a copy of the mother's file from the local CPS to obtain the details of the investigation. In both instances, authorization for the release of the client's records to the attorney must be provided. If the attorney cannot represent the mother in a fair hearing, the attorney should help the mother file her request pro se.

OCFS will conduct an "administrative review" before scheduling a hearing. During the administrative review process, an attorney may make a submission advocating for amendment of the report to unfounded. The submission can be as informal as an advocacy letter, or as formal as a brief if the finding is contrary to law. There is no set time frame for an administrative review so any submission should be made as soon as possible. The next step is that the attorney, or client pro se, will be notified of the result of the administrative review. If OCFS declines to amend the report to unfounded and to seal the record, OCFS will automatically schedule a fair hearing before an administrative law judge.

Procedural and Substantive Requirements for Removal

The Court of Appeals recognizes that "the liberty of a parent to supervise and rear a child" is one of the "[f]undamental constitutional principles of due process and protected privacy."[26] It is, likewise, in a child's interest to be raised by his or her parent, and that relationship should not be interfered with absent grievous cause or necessity.[27] Accordingly, the removal of a child from a parent is one of the most serious exercises of government power that our constitution permits. Exacting procedural safeguards are applied when the government seeks removal.

The law requires CPS to obtain a court order authorizing removal of a child. The only exception is when CPS determines that there is an imminent danger of serious injury to the children's life or health and the risk of harm is so immediate that there is no time to obtain a court order.[28] The court must then hold a hearing prior to continuing the removal made without court order.[29] CPS may file ex parte but must give the mother notice of its intention to do so and, again, a hearing must be held. Upon any application for removal, the court must determine whether reasonable efforts were made to eliminate the need for removal or, if such efforts were not made, whether the lack of such efforts was appropriate under the circumstances and whether an order of protection would ameliorate the danger.[30] At the conclusion of the hearing, the court may decline to order removal or issue a "remand" order, i.e., an order placing or continuing the child in CPS custody for a period of a few days until the neglect petition is served. Children must be placed with relatives if possible.[31]

A mother may challenge a removal through what is commonly known as a "1028 hearing," named after the section of the Family Court Act which provides for it.[32] She may file a Demand for Return of Child (which causes the scheduling of a hearing) even before CPS commences a proceeding. If the attorney has been retained after the removal but before the next court date, the attorney may file for a hearing and the court date will be advanced. The hearing takes priority over all other matters in the Family Court, must occur within three days, and cannot be adjourned without consent. Because the standard for continued placement in foster care is "imminent danger," a mother has a right to seek a 1028 hearing at any point prior to disposition, even during fact-finding, if imminent danger no longer exists. A parent does not waive the right to a hearing merely by declining to exercise that right at the commencement of the case.

The Family Court Act § 1028 Hearing

If a removal has occurred, the attorney must weigh whether and when to request to a 1028 hearing. Although the decision will depend on the facts of the case, requesting a 1028 hearing while a case is newly before the court is often best. The request emphasizes the serious nature of removal of a

child and causes an immediate conference about the case. The request itself may result in the return of the child. Further, even if the child is not returned as a result of a 1028 hearing, the hearing focuses the parties and the court on what steps CPS and the mother must take so the child can be returned as soon as possible. Reasonable efforts by CPS virtually always can eliminate danger, but such efforts can only be ordered by the Family Court when the case is before it. In challenging removal the attorney must focus not only on the issues of "imminent danger" but also on "best interests of the child." The court is required to weigh any risk to the child against any trauma or damage to the child from being removed from home.[33]

The abused parent's attorney must assure that this balancing of harms is explicitly considered. The Court of Appeals has recognized that "the psychological trauma of removal" is so great that sometimes it may "threaten destruction of the child"[34] and that "[i]f removed from the home of her primary care giver, a young child would be expected to have a 'normal grief reaction,' including crying, aggressiveness, eating or sleep disturbances, nightmares or night terrors, as well as temporary regression in developmental skills."[35] The attorney also should challenge any attempt to categorize placement in foster care as the "safer course" or "erring on the side of safety." Although the Court of Appeals rejected this standard in *Nicholson*, some lower courts persist in applying it.[36]

Upon seeking a 1028 hearing, the attorney should obtain the case record and ask whether CPS intends to call any witnesses other than the caseworker. Since CPS has the burden to prove imminent risk, CPS will present its case first. The caseworker who investigated the complaint is likely to be the only witness since hearsay is admissible. Upon the conclusion of the petitioner's case, the attorney may make an oral motion to deny the removal petition if CPS does not meet its three-prong burden of showing imminent danger of harm; that removal is in the best interests of the child; and, that no reasonable efforts will ameliorate the danger. If that motion is denied, the attorney must consider what evidence and witnesses to present on the mother's case. Documentary evidence of safety and best interests should be submitted. Witnesses may include a therapist, doctor, clergy, or others with knowledge of the mother and child's safety and well-being.

An attorney must consider whether the mother should testify. If the mother does not testify, CPS is likely to ask that a negative inference be drawn. Whether the mother testifies will depend on the facts and circumstances, the strength of the case without her testimony, how the mother will present as a witness and the judge before whom the application is being heard. The downside of having the mother testify is that CPS is likely to focus on past violence rather than current safety. The attorney should object to that line of questioning on grounds of relevance. If the questioning is allowed, it is imperative on re-direct that the victim's attorney emphasize the protective measures that she took and underscore the challenges she faced.

At the conclusion of the hearing, the court will either return the child to the mother (referred to as a "parole"), continue the child's remand in foster care or order the direct placement of the child with a relative or other person. All parties have the right to an immediate appeal of the decision. If the court orders the child to be returned, CPS does not have a legal basis for holding the child to complete its internal protocols such as a discharge medical examination. However, CPS may assert its right to an automatic stay of the return of the child until 5 p.m. the next business day after the day on which the order was issued.[37] If the court orders removal or continued removal, the mother's attorney also should consider seeking an immediate stay of the removal order from the Appellate Division.

If the mother does not prevail at the hearing, the attorney should ask CPS, the court and, where applicable, the attorney for the child, to articulate why they believe that the child remains in "imminent danger" and how to eliminate hurdles to reunification. When services are identified, the attorney should seek a court order mandating CPS to provide them as well as an order providing for frequent visitation under the least restrictive circumstances.

Neglect Petition Against Perpetrator Only

CPS may file a neglect petition against the abuser exclusively, without naming the mother. The non-respondent mother will be notified of the proceeding against the abuser and has a right to appear as an interested-party intervenor and to participate in all arguments, fact-finding and dispositional hearings insofar as they affect the custody and well-being of the child.[38] The child may then be removed from the perpetrator. The court may characterize the child remaining with the mother as "parole" to the mother; this is an incorrect characterization where the child has never been removed from the mother, and the mother should ask for a temporary custody order instead.

Participants in a child welfare proceeding involving domestic violence tend to categorize a non-respondent mother as "cooperative" or "uncooperative," but the reality of the non-respondent mother's involvement in the case is not so simply defined. An allegedly uncooperative mother is often simply a mother who has her own position on what is necessary for the protection of herself and her child, a position based on the reality of her daily life and her intimate knowledge of the habits of the abuser. The attorney may need to remind CPS that the goal is ensuring safety of the child and that a neglect prosecution against the abuser may undermine that goal.

An abused parent should be encouraged to take advantage of the protections offered to her in a neglect proceeding against the abuser. CPS will take responsibility for arranging safe visitation between the abuser and the child, thereby relieving her of this difficult task. CPS has the power to obtain an order of protection on behalf of the mother and child including exclusion of the abuser from the home, sometimes until the child's eighteenth birthday.[39] A neglect finding against the abuser may be used in custody or visitation proceedings that occur after CPS ceases its involvement with the family.

When a petition under Article 10 is filed against the abuser, a non-respondent mother must decide whether she should file separate custody or family offense petitions. Since the non-respondent mother has the right to participate in the neglect proceeding, these petitions may complicate and delay the case procedurally and may offer her no greater relief. On the other hand, the other proceedings assure that the mother can assert her right to seek independent and continuing relief beyond what CPS pursues and guarantee that, if a neglect finding is not entered, the court continues to have jurisdiction over the issues of visitation and protection. If the mother files her own custody or family offense petitions, these may well be consolidated with the dispositional phase of the child welfare case, the practical result of which would be application of a loser evidentiary standard.

If the abused parent is a non-respondent in a neglect case against the abuser, the attorney usually will not put on a case at trial but rather will provide relevant evidence through cross-examination or at disposition. However, CPS is likely to call the non-respondent mother to testify. The attorney should prepare her to testify and may even offer proposed questions to the CPS attorney.

Neglect Petition Against Victim

As courts have shifted away from holding abused parents responsible for the violence perpetrated against them, cases in which an abused parent is named as a respondent are more likely to include allegations in addition to, or instead of, domestic violence. An attorney should be alert to whether other issues are a pretext for, or are masking, unlawful charges based on domestic violence.

When CPS identifies other issues, such as alleged drug use or mental illness, as the basis for the removal or neglect charges, the attorney must be vigilant in ensuring that domestic violence is not brought in through the back door at trial to imply maternal deficiency. Further, throughout any neglect case involving allegations of domestic violence, the attorney must insist upon distinguishing between the behavior of the battered parent and that of the abusive parent.

Pre-Trial Practice

Aggressive litigation forces all parties and the court to focus on the case more intently and may result in moving it along more quickly. Immediately upon being retained, the attorney should serve a Notice to Produce and a Demand for a Witness List upon the CPS attorney. If the case record is provided early on, the attorney must insist on updated records as the case progresses. A non-respondent parent also is entitled to discovery and, at minimum, the attorney should request the case record. If discovery is not provided, the attorney may make a motion to compel.

The attorney should consider filing a Demand for a Bill of Particulars. The mother is entitled to know when and where the incidents are alleged to have occurred, and under what circumstances. In particular, in cases in which CPS argues that the abused parent was "offered services" and "failed to cooperate," CPS must identify what services were allegedly offered and how they would have contributed to the safety of the child.[40]

If there is a foster care or preventive services agency involved, the attorney should subpoena its records and interview the foster care worker. The foster care agency is not represented by CPS counsel and may be contacted directly, although the agency may have internal policies that prohibit the caseworker from speaking to a parent's attorney.

The attorney should consider filing a motion to dismiss all or some of the neglect charges, especially those related to the domestic violence. Although only the Court of Appeals decision in *Nicholson* is binding on state courts, the federal *Nicholson* decision also contains an excellent discussion of the issues at hand in child welfare cases involving domestic violence. The attorney might consider filing a motion under the Family Court Act on the grounds that the court's "aid is not required on the record before it."[41] Since the intent and purpose of the Family Court Act is not to punish but rather "to help protect children,"[42] it follows that if the child is safe there is no need to expend judicial resources on the family.

The attorney also should consider whether to seek appointment of a social worker for the mother if she is indigent to assist her in navigating the social services systems with which she comes in contact and to assist the attorney in assessing the issues in the case.[43] If appropriate, the social worker also may be a fact witness at trial.

The attorney should be creative in locating expert witnesses: local domestic violence agencies or shelters frequently employ or have access to dedicated professionals who will serve as experts at no charge. The expert witness should not necessarily interview the mother, but should review the pleadings, case record and other documentary evidence and, when possible, be present for the mother's testimony. The expert witness can testify about domestic violence generally and assess whether the safety measures employed by the mother were reasonable and rise to a statutory "minimum degree of care" as defined in *Nicholson*.

Settlement

A non-respondent parent has a stake in any settlement of a neglect case against the abuser. The attorney should ensure that no settlement is offered or agreed upon without input by the non-respondent mother. In particular, any settlement should include an order of protection for the non-respondent mother as custodial parent.

With regard to a respondent mother, when a child is safe and the abuser is no longer in the picture, the attorney should urge CPS to consent to dismissal because the aid of the court is no longer required[44] or to withdraw the petition outright. Again, the attorney must remind CPS that the purpose of the Family Court Act is protection, not punishment. More likely, if there is a pre-trial settlement

offer it will take the form of an adjournment in contemplation of dismissal (ACD). With an ACD, the mother makes no admission of neglect but agrees to submit to certain terms including a period of supervision by CPS that is likely to range from three months to the maximum permissible period of a year. During the period of the ACD, the mother may be required to continue counseling, enforce an order of protection or cooperate with other services. She may be required to testify against the abuser. If the mother complies with the supervision, there will be no further court appearances and, at the end of the ACD period, the petition will be dismissed. If CPS alleges that she has not complied with the terms of the ACD, CPS may file a violation petition, prove that the terms of the ACD were violated, and reinstate the neglect case. While an ACD is not an ideal outcome, it may be a practical way to avoid protracted litigation. As always, the decision is the mother's to make.

CPS also may offer to accept what is called an "admission."[45] With an admission, the mother does not actually admit to neglect but rather agrees to submit to the jurisdiction of the court and to the entry of a neglect finding. An admission is appropriate where the facts alleged constitute neglect under existing case law and the facts are likely to be proven. This settlement may be advisable if there is a pending criminal case against the mother because she will not be admitting facts that could be used against her in criminal court, or if the attorney believes that the evidence at trial may lead to a harsher disposition. An admission, like an Adjournment in Contemplation of Dismissal, will cause the case to progress to disposition more quickly.

Trial

The attorney should review carefully the rules of evidence in a child protective proceeding as set forth in the statute.[46] In particular, although most evidence at a fact-finding hearing must be competent, hearsay statements of a child are admissible and may form the basis for an abuse or neglect finding if they are corroborated.

As prosecutor, CPS presents its case first. It is imperative that the attorney carefully assess each element of the case to ensure that CPS and the court do not rest on improper presumptions, such as the presumption that the mother failed to exercise a minimum degree of care merely because she did not separate from the abuser or that a child suffered emotional harm from exposure to the domestic violence. With respect to allegations of emotional harm in particular, it is important to restrict the caseworker's testimony to her observations unless she otherwise qualifies as a mental health expert.

If CPS makes out a prima facie case, the burden shifts to the respondent to defeat the charge of neglect. Usually, the respondent will testify along with any other fact witnesses. It is imperative that a battered mother testify about her help-seeking efforts and safety decisions. Where appropriate, the attorney should present an expert witness to discuss the reasonableness of her behavior under the circumstances existing at the time. The expert can testify about the mother's imperfect options and, if impairment is established, the unlikelihood that it was she who caused it. An attorney also may challenge assumptions about impairment through reference to established literature.

The attorney for the child typically presents her case last. Oral closing statements are the norm, although an attorney may request an opportunity to submit a written summation if the issues are complicated or the law unsettled. After summation, it is common for the court to rule from the bench. If the neglect petition is dismissed, CPS no longer has the authority to be involved with the family. CPS may try to continue its involvement in the family's lives; however, if the neglect case has been dismissed the mother is justified in refusing further interaction with CPS. If a finding of neglect is made, the court will either proceed directly to disposition or adjourn the case for a separate dispositional hearing.

There are a range of dispositional options. The child may be returned to the respondent parent, placed or continued in foster care, or released to the custody of the non-respondent parent or another person. The court is likely to impose a period of CPS supervision of up to a year and to set forth terms and conditions, such as counseling and enforcement of an order of protection against the abuser. For a non-respondent mother, a finding against the abuser may mean that CPS remains in her child's life, for example to arrange visitation. The non-respondent mother must cooperate with CPS as the agency monitors the child's relationship with the abusive parent, but cannot herself be supervised or ordered to participate in services.

Hearsay is admissible at disposition, and evidence that the attorney may not have been able to authenticate at trial may be offered. In addition, post-petition developments should be explored when helpful. For an attorney representing a non-respondent mother, disposition offers an opportunity to obtain custody, supervised visitation and an order of protection against the abuser.

At every stage of a child protective proceeding involving domestic violence, as in all child welfare cases, an attorney must consistently emphasize that the child is, and will be, safe in the mother's care. At the same time, the attorney representing the abused mother in a child welfare case also must present evidence, arguments and expert testimony about the series of complex choices that an abused mother makes in trying to assure the safety of herself and her child and about the reality of her life, her resources and her options.

Notes

1. 3 NY3d 357 (2004).
2. The federal district court litigation was captioned *Nicholson v Williams*, while the Second Circuit and state court decisions were captioned *Nicholson v Scoppetta*.
3. 203 F Supp 153, 252 (ED NY 2002).
4. 203 F Supp 153, 253 (ED NY 2002).
5. 344 F3d 154 (2d Cir 2003).
6. Family Court Act § 1012(f)(i).
7. Family Court Act § 1012(f)(i)(B).
8. 3 NY3d 357, 369 (2004).
9. *See e.g.,* Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan of New Knowledge from Neuroscience*, 53:3 The Judges' Journal (2014).
10. 3 NY3d 357, 370 (2004).
11. 3 NY3d 357, 370 (2004).
12. 3 NY3d 357, 374 (2004).
13. 3 NY3d 357, 370 (2004).
14. For a more in-depth review of the case law, see *New York Law of Domestic Violence* (3d ed), Breger, Kennedy, Zuccardy & Elkins (Thomson-West-Reuters 2013) Ch 4.
15. *In re David G.,* 29 Misc 3d 1178 (Fam Ct, Kings County 2010).
16. *In re Ravern H.,* 15 AD3d 991 (4th Dep't 2005).
17. *E.g. Matter of Paul U.,* 12 AD3d 969 (3d Dep't 2005) (neglect finding upheld because respondent placed child with father despite orders of protection); *In re Lindsey B.B.,* 70 AD3d 1205 (3d Dep't 2010) (upholding findings of neglect where drug abusing parents often became violent during their arguments, including one incident where father threw or pushed a computer monitor at mother, causing daughter to be so distressed that she called 911; additionally father was emotionally abusive to daughter); *In re Jayden B*., 91 AD3d 1344 (4th Dep't 2012)(upholding finding of neglect where mother admitted that she and respon-

dent "had several disagreements and arguments… in the presence of the children and [that] sometimes [the children] were afraid," and mother failed to appear at the fact-finding hearing).

18. 68 AD3d 1373 (3d Dep't 2009). *See also In re Eryck N.,* 17 AD3d 723 (3d Dep't 2005) (reversing summary judgment of neglect based upon domestic violence, in light of the decision in *Nicholson* rendered while the appeal was pending, noting that while "the basis for the removal was the extensive domestic violence which occurred in the presence of the children and, although respondent [mother] had removed herself and the children and obtained court-ordered protection, she abandoned that safety plan and returned to the marital residence," but there was "a dearth of testimony describ[ing] the effect that this domestic violence had upon the children"); *In re Deshawn D.O.,* 81 AD3d 961 (2d Dep't 2011) (parental violence in front of and toward the child, along with other acts of parental neglect left the child afraid, frustrated and at risk of more running away from home and harm to himself or others).
19. *See e.g. In re Michael W.W.,* 20 AD3d 609 (3d Dep't 2005) (holding that *Nicholson* "does not prevent neglect findings against the perpetrator of domestic violence, especially when the children are present for such violence and are visibly upset and frightened by it"; respondent while intoxicated broke a window, crawled into the house, and confronted his wife and, during the confrontation, wrestled the phone away from her, injuring her arm, placed his forearm against her neck and choked her causing the children to become frightened and upset by the situation when they responded to their mother's screams); *In re Jeaniya W.,* 96 AD3d 622 (1st Dep't 2012) (upholding neglect finding against respondent who struck the mother in the presence of their 3-year old child, breaking her nose, bloodying her face and causing several bruises; licensed clinical social worker testified that the child saw the violence and sad and upset when recounting the incident); *In re Imena V.,* 91 AD3d 1067, 1069 (3d Dep't 2012)(upholding neglect finding against father who engaged in repeated instances of physical violence against the mother, many of which were witnessed by the children, who intervened).
20. SCR Intake Procedure Manual § F at 53.
21. Social Services Law § 424(6).
22. *See* Social Services Law § 424(10).
23. *In re H/R Children*, 302 AD2d 288 (1st Dep't 2003).
24. Social Services Law § 422.
25. Social Services Law § 412 (12).
26. *Matter of Marie B*., 62 NY2d 352, 358 (1984).
27. *See Ronald F.F. v Cindy G.G.*, 70 NY2d 141 (1987); *Spence-Chapin Adoption Service v Polk*, 29 NY2d 196, 204 (1971).
28. Family Court Act § 1024; see also *Tenenbaum v Williams,* 193 F3d 581 (2d Cir 1999).
29. Family Court Act § 1027(a).
30. Family Court Act §§ 1022(a), 1027(b)(i).
31. Family Court Act § 1017.
32. If the mother appears on the day that removal is requested rather than after removal has occurred, the same hearing is held under Family Court Act § 1027 and is called a "1027 hearing." A hearing on a removal application prior to the filing of the petition is held under Family Court Act § 1022.
33. *Nicholson v Scoppetta,* 3 NY3d 357 (2004).
34. *Bennett v Jeffreys,* 40 NY2d 543, 550 (1976).
35. *John B. v Niagara County Department of Social Services,* 289 AD2d 1090, 1092 (4th Dep't 2001).
36. *See e.g., In re Solomon W.,* 50 AD3d 912 (2d Dep't 2008) (affirming removal of the child, ruling that in light of the evidence presented, "the safer course is to not return the children to their mother's custody pending a full fact-finding hearing"); *In re Amber Gold J.,* 59 AD3d 719 (2d Dep't 2009) (agreeing with the Family Court's determination that the "safer course" is to not return the child to the parents' custody at this time); *In re Deonna E.,* 104 AD3d 943 (2d Dep't 2013) (finding that the record demonstrated that the "safer course" is not to return the children to the mother's custody pending a full fact-finding hearing); *In re Xavier J.,* 47 AD3d 815 (2d Dep't 2008) (reversing lower court's return of a child to his mother's custody on the grounds that it was the "safer course"). *But see In re Raymond A.,* 26 Misc 3d 394 (Fam

Ct, Kings County 2009) (criticizing CPS application of safer course doctrine, and denying application for removal where the risk of emotional harm in continuing the removal significantly outweighed any risk to the infant being in the mother's care and custody).

37. Family Court Act § 1112(b).
38. Family Court Act § 1035 (d).
39. Pursuant to Family Court Act § 1056, the Family Court may issue an order of protection against a person who is not the father of subject child, until the child's eighteenth birthday. Some courts also have permitted or upheld orders of that duration even if the respondent is the biological father. *See Matter of A.G.,* 253 AD2d 318 (1st Dep't 1999); *Matter of Victoria H.,* 255 AD2d 442 (2d Dep't 1998); *Matter of CSS o/b/o Kanisha W.,* 233 AD2d 325 (2d Dep't 1996).
40. *See In re H/R Children,* 302 AD2d 288 (1st Dep't 2003); *Nicholson v Williams,* 203 F Supp 2d 153 (ED NY 2003).
41. Family Court Act § 1051(c).
42. Family Court Act § 1011.
43. County Law § 722-c.
44. Family Court Act § 1051(c).
45. Family Court Act § 1051(a).
46. Family Court Act § 1046.

17

Representing Domestic Violence Victims in Child and Spousal Support Cases

by Roxana Bernal & Amy Hozer

Victims of domestic violence not only suffer emotional and physical abuse at the hands of their abusers, but they also often endure economic abuse as well. Abusers feel the need to constantly control their victims and this desire also extends, into the financial aspects of the parties' lives. Victims are often not allowed to work, thereby ensuring that the abuser is always needed and always in control. It is not uncommon for domestic violence victims to live off an allowance provided to them by the abuser or for them to have to beg the abuser for money to buy food and supplies for the household. Accordingly, while a victim might be ready to leave the abuser, the fear of being unable to provide for one's child(ren) quickly becomes a harsh reality.

The ability to petition for, and obtain, an order for child support can provide the financial stability necessary to break free from one's abuser. No longer reliant on the abuser's "generosity," a child support award often affords victims the opportunity to take back their independence. However, victims are often afraid to seek support from the abuser despite the financial need. This fear is not to be taken lightly and even when child support may be of immense assistance, it will sometimes be better to for go it — at least until the possibility of danger has been reduced. An award of child support can be extremely important as domestic violence victims work to regain their independence and provide for their children, but attorneys must proceed with extreme caution as they help their clients navigate the child support landscape.

Before Filing for Child Support

The victim's safety is an important consideration when deciding whether or not to file for child support. The risk of the abuser retaliating, and the form that retaliation could and might take, should be given serious scrutiny. While victims should never enter into agreements forgoing child support forever, it also may not be the right time to pursue such an award. Another option for the victim is to first file a family offense petition and request that the judge issue a temporary order of support as part of the order of protection.[1] The order of protection could act as a deterrent for the abuser, stopping him from reacting to a request for support, and would ensure an automatic arrest if the abuser were to attempt to further harm the victim. Once that order of protection, including the temporary order of support, is in place, the victim would be able to file a child support petition and proceed with a full child support case in front of a support magistrate.

Child support is determined by both parties' income. Thus, the first assessment is to determine the other party's income, how hard this income will be to prove, and whether the income will lead to meaningful child support. For example, if the other party works "off the books" or works in a profession that notoriously pays in cash to avoid any tax liabilities then it will be difficult to prove income. Similarly, if the other party does not work and receives social security, unemployment, disability, worker's

compensation or public assistance benefits then a very low order will be entered. Thus, as part of the initial conversation with a client, ask questions to determine whether there are hidden assets or income, including questions about the parties' lifestyle when they lived together (i.e., did they eat out, take vacations, own expensive items?) and whether the other party is paying child support for other children. The answers to these questions might be the deciding factors in determining whether to file for child support. While parents, guardians, or caretakers (i.e., grandparents) can file for a determination of child support against non-custodial parents, this chapter focuses on victims of domestic violence seeking child support from their abusers in order to provide for the children they have in common.

Establishing Paternity

A parent has a duty to support a child until the child reaches age 21.[2] Often, when representing a victim of domestic violence, the client is the mother of the child. To file for child support, the client must legally establish that the other party is the father or parent of the child.[3] If the parties were married when the child was born there is a legal presumption that the spouse is the parent of the child.[4] This holds true for same sex couples; if the mother is pregnant when married to wife, wife is legally the second parent.[5] If the parties were never married but the father signed an acknowledgment of paternity, then that is enough to establish that he is legally the father.[6] If neither of these two circumstances exists, then the mother of the child must first file a paternity petition to establish paternity before being able to proceed on a child support petition.

If the client files a paternity petition and establishes that the abuser is legally the father, the finding will give the father certain rights, such as the right to seek custody and/or visitation.[7] He can, of course, file his own petition to establish paternity, but might not do so if left alone. Counsel should advise the client to consider the possibility that the father will file for custody or visitation in retaliation and can use visitation as an opportunity for continued contact. It is important to determine whether the potential difficulties outweigh the advantages of receiving support.

Public Assistance

Before deciding to file a petition for child support, it is important for custodial parents, who are receiving, or applying for, public benefits, to understand how the receipt of such assistance can affect the right to child support. A client receiving public assistance will be required to assign her support rights to the state.[8] The State will then pursue the other parent for child support to recoup some, or all, of the cost of the benefits the State is providing to the custodial parent. In theory, the idea is that the duty to support is that of the absent parent and not the State. Thus, the State should be able to recoup from the absent parent the support given to the family from the date of opening of assistance either by the State or the custodial parent.[9]

In practice, it is necessary to assess whether the public benefits received are more beneficial than the support she would get from the other parent. A custodial parent who receives public assistance when the state is able to obtain a child support order against the absent parent will receive the first $100 per month for one child or the first $200 for two or more children from the amount ordered, and the state will receive the rest to recoup the costs of providing benefits.[10] However, the agency rarely recoups more than the $200 pass through because the abusive parent hides income or refuses to pay all or part of the ordered amount. This arrangement is beneficial for custodial parents who know that they will have a hard time finding the absent parent or the absent parent will fail to pay consistently even after being ordered to do so.

The drawback with this arrangement is that the custodial parent must cooperate with the States' efforts in pursuing the absent parent, including providing information on the absent parent's whereabouts, establishing paternity, discovering any income or assets, and obtaining an order for child support. If

requested by the agency, the custodial parent must also appear as a witness in court. Noncompliance with these requirements, can lead to sanctions: her portion of the public assistance budget will be removed from the grant, reducing the family's benefits, but this is an extreme measure rarely applied. Even if the agency does not sanction the custodial parent for refusing to cooperate and does not require that information be provided, it can still proceed on its own without the custodial parent's cooperation if it determines that it can do so without risk of harm to her or the child.

In recognition of the special needs of victims of domestic violence, the State has put in place some exceptions to the requirement to cooperate in obtaining child support.[11] Each public assistance agency is required to have a domestic violence liaison, who can determine whether it is appropriate for a particular parent to receive a waiver from the cooperation requirement.[12] A waiver is available, and thus no sanctions applied, if the parent can show (s)he has "good cause" for refusing to cooperate.[13]

Obtaining a Child Support Order

After the choice to file for child support has been made, the next decision is whether to file in Supreme or Family Court as both courts have jurisdiction over child support.[14] If the parents are not married, or do not currently plan to pursue a divorce, the case would be filed in Family Court. There are no filing fees in Family Court and while there are filing fees in Supreme Court, these fees can be waived if income guidelines are satisfied. As discussed in more detail later, a litigant in a child support matter is not entitled to assigned counsel unless charged with willful violation of a child support order. However, it is possible for the court to order the non-custodial parent to pay counsel fees and the court is required to order counsel fees when it finds that the non-respondent parent willfully failed to pay the support order.[15]

Office of Child Support Enforcement

When drafting the child support petition it is important to include whether the custodial parent is seeking direct payment of support or whether the request is that the support be paid through the Office of Child Support Enforcement (OCSE). While there are sometimes delays associated with channeling the money through OCSE, utilizing OCSE ensures that a record of the amount of child support paid is documented and it decreases the need for the parties to engage with one another. Enforcement of the support order is handled by OCSE when payments are made through them and, while party petitions to enforce the order are possible, there are some methods of collection such as interception of tax refunds and lottery winnings that only OCSE is permitted to undertake.[16] However, it is also important to keep in mind that the choice for OCSE to oversee the child support collection means that OCSE will also have control over the enforcement method utilized which decision may or may not weigh relevant safety issues. If the non-custodial parent is a W-2 wage earner, an income withholding order automatically deducts child support payments from the non-custodial parent's paycheck.These orders are mandatory. If the order is payable through the child support unit, the unit sends an administrative income withholding order. If it is direct pay, the court will issue an Income Withholding Order.[17]

Initial Filing

Once the child support petition is drafted, it must be served on the non-custodial parent(s) pursuant to Family Court Act § 427. Upon arrival at Family Court, counsel and parties must check in with the court officer. In order to avoid having victims wait in the same area as the abusers, victims can often wait in Safe Horizon offices and Safe Horizons' staff will call the court part to inform them of such. Additionally, the court officers in the waiting area can be alerted of safety concerns. Upon completion

of the court appearance, court officers can delay the abuser so that the victim can exit the courthouse first, eliminating the possibility of the abuser lingering outside the courthouse.

New York Child Support Standards Act

In New York, pursuant to the Child Support Standard Act (CSSA)[18] there are two parts of a child support determination: "basic" child support and "add-ons." There is a rebuttable presumption that the "basic" support award is the appropriate amount of child support to be ordered unless the court finds that this amount is unjust or inappropriate based on certain factors, a determination which must be detailed in the court's order.[19] The CSSA provides a three-step calculation in determining the "basic" award of child support. First, the combined parental income must be determined by adding gross income, as reported on the most recent federal tax return, and, if not included in gross income, investment income, as well as workers' compensation, disability benefits, unemployment insurance benefits, social security benefits, veterans benefits, pensions and retirement benefits, fellowships and stipends, and annuity payments. Money received from public assistance and supplemental security income (SSI) is not counted as income. After computing the combined income of the parties, the law allows for specific deductions, including unreimbursed employee business expenses, NYC taxes, social security and Medicare deductions and child or spousal support paid pursuant to a court order. Additionally, if the non-custodial parent is paying spousal support/maintenance and the order provides for an adjustment in the amount of child support to be paid upon termination of the spousal support/maintenance payments, then that spousal support/maintenance award is deducted. The next step is for the court to apply specific percentages based on the number of children in common (one child: 17%, two children: 25%, three children: 29%, four children: 31%, five or more children: 35%), to the combined parental income up to the "cap" which in 2014 is $141,000.[20] The court then determines each party's pro rata share of the child support award which is based on the percentage each party's income is of the overall combined parental income.[21] For combined income over the cap, the court can apply the factors set forth in FCA(1)(f) and/or the child support percentages. If the child support percentage is applied, the court must state its reasoning for doing such.[22]

Example:

Mom makes $20,000 a year and dad makes $40,000 a year.

The combined parental income is $20,000 + $40,000 = $60,000.

Mom is the custodial parent of the parties' two kids making the appropriate percentage 25%.

25% of the combined parental income ($60,000) is $15,000.

Therefore $15,000 would be the combined child support.

Because he is the non-custodial parent, Dad must pay Mom his pro rata share of the combined child support. Dad's pro rata share of the combined support is 2/3 ($40,000 dad's income/$60,000 combined income).

2/3 of $15,000 (combined child support) = $10,000.

Dad must pay Mom $10,000 per year in basic child support.

Determining Parental Income

Needs of a Child

The most common way in which an award is figured is based on the parent's income as reported to the IRS. However, when there is a lack of financial disclosure, or finances are concealed or misrepresented, the court may enter a child support order based upon the needs or standard of living

of the child, whichever is greater.[23] Therefore, in cases where the non-custodial parent refuses to present his financial information, or was served but never comes to court, the Support Magistrate can make an order based on the needs of the child. In order to determine the needs of the child, the custodial parent's expenses for rent, utilities, food, etc. are added and then divided by the number of people in the household. The needs of the child award would then be based on the portion of the household expenses for which the child is responsible.

Imputed income

The court also need not rely on the party's testimony regarding income, but can instead look at the party's past income or demonstrated earning potential.[24] The court has discretion to consider imputed income such as: non-income producing assets, meals, lodging, memberships, automobiles, employment fringe benefits and money, goods, or services provided by others.[25] Funds received from non-recurring payments such as money from life insurance policies, discharges of indebtedness, recovery of bad debts and delinquency accounts, gifts and inheritances, and lottery winnings can also be considered when calculating a child support order.[26] It is also possible to impute income based on what the parties formerly earned if the court believes that the non-custodial parent purposely quit his job or purposely took a job under his earning potential.[27] The court often uses this method of determining a child support award when it deems that the party is not being truthful about his income. If the non-custodial parent claims $30,000 on his W-2 but has an expensive car, owns his home, makes sizable deposits and withdrawals from his bank account etc., it might be advantageous to request an order based on imputed income.

Low-Income Parents

If the non-custodial parent does not have any income or has income below the poverty level, the court will issue a support order for $25 a month. However, as of October 2010, the court can order the non-custodial parent, who is not receiving SSI or SSD, to participate in a work program. If the annual support will reduce the non-custodial parent's income to below the poverty level then his obligation will be the greater of $25 per month or the difference between his income and the self-support reserve. When the annual amount of the child support obligation would reduce the non-custodial parent's income to below the self-support reserve but not below the poverty income level, the child support obligation will be $50 per month or the greater of the difference between the parent's income and the self-support reserve.[28] If the non-custodial parent's income is less than or equal to the poverty income level, warranting a $25 per month order, child support arrears shall be capped at $500.[29] The poverty and self-support reserve numbers change yearly and can be found on the Child Support Standards Chart released every April.[30] The $25 minimum support award in all child support cases is a rebuttable presumption.[31] If a court finds that the non-custodial parent's share of the basic child support obligation is "unjust or inappropriate" it may upwardly or downwardly modify the support award. This means that the court can, in fact, enter an order for an amount lower than $25 per month. However, before concluding that the amount is "unjust or inappropriate," the court must consider nine statutory factors as well as any other factors it deems appropriate.[32]

Additional Support

Add-On Expenses

Parties pay their pro rata share of "add-on" expenses which include unreimbursed medical expenses and child care expenses. Common unreimbursed medical expenses include drug and doctor visit copays. Child care expenses for when a custodial parent is seeking employment, as opposed to when (s)he is employed, might be harder to get, but it is still within the discretion of the judge to order. The court can also order that the parties pay for college expenses.[33] When determining whether to

order the parties to pay for private school, college or other educational expenses, the court will look at several factors, including the parent's educational background, the child's academic ability and the parent's financial capacity to pay for the schooling. The support magistrate can order a party to purchase, maintain or assign an accident or life insurance policy for his or herself and can designate the beneficiaries of the life insurance policy.[34] A party with private pay health insurance is charged with having to maintain health insurance for the child(ren).[35] If neither party has private health insurance than the judge will order the child(ren) to be on public health insurance.[36]

Non-Recurring Payments

When the non-custodial parent receives or is entitled to receive non-recurring payments such as money from life insurance policies, gifts, inheritances, lottery winnings, and personal injury recoveries, the court can order that a portion of that money be added to the basic child support amount.

Spousal Support, Family Court Act 412

Pursuant to the Family Court Act, a person may bring an action to enforce a "Married person's duty to support spouse." Section 412 provides:

> A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

For a client seeking an order of protection, this provision can provide essential financial support while addressing domestic violence. Spousal support is available even if the parties still reside in the same home. *Stoltz v Stoltz*, 257 AD2d 719 (3d Dep't 1999); the action may be brought independently of one for divorce. For an overview of the procedure for seeking spousal support, and a comparison of maintenance in a divorce action, see www.herjustice.org/assets/pdfs/TheBasicsSeries_English/Getting-Spousal-Support_ENGLISH.pdf.

Child Support and Social Security

Supplemental Security Income ("SSI") is money paid to low income, disabled adults and children. Under the Social Security Administration's ("SSA") guidelines, any payment, whether in cash or in-kind, from an absent parent to or for a child to meet the child's needs for food and shelter is considered child support and thus deemed unearned income to the child. One-third of cash child support payments is excluded from being counted as income and the remaining two-thirds is subject to the presumed maximum value, an amount that changes on a yearly basis, and will affect the amount of SSI that the child receives.[37]

> **Example:**
>
> Dad is paying Mom $10,000 a year in child support or, approximately, $833.33 a month.
>
> Subtract 1/3 of the child support payment ($275.00).
>
> Subtract the $20 general income exclusion ($20.00).
>
> Countable Income: $538.33.
>
> SSI Benefit ($205.67) = SSI Award (2014 Monthly SSI benefit is $744.00) – countable income ($538.33).
>
> Total Income to Child: $833.33 (child support) + ($205.67) Adjusted SSI benefit.

Of note, a child's SSI payment will also be affected if the child receives child support in the form of food or shelter.[38]

The Social Security Disability ("SSD") insurance program provides benefits to disabled individuals and certain of those individual's family members if the disabled individual worked for a long enough period of time and paid Social Security taxes. In New York, SSD benefits paid to a child are not a credit against the non-custodial parent's child support obligation, but can be considered when determining whether to deviate from the basic child support obligation.[39]

In Court[40]

Temporary Order of Support

Rarely will a case be resolved in one day, so a temporary support order should be requested and can be ordered before financial disclosure is complete.[41] It is up to the support magistrate whether to apply the Child Support Standards Act when creating temporary awards as they are not subject to the same rules as permanent awards.[42] Once inside the courtroom, parties must be prepared to provide completed Financial Disclosure Affidavits to the court. If the other party was previously paying the rent, child's school tuition, food and similar expenses, the support magistrate should be alerted so that the temporary award can reflect this. Final orders of child support are made retroactive to the date that the child support pleadings were filed. Therefore, if the final amount of child support is more than the temporary award, the custodial parent will still get the difference in amounts for the period (s)he was receiving less money. Although the non-custodial parent can get credit for overpayments, made after the start of the proceeding, against retroactive support owed, public policy does not allow that the extra money paid be recovered by reducing future basic support payments.[43] It can be argued that such overpayments can be applied to future add-on expenses.[44] If a new support order is issued after objections (discussed later), payments made by the non-custodial parent, in excess of the new award, can be credited towards future support owed.[45]

Order of Protection

If deemed necessary, an order of protection can be obtained during a support proceeding without having to file a separate petition alleging a family offense. After the request for the order of protection is made, the support magistrate will refer the case to a judge to hear.[46]

Address Confidentiality

If proven that it would pose an unreasonable risk to reveal a victim's address, the court will grant a motion for address confidentiality.[47] An order for address confidentiality alleviates the need for any identifying information to be included in the documents submitted to the court. The victim can designate someone to be served with process or the court can designate the clerk of the court to be the person served. It is important to note that the address of the person chosen for service of process will be disclosed to the abuser. When a confidentiality order is granted, identifying information on discovery documents should also be redacted before they are given to the abuser or to the court. It also might be necessary to ask the court for an in camera inspection of some of the documents. Remember that the abuser will have access to any documents in the actual court file. For further guidance, see Chapter 9, Litigating Family Offenses, "Disclosure of Confidential Location."

Telephonic Testimony

If seeing the abuser in court would be too upsetting or dangerous for the victim, it is possible to request a telephonic hearing. If the support magistrate determines that it would be an undue hardship for the victim to appear in court, the victim may testify by telephone. The decision to appear by telephone should be carefully weighed as it makes it much harder for the support magistrate to access and weigh the victim's credibility against the often manipulative and charming abuser testifying before him or her in court.

Final Order of Support

If the non-custodial parent is a W-2 wage earner the case should proceed fairly quickly, but if the non-custodial parent works off the books or is hiding his money, discovery, and possibly trial, might be necessary. It is important to review the Financial Disclosure Affidavit and determine how much money the custodial parent believes the non-custodial parent earns, the source of that income, and the reason(s) (s)he believes such to be true. If the non-custodial parent works off the books or is being less than truthful in his disclosures, further discovery is probably warranted. In addition to depositions and interrogatories, it might be beneficial to subpoena people and/or documents related to the case. Copying costs and witness fees must be paid by the requesting party. A court order for additional documentation, such as past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses, in order to verify the opposing party's income and/or expenses is also possible upon request.[48] If discovery requests are not complied with, the support magistrate, on motion, can order the non-responsive party to comply with the request and/or preclude him from submitting any evidence that was not turned over.

If the case proceeds to trial, the Petitioner will go first and has the burden of proving Petitioner's case. While child support proceedings are often somewhat informal, it is necessary to make a good record in case of appeal. This means following the rules of evidence including obtaining signed certification forms for records that will be introduced into evidence.[49] It is also appropriate to ask that the judge take judicial notice of anything contained in the court file; however, it is always good practice to have certified copies of all court orders introduced into evidence. Original documents must be entered into evidence and copies of all documents should be provided to any opposing parties. Counsel should make sure to prepare their clients for direct and cross examination. When preparing the cross examination of the non-custodial parent, reviewing his lifestyle and whether it is compatible with his reported income is essential. If the non-custodial parent owns a business, it is important to question each expense, and look at the business bank accounts, as it is possible that some of the expenses claimed for the business are, in fact, personal expenditures. For example, if the non-custodial parent claims a car as a business expense but it is the only car (s)he owns, it is very possible that (s)he uses it for personal reasons as well. In addition to both sides asking questions of the witnesses, it is also common for the support magistrate to ask questions.

Objecting to the Child Support Order

The support magistrate will often wait to rule on the case and then mail the decision to the parties. After the final child support order is entered, parties have 35 days to object if the order was mailed to them. If the order was received in court, or by personal service, parties have 30 days to object to the support magistrate's order.[50] The objections are then reviewed by a Family Court judge. The judge can find in favor of the objecting party and remand the case so that it is adjudicated in accordance with the court's decision or the judge can uphold the support magistrate's decision. If the judge upholds the support magistrate's decision, the objecting party can appeal to the Appellate Division.

Post-Court

Violations

Once a final order of child support has been obtained, the parent ordered to pay child support has a legal obligation to pay the ordered amount. If the parent fails to pay as ordered, (s)he is violating a court order.[51] When this occurs, the legal remedy is to file a violation petition asking that the court enforce the order of child support, i.e., make the parent pay what has been ordered. It is important

to weigh safety concerns at this juncture and determine whether it is safe for the victim to file a violation petition. If it is determined that filing a violation petition is the best course to take, the court has a host of enforcement mechanisms at its disposal to make the parent pay and follow the court order. Before filing, victims should consider which enforcement mechanisms they are comfortable asking the court to take in light of any safety concerns. These enforcement mechanisms include:

Money Judgment

The court must issue a judgment stating that the non-custodial parent owes the custodial parent the amount that has not been paid.[52] The custodial parent can file the order with the County Clerk's office.[53] This judgment will collect interest and can be satisfied in the same way as other money judgments, i.e., through attaching bank accounts, 401(k) plans, the sale of property, etc.

License Suspension

The court can issue an order suspending the non-paying parent's business or professional license, and recreational license(s).[54]

Posting of Undertaking

The court can issue an order stating that the non-paying parent must pay all or a portion of what is owed and if the parent fails to do so by a given date, a support magistrate can recommend that a judge order jail time for the non-paying parent.[55]

Sequestration of Property

The court can issue an order in which the non-custodial parent's property is held as security for the payment of the support.[56]

Participate in work programs

If the non-custodial parent is on public assistance, the court can order that the non-paying parent participate in work programs to pay the ordered amount.

Willful Violations

If the court determines that the non-paying parent willfully failed to pay, the court can order that the non-paying parent be put on probation, serve a jail sentence of up to 6 months in jail or participate in a rehabilitative program. Only a Family Court judge can issue orders with these remedies so a support magistrate will often conduct a hearing and issue an order recommending that a Family Court judge issue an order with one of these remedies. The parties will then appear in front of a Family Court judge who has the discretion to order all or part of the support magistrate's recommendation. If income-eligible, the non-paying parent will also be appointed an attorney for due process considerations.

Modifications

As of October 13, 2010, all child support orders can be modified if 1) there has been a *substantial change of circumstances* since the order was entered; 2) it has been 3 years since the order was entered; or 3) there has been a 15 percent change in either party's income since the order was entered, last modified, or adjusted. The substantial change of circumstances standard is a very broad standard. A party seeking to modify an agreement entered prior to October 13, 2010 must show either an unreasonable or unanticipated change of circumstances, or that the needs of the child cannot be met with the existing support obligation combined with the income of the custodial parent.[57] Modifications are made retroactive to the date of the filing of the petition for modification. The court is prohibited

from granting an adjustment for arrears that have accrued before the moving party filed a petition for a downward modification.[58]

Upward Modification — Increasing the Child Support Amount

In determining whether there has been a change in circumstances warranting an upward modification, the court must consider several factors, including: the increased needs of the children; the increased cost of living if it results in greater expenses for the children; a loss of income or assets by the custodial parent or a substantial improvement in the financial condition of the non-custodial parent; and the current and prior lifestyles of the children.[59] In practice, it is also necessary to show that the non-custodial parent has the means to pay the additional amount of support. Indeed, the non-custodial parent, often the abusive parent, will not agree to pay more and will in fact claim that (s)he does not have the means to pay more in child support.

Downward Modification — Decreasing the Child Support Amount

A loss of employment can demonstrate a change in circumstances warranting a downward modification of the non-custodial parent's child support obligation. However, the non-custodial parent must provide proof that the loss of employment was involuntary as well as an inability to find new work despite documented and diligent efforts.[60] Illness can also constitute a change of circumstances, warranting a downward modification, but it is case specific.[61] Until October 2010, an individual's incarceration was not considered a change in circumstances; however, the law was changed and incarceration can now be considered a substantial change of circumstances unless the non-custodial parent is in jail because of his failure to provide support or because of a crime committed against the custodial parent.[62]

Termination of Child Support

A parent's child support obligation terminates upon emancipation of the child. A child who gets married, enters the military, or fully supports oneself and is thus not financially reliant upon his parents, may be deemed emancipated.[63] The child's abandonment of the non-custodial parent may be grounds for termination of support but it is case-specific.[64] Interference with the rights of visitation of the non-custodial parent may be grounds for suspending support payments when the custodial parent's actions rise to the level of deliberate frustration or active interference with the non-custodial parent's visitation rights.[65] However, a non-custodial parent's failure to maintain contact is not a permitted reason to terminate a child support obligation.[66]

Conclusion

Child support is a complex issue necessitating both legal and practical considerations. Child support is important because it allows victims the ability to provide for the needs of the child(ren) and often gives them the necessary financial support to afford them much needed independence. However, even after the parties have separated the abuser often uses the child support to maintain control. The abuser can continue to harass the victim by constantly filing downward modification petitions containing false allegations, or modification petitions which are simply meritless. An abuser's ability to file modification petitions is limitless and, thus, his ability to abuse the court process, to continue to harass the victim, is also limitless. Vexatious child support petitions cause huge disruptions in victims' lives by reminding them of the abuser, making them come to court and see the abuser, and causing undue stress in having to defend court actions. Moreover, if the abuser succeeds in obtaining a downward modification of child support, money that the victim desperately needs to take care of the children will be lost, causing even more stress and disruption for the victim and the

children. Accordingly, it is important, for the safety and financial well-being of domestic violence victims and their children, for counsel to help victims navigate the child support system.

Notes

With thanks to Kristine Stephens, Coordinator of Child Support Enforcement Unit, Essex County Department of Social Services, for her review of this chapter.

1. Family Court Act § 842 (k).
2. Domestic Relations Law § 240, Family Court Act § 413.
3. Family Court Act § 513.
4. Family Court Act § 417.
5. *Debra H. v Janice R.,* 14 NY3d 576 (2010).
6. *See* Public Health Law § 4135-b(1)(b)(i).
7. *See* Family Court Act art 5.
8. Social Services Law § 102.
9. Family Court Act § 571(9).
10. *See* 18 NYCRR 347.13; 18 NYCRR 352.15; and NYC Human Resources Admin Policy Bulletin No. 10-08-ELI.
11. New York Child Support Enforcement Document (2012), www.childsupport.ny.gov/dcse/pdfs/LDSS-4882AW.pdf.
12. *Id.*
13. *Id.*
14. Family Court Act § 411; NY Const art 6, §§ 7(a), 13(d).
15. Domestic Relations Law § 237; Family Court Act § 438.
16. *See* generally Social Services Law § 111; 18 NYCRR § 346.
17. *See* New York City Office of Child Support Enforcement (2014), at www.NYC.gov/hra/ocse. Parents can also view their child support account information at the New York State Division of Child Support Enforcement website www.childsupport.ny.gov/dcse/home.html.
18. Domestic Relations Law § 240; Family Court Act § 413.
19. Family Court Act § 413(1)(g); Domestic Relations Law §§ 240(1-b)(f) and (g).
20. Family Court Act § 413(1)(b)(3); New York State Office of Temporary and Disability Assistance Division of Child Support Enforcement (March 12, 2014), www.childsupport.ny.gov/dcse/pdfs/cssa_2014.pdf.
21. Family Court Act § 413(c)(2).
22. Family Court Act §§ 413(c)(3); *Matter of Cassano v Cassano,* 85 NY2d 649 (1995).
23. Family Court Act §§ 413(1)(k) and Domestic Relations Law §240(1-b)(k); *Amsellem v Amsellem,* 15 AD3d 510 (2d Dep't 2005).
24. *Curran v Curran*, 2 AD3d 391 (2d Dep't 2003).
25. Family Court Act § 413(1)(b)(5)(iv).
26. Family Court Act § 413(1)(e).
27. Family Court Act § 413(1)(b)(5)(v).
28. Family Court Act § 413(1)(d) and Domestic Relations Law § 240(1-b), (d).
29. Family Court Act § 413(1)(g).
30. New York State Office of Temporary and Disability Assistance Division of Child Support Enforcement (March 12, 2014), www.childsupport.ny.gov/dcse/pdfs/cssa_2014.pdf.
31. Family Court Act § 413(1)(d) and Domestic Relations Law § 240(1-b)(d).
32. *Id.*

33. Domestic Relations Law § 240 1-b(c)(7).
34. Family Court Act § 416(b).
35. Family Court Act § 416(e).
36. *Id.*
37. Social Security Administration (2012), SSA Program Operations Manual System (POMS) citation: SI 00830.420 Child-Support Payments, policy.ssa.gov/poms.nsf/lnx/0500830420.
38. Id.
39. *Graby v Graby,* 87 NY2d 605 (1996).
40. The New York State Unified Court System's website contains helpful information and forms for use in child support cases at www.nycourts.gov/courthelp/Family/childSupport.shtml.
41. Family Court Act §434; Domestic Relations Law §236 Part B (7)(a).
42. *Id.; Koczaja v Koczaja,* 195 AD2d 693 (3d Dep't 1993).
43. *Matter of Maksimyadis v Maksimyadis,* 275 AD2d 459 (2d Dep't 2000); *Baraby v Baraby,* 250 AD2d 201 (3d Dep't 1998); *but see F.S. v K.O.,* 42 Misc 3d 466 (Fam Ct, Albany County 2013).
44. *Coull v Rottman,* 35 AD3d 198 (1st Dep't 2006).
45. Family Court Act § 439(e).
46. Family Court Act § 446.
47. Family Court Act § 154-b(2).
48. Family Court Act § 413(1)(i).
49. See CPLR 3122-a.
50. Family Court Act § 439(e).
51. *Powers v Power,* 86 NY2d 63 (1995).
52. Family Court Act § 451.
53. *See* Family Court Act § 460.
54. Family Court Act §§ 458-a-c.
55. Family Court Act §§ 471-476.
56. Family Court Act § 457.
57. *Mera v Rodriguez,* 74 AD3d 974 (2d Dep't 2010).
58. Family Court Act § 451; *Miller v Miller,* 308 AD2d 541 (2d Dep't 2003).
59. *Shedd v Shedd,* 277 AD2d 917 (4th Dep't 2000).
60. *Ketcham v Crawford,* 1 AD3d 359 (2d Dep't 2003).
61. *Macauley v Duffy,* 297 AD2d 680 (2d Dep't 2002).
62. Family Court Act § 451.
63. *See Roe v Doe,* 29 NY2d 188 (1971); *Parker v Stage,* 43 NY2d 128 (1977) and *Labanowski v Labanowski,* 4 AD3d 690 (3d Dep't 2004).
64. *See McCarthy v Braiman,* 125 AD2d 572 (2d Dep't 1986); *Villota v. Zelenak,* 203 AD2d 370 (2d Dep't 1994).
65. Domestic Relations Law § 241. *See Nir v Nir,* 174 AD2d 657 (2d Dep't 1991); *Feuerstein v Feuerstein,* 158 AD2d 990 (4th Dep't 1990). *See also Giacopelli v Giacopelli,* 82 AD2d 806 (2d Dep't 1981).
66. *Marotta v Fariello,* 207 AD2d 450 (2d Dep't 1994).

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Interstate Custody for Domestic Violence Victims and Their Children: The UCCJEA and Relocation

Updated by Mary Rothwell Davis*

Anna S. fled from Virginia to New York last August with her two school-aged children, after enduring years of well-documented domestic violence. Her daughters have completed most of the school year in a New York City public school, settling in and excelling, and Anna has found employment; the three live with her cousin in a comfortable apartment in the Bronx. In May, Hank S., Anna's husband and the girls' father, located them and filed a writ of habeas corpus in Bronx Family Court, claiming that Anna is in violation of a default custody and visitation order issued by the court in Virginia. This is a case that falls under the Uniform Child Custody and Jurisdiction Enforcement Act, with the hope that the Bronx court will retain jurisdiction and modify the Virginia order.

Domestic violence causes upheaval in family lives, including the need to relocate in order to escape abuse. For clients seeking advice about moving to another state, or moving to New York to escape violence elsewhere, the answers are most often found in the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA).[1] The UCCJEA, drafted in response to decades of difficulty in litigation of interstate custody issues, has done much to smooth these conflicts, ease inconsistencies in state laws, and eliminate incentive to forum-shop for more favorable state laws. Crucially, the statute expressly allows jurisdictions to shield victims of domestic violence, and this is a fundamental difference from its predecessor law, the Uniform Child Custody Jurisdiction Act (UCCJA). Application of the UCCJEA is now well understood throughout the country, with significant case law available on a wide range of interstate custody issues that arise under the uniform act, including wrongful retention of children in another jurisdiction. This chapter focuses in particular on how the law operates when domestic violence is part of the picture.

Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA is in effect in all 50 states as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands. Its principles also apply to international disputes.[2] (Discussion of other international custody-related provisions is found in Chapter 19 of this volume discussing the Hague Convention and related laws.) In fundamental part, the UCCJEA provides that "a child custody determination made in substantial conformity with the jurisdictional standards of this article must be recognized and enforced."[3] Each state must grant full faith and credit to lawful custody orders of sister states. This federal principle, expressed in the Parental Kidnapping and Protection Act (PKPA), is also a centerpiece of the UCCJEA.[4] The statute is intended as "an effective mechanism to obtain

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and enforce orders of custody and visitation across state lines" so that "the safety of the children is paramount and that victims of domestic violence and child abuse are protected." Accordingly, the legislature sought to ensure that custody and visitation by perpetrators of domestic violence is restricted.[5]

In gaining expertise in this area of the law, attorneys should review the model UCCJEA petition and order templates that have been developed by the New York State Office of Court Administration (OCA) and are posted on the OCA website.[6] Next, read the foreign state's UCCJEA laws. While each state has adopted a general legal framework that is based on the Uniform Code, there are some differences from state to state that could require special attention.

Temporary Emergency Jurisdiction

> *Anna has cross-petitioned for Bronx Family Court to assume temporary emergency jurisdiction under the UCCJEA. She argues that returning to Virginia will place her in danger of renewed domestic violence, and put her children at risk as well. The New York court issues a temporary order pursuant to the UCCJEA granting custody to Anna, based on the showing of risk.*

UCCJEA's provision on temporary emergency jurisdiction is central to litigating interstate custody cases that involve domestic violence.[7] Temporary emergency jurisdiction empowers a judge to take a case not only when there is a risk to the child but also when there is a risk to the mother.[8] Specifically, the court may take jurisdiction if the child has been abandoned or jurisdiction is necessary to protect the child, a sibling or parent of the child. While a crucial resource for domestic violence victims, New York's assertion of emergency jurisdiction can only be temporary and is in effect only until an order is obtained from the state having appropriate home state jurisdiction.[9]

Upon learning that a custody proceeding has been filed in another state, the New York court must "immediately communicate with the other court" about which state should take the case. This procedure was followed in *Hector G. v Josefina P.,* where the respondent mother had fled to New York following severe domestic violence without seeking permission from the Dominican court that had handled the parties' custody issue. The New York court, by phone, conferred with the judge who presided over the case in the Dominican Republic. Even though the Dominican Republic was the home state, the court there acquiesced in the New York court's assertion of temporary emergency jurisdiction. The child was settled here, and school and other records were in New York City.[10]

If a child is in imminent risk of harm, then the order shall remain in effect until a court having jurisdiction has taken steps to insure the child's protection. The order must specify a period that the court considers adequate to allow the person to obtain an order from the other state with potential jurisdiction. A temporary custody order may become final if the order so provides and New York becomes the child's home state or the other state declines jurisdiction.[11] The Parental Kidnapping Prevention Act (PKPA) confers exclusive and continuing jurisdiction on the home state.[12]

In seeking a temporary emergency order, the client will need to prove existence of the domestic violence and show its harmful effect on the children. From the outset, assess the seriousness of the abuse, its duration, and the evidence of the abuse that can be introduced in court. Discuss whether there are any police reports, medical records, photos, witnesses, or orders of protection. The victim may want to file a police report in New York as soon as possible. Counsel should obtain certified copies of any orders from the other state.

If the parent who was left behind has custody proceedings in the home state, find an attorney in that state to represent your client. Once the proceeding is filed in that state, file a parallel custody proceeding in New York. Suggest that the other attorney argue that the court decline jurisdiction on

the grounds that the forum is inconvenient. If there are two proceedings pending, the courts should communicate and decide which court should hear the case, but again, it is likely that the ultimate custody decision will be made by the home state.

At the hearing, request appointment of an attorney for the child or children and a court-ordered investigation. Consider using an expert witness to establish imminent risk and asking the court to appoint a forensic expert. The court of the state in which the custodial parent resides could also prepare a home study for the hearing. If a case is pending in the home state, the abuser may seek a dismissal or stay of the action in New York. In response, argue that the home state should decline jurisdiction because defending the action in that state would put the parent and child at risk and that New York is the more convenient forum (see below for discussion of "inconvenient forum").

In *Noel D. v Gladys D.,*[13] the court assumed temporary emergency jurisdiction and issued an interim order of custody to the mother until the parties could return to Illinois, which was retaining exclusive, continuing jurisdiction. The Illinois court, unaware that the father was unbalanced, violent, and the subject of an order of protection issued by another court, had entered a default order of custody to the father. The court in New York gave the Illinois court a fuller picture before returning the case.

Invoking New York's Jurisdiction: Initial Custody Proceeding

> *Anna is reluctant to return to Virginia for further consideration of the case there. In her cross-petition for custody, Anna asserts that New York is the "home state" of the children for UCCJEA jurisdictional purposes, because the children have lived here for more than six months, and there is substantial evidence available here concerning their development, education, well-being and determination of their best interests.*

When a child's parents are not residing in the same state, and one parent wants to petition for custody, the question arises: which state has jurisdiction over the custody question? Under the UCCJEA, there are four paths to jurisdiction: home state, significant connection, more appropriate forum, and vacuum, or last resort, jurisdiction.[14] A "home state" is defined as the state in which a child lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.[15] A temporary absence during the six month period will not defeat "home state" jurisdiction.[16] Thus if a parent relocates with a child, the other parent can file for custody in the original state, provided six months have not yet passed. The parent who relocates must wait out the six months before "home state" status could be claimed in the new, refuge jurisdiction. This can lead to timing issues, and raises strategic questions about whether a custody order should be sought before or after relocating.

"Significant connection" jurisdiction arises when no other state has asserted home state jurisdiction, and the child and the child's parents have "a significant connection with this state other than mere physical presence," and "substantial evidence is available in this state concerning the child's care, protection, training and personal relationships."[17]

Even if a foreign court could assert jurisdiction under these first two provisions, New York may assume jurisdiction for a custody proceeding if the foreign court has determined that New York is a more appropriate jurisdiction. That is not a determination New York can make; it must be made by the sending state. Lastly, if no other state has jurisdiction, New York may step into the vacuum.[18]

It can be difficult to determine the best point, and venue, for filing for custody. Sometimes, upon being served with court papers, a parent may show new interest in the children, and file for custody in the state your client fled, forcing her to return to litigate the case. Therefore, it may be a better option to wait to file a petition for the requisite six months and allow New York to become the home

state. That leaves a window, however, during which the other parent may file for custody in the original state.

These concerns were all invoked in *Matter of M.M.B. v C.B.*[19] The parties had lived in both New York City and Melbourne, Australia for several years; although their child had not lived in New York City for six consecutive months because of trips to Melbourne, the parents always returned to New York City. The respondent had moved to Chicago just as the custody proceeding was filed, and intended to relocate there. The court found that New York City was the home state because the absences while in Melbourne were only temporary. Even if, however, the court concluded that the six-month threshold could not be reached, New York was still the appropriate forum because no other state could claim home state status either, and all of the information relating to the child's upbringing was in New York, making it the most convenient forum.

Modification of Custody Orders: Continuing Jurisdiction

> *The New York court immediately arranges for a telephone conference with the judge in Virginia who issued the original custody order.* ***Virginia has exclusive continuing jurisdiction under the UCCJEA.*** *It is up to the Virginia court to determine whether the case can stay in New York long-term. The judge in Virginia is surprised to learn that there is a history of severe domestic violence in this case. Hank's petition for custody omitted this information; the petition had seemed straightforward; he had attributed his wife's absence in court to her temporary caretaking of a relative in New York City. Anna has told the New York court that she never received the summons and petition Hank claims to have served upon her; she believes the affidavit attesting to service is false. The Virginia judge acquiesces to New York's assumption of jurisdiction, clearing the way for the Bronx Family Court judge to issue its own orders.*

The UCCJEA also governs the question of which state should hear requests for modification to an initial custody determination. Pursuant to PKPA, the home state has exclusive and continuing jurisdiction.[20] PKPA mandates that state orders of custody be given full faith and credit by sister states.[21] Now that the UCCJEA has been adopted in all 50 states, the federal standards of PKPA are far less often called upon to provide consistency among the jurisdictions. The UCCJEA similarly provides that the court that issued the initial custody decision has right of first refusal over the case, regardless of how long ago the order was entered. If New York has entered the initial custody order, it has exclusive continuing jurisdiction over that determination until it finds that the child does not have a "significant connection" with New York, and "substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships."[22] Conversely, New York will not modify an initial order from a sister state without that state's acquiescence.[23]

The New York court may communicate with a court in another state about jurisdiction. This is generally done through a telephone conference with the two judges. The court may allow the parties to participate in the communication. At a minimum, the parties must be given the opportunity to present facts and arguments before a decision is made. Most importantly, a record must be made of the communication, and the parties have a right to the record. This approach was taken in *Salman v Salman*, where Florida was found to be the more convenient forum, in part because the wife had moved there after being subjected to domestic violence in the parties' Brooklyn home.[24]

In *Noel D., supra*, the court spoke to the judge in Illinois without the parties present, and during that conversation agreed with the judge that jurisdiction should remain in Illinois. After allowing the respondent mother to be heard, however, and becoming more familiar with the facts, the court

concluded that it was essential it take temporary emergency jurisdiction for the safety of the mother and children. While the New York court was obliged to communicate with the Illinois judge, the phone conversation was not, in itself, a binding, decision-making process.[25]

Courts often prefer to retain jurisdiction over their own orders. In *Vernon v Vernon*, for example, the Court of Appeals held that New York retained continuing jurisdiction over modifications of a New York divorce custody judgment even though the mother and child had been living in Wyoming for ten years.[26] Thus a client subject to a New York custody order who wants to relocate will most often petition the New York court for modification. When domestic violence makes a return to New York unwise, a court in a different state may be able to assert temporary emergency jurisdiction (see above), and confer with the New York court on the best manner in which to proceed. The UCCJEA allows for this type of interstate cooperation and protection of persons at risk.[27]

When a client arrives in New York already subject to a custody order from a foreign state, evaluate the terms of such order, and determine whether the order was on consent, after trial, or on default. A New York court may not modify an existing out-of- state custody order unless the court that rendered the decree declines to assume jurisdiction and New York has a significant connection to the case.[28] A New York court can do much, however, with temporary emergency jurisdiction.[29]

Inconvenient Forum

Even when it *can* invoke home state jurisdiction, a court in New York may nevertheless decline to exercise jurisdiction if it determines that a court of another state is a more appropriate and convenient forum.[30] In making this determination, the court must consider several statutory factors, including:

- whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future;
- which state could best protect the parties and the child;
- the length of time the child has resided outside the state;
- the distance between the two courts;the relative financial circumstances of the parties;
- agreements regarding jurisdiction;
- the nature and location of evidence and witnesses;
- the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- the familiarity of the court of each state with the facts and issues in the pending litigation.[31]

In *Gottlieb v Gottlieb*, the First Department rejected an assertion of inconvenient forum after determining that the most of the witnesses and documents needed for litigation were in New York. Moreover, the children in question had only been in the other jurisdiction because they were improperly removed to that state by their father, which was "unjustifiable conduct."[32]

In a case deciding between forums in New York or California, the financial security of the father in California was a factor in determining that the lower court had erred in finding that New York was an inconvenient forum. It would be easier for him to travel between the states for the proceedings.[33]

Upon determining that its state is an inconvenient forum, the court can stay the proceeding on the condition that a child custody proceeding is started promptly in another, more appropriate state. Thus in *Balde v Berry*, the Court concluded that Georgia was the more convenient forum even though

New York was the home state, because all of the evidence was in that state. It remitted for issuance of a stay until a proceeding was commenced in Georgia.[34]

Inconvenient forum led to dismissal of an action in *Allan F. v Elizabeth F.* when the mother and children, who resided in New Jersey, alleged domestic violence and drug use on the part of the petitioner. The court ruled that it would be burdensome for the visitation proceedings to take place in New York, where the father lived.[35] A similar set of facts led to the opposite outcome, however, in *Matter of Jamie D. v Traci V*.[36] Even though the mother and child had resided in Connecticut for more than eight years, the original custody order was issued in New York. Because the father's behavior was problematic, the court noted that New York-based family members and social services would be called upon to support visitation and document the father's progress. Those witnesses were all in New York. To mitigate the inconvenience to the mother, the court would allow telephonic appearances.

Unjustifiable Conduct

New York's UCCJEA directs courts to decline jurisdiction if the parent trying to invoke jurisdiction has "engaged in unjustifiable conduct." **This provision does not apply to a domestic violence victim who flees with a child.** The statute expressly states that removal of the child from the jurisdiction should not be considered as a factor weighing against the petitioner "if there is evidence that the taking or retention… was to protect the petitioner from domestic violence…."[37] Without having to resolve the issue factually, the court in *Gottlieb v Gottlieb* noted that if the father's bid for jurisdiction in North Carolina was based on his improper removal of the children from New York, then North Carolina would have to decline jurisdiction.[38]

UCCJEA and International Custody Disputes

The UCCJEA explicitly authorizes New York Courts to analyze international cases in the same way that it treats interstate cases. Section 75-d states that "a court of this state shall treat a foreign country as if it were a state of the US for the purpose of applying this article." Indeed, New York courts have looked first to the UCCJEA when considering international custody cases.[39] Courts therefore ask the same questions when determining international jurisdiction as they do in interstate cases: Where has the child lived in the last six months? Is there an existing court order? Is there an emergency that justifies asserting temporary jurisdiction?[40]

Home state priority in a foreign jurisdiction can be challenged in several ways. It may be possible to argue that the absence is "temporary," a time period that is excluded from the six months span necessary to establish home state priority. New York courts look to the "totality of the circumstances" to determine whether or not the absence should be considered temporary, including the intent of the parties.[41]

If the foreign jurisdiction does not provide conventional human rights protections for women in litigation, it should not be recognized as a home state. Allowing a country that simply will not credit women's testimony to take jurisdiction circumvents established public policy. For further guidance, see Chapter 19.

When the children are in New York, it is not in the children's interest for New York to defer to a foreign jurisdiction. In *Hector G. v Josefina P., supra*, the Bronx Supreme Court assumed jurisdiction and modified an existing custody order from the Dominican Republic by invoking UCCJEA provisions concerning appropriate forum and protection for victims of domestic abuse. The children were settled in New York City, and their school reported that they were excelling in their studies.

Information to Be Submitted to Court

For a client seeking to keep the whereabouts of herself and her children confidential as she tries to build a safe life in a new state, the challenges can be severe.[42] New York law requires each party in a custody proceeding to file, under oath, certain information, including the child's present address and the names and addresses of the persons with whom the child has lived within the past five years.[43] Domestic violence victims may ask for confidentiality. If the person seeking custody lives or has lived in a domestic violence shelter, the address cannot be revealed and the law provides for the designation of an agent for service of process. While a domestic violence victim may be able to keep her residence confidential, the caption of the court papers will necessarily reveal the state in which the client is located. Service of process can be difficult in another state. (Contact the sheriff or marshal in the county where the other parent lives.) For further guidance on address confidentiality, see Chapter 9, "Disclosure of Confidential Location."

Escaping Violence: What to Consider When Advising Your Client

In New York State, courts assume, absent evidence to the contrary, that it is in the child's best interest to have a close relationship with both parents; therefore, relocating any distance from the other parent is generally discouraged. Even though courts must consider proven domestic violence, the presumption against relocation often works against victims seeking to start over elsewhere. This section is intended to help advocates for domestic violence victims negotiate these realities.

Has Paternity Been Established?

Whether paternity has been established is an important factor in deciding whether to seek a court order to relocate before leaving the jurisdiction. If paternity has been established, then the father has a right to seek custody and visitation of the children and the mother probably should not leave the jurisdiction without seeking a court order.

When paternity has not been established there is less risk, but even an unacknowledged father may file for paternity and custody or visitation. Counsel should consider the severity of the domestic violence, the age of the child, the nature of the relationship between the father and the child, and the degree of their contact.

The closer and longer the relationship between the abuser and the children, the greater the risk of leaving without a court order. In such a case, a court would be more likely to require the victim's return to New York. If a mother does not want to leave the jurisdiction until paternity has been established, she will have to serve paternity and custody papers on the father.

How is Paternity Established?

Clients may be unsure whether paternity has been legally established. Paternity can be established in three ways: through marriage, an order of filiation, or a validly executed acknowledgment of paternity signed after July 1, 1993. For further guidance, see Chapter 17, Child and Spousal Support.

Marriage

Children born to a marriage are presumed to be the children of the marriage.[44] This applies equally to same-sex marriages.[45] Each parent has equal right to custody of the child and no proof of paternity is required to seek visitation or custody. If the mother was married to someone other than the actual biological father at the time of the child's birth, the husband at the time of the birth is nevertheless presumed to be the father of the child. Only a court order can overcome this presumption. The

husband would have the right to seek custody, and the mother would have to prove he is not the father. The biological father would have to file for and prove paternity.

Order of Filiation

Either parent can file a petition in court to determine paternity.[46] A paternity petition can be filed in New York State if the mother, child, or putative father resides here, even if the child was not born in New York State.[47] Once paternity has been established, the court will enter an "order of filiation." If the client was on welfare, an order of filiation may have been entered without your client's knowledge. The Department of Social Services establishes paternity when filing for child support on behalf of the mother. If your client is receiving child support pursuant to a court order, paternity has probably been established.

Acknowledgment of Paternity

An Acknowledgment of Paternity is signed in the hospital after the birth of a child and has the same force and effect as an order of filiation.[48] The client may not remember whether an acknowledgment of paternity was signed. If the child was born after 1995, the father was at the hospital during or shortly after the birth, and his name is on the birth certificate, he probably signed an acknowledgment of paternity.

Interstate Spousal and Child Support

Fleeing a home state jurisdiction does not mean foregoing economic support to which parent and child are entitled. New York is a signatory to the Uniform Family Support Act, permitting enforcement of child support judgments across state borders, and is found at Family Court Act Article 5-B. Forms are available at www.nycourts.gov/forms/familycourt/uifsa.shtml.

Spousal support may also be sought and enforced across state borders.

Spousal Support, Family Court Act Section 412

Pursuant to the Family Court Act, a person may bring an action to enforce a "Married person's duty to support spouse." Section 412 provides:

> A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

For a client seeking an order of protection, this provision can provide essential financial support while addressing domestic violence. The action may be brought independently of one for divorce. For an overview of the procedure for seeking spousal support, and a comparison of maintenance in a divorce action, see www.herjustice.org/assets/pdfs/TheBasicsSeries_English/Getting-Spousal-Support_ENGLISH.pdf. For additional guidance, see Chapter 17.

Departure Prior to Issuance of a Custody Order

When paternity has been established, and a client leaves New York with her children, New York will almost certainly have home state jurisdiction if the other parent files a UCCJEA petition within six months. If the parties were living together, or the father had regular visits with the child prior to the mother's departure, the court may issue a writ of habeas corpus directing that the mother return the child to New York immediately.

Should a writ be issued, your client will be required to return to New York. She will have an opportunity to be heard, and can argue that because of the abuse, she did not "wrongfully" deny him access to the child and that her conduct was not "unjustifiable."[49] Document the domestic violence to establish that leaving was important for her and the child's safety. In *Matter of Sara Z.Z. v Matthew A*.[50] the New York court approved Sara Z.Z.'s relocation to South Carolina even though it would limit the children's contact with their father, who had a history of violence. The mother had supportive family in the new state, as well as work for herself and better educational arrangements for her children.

If the father files for custody in New York after the client flees, the client needs to decide whether to respond only in New York or also file for temporary emergency jurisdiction in her new location, asking New York to decline to exercise its home state priority. Either way, once the client has been served with a custody petition, she is required to appear in court, and the court could issue a warrant if she does not appear. Read the petition carefully, along with any court orders, to determine whether the court has directed your client to remain in the jurisdiction until the court appearance. If not, she may leave until the court date but should be prepared to return.

Litigating in the refuge state may seem preferable for reasons of safety, travel, and cost. An effort to persuade New York to relinquish home state jurisdiction over the final custody decision will most often fail, however. It may also be in your client's interest to litigate in New York, where the law supports domestic violence victims and where she has an attorney. The client can ask New York to decline to exercise its home state jurisdiction under the inconvenient forum provision of the UCCJEA, discussed above.[51] Domestic violence is a factor for the court to consider in deciding whether or not to exercise jurisdiction.[52] Thus in *Swain v Vogt,*[53] the court declined to exercise jurisdiction under the UCCJA, the predecessor law to the UCCJEA, when the mother was forced to flee New York due to violence. The Court held that "[i]t is axiomatic that Family Court, having not yet made a decree concerning custody in this case, may decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make a custody determination." Under the expanded provisions of the UCCJEA, which expressly permits consideration of domestic violence, the outcome might have been different.

Seeking a Custody Order Prior to Departure

If, on the other hand, your client has decided to seek a court order allowing her to relocate *before* leaving New York, she should file a petition for custody and permission to relocate. If a court order granting custody already exists, file a petition to modify the visitation order and to seek permission to relocate prior to leaving the state. Review the original order carefully. Should your client fail to seek prior approval, she may be found in contempt.

Tropea Relocation Inquiry: "Totality of the Circumstances"

In assessing a request to relocate, the court must look to the totality of the circumstances to determine whether relocation is in the best interest of the child. In *Tropea v Tropea*,[54] the Court of Appeals explained that relevant factors include the existing relationship between the children and the non-custodial parent, any potential damage to that relationship if relocation is allowed, the reasons given for relocation, and whether a change in custody would otherwise be in the child's best interest. A history or threat of domestic violence bears on all of these factors. Domestic violence influences the nature and quality of the relationship between the abuser and the children; it is also a compelling reason for seeking to relocate. Post-separation abuse can be highly dangerous and unremitting, particularly when court-ordered visitation requires contact for exchange of the child. (For further discussion, see Chapter 4, Assessing Lethality and Risk.)

New York courts may allow a parent to relocate when the parent is a victim of domestic violence. In *Bodrato v Biggs*,[55] the father's physical assault on the petitioner was a factor in the court's decision to modify a joint custody order, grant sole legal and physical custody to petitioner and allow her to

relocate to New Jersey with the parties' two children. In *Spencer v Small*,[56] the lower court's decision to grant sole custody to the mother, enabling her to move from New York to Florida, was upheld in light of the father's history of domestic violence against the mother. In *Hilton v Hilton*,[57] a court's decision to award custody of the parties' children to the mother despite her relocation to a new home 400 miles from the father's residence was upheld because the father had a history of threats and acts of violence against the mother.

Because relocation cases involve the best interests of the children, petitions should detail other benefits of the move as well, such as economic factors.[58] The more specific your client can be about plans in the new jurisdiction, the better; a general intention to move is not sufficient.[59] Moving for family support is also an important factor in relocation cases. A move to be closer to extended family should be fully presented to the court. In *Matter of Doyle v Debe*,[60] the Appellate Division reversed a lower court award of custody to the father in New York. Instead, the court permitted the children to reside in Georgia with their mother. She had family there, good living conditions, and educational opportunities for the children. The father had a history of domestic violence as well as a tendency to undermine the mother's parenting efforts.

In *Matter of Shirley v Shirley*,[61] the mother was allowed to relocate to Arizona. The father was attending domestic violence programs and was subject to a five-year order of protection in favor of the mother. The mother was joining her fiancé in Arizona. He was well employed, and the children's needs would be much better met there.

Obtaining an order of relocation may be especially challenging if the client also seeks limited or supervised visitation. In *Shirley*, the mother requested supervised visits for the near future, and the court accommodated her. Both the mother and her fiancé committed to ensuring that the child would continue to visit with the father, however. In *Doyle*, the mother attested that she would grant the child's father liberal visitation on school vacations, and that was a factor in granting her custody. Courts generally order longer visitation periods when the custodial parent relocates. Supervised visitation programs may have difficulty accommodating prolonged visits. One solution is to find a family member who is willing to supervise extended visits. If the domestic violence is severe, it may be best to argue that any visitation is unwarranted.

In either case, petition the New York court for temporary custody and permission to relocate immediately to her new location. Success will turn on whether the court finds the allegations of domestic violence credible, and that it is in the child's best interest to remain where he or she is currently living.

When Leaving Leads to Legal Complication

Sanctions for Violating Court Orders

A court may punish a party who willfully violates an existing court order, and most courts will punish a parent who removes a child from the jurisdiction when the parent was specifically prohibited from doing so. Courts can also hold a party in contempt for failing to respond to other orders of the court, such as a subpoena, an order to appear in another state's court, or an order to produce the child. If the court finds after a hearing that your client willfully violated the order, she may be held in contempt of court. In more extreme situations, your client may face criminal sanctions for custodial interference. It is important to establish that she fled for her safety and not simply to relitigate an unfavorable custody or visitation decision. By analogy to law governing international kidnapping, fleeing domestic violence is an affirmative defense.[62] Argue that while this defense was enacted for international crimes, it is federal law and the rationale behind the defense should be applied to interstate crimes as well.

State Criminal Laws Involving Custody Violations

A victim of domestic violence may be concerned about the legal ramifications of fleeing with her children to a different jurisdiction. The abuser may have threatened to press charges for "kidnapping."

Kidnapping, however, is not likely to be charged. It is an affirmative defense to kidnapping that "the defendant was a relative of the person abducted, and his sole purpose was to assume control of such person."[63]

A parent in a custody case could face a criminal charge of custodial interference, however. Custodial interference in the second degree, a class A misdemeanor, is established by showing that a relative of a child under 16 acted with intent to hold that child permanently or for a protracted period and "knowingly without right" took the child from his or her lawful custodian.[64] Custodial interference in the first degree, a class E felony, includes all elements of the second-degree offense plus the added elements that the perpetrator acted with intent to remove the child from the state and removed the child from the state or exposed the child to risk of harm.[65]

Where there is no formal custody order in place, it is sometimes argued that one parent did not "knowingly without right" remove the child from the jurisdiction. Even in the absence of a legal order, both parents have custodial rights to a child if the child was born during a marriage or if paternity has been established.

Courts have given a broad and flexible interpretation of what is sufficient to constitute "a custody order" for the purposes of a charge of custodial interference. In *People v Morel*,[66] the Appellate Division upheld an indictment of custodial interference in the first degree when the parties had agreed in open court that the mother was to have exclusive physical custody of the child and that the terms of the stipulation had made the mother the "lawful custodian." In *People v Lawrow*,[67] a trial court refused to dismiss a charge of custodial interference in the second degree although the defendant-parent had not been served with a custody order. However, the court held that the State bears the burden to prove beyond a reasonable doubt that the defendant had knowledge of the custody order even if he had not been served.

Conclusion

Interstate cases can take a long time to make their way through the courts and, in the meantime, hinder your client's ability to protect herself and her children from continued abuse. Although the UCCJEA and other statutes provide advocates with some tools to argue on behalf of domestic violence victims, overcoming the presumption in favor of home state jurisdiction can be difficult. If an interstate case is commenced, the jurisdictional argument can end up being the key to winning. The choice between litigating long-distance or returning to an unsafe jurisdiction can overwhelm even the most persistent parent, but continued pressure and the threat of a court order can succeed in returning improperly removed children. Similarly, careful advocacy and safety planning can help support your clients' efforts to find refuge in a new jurisdiction, supported by the UCCJEA, which at last has national force.

Notes

1. New York's law is codified at Domestic Relations Law art 5-A, §§ 75 (amended 2004).
2. Domestic Relations Law § 75-d; *Hector G. v Josefina P.,* 2 Misc 3d 801 (Sup Ct, Bronx County 2003).
3. Domestic Relations Law § 75-d(2). A foreign child custody law that violates "fundamental principles of human rights" need not be enforced. Domestic Relations Law § 75-d(3).
4. *Id.* For assistance, *see* Legal Resource Center on Violence Against Women, www.lrcvaw.org.

5. Domestic Relations Law § 75.
6. www.nycourts.gov/forms/familycourt/uccjea.shtml. *See also* Legal Resource Center on Violence Against Women, www.lrcvaw.org, an excellent resource on interstate custody issues.
7. Domestic Relations Law § 76-a(2).
8. Risk to the child was at issue in *Matter of Bridget Y. (Kenneth M.Y.),* 92 AD3d 77 (4th Dep't 2011). Risk to mother and children was at issue in *Hector G. v Josefina P.,* 2 Misc 3d 801, *supra,* and *Matter of Callahan v Smith,* 23 AD3d 957 (3d Dep't 2005).
9. Domestic Relations Law § 76-c(1).
10. Domestic Relations Law § 76-c(2). *See Hector G. v Josefina P., supra.*
11. Domestic Relations Law § 76-c(2).
12. 28 USC § 1738A et seq.
13. 6 Misc 3d 1017(A) (Fam Ct, Qns County 2005).
14. Domestic Relations Law § 76(1), (2).
15. Domestic Relations Law § 75-a(7).
16. *Matter of Felty v Felty,* 66 AD3d 64 (2d Dep't 2009).
17. Domestic Relations Law § 76(1)(b).
18. Domestic Relations Law § 76(1)(c), (d).
19. *Matter of M.M.B. v C.B.,* NYLJ at 1 (April 14, 2015) (Fam Ct, Kings County).
20. 28 USC § 1738A et seq.
21. *Id.* For assistance, *see* Legal Resource Center on Violence Against Women, www.lrcvaw.org.
22. *Matter of Mojica v Denson*, 120 AD3d 691 (2d Dep't 2014), citing Domestic Relations Law § 76-a(1)(a) and *Matter of Wnorowska v Wnorowski*, 76 AD3d 714 (2d Dep't 2010).
23. *Stocker v Sheehan*, 13 AD3d 1 (1st Dep't 2004)(declining to modify Rhode Island order entered eight years earlier).
24. *Salman v Salman*, 32 Misc 3d 1242(A) (Sup Ct, Kings County 2011).
25. *Noel D.*, 6 Misc 3d at 1017(A).
26. *Vernon v Vernon*, 100 NY2d 960 (2003); *see also Matter of Breselor v Arciniega*, 123 AD3d 1413 (3d Dep't 2014).
27. Domestic Relations Law § 76-c.
28. Domestic Relations Law § 76-b.
29. *See Hector G., supra* at n 2.
30. Domestic Relations Law § 76-f.
31. Domestic Relations Law § 76-f(3); *Jun Cao v Ping Zhao,* 2 AD3d 1203 (3d Dep't 2003). Deborah Goelman & Darren Mitchell, Legal Resource Center on Violence Against Women. *See Look Both Ways Before You Cross State Lines: Using the Uniform Child Custody Jurisdiction and Enforcement Act to Assist Domestic Violence Survivors*, 43 Clearinghouse Rev 346 (2009).
32. *103 AD3d 593* (1st Dep't 2013). *Cf. Matter of Mojica v Denson*, 120 AD3d 691 (1st Dep't 2014) (New York inconvenient forum where witnesses elsewhere).
33. *In re Sarah Ashton McK. v Samuel Bode M.,* 111 AD3d 474 (1st Dep't 2013).
34. 108 AD3d 622 (2d Dep't 2013).
35. 6 Misc 3d 1024(A) (Fam Ct, Richmond County 2004).
36. 22 Misc 3d 1131 (Fam Ct, Clinton County 2009).
37. Domestic Relations Law § 75.
38. 103 AD3d 593(1st Dep't 2013).
39. *Hector G., supra; Matter of Michael McC. v Manuela A.,* 48 AD3d 91 (1st Dep't 2007); *Bjornson v Bjornson*, 20 AD3d 497 (1st Dep't 2005).

40. Practitioners should also consult Chapter 19 in this volume on cases arising under the Hague Convention and related international laws.
41. *Matter of Felty v Felty*, 66 AD3d 64 (2d Dep't 2009).
42. For a fuller discussion of these considerations, *see* Kristen M. Driskell, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 Hastings L J 129 (2008/2009).
43. Domestic Relations Law § 76-h.
44. Domestic Relations Law § 24.
45. *Debra H. v Janice R.*, 14 NY3d 576 (2010); *see also Matter of Arriage v Dukoff*, 123 AD3d 1023 (2d Dept 2014).
46. Family Court Act § 522.
47. Family Court Act § 521.
48. Public Health Law § 4135-b.
49. Domestic Relations Law § 76-g.
50. *Matter of Sara ZZ. v Matthew A.,* 77 AD3d 1059 (3d Dep't 2010). *See also Sheridan v Sheridan*, 204 AD2d 771 (3d Dep't 1994).
51. Domestic Relations Law § 76-g.
52. *See e.g. Jeanne E.M. v Lindey M.M.*, 189 Misc 2d 669 (Fam Ct, Albany County 2001).
53. 206 AD2d 703 (3rd Dep't 1994).
54. 87 NY2d 727 (1996).
55. 274 AD2d 694 (3d Dep't 2000).
56. 263 AD2d 783 (3d Dep't 1999).
57. 244 AD2d 902 (4th Dep't 1997).
58. *See e.g. Miller v Pipia*, 297 AD2d 362 (2d Dep't 2002).
59. *See e.g. Matter of L.G. v A.H.*, NYLJ at 25, col 1 (Nov. 5, 1998) (Fam Ct, Nassau County).
60. 120 AD3d 676 (2d Dep't 2014).
61. 101 AD3d 1391 (3d Dep't 2012).
62. 18 USC § 1204.
63. Penal Law § 135.20. *But see People v Dianna Brown*, 264 AD2d 12 (4th Dep't 2000), which denied a biological mother whose parental rights had been terminated the right to assert this defense.
64. Penal Law § 134.45
65. Penal Law § 135.50.
66. 164 AD2d 610 (2d Dep't 1992).
67. 112 Misc 2d 494, 495 (Dist Ct, Nassau County 1982).

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International Custody Disputes and Abduction: Invoking and Defending Against UCCJEA and Hague Convention Claims

by Betsy Tsai, Mary Rothwell Davis & Josephine Lea Iselin

When one parent, without permission of the other, removes a child to a foreign jurisdiction, two important laws help resolve the issues: the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) and the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").[1] These laws bring consistency across jurisdictions and help ensure that parties do not gain an advantage by moving to another jurisdiction. Both have special provisions for domestic violence. Some clients may be the respondent on a petition, having fled another jurisdiction to escape domestic violence. Others may be the petitioner, seeking to secure the return of a child who was wrongfully retained by an abuser, or seeking to establish jurisdiction in a safe forum that is some distance from where the abuser resides.

The UCCJEA, an interstate compact adopted by all 50 states, can also be applied to cases where parties are in a foreign country.[2] If the child is in the United States, these proceedings can be initiated in New York State Family Court, much like an ordinary custody or visitation matter. The UCCJEA provides jurisdictional authority in the child's "home state," even if that child has been taken elsewhere.[3]

The Hague Convention is an international treaty designed to address child abduction by a parent.[4] It provides parents with a civil remedy — the prompt return of their children. These proceedings are initiated in State Court, United States District Court or, if the child is abroad, in the courts of the other country. The underlying purpose of the Hague Convention is to prevent international abductions and restore the status quo while the courts of the country from which the child was taken resolve underlying custody and visitation issues. Once a prima facie case under the Hague Convention has been established, the Convention, in most instances, mandates return of the child.

Both of these remedies were initially drafted with an abducting parent in mind, rather than a parent fleeing for safety from domestic violence. Case law and subsequent legislative amendment have, however, strengthened their effectiveness for victims of domestic violence, although it is increasingly seen that these proceedings (both Hague Convention and UCCJEA) are both shields for an abused parent seeking refuge and a sword for an abuser seeking to regain or maintain control over the family. Complexities frequently arise, requiring careful study of the individual and interacting laws and resolution of strategic decisions at every turn. This chapter will help the practitioner to understand many of these complexities.

Part I

UCCJEA and International Custody Disputes

The UCCJEA (discussed more completely in Chapter 18) explicitly authorizes New York courts to analyze international cases in the same way that it treats interstate cases. Section 75-d states that "a court of this state shall treat a foreign country as if it were a state of the US for the purpose of applying this article."[5] Indeed, New York courts have looked first to the UCCJEA when considering international custody cases.[6] Courts therefore ask the same questions when determining international jurisdiction as they do in interstate cases: Where has the child lived in the last six months? Is there an existing court order? Is there an emergency that justifies asserting temporary jurisdiction?

Home state priority in a foreign jurisdiction can be challenged in several ways. It may be possible to argue that the absence is "temporary," a time period that is excluded from the six months span necessary to establish home state priority. New York courts look to the "totality of the circumstances" to determine whether or not the absence should be considered temporary, including the intent of the parties.[7]

If the foreign jurisdiction does not provide conventional human rights protection for women in litigation, it should not be recognized as a home state. Allowing a country that will not credit women's testimony to take jurisdiction circumvents established public policy. The U.S. State Department prepares helpful "country reports" that describe how domestic violence victims and women are treated in the foreign jurisdiction.[8]

When the children are in New York, it is not in the children's interest for New York to defer to a foreign jurisdiction. In *Hector G. v Josefina P.*,[9] Mr. G. was arrested in the Bronx in November 2002 and charged with threatening Ms. P., his ex-wife and the mother of their twin sons. Because Mr. G. filed, in Bronx Family Court, a writ of habeas corpus claiming that Ms. P. had interfered with his custodial rights pursuant to default order of a Dominican court, both the criminal and family law cases were transferred to the IDV Court to be heard by a single judge. Very shortly thereafter, Ms. P. filed a petition for custody and a family offense petition, both alleging that Mr. G. had subjected her to severe domestic violence.

For purposes of analysis, the Dominican Republic was determined to be the equivalent of any other state. Because the Dominican Republic is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction,[10] that law did not come into play. While the drafters spoke of the UCCJEA as addressing custody disputes "across state lines," in fact the Act is expressly made applicable to foreign disputes as well, so long as the determination was made "in substantial conformity with the jurisdictional standards of this article."[11] Thus the principles of the UCCJEA properly governed determination of this dispute — even though the Dominican Republic was not similarly bound by a reciprocal act.[12]

Defining the Home State

Because the overriding purpose of the UCCJEA is to eliminate jurisdictional competition between courts in matters of child custody, jurisdictional priority is always conferred to a child's "home state," and many of the Act's provisions are intended to assist a court in determining which jurisdiction is the "home state."[13] A jurisdiction does not become a child's "home state" unless the child has lived in that state with a parent or "person acting as a parent" for at least six consecutive months prior to commencement of the action.[14]

In the *Hector G.* case, New York was not the "home state." A final order of custody from a court in the Dominican Republic had been affirmed on appeal just weeks before Mr. G.'s arrest, and Ms. P. and the children had only just arrived in New York State. The IDV court had to determine whether

it could or should assume jurisdiction of the matter at all or must simply refer the parties back to the Dominican Republic court.

Temporary Emergency Jurisdiction[15]

Different standards govern cases in which there is no prior custody decree[16] and those in which a court of another jurisdiction has already assumed jurisdiction of the custody matter.[17] A court has much more latitude in cases involving initial child custody determinations, as there is no competing jurisdictional claim. As a general rule, once a court has made a valid child custody determination, that court has "exclusive, continuing jurisdiction" over any subsequent related matters, unless it decides that another jurisdiction would be a more appropriate forum or the child and the child's parents no longer reside in that state.[18]

In *Hector G*., the Bronx Supreme Court assumed jurisdiction and modified an existing custody order from the Dominican Republic by invoking UCCJEA provisions concerning appropriate forum and protection for victims of domestic abuse. The children were settled in New York City, and their school reported that they were excelling in their studies. The *Hector G*. case thus presented a complicated scenario because another jurisdiction had already issued a custody order that, presumably, might claim "exclusive, continuing jurisdiction." The question was whether New York might nevertheless be able to take some constructive action upon the case. Here the UCCJEA differs significantly from its predecessor, the UCCJA. The UCCJEA permits a court to assume "temporary emergency jurisdiction" of a custody matter if there are allegations of domestic violence.[19] The order issued remains in effect until "an order is obtained from the other state within the period specified" *or* "where the child who is the subject of a child custody determination… is in imminent risk of harm,… until a court of a state having jurisdiction under sections seventy-six through seventy-six-b of this title has taken steps to assure the protection of the child."[20] If there is no prior or simultaneous custody proceeding but New York is not the child's "home state" under Domestic Relations Law § 76 –b, the court may make any orders necessary and they may remain in effect until the home state steps in or until New York becomes the home state.[21] Where, as in the Bronx IDV case, there is a valid prior child custody order, New York may issue a temporary order in order to enable the party seeking relief to apply to the home state court, and the temporary order remains in effect until the home state has taken sufficient steps to protect the child.[22]

Pursuant to these provisions, the Bronx IDV court determined to keep the case before it in order to resolve questions concerning the safety of the children and their mother, given the new criminal charges pending against the father.

The court directed official translation of all Dominican Republic court documents, and ordered the Administration for Children's Services [ACS] to interview all the parties. The report from ACS detailed an extensive, severe history of domestic violence, on occasion requiring the mother's hospitalization for treatment of injuries. The children, now enrolled in New York City public school, were described by their teacher as her "best" students, and had made a good adjustment.

Contacting the Home Court

With a basis for "temporary emergency jurisdiction" now well established, the Bronx IDV court was next obligated, by statute, to contact the home state court in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."[23] Accordingly, the Bronx IDV court held a telephone conversation, which was transcribed by a court stenographer, with the judge in the Dominican Republic who had issued the original custody decree. Domestic Relations Law § 75-i requires that such communications be recorded, and that the parties be given an opportunity to participate or present facts and argument concerning jurisdiction. The end result was that the Dominican court declined to reassert jurisdiction, allowing that New York

was the better forum upon the assumption that both parents were now domiciled in New York. The court also stated that it understood the parties' custody agreement to allow custody to revert to the mother once she was settled in the United States.

Determining Residence

Although the father attempted to argue that he was still domiciled in the Dominican Republic, the IDV court determined — based on the statements that he had made to probation authorities when seeking release on his own recognizance in the criminal matter — that the father had claimed in that proceeding to be a businessman who had resided in New York City for the previous two years. Demonstrating how an integrated court prevents parties from presenting different faces to different courts, the IDV court declined to credit the father's subsequent contradiction of those assertions as part of his bid to have jurisdiction remain in the Dominican Republic. Thus, the IDV court could assume modification jurisdiction because "a court of this state or a court of the other state determines that the child, [and] the child's parents… do not presently reside in the other state."[24]

The Bronx court found additional, independently sufficient reasons why it was appropriate to assume modification jurisdiction. The UCCJEA permits assumption of jurisdiction if "the court of the other state determines it no longer has exclusive, continuing jurisdiction."[25] The Dominican judge had indicated that, according to an original custody agreement, the parties intended that custody revert to the mother once she settled in the United States, as she now had, and the court gave its express consent to transfer of the matter to New York. Notably, the determination that a child no longer has a "significant connection" with the home state can only be made by the original court; another court cannot determine that issue for it.[26] Thus it was only for the Dominican court, and not New York, to come to that important conclusion. Either the original or new court, however, may determine that the child and the child's parents do not presently reside in the original home state.[27]

Safety Issues

Even when the foreign court refuses to relinquish jurisdiction, a concerned New York court can take significant steps to ensure that domestic violence is addressed by the foreign court. In Matter of *Noel D. v Gladys D.*,[28] the New York court, deeply troubled by a default award of custody in Illinois to a parent with an extensive history of mental instability and violence that was unknown to the Illinois court, retained temporary emergency jurisdiction until such time as it could be assured that Illinois would address the significant safety issues, even though the Illinois court refused to give up continuing, exclusive jurisdiction.

Like the court in *Noel D.*, the Bronx IDV court was presented with a default order of custody granted without adequate knowledge on the part of the original court about the history of domestic violence in the home. In both cases, the courts had concerns about the capacity or willingness of the originating court to protect the safety of the parties before it. The *Noel D.* court determined to hold on to the case until the Illinois court could assure the safety of the mother and child. The Bronx IDV court, in *Hector G.*, examined whether the court in the Dominican Republic would ever be in a position to protect this mother and her children, since the UCCJEA permits a court to assume jurisdiction if foreign proceedings do not conform to our basic jurisdictional standards.[29]

It cited the Department of State Country Report on Human Rights Practices for the Dominican Republic,[30] noting that the Dominican Republic had no laws against domestic violence until 1997, that domestic violence was "widespread," affecting 40% of the country's women and children, and that there were *no* shelters for battered women there, as of March 2003.[31]

Logistical Concerns and Determination of "Convenient Forum"

Whether there are sufficient resources for the family in the other jurisdiction is a factor to be considered under the analysis of "convenient forum."[32] Even where a court can take jurisdiction — as when the originating judge agrees to it — the new court may nevertheless consider whether it should take jurisdiction, based on assessment of whether it is an "inconvenient forum" and another forum may be more appropriate. Here the court must consider multiple factors:

1. whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child;
2. the length of time the child has resided outside this state;
3. the distance between the court in this state and the state that would assume jurisdiction;
4. the relative financial circumstances of the parties;
5. any agreement of the parties as to which state should assume jurisdiction;
6. the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
7. the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
8. the familiarity of the court of each state with the facts and issues in the pending litigation.[33]

While the difficulty of taking evidence in a particular jurisdiction is a factor to be considered, the UCCJEA nevertheless contains multiple provisions intended to make interstate litigation easier by including measures that can ease or eliminate logistical concerns. One party may be required to bear the cost of transportation for the other.[34] More innovatively, the UCCJEA sets forth procedure for "taking testimony in another state, including testimony and deposition by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state."[35] The UCCJEA also allows courts of different jurisdictions to cooperate fully in management of a custody matter. A court of one state may request a court of another state to hold an evidentiary hearing, order a person to produce evidence, or order an evaluation with respect to a child involved in a pending proceeding; forward transcripts of proceedings; direct a party to appear, with or without the child; and enter orders.[36] Thus even when a jurisdictional ruling is disappointing to one's client, application can still be made to conduct significant parts of the litigation in the alternate jurisdiction.

Unjustifiable Conduct Exemption

Lastly, in the case before the Bronx IDV court, the father alleged that the mother had violated a Dominican court order by failing to return with the children after an authorized visit, instead taking them to, and retaining them in, New York.

While the UCCJEA denies protection to a person who has engaged in "unjustifiable conduct," there is an express exemption for "any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was to protect the [party] from domestic violence

or the child or sibling from mistreatment or abuse."[37] Here, Ms. P. could explain her conduct under this provision.

* * *

The UCCJEA is a complicated statutory scheme, replete with cross-references and multi-layered analyses that demand careful study. A practitioner would do best to spend some time becoming familiar with the overall structure of the Act, which is divided into three areas: Title I, "General Provisions"; Title II, "Jurisdiction"; and Title III, "Enforcement." Because of the extensive interplay of the various provisions, it would be a mistake to go forward with a UCCJEA application based only upon a partial reading of the statutory scheme. While a particular provision may seem exactly on point, and even dispositive, it will no doubt be subject to modification by some other provision, such as "inconvenient forum" analysis. Thus any claim must be assessed in light of the statutory scheme in its entirety.

Preservation of continuing and exclusive home state jurisdiction remains an important purpose of the UCCJEA. Where there is no compelling reason to upend that jurisdiction, and a parent still remains in the original jurisdiction, a foreign court faced with a request for modification will most probably reject the application, and a client's chance of success is low.[38] If, however, both parents and the child have left the original jurisdiction, a new jurisdiction will be much more inclined to assert modification jurisdiction.[39]

Another overriding goal of the UCCJEA is to prevent forum-shopping. Forum-shopping is not the same, however, as an effort to find relief in a jurisdiction that will be sensitive to the safety needs of a parent and child fleeing a batterer. Both *Hector G*. and *Noel D*. show how general jurisdictional priorities can be set aside when domestic violence is a factor in the parent's relocation to the new jurisdiction, even when that relocation is in violation of an existing court order. If there is something about the original jurisdiction that makes it a particularly unsafe venue for a client, that should be described in detail to the new court. Whether the concern is community or judicial indifference to domestic violence, an inability to protect from threatened harm, particular support or resources available only in the new jurisdiction, these factors should all be placed before the court in support of a request for temporary emergency jurisdiction.[40] Domestic violence advocates in the alternate jurisdiction, if there are any, can be contacted for insight into how matters are treated in that locale. If there are no organized services for battered women, that is an important fact to bring before the court's attention.

Although the UCCJEA does expand to an important degree the power of a court to assume at least temporary jurisdiction of cases involving domestic violence, the statutory scheme should not be regarded, where there is already an order of custody in place, as a means of avoiding a relocation hearing under *Matter of Tropea*.[41] Absent real evidence of risk to the parent seeking refuge in a new jurisdiction, the UCCJEA does not authorize much more than referral back to the court that made the initial custody determination. Where such risk can be shown, however, particularly when combined with evidence that the new jurisdiction is a supportive one to the parent and child, the UCCJEA can now offer real relief that was not previously available to victims of domestic violence and their children.

Part II

Federal Remedies: The Hague Convention

The Hague Convention is a 1980 international treaty drafted by the Hague Conference on Private International Law. Although the United States signed on in 1981, the Hague Convention did not become law in the United States until 1988, when the International Child Abduction and Recovery

Act (ICARA),[42] its implementing legislation, was passed. The Hague Convention is only applicable between and among countries that have ratified the Convention, otherwise known as Contracting States, or countries that have acceded to it. A list of Hague Convention party countries and their effective dates with the U.S. can be found on the U.S. Department of State's website, which is a valuable resource for many Hague Convention issues.[43] Federal and state courts are given concurrent jurisdiction over petitions for the return of a child.[44]

Purpose

The primary purpose of the Hague Convention is to effect the prompt return of abducted children to their countries of habitual residence. The focus of the Hague Convention is on remedying wrongful removals rather than deciding custody issues. The Hague Convention does not allow Contracting States to hear the merits of any underlying custody disputes, thereby creating a disincentive for parents to abduct their children in search of more favorable jurisdictions.

The objects of the Hague Convention are only "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[45]

For victims of domestic violence, Hague proceedings initiated in the United States most often arise when the victims have fled to the United States from a foreign jurisdiction, with the children. The children's other parent then files for return of the children. If the victim is not the sole custodian of the children, she must attempt to show that the children would be at "grave risk" if returned to their other parent. For victims of domestic violence, resolution of Hague petition matters will often turn on this "grave risk" question. If the child has been abducted to or wrongfully retained in another country by the abuser, the petition must be filed there, as discussed below.

Application of the Hague Convention

What is the Central Authority?

Each Contracting State must establish a Central Authority whose functions include cooperating with Central Authorities in other Contracting States, attempting to locate an abducted child, coordinating Hague Convention applications requesting the return of a child from other countries, initiating legal proceedings, and securing counsel for foreign litigants. The United States has designated the Department of State's Office of Children's Issues as the Central Authority. The National Center for Missing and Exploited Children processes applications requesting the return of children in the United States on behalf of the State Department.[46]

When Does the Hague Convention Apply?

The Convention has a number of limitations. First, the Hague Convention applies only between Contracting States, so if a parent abducts the child to a country that is not a signatory to the Hague Convention, these provisions do not apply. Second, the Hague Convention applies only to children under sixteen years of age. Finally, the child must have been habitually resident in a Contracting State immediately prior to the removal by the parent.[47]

How Does a Party Bring a Hague Convention Claim?

A parent seeking the return of an abducted child may make an application directly to a court in the Contracting State to which the child has been taken. The parent may also submit an application to the Central Authority in his or her own country, which then forwards the application to the Central Authority in the abducted-to country. These options are not mutually exclusive, so a party seeking return of a child under the Hague Convention may use both avenues of relief.

What are the Elements of a Hague Convention Claim?

Wrongful Removal

To make out a prima facie case under the Hague Convention in the United States, the parent seeking return of the child must first establish, by a preponderance of the evidence, that there was a "wrongful removal." A wrongful removal occurs if the child was taken from his or her *habitual residence* in breach of the other parent's custodial rights that were being exercised at the time of removal.[48]

Habitual Residence

The Hague Convention does not define what constitutes "habitual residence," and courts have developed this concept through case law. Habitual residence, unlike domicile, does not necessarily depend on the long-term intentions of the parties but is a concept used to identify where the children and family are settled. As one court stated, habitual residence depends on "a 'degree of settled purpose,' as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there. The focus is on the child rather than the parents."[49] Another court, explaining the concept of habitual residence, stated that "technically, habitual residence can be established after only one day as long as there is some evidence that the child has become 'settled' into the location in question."[50] The Second Circuit in *Gitter v Gitter*[51] set forth a two-part standard for making this determination:

> First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) *at the latest time that their intent was shared*. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent. [Emphasis added]

Where the parents have married in one country, the child or children were born there and lived there continuously until the alleged wrongful removal, courts will generally find that country to be the child or children's habitual residence.[52] Accordingly, where a 5-year old child had lived virtually all her life in one country, the parents had bought a house there and enrolled the child in school there, that country was deemed the child's habitual residence, even if the parents intended one day to return to the United States.[53] However, where parents and children have moved frequently, both issues (parental intent and acclimatization) are subjected to a very fact-oriented analysis.

In the case of *Ermini v Vittori*,[54] where an Italian family moved to New York in order to permit their severely autistic son to receive therapy unavailable to him in Italy, the Second Circuit noted that even though the move was intended to be of limited duration, New York could nevertheless qualify as the habitual residence.

Rights of Custody

Wrongful removal occurs only if the child was taken from his or her habitual residence in breach of the other parent's custodial rights, which were being exercised at the time of removal. The Hague Convention defines rights of custody as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[55] This term was intended by the Convention drafters to be interpreted broadly. For more specificity on what constitutes custody rights, it is important to look to the laws of the child's country of habitual residence. To establish that custody

rights were actually being exercised at the time of removal requires very little evidence on the part of the party with the custody rights. In fact, the Convention assumes that the person with rights of custody was exercising them, and places the burden of proof on the alleged abductor to show that custody rights were not actually being exercised at the time of removal.

The Hague Convention draws a key distinction, however, between a parent's "rights of custody" and his or her "rights of access" or visitation rights.[56] As is made clear in Articles 3 and 8 of the Convention, the former is protected by the return remedy, the latter is not.[57] *Abbott v Abbott*, 560 US 1, 7 (2010).[58]

Article 5 of the Convention defines these terms as follows:

> For the purposes of this Convention-
>
> (a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> (b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Abbott virtually erased the Convention's distinction between custody and visitation rights in 2010, reversing the opposite rule followed in the Second Circuit up until then.[59] The Court found that a restraint on the custodial mother's ability to leave the country (Chile) conferred on the father a joint "right to determine the child's place of residence" and joint "rights relating to the care of the person of the child."

The joint right to determine the child's country of residence also confers "rights relating to the care of the person of the child" as set forth in Article 5(a) of the Treaty. The Court noted, "[f]ew decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self-definition, are linked in an inextricable way to the child's country of residence…. "[60] Thus the status of "custodial parent" must be carefully assessed under the Hague Convention, as it may differ significantly from state law definitions and unwittingly lead to wrongful removal.

A Second Department Appellate Division decision added complexity to this area. In *Katz v Katz*, a mother fleeing domestic violence successfully fended off the father's Hague Convention petition when a Dominican court found that the children were at "grave risk" of harm if returned to New York, where the father resided. When the father subsequently filed for custody in New York Family Court, his petition was dismissed. The Second Department reversed, however, and reinstated the custody petition. The court held, citing *Abbott*, that New York courts could rightfully retain jurisdiction of that question even though the Dominican court had refused to order return of the children. *Katz v Katz*, 117 AD3d 1054 (2d Dep't 2014).

Defenses and Exceptions to the Return Remedy

Once petitioner has made a *prima facie* case on "wrongful taking" under Article 3, Articles 12 and 13 provide four exceptions to the mandatory return order set forth in Article 12:

1. If the petition is brought after the expiration of one year from the wrongful removal or retention, and the court finds that the child is "settled in his or her new environment" (Article 12);
2. Where the person or institution having care of the child was not actually exercising custody of the child at the time of the removal or had consented to or subsequently acquiesced in the removal or retention (Article 13(a));

3. Where "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Article 13(b)); or
4. Where the court finds that "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views" (Article 13, Para. 3).

In addition, Article 20 of the Convention provides:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

The "exceptions" (affirmative defenses) described above in (1) and (2) require proof by a preponderance of the evidence, while those in (3) and (4) require clear and convincing evidence.[61]

As emphasized by many courts, "these [affirmative] defenses do not authorize a court to exceed its Hague Convention function by making determinations, such as who is the better parent, that remain within the purview of the court with plenary jurisdiction of the question of custody."[62] "To view the defenses more broadly would frustrate the core purpose of the Hague Convention — to preserve the status quo and deter parents from seeking custody of their child through, in effect, forum shopping. [*citation omitted*]. Therefore, "even where the respondent meets his or her burden to show that an exception applies, the court may nevertheless exercise discretion to order repatriation." *Id.*

Using the Hague Convention Exceptions on Behalf of Those Fleeing Domestic Violence

The Hague Convention can pose serious problems for an abused parent who flees to the United States seeking safety. Because the various exceptions are designed to be narrowly construed and may be difficult to establish, lawyers with an abused client should first explore other avenues of relief, such as arguing that the child was not wrongfully taken from the country of origin. If necessary, however, exceptions to the Hague Convention may be successfully litigated.

The Article 13(b) grave risk of harm exception is the most commonly litigated exception in Hague Convention cases and potentially useful for women fleeing abusive partners, although it has traditionally been a difficult exception to establish. The 13(b) exception allows courts to circumvent their obligation to return the child to the country of habitual residence if the opposing party can demonstrate that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The party opposing the return has the burden of proof and must demonstrate the applicability of the 13(b) exception by clear and convincing evidence. Because the Hague Convention does not provide a definition for what constitutes "grave risk," it is important to examine judicial interpretation of the 13(b) exception. In 2011, the Permanent Bureau of the Hague issued a report examining judicial handing around the world of domestic violence allegations in Hague petitions.[63]

Traditionally, U.S. courts have interpreted the 13(b) exception very narrowly. The Second Circuit has stated:

> A "grave risk" exists in only two situations: (1) where returning the child means sending him to "a zone of war, famine, or disease"; or (2) "in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[64]

The case that initiates all subsequent "grave risk" analysis is *Blondin v Dubois*, which resulted in four published decisions.[65] Marthe Dubois fled from France to the United States with her two children,

Marie-Eline (age eight) and Francois (age four), to escape her abusive husband, Felix Blondin. The district court found that Blondin had repeatedly abused Dubois throughout their relationship and beat Marie-Eline, twisting an electrical cord around her neck, and threatening to kill her. On two other occasions, Dubois had attempted to leave Blondin, fleeing to a battered women's shelter for a total of approximately nine months. The district court held that the 13(b) grave risk exception applied and denied return of the children because return "would present a 'grave risk' that they would be exposed to 'physical or psychological harm' or that they would otherwise be placed in an 'intolerable situation.'"[66] On appeal, the Second Circuit, although in agreement with the district court's finding of grave risk, remanded for consideration of "whether other options are indeed available under French law — options that may allow the courts of the United States to comply both with the Convention's mandate to deliver abducted children to the jurisdiction of the courts of their home countries and with the Convention's command that children be protected from the 'grave risk' of harm."[67] On remand, the district court not only considered and rejected other options by which the children could be safely returned to France, but also relied on uncontroverted expert testimony from a child psychologist that returning the children to France would likely trigger severe symptoms of post-traumatic stress disorder. The court declined to order the return of the children.[68] As part of its grave risk analysis, the district court also considered that the children were "well settled" in their new environment and that Marie-Eline objected to return. On further appeal, the Second Circuit affirmed.[69]

In another important case, *Elyashiv v Elyashiv*,[70] Iris Elyashiv fled from Israel to the United States with her three children to escape, in the words of the court, "severe domestic violence." Mr. Elyashiv, a martial arts instructor who kept three swords and a gun in the house, verbally and physically abused Ms. Elyashiv throughout the course of their marriage, beating her, attempting to strangle her, and threatening to kill her if she left him. The court also found that Mr. Elyashiv physically abused the two older children, hitting them with a belt, shoes, or his hand approximately once or twice a week. As in *Blondin*, the court relied on the uncontroverted expert testimony of a child psychiatrist who said that returning the children would result in "a full-blown relapse of their [post- traumatic stress disorder] symptoms." After also finding that the children were well settled in the United States and that "there are no alternative arrangements that could effectively mitigate the grave risk" to the children if they were returned to Israel, the court concluded that the 13(b) grave risk exception applied, and the father's petition for return of the children under the Hague Convention was denied.

In R*eyes Olguin v Cruz Santana*,[71] Maria del Carmen Cruz Santana fled from Mexico with her two children to escape her abusive husband, Noel Stalin Reyes Olguin. Throughout the course of their relationship, Reyes Olguin would beat Cruz Santana, sometimes in front of the children; he attempted to throw her down the stairs and insisted on two occasions that she get an abortion, beating her when she refused to comply. After first arguing unsuccessfully that the court had no jurisdiction to hear the case because the father did not have custody of the children, Cruz Santana established that the 13(b) grave risk exception applied, and the court declined to return the children to their father's abusive household in Mexico. As part of its grave risk analysis, the court not only considered the expert testimony of a child psychiatrist, but also looked at whether the children were well settled into their new environment and whether the children objected to returning to their country of habitual residence. Then, in keeping with *Blondin IV*, the court also looked at "whether any ameliorative measures might mitigate the risk of harm to the child and allow him to return safely pending a final adjudication of custody." Finding no sufficient measures existed in Mexico to mitigate the grave risk of harm to the children, the court denied the petition and declined to return the children.

The issue of whether abuse of the mother that has been witnessed by the children is sufficient to meet the "grave risk" exception has been an important question in several recent cases. In *Broca v Giron*,[72] the District Court accepted a magistrate's determination that well-documented violence against the mother in the children's Mexican home did not establish "grave risk" against the children,

whom the mother had brought illegally to the United States in an effort to escape her violent husband. The court found, however, that the children — who had been in the U.S. for more than a year — were "well settled," and should remain in the United States with their mother. The Second Circuit affirmed on these grounds, overturning a district court ruling that would have allowed an older sister to remain here but order a younger brother to return to Mexico. *Id*. A finding that the child is "well-settled" is more often grounds for success than a "grave risk" defense, discussed below.

Similarly, in *Souratgar v Fair*,[73] the Second Circuit ordered a young boy returned to Singapore; his mother, who had asserted that the boy's father had abused her, had removed the child from Singapore in violation of a custody order. They were living in New York when the boy's father filed a Hague petition seeking to have the child returned to Singapore. The Second Circuit, in a very narrowly considered opinion, found that:

> Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child, have not been found to constitute a grave risk. *See In re Filipczak*, 838 F Supp 2d 174, 180 (SD NY 2011) (granting repatriation petition even though the child had witnessed one incident of spousal abuse as a two-year-old); *Rial*, 2010 WL 1643995 at *2–3 (ordering return of child despite evidence that petitioner was verbally and sometimes physically abusive to respondent); *Lachhman v Lachhman*, No. 08–CV–04363 (CPS), 2008 WL 5054198, at *9 (ED NY Nov. 21, 2008) (concluding that evidence of petitioner's previous arrest, but not conviction, on domestic abuse charges was insufficient to establish grave risk where there was no evidence that petitioner had ever harmed child). In this case, the district court found that, while Lee was subjected to domestic abuse on certain occasions— albeit less than she claimed, at no time was Shayan harmed or targeted.

Soon after its decision in *Souratgar*, the Second Circuit, ruling in *Ermini v Vittorio*,[74] did find a "sustained pattern of physical abuse and/or a propensity for violent abuse," citing *Souratgar*. The Court also noted that the children themselves had been subjected to physical abuse with regularity, and that they were fearful of their father, in part because of the violence they had seen inflicted upon their mother. The potential for harm from exposure to the violence was heightened in the autistic child. These facts were sufficient to establish "grave risk" of harm from physical abuse if the children were returned to the custody of their father:

> We have in the past ruled that a "grave risk" of harm does not exist when repatriation "might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences." *Blondin IV*, 238 F 3d at 162. But we have also stressed that a grave risk of harm exists when repatriation would make the child "face[] a real risk of being hurt, physically or psychologically." *Id*. The potential harm "must be severe," and there must be a "probability that the harm will materialize." *Souratgar v Lee*, 720 F 3d 96, 103 (2d Cir 2013).

Domestic violence can satisfy the defense when the respondent shows by clear and convincing evidence a "sustained pattern of physical abuse and/or a propensity for violent abuse." *Id*. at 104.[75]

The Second Circuit's frequent requirement that children be the direct victim of physical abuse before "grave risk" is established can remain a hurdle for some parents defending on these grounds, as *Souratgar* and *Gil-Giron* demonstrated. The Circuit's narrow interpretation of "grave risk" remains out of step with, *inter alia*, the analysis of the Permanent Bureau of the Hague. In its lengthy 2011 discussion on the 13(b) grave risk defense in the context of domestic violence, the Bureau cited a

number of studies that recognize the potential harm to children of exposure to domestic violence in the home.[76]

The "Settled" Defense

In *Broca v Giron* and *Ermini v Vittori*, discussed above, the more successful defense to the Hague claim was evidence that the children in question were "settled"[77] for a period in excess of one year.[78]

Article 12 of the Convention provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, [the US court] *shall* order the return of the child forthwith.
>
> [The US court], even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, *shall also* order the return of the child, unless it is demonstrated that the child is now settled in its new environment.[79]

Under Article 12, the "settled" defense is only available where a petition is filed in a civil action more than one year after the wrongful removal or retention.[80] In 2014, the Supreme Court of the United States ruled in *Lozano v Montoya Alvarez*, a case originating in the Second Circuit, that equitable tolling does not apply to the one-year threshold. The focus under this provision is not the conduct of the parent that brought the child to the new jurisdiction, but the consequences to the child of return to the other jurisdiction after a year has passed.[81] As the Court noted, rather than establishing any certainty about the respective rights of the parties, the expiration of the one-year period opens the door to consideration of a third party's interests, i.e., the child's interest in settlement. Because that is not the sort of interest addressed by a statute of limitations, the one-year period is not treated as a statute of limitations.

When the one-year threshold can be met, however, courts are receptive to these arguments. As the Southern District of New York noted in *Matovski v Matovski*,[82] a case originating in Australia,

> The Courts of New York and of Australia are each highly competent to assess the best interests of the children and could thoughtfully and appropriately consider issues of custody and visitation. Even without a present ability to obtain a visa to enter the U.S., there has been no showing that petitioner could not be heard in a New York State Court as he has been heard in this Court. The identity of the forum will not necessarily dictate the outcome of any issue. But travel to Australia would disrupt the social relationships, routines and schedules of the children. The children would be taken out of school in New York for judicial proceedings in Australia. There has been no showing that judicial proceedings could be completed in a matter of weeks or a few months. It is more sensible that any judicial proceedings over custody and visitation occur where the children are now settled.

Alternatives to Defending a Hague Convention Petition

Lastly, the alternatives to contesting a Hague petition should always be considered. If the facts are unfavorable to a defense, should the parent agree to return to the child's habitual residence to have the custody issues decided there? What are the chances of obtaining an order there awarding custody of the child and allowing return to live with the child in the United States? Should one bargain for a commitment from the other parent to pay for alternative living conditions for her and the child

pending the custody proceedings? These considerations are particularly important in a case with facts unfavorable to the client, given that a contest of the petition fails, a sizeable award of fees may be awarded against the client.

Filing for Custody in the United States

Regardless of the position to be taken in the face of a Hague petition, a parent who has fled a foreign country should not commence a custody proceeding in a state court unless and until the Hague petition has been adjudicated favorably. Not only will such a proceeding be required to be postponed under Article 16 of the Convention (as noted *supra* at 3), but under the UCCJEA, the state court has jurisdiction to make "an initial custody determination" only under certain conditions, the most important of which is that it is the "home state" of the child at the time a custody petition is filed.[83] Section 75-a (7) provides in relevant part:

> "Home state" means the state in which a child lived with a parent…for at least six consecutive months immediately before the commencement of a child custody proceeding….A period of temporary absence of any of the mentioned persons [mother, father, child] is part of the [six-month] period."

Thus, when a parent flees a foreign country where the family has lived for some time and then files for custody here in New York, the court may well dismiss the petition for lack of subject matter jurisdiction on the grounds that the child's absence from his or her home state as a result of their parent's abduction was only a "temporary absence."[84] Moreover, if by the time the mother files a custody petition in New York, a court in the foreign country has already issued a custody order in favor of the father, Domestic Relations Law §§ 76-a and 76-b provide that the issuing state has exclusive jurisdiction over all subsequent custody proceedings relating to that child, unless it declines to assume such jurisdiction.[85] Even more threatening, if the foreign order has been registered, the New York court will be required not only to refuse jurisdiction over the mother's petition, but also to enforce the father's foreign order against her.

Maura B.[86] is a cautionary tale. In that case, the mother was an Italian citizen and permanent resident of the U.S.; the father held dual citizenship from Italy and the United States. They had one child who was born in the United States. The parents moved to Italy and lived there five years. Within a short time after they separated in 2005, a court in Florence issued an order awarding sole custody to the mother with the father having visitation rights. A year later, after making serious allegations of violence by the father against both herself and the child, the mother unilaterally moved to the United States with the child. While the Italian court disapproved of the mother's move, it issued a new order stating that residential custody was to remain with the mother and modified the father's visitation schedule to take into account the mother's relocation to New York. The father appealed, but in a number of orders over the next four years, each appeal was denied, and each order ruled anew that custody was to remain with the mother.

In fall 2010, the father retained the child in Italy beyond his allotted visitation time. In order to enforce its prior order, the Italian court ordered Italian officials to assist in returning the child to the mother so that both could return to New York. When the mother went to pick up her daughter at school to take her home, there was a fight with the father. The court then ordered a forensic evaluation of the family. Although the mother assured the court that the child would remain in Italy pending completion of the evaluation, she fled with the child back to the United States. Thereafter, an Italian appellate court awarded sole custody to the father and provided visitation to the mother, citing as reasons for its reversed decision the court's forensic opinion that the mother had been alienating the child from the father, and the mother's having removed the child from Italy contrary to her assurances to the court.

The mother filed a petition in the New York Family Court seeking custody. The New York court dismissed the petition holding that, under the UCCJEA, the Italian court had continuing and exclusive jurisdiction over the custody issues raised. Moreover, because the foreign order had been registered in New York, the court ruled that under UCCJEA, it was compelled to enforce the order and ordered a transfer of physical and legal custody of the child to the father.

Thus, as can be seen from *Maura B*, the restrictions of a New York court under UCCJEA are greater, with far less flexibility, than the authority granted both state and federal courts under the Hague Convention and ICARA. For example, under UCCJEA (under which a court has jurisdiction over the custody of minors up to age 18), a New York court could be required to order the return of a 17-year old, even though such remedy would be unavailable under the Hague Convention. Furthermore, as pointed out in *Maura B*., once a valid custody order has been issued by a foreign country or state, a New York court has no authority to consider any inequities involved. The foreign order must be enforced regardless. This is in contrast to a Hague court's scope of authority and flexibility in dealing with prior orders from both domestic and foreign courts under Article 17 of the Convention.

Conclusion

Litigating Hague Convention cases in domestic violence matters is challenging in light of the Convention's primary purpose of ensuring prompt return of abducted children to their country of habitual residence. It can be difficult to persuade the Court that the remedy of return should not be reflexively applied when the primary purpose of the respondent was not to abduct or wrongfully withhold a child, but to flee domestic violence and find safety. In the Second Circuit, the Article 13(b) grave risk exception has met with some success when used on behalf of respondents who have fled abusive households with their children. Evidence of the physical risk to children as well as expert testimony from a child psychiatrist and exploration of alternative arrangements in the country of habitual residence that would protect the child from "grave risk" are of critical importance in the court's analysis. Evidence of psychological harm alone to children, from exposure to violence against the mother, is not yet consistently viewed as a "grave risk," but this view is counter to the prevailing expert view and should continue to be challenged. (See generally Chapter 15, Litigating Custody and Visitation Cases, as well as Chapter 16 on Child Welfare cases for more resources concerning the impact on children of exposure to domestic violence.) Whether the children are settled in their new environment and whether they, if older, object to the return are also important factors to consider; a "settled" exception can succeed even where a "grave risk" showing fails. Finally, interplay of the Hague Convention with the UCCJEA is complex and should be approached with great care and forethought.

Notes

1. 42 USC §11601 *et seq.*
2. Domestic Relations Law § 75; *See Hector G. v Josefina P.*, 2 Misc 3d 801 (Sup Ct, Bronx County 2003).
3. *See Forms,* www.courts.state.ny.us/forms/familycourt/uccjea.shtml.
4. *See* 42 USC § 11601 *et seq.*
5. Domestic Relations Law § 75-d(2).
6. *Hector G., supra; Matter of Michael McC. v Manuela A.,* 48 AD3d 91 (1st Dep't 2007); *Bjornson v Bjornson,* 20 AD3d 497 (1st Dep't 2005).
7. *Matter of Felty v Felty,* 66 AD3d 64 (2d Dep't 2009).
8. Such reports are available at the web site of the Department of State, www.state.gov.
9. *Hector G. v Josefina P., supra,* 2 Misc 3d at 820.
10. See 42 USC § 11601 *et seq.*
11. Domestic Relations Law § 75-d(2).
12. *See* Sobie, Practice Commentaries, McKinney's Domestic Relations Law of New York § 75-d at 48.
13. *See* Hoff, The Uniform Child Custody Jurisdiction and Enforcement Act, Office of Juvenile Justice and Delinquency at 4 (US Dep't of Justice, Dec. 2001); *see also* UCCJEA Prefatory Notes and Comments, National Conference of Commissioners on Uniform State Laws (NCCUSL) at 3-30, 1997.
14. Domestic Relations Law § 75-a(7).
15. This material is covered in greater detail in the preceding chapter.
16. Domestic Relations Law § 76, "Initial child custody jurisdiction."
17. Domestic Relations Law § 76-b, "Jurisdiction to modify determination."
18. Domestic Relations Law § 76-a(1)-(2), "Exclusive, continuing jurisdiction."

    The most effective way to ensure that a foreign state will exercise comity with respect to a client's custody order is to register that decree pursuant to the UCCJEA. Domestic Relations Law § 77-d; *see also* Domestic Relations Law § 75-e. Thus if your client has a custody order from a New York court but must send her child for court- ordered visitation in, for example, Ohio, she should register her custody decree in Ohio. Once properly registered, a foreign decree is treated as the equivalent of a decree of both states and, once registered, any further contest to the decree is precluded. Domestic Relations Law § 77-d. Even where an order has been registered, however, a new proceeding relating to domestic violence— about which the court must be notified — can affect an existing order. Domestic Relations Law § 77-g(2)(c). *See* www.courts.state.ny.us/forms/familycourt/uccjea.shtml for forms.
19. Domestic Relations Law § 76-c.
20. Domestic Relations Law § 76-c(3).
21. Domestic Relations Law § 76-c(2).
22. Domestic Relations Law § 76-c(3).
23. Domestic Relations Law § 76-c(4).
24. Domestic Relations Law § 76-b(2).
25. Domestic Relations Law § 76-b(1).
26. Domestic Relations Law § 76-b(1)(a).
27. Domestic Relations Law § 76-b(1)(b).
28. *Noel D. v Gladys D.,* 6 Misc 3d 1017A (Fam Ct, NY County 2005).
29. Domestic Relations Law § 75-d(2).
30. *See* Department of State, Human Rights Reports, at www.state.gov/j/drl/rls/hrrpt/.
31. *Hector G. v Josefina P.,* 2 Misc 3d at 820.
32. Domestic Relations Law § 76-f, "Inconvenient forum."
33. Domestic Relations Law § 76-f.

34. Domestic Relations Law § 76-i.
35. Domestic Relations Law § 75-j(2).
36. Domestic Relations Law § 75-K(1)(a)-(e).
37. Domestic Relations Law § 76-g(4).
38. *See Stocker v Sheehan,* 13 AD3d 1 (1st Dep't 2004); *Karen W. v Roger S.,* 8 Misc 3d 285 (Fam Ct, Dutchess County 2004).
39. *Diane H. v Bernard H.,* 2 Misc 3d 1101A (Fam Ct, Erie County 2004).
40. *See Pleadings,* www.courts.state.ny.us/forms/familycourt/uccjea.shtml.
41. *Matter of Tropea,* 87 NY2d 727 (1996).
42. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, 19 ILM 1501 (1980); International Child Abduction Remedies Act, 42 USC § 11601 et seq.
43. *See* travel.state.gov/content/childabduction/english.html
44. 42 USC §11603(a).
45. *See* Hague Convention Resources for Attorneys, travel.state.gov/content/childabduction/english/legal/for-attorneys.html.
46. Hague Convention, Article 5(a).
47. *Id.* at Article 12.
48. *Id.* at Article 12.
49. *Brennan v Cibault,* 227 AD2d 965, 966 (4th Dep't 1996) (*citing Feder v Evans-Feder*, 63 F3d 217, 224 (3d Cir 1995)).
50. *Brooke v Willis*, 907 F Supp 57, 61 (SD NY 1995).
51. *Gitter v Gitter*, 396 F3d 124, 134 (2d Cir 2005).
52. *See e.g. Koc v Koc*, 181 F Supp 2d 136, 147 (ED NY 2002); *Wojcik v Wojcik*, 959 F Supp. 413, 417 (ED Mich 1997); *Friedrich v Friedrich,* 983 F2d 1396, 1402 (6th Cir 1993) (*Friedrich I*).
53. *Rial v Rijo,* 2010 US Dist LEXIS 39271 (SD NY 2010).
54. *Ermini v Vittori,* 758 F3d 153 (2d Cir 2014).
55. Hague Convention, Article 5(a).
56. Section 3(7) of ICARA, 42 USC § 111602, defines the term "rights of access" as meaning "visitation rights." Courts view these two terms as interchangeable.
57. *Abbott v Abbott,* 560 US 1, 16 (2010).
58. This distinction is further emphasized by Article 21 of the Convention that sets forth an entirely separate and detailed protocol "to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject."
59. *See e.g. Croll v Croll,* 229 F 3d 133 (2d Cir 2000); *Villegas Duran v Beaumont,* 534 F 3d 142 (2d Cir 2008).
60. *Abbott, supra,* 560 US at 21.
61. 42 USC § 11603(e)(2)(A) and (B); *Blondin I,* 189 F3d at 245-246. The Article 20 exception requires proof by clear and convincing evidence. 42 USC § 11603(e)(2)(A); *Wasniewski v Grzelak-Johannsen*, 2007 US Dist LEXIS 35843 (ND Ohio May 16, 2007) at 11.
62. *Lozano v Alvarez,* 809 F Supp 2d 197, 218 (SD NY 2011), affd--US--, 134 S Ct 1224 [2014]), citing *Blondin I and Nunez-Escudero v Tice-Menley*, 58 F 3d 374, 377 (8th Cir 1995).
63. Preliminary Document No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, *Domestic And Family Violence And The Article 13 "Grave Risk" Exception In The Operation Of The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction: A Reflection Paper*, at www.hcch.net/upload/wop/abduct2011pd09e.pdf

64. *Blondin v Dubois*, 238 F3d 153, 162 (2d Cir 2001) (*Blondin IV*) quoting *Friedrich v Friedrich*, 78 F3d 1060, 1069 [6th Cir 1996].
65. *Blondin v Dubois*, 19 F Supp 2d 123 (SD NY 1998) (*Blondin I*); *Blondin v Dubois*, 189 F 3d 240 (2d Cir 1999) (*Blondin II*); *Blondin v Dubois*, 78 F Supp 2d 283 (SD NY 2000) (*Blondin III*); *Blondin v Dubois*, 238 F3d 153 (2d Cir 2001) (*Blondin IV*).
66. *Blondin I*, 19 F Supp 2d at 127.
67. *Blondin II*, 189 F3d at 242.
68. *Blondin III*, 78 F Supp 2d at 294.
69. *Blondin IV*, 238 F3d at 168.
70. 353 F Supp 2d 394 (ED NY 2005).
71. *Reyes Olguin v Cruz Santana, Olguin v Del Carmen Cruz Santana*, 2005 US Dist LEXIS 408 (ED NY Jan. 13, 2005).
72. *Broca v Giron*, 530 Fed Appx 46 (ED NY 2013), *affg* 2013 US Dist LEXIS 31708 (ED NY Mar. 6, 2013). *See also Buenaver v Vasquez* (*In re R.V.B.*), 29 F Supp 3d 243 (ED NY 2014)("grave risk" not established).
73. *Souratgar v Fair,* 720 F3d 96 (2d Cir 2013).
74. *Ermini,* 758 F3d at 153.
75. *Ermini, supra.*
76. *See Domestic Violence and the Article 13 "grave risk" exception, supra,* www.hcch.net/upload/wop/abduct2011pd09e.pdf, at 9:

    "Effects of domestic violence on children

    a) *Links between domestic violence and child abuse*

    1. There are a number of statistical correlations cited in research that link abuse and harm patterns towards one parent to abuse and harm patterns also towards childeren who are exposed to adult domestic violence.
    2. A range of studies have found a correlation of between 30% to 60% instances of spousal abuse and abuse of children. This means that children who are part of a family where adult domestic violence is found are at greater risk of being exposed to physical harm themselves. It has been noted in literature that there are linkages between spousal homicide and child homicide such that "in about a quarter of cases where male batterers kill their intimate female partners, they also kill their children."

    b) *Harm to children who are exposed to domestic violence*

    1. A recent World Health Organization study on domestic violence in 10 countries notes that: "[v]iolence against women has a far deeper impact than the immediate harm caused[…] [i]t has devastating consequences for the women who experience it, and a traumatic effect on those who witness it, particularly children."
    2. A body of social science research supports such observations, and it is reported in this literature that there are correlations between a child's exposure to domestic violence, whether direct or indirect, and contemporaneous childhood and later problems in adult life. Such problems may include higher rates of "aggressive and antisocial" and "fearful and inhibited" behaviours among children, "lower social competence," and higher than average rates of "anxiety, depression, trauma symptoms and temperament problems." The degree of harm to the child in particular situations of family violence has also been found to vary depending on the presence or absence of a variety of other influential factors, including substance abuse of one of the parents, the presence of a protective care-giver or the presence of other protective factors. [*citations omitted*]."
77. As a preliminary note, although this is commonly referred to as the "well-settled" defense, under both Convention and statute, Article 12 reads: "if the child is *now settled*," not "well settled" as many petitioners claim.
78. *Broca v Giron, supra; Ermini v Vittori, supra*.
79. Hague Convention, Article 12.

80. 42 USC §11603(f)(3); *see also Blondin v Dubois*, 238 F3d 153, 157 (2d Cir 2001)(*Blondin II*).
81. *Lozano v Montoya Alvarez, supra.*
82. *Matovski v Matovski*, 2007 US Dist LEXIS 39766 (SD NY May 29, 2007). *See also Gwiazdowski v Gwiazdowska*, 2015 US Dist. LEXIS 44274 (ED NY Apr. 3, 2015) (children settled; Hague petition denied even though original removal from Poland violated custody agreement).
83. Domestic Relations Law §76(1).
84. *See Koons v Koons*, 161 Misc 2d 842 (Sup Ct, NY County 1994).
85. *Maura B. v Giovanni P.*, 111 AD3d 443 (1st Dep't 2013).
85. *Id.* The facts are set out in detail in the Family Court opinion, available at NYLJ 1202544107647, 1 (Fam Ct, NY County) (February 7, 2012).

Section 5
Protecting All Victims

20

Lesbian, Gay, Bisexual, Transgender and Queer Victims of Intimate Partner Violence

by Sharon Stapel & Virginia M. Goggin

Much progress has been made in naming and responding to intimate partner violence in the lesbian, gay, bisexual, transgender, and queer (LGBTQ)[1] communities in the past decade, yet there is still more work to be done. Nationally, we often still identify the problem of intimate partner and sexual violence as "violence against women," language that omits male-identified and transgender women survivors. This frame creates barriers for LGBTQ survivors, who may have difficulty identifying the violence that occurs in their relationships. As well, many traditional models for addressing intimate partner violence assume intimate partners are heterosexual and cisgender[2] and omit reference to LGBTQ survivors or craft solutions that fail to account for the impact of sexual orientation or gender identity. Some advocates and organizations may not know how to even begin to talk about the issue because of a lack of familiarity with the language or culture of the LGBTQ communities. Civil legal practitioners now have multiple legal options available to them, but also have to cultivate competence and confidence in working with LGBTQ communities to assure access to those legal remedies for LGBTQ survivors.[3]

This article will explore intimate partner violence in the LGBTQ communities and the civil legal remedies in New York State that address this violence. Some legal remedies discussed in this article are existing laws and policies regarding intimate partner violence that now include LGBTQ survivors. However, since some survivors of violence in the LGBTQ communities cannot invoke the entire spectrum of remedies available for heterosexual cisgender survivors of intimate partner violence, also discussed are more creative, and perhaps less common, uses of law.[4]

Understanding "LGBTQ"

The lesbian, gay, bisexual, transgender and queer communities are not interchangeable. For practitioners new to the issues of the LGBTQ communities, some of the language used to describe LGBTQ people and their partners or their identities can be confusing. Gender identity is often confused with sexual orientation. *Sexual orientation* is commonly defined as the culturally-defined set of meanings through which people describe their sexual attractions, or their preference for sexual partners — either same, opposite-sex, gender non-conforming partners or a combination thereof. Lesbians generally identify themselves as female-identified people who partner with other female-identified people. Gay men generally identify themselves as male-identified people who partner with other male-identified people. Bisexual people often identify themselves as people who partner with more than one gender. Queer, both an umbrella term and a specific sexual orientation, often indicates a desire to be more fluid in identifying either one's own gender or the gender of their partner and/or the general concept of binary gender in defining sexual relationships. *Gender identity*, on the other hand, is commonly defined as a sense of ourselves as masculine, feminine or at some other point

along that spectrum. Transgender people may define themselves as male or female and gender non-conforming people or genderqueer people may define their gender in a non-binary way (or as a lack of gender). Many transgender people define their sexual orientation as straight or heterosexual, but the two should not be conflated as gender identity and sexual orientation are two different types of identities.

LGBTQ Intimate Partner Violence

As in heterosexual communities, intimate partner violence in the LGBTQ communities is defined as a pattern of behavior where one partner coerces, dominates, or isolates the other partner. It is the exertion of power to maintain control in a relationship. LGBTQ abusive partners employ the same forms of abuse as heterosexual batterers, including physical, emotional, psychological, sexual or economic abuse.

Some weapons of abuse, however, are unique to the LGBTQ communities. A "power and control wheel" designed to assess intimate partner violence in LGBTQ relationships may help a client recognize subtler forms of abuse.[5] Abusers may threaten to "out," or disclose, a partner's sexual orientation or gender identity to family, friends, employers, landlords or other community members. Those faced with custody battles may still worry that sexual orientation will negatively impact their case and decide to stay with an abuser rather than risk losing custody or visitation rights. Abusers may tell transgender partners that no one will understand or love them because of their gender identity or transition process, or they may threaten to throw out their transgender partner, leaving the survivor homeless and facing dangers in the streets, the homeless shelters and the job market. A victim may be reluctant to access services that are not perceived as LGBTQ-friendly. The batterer may be the first person to accept their sexual orientation or gender identity, and batterers may use this knowledge to keep a survivor isolated.

Intimate partner violence occurs within the lesbian, gay and bisexual communities at the same, or higher rates, as within non-LGB communities. The Centers for Disease Control[6] found that nearly 44% of lesbians and 26% of gay men have been the victim of rape, physical violence, and/or stalking by an intimate partner in their lifetime.[7] Occurrence of sexual violence is especially high; 46% of lesbians, 75% of bisexuals, 40% of gay men, and 47% of bisexual men reported being the victim of sexual assault.[8] In 2011, the National Coalition of Anti-Violence Programs (NCAVP), received nearly 4,000 reports of LGBTQ intimate partner violence, including sexual violence, reporting the highest number of homicides ever recorded (19, including two in NYC), up 300% from 2010, and in 2012 and 2013 recorded 21 IPV-related homicides, the highest number ever recorded for two years in a row.[9] In 2013, NCAVP reported that transgender and gender non-conforming people were 1.9 times more likely to experience physical violence. Transgender and gender non-conforming people of color were 4.3 as likely to experience police violence when reporting intimate partner violence to the police.[10]

Barriers to Service for LGBTQ Survivors

Social service models based on heterosexual cisgender relationships can be alienating and even unavailable to LGBTQ survivors. Survivors who disclose their orientation to service providers may be afraid that they will be treated disrespectfully or be denied services. LGBTQ survivors may not have the energy to educate advocates unfamiliar with LGBTQ communities about their experiences and cultural norms. LGBTQ survivors also face ever-changing and often restricted access to civil legal remedies, and may not seek services because of doubts that the law will afford protection.

These barriers prevent LGBTQ survivors from accessing support. NCAVP reports that in 2013, 5.8% of all survivors sought access to domestic violence shelters, an increase from 3.7% in 2012.

Of those seeking shelter, 20.3% were turned away. That same year 22.4% of all survivors reported information about interacting with the police, an increase from 2012 (16.5%), and while only 17.0% of total survivors applied for orders of protection, that number represents a large increase from 2012 (4.9%).[11]

Through education about social and legal issues specific to the LGBTQ communities, many barriers can be easily eliminated. Practitioners can examine their own service provision models, policies, and practices, and make sure these models are LGBTQ inclusive at every level. Literature that advertises LGBTQ-specific services, support groups and legal service providers can be displayed in a waiting room or office. Most critically, practitioners should form meaningful collaborations with other service providers who have worked with LGBTQ intimate partner violence issues. Securing safety and freedom from intimate partner abuse often requires support on many fronts. Partnering with experienced providers who can support a client in non-legal needs can be critical to a successful outcome.

Interviewing LGBTQ Clients

To plan for safety and find legal remedies and strategies with clients, practitioners need complete histories of the relationship with the abuser and the violence. Seek this information in a neutral, respectful manner. Avoid assumptions and allow clients to describe and define their own identity, and the identity and gender of the batterer, and to name the violence in their own language. Lawyers and advocates may find themselves in situations where they are still unsure of how clients identify their sexual orientation, their gender identity or that of their partner. In such cases, it is best simply to ask clients what language they would use to describe themselves, their partner or their situation. This might be uncomfortable for practitioners unfamiliar with the language or culture of the LGBTQ communities. However, practitioners can best help clients when they strive to understand the cultural norms and community mores of clients whose experiences are different from their own.

While most practitioners work diligently to create an atmosphere of tolerance and respect, there are times when inaccurate assumptions may arise. For example, advocates working within the anti-violence communities may assume that most victims are women and most perpetrators are men. Referring to an abuser as “he” or “your boyfriend” or “husband” may cause a lesbian client to feel uncomfortable about disclosing her sexual orientation and the gender of her abuser. Asking personal questions that are irrelevant to the abuse will invariably make a client very uncomfortable.

Consider the following suggestions for law offices and lawyers:

- Use gender-neutral terms until the client identifies the abuser’s gender (e.g., “So what is your partner’s name?” instead of “What is his name?”).
- Ask respectfully how the client identifies and what pronoun is preferred. Questions about a transgender client’s sexual organs, sexual-reassignment surgery status (many transgender people never have sexual reassignment surgery), hormone status or any other clearly private matter are intrusive and embarrassing. If discussion of the transition process is necessary for a legal theory or remedy, practitioners should explain to the client why they are asking an admittedly personal and invasive question.
- Create intake forms that are neutral in tone. For example, instead of “Gender: F or M,” use “Gender:___,” which allows transgender clients to self-identify. Also consider using language like “partner” instead of “boyfriend” or “husband” on written materials.

- Instead of using the phrase "battered woman" — which may alienate battered gay, bisexual and trans men and gender non-conforming people — use gender-neutral language such as "victim," "survivor," "client" or "community member."
- Consider making some or all office bathrooms gender neutral. Transgender and gender non-conforming clients face pervasive and often violent discrimination in attempting to go about the everyday business of their lives. These clients are often harassed for using bathrooms appropriate to their gender identity and gender neutral bathrooms can alleviate unnecessary strain and anxiety for clients.
- Do not assume male-identified people requesting services are not victims of intimate partner violence.

Once a practitioner understands a client's gender identity or sexual orientation and that of the abuser, make no assumptions about the client's experience. As in all interviews, practitioners should ask detailed questions that allow clients to explain their story; this is particularly true with LGBTQ survivors who may have cultural assumptions or life experiences very different from those of the practitioner. Practitioners may well make mistakes while learning to work with LGBTQ-specific intimate partner violence issues; however, it is generally enough to stay alert to that possibility, acknowledge the error, correct it and move on. This open attitude will demonstrate respect for the client, and avoid placing the burden of educating practitioners about LGBTQ issues on a survivor who is in the midst of a personal and traumatic time.

Identifying the Victim or the Abuser

When it is unclear to a practitioner which party is the aggressor, assumptions can have devastating effects. Assuming that the more "butch" or masculine-acting (or identifying) partner is an abuser, or assuming that the more effeminate-acting (or identifying) partner is the victim, creates not only a barrier to talking with clients, but also potentially erroneous analysis of who is the victim and who is the perpetrator in the relationship. The process of identifying perpetrators in an LGBTQ relationship can be complex, but it is a critically important process to assuring a victim's safety and preventing a batterer from entering a support system meant for victims.

Instead of relying on gender stereotypes, practitioners must look to factors that indicate typical behaviors of an abuser or a victim. For example, victims are more likely to blame themselves, to minimize violent attacks, to excuse the behavior of their abuser, or to hesitate to take action against the abuser. Abusers are more likely to blame the victim, to use aggressive and hostile language in describing incidents, and they may exhibit a sense of entitlement in punishing their partner. Sometimes clients who are victims also indicate that they are seeking "justice" or want their abuser "to pay." This can be a normal reaction and may not indicate that the client is an abuser. According to the New York City Anti-Violence Project, batterers may request services pretending to be the victim, both to prevent the victim from accessing services and to keep track of the victim's options in reaching out for assistance. None of these factors is determinative.[12] There is no way to assess which partner is statistically more likely to be the batterer based on gender in LGBTQ relationships. Therefore, practitioners must be vigilant both in welcoming LGBTQ and in engaging in a victim/aggressor analysis of the relationship.

Careful consideration of the totality of the circumstances made after investigation into the issues is the best way to determine who is the victim and who is the abuser. For more information about this topic, contact The New York City Anti-Violence Project, www.avp.org.

Legal Recognition of Partnerships Between LGBTQ Couples in New York State

While LGBTQ battering in many ways mirrors heterosexual and cisgender battering, both in type and prevalence, only recently have LGBTQ survivors had access to some of the same legal protections as non-LGBTQ people. The legal recognition or identity that a court or statute gives to a relationship largely defines the remedies available to the parties in that relationship. Since 2008, the definitions of "family and household member" in the Family Court Act and in criminal matters have included LGBTQ people.[13] In 2011, New York State formally recognized marriage between same-sex partners.[14] In 2013, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), allowing same-sex married couples to be recognized as spouses for purposes of federal law, and in 2015 upheld the constitutional right of same-sex couples to enter into marriage.[15] With these new legal recognitions, married LGBTQ New Yorkers now have the same rights as non-LGBTQ married people under the law — including the right to divorce, obtain orders of protection, and the like.[16] Some LGBTQ people may have other types of legal relationships, such as civil unions or domestic partnerships; rights and responsibilities of these relationships often differ greatly from those of legally married people.[17]

Domestic partnership, recognized in some localities, can provide another layer of legal protection.[18,19] For New York City residents, the clerk's office can provide information about the legal effect of a partnership as well as guidance on termination of a partnership.[20] Civil union may carry many of the same protections as domestic partnership. Dissolution of a civil union, however, can be challenging, depending on the state of origin.[21]

LGBTQ survivors of intimate partner violence may seek compensation from the Crime Victims Board for same-sex domestic partners of crime victims.[22] Restitution, which must be sought within one year of the crime, can include:

- Medical expenses (doctor, physical therapist, ambulance, transportation, emergency services, etc.)
- Counseling expenses
- Loss of earnings
- Property expenses (replace, repair and/or clean damaged or stolen property)
- Funeral expenses
- Insurance deductible
- Incidental expenses (changing locks, towing fees, and the cost of changing a phone number)
- Any expense incurred as a result of the criminal offense [23]

New York City and New York State Custody and Visitation

The laws regarding children of an LGBTQ relationship are not well settled, and it is critical that a practitioner seek the most current rulings that affect a client. For many couples and families, the recent availability of same-sex marriage does not clarify the legal status of relationships and property ownership (see below) that precede the right to marriage or marriage itself. If the child is of a marriage, both parents have a legal relationship to the child, and thus legal standing, regardless of the parents' genders.[24] When a child is not born out of a marriage, or was born prior to marriage, and only one parent is biologically related to the child, recent court decisions have found that the non-biological

parent does not have legal standing in matters regarding the child. As of this writing, this result is not affected by evidence that the parties planned to have the child together or that the non-biological parent was a primary caretaker of the child, although at least one court has taken a different view.[25] The spectre of losing access to a child can have a devastating impact on a non-biological parent in deciding whether to leave a violent relationship. Legislation that would allow for same-sex parent recognition without the additional step of adoption by the non-biological parent has been pending in the New York State Legislature for some years, but has yet to pass.[26] Child custody and visitation options should be carefully reviewed and discussed fully with an LGBTQ client in advising legal rights.

Orders of Protection

LGBTQ survivors of violence now have standing to petition for an order of protection in civil proceedings in Family Court based on the intimate nature of the relationship.[27,28] The criminal court, with concurrent jurisdiction over family offenses, shares the same definition of family; therefore, any criminal cases involving intimate partner violence are heard in the Domestic Violence part. In the specialized parts, cases settled with an adjournment in contemplation of a dismissal (ACD) carry a minimum adjourn date of 12 months; the period is 6 months in a regular misdemeanor part. This allows for an extended criminal court order of protection.[29]

Equitable Distribution and Maintenance

For married survivors, the protections found in the Domestic Relations Law apply.[30] However, because marriage has only been available since 2011 for same-sex couples, many assets may be deemed pre-marital, despite the existence of a long-term relationship. Equitable distribution of marital property can be lopsided in favor of the monied spouse.

This anomaly is somewhat helped by a 2010 amendment to the Domestic Relations Law; courts are now required to determine temporary maintenance orders on the basis of a prescribed formula during the pendency of matrimonial actions.[31] The formula includes consideration of "the existence and duration of a pre-marital joint household."[32] Many same-sex couples maintained a "pre-marital household" prior to the availability of marriage for same-sex couples. This provision allows a non-monied spouse to receive a fair temporary maintenance award despite a short-term marriage.

Immigration and Intimate Partner Survivors

With federal recognition of all validly entered marriages, including same-sex marriages,[33] undocumented alien LGBTQ survivors of intimate partner violence who are married to a U.S. citizen or legal permanent resident may be eligible to adjust their immigration status through a VAWA self-petition or battered spouse waiver.[34] For additional guidance, see Chapter 22, *Immigration Remedies for Victims of Domestic Violence*.

Public Assistance and LGBTQ Intimate Partner Violence

Victims of intimate partner violence often need help securing a new, safe home. Safety planning may include financial assistance and obtaining social services. New York State's Sexual Non-Discrimination Act (SONDA)[35] prohibits discrimination on the basis of sexual orientation in employment, education and housing accommodation.[36] Under New York City and New York State anti-discrimination law, LGBTQ public assistance recipients should be treated as any other public recipient is treated. Sexual orientation or gender identity has no effect on eligibility for public assistance, and the Family

Violence Option (also known as the "domestic violence waiver") is available to LGBTQ survivors.[37] Confusion, ignorance and prejudice about sexual orientation or gender identity issues may, however, make accessing public assistance more difficult for transgender and gender non-conforming people.[38]

Housing for LGBTQ Survivors

Many survivors of intimate partner violence face homelessness; for LGBTQ survivors, however, shelters — even domestic violence shelters — often do not provide appropriate services. Under New York City and New York State anti-discrimination law, LGBTQ homeless and subsidized housing tenants should be treated in a non-discriminatory manner.[39]

Anti-discrimination laws specifically allow single gender shelters.[40] Thus a gay man may be precluded from sheltering in a facility for women-only. An important amendment contained in the Violence Against Women Reauthorization Act of 2013 explicitly bars discrimination based on actual or perceived gender identity or sexual orientation in addition to race, color, religion, national origin, sex or disability, the first time such a bar was written into a federal funding statute.[41] Problems arise, however, for transgender clients who may be identified by their sex assigned at birth and therefore assigned to the incorrect single-sex shelter.[42] An excellent source of guidance on this issue is a policy directive released by New York City's Department of Homeless Services (DHS), regarding sheltering transgender clients in homeless shelters. The DHS policy states that "a client's gender is determined by his or her gender identity," and gender identity shall be determined by asking "the client how he or she identifies, irrespective of legal documents or physical appearance."[43]

All who are in imminent danger and have no safe place to live are eligible for shelter regardless of sex, gender, immigration status, family size or income, state or community of origin, or any other factor. However, because of space restrictions some shelters may limit the number of beds available for large families, single people or residents with special needs.[44]

LGBTQ people may be entitled to exclusionary orders of protection through Family Court or criminal court whether or not they are listed as a tenant on the lease or deed, and survivors may be protected from eviction by Housing Court.[45] One spouse cannot evict the other spouse in a summary proceeding in Housing Court;[46] this protection has been extended to non-married couples who are found to be "family members" as well.[47] The courts, however, remain divided on who is eligible for "family member" status as opposed to "licensee" status (a person who enters the premises with permission of a person entitled to possession, called the licensor).[48] For same-sex spouses, or for those who are able to establish their "family member" status, the designated proceeding is an ejectment action in New York Supreme Court, which takes a significantly longer time to proceed and is more expensive.

New York's Roommate Law[49] could be helpful in defending an eviction against a landlord who may be working with an abuser to evict the battered partner.[50] The roommate law permits a tenant to have immediate family, one additional occupant and dependent children occupy the apartment. In New York City no one may be excluded from an apartment in which they have been residing for at least 30 days. without an order from the court, even if that person is not listed on the lease.[51] When parties own property as joint tenants or tenants-in-common and the batterer unlawfully excludes the victim, the victim may file Action to Recover Possession of Real Property, to recover possession, damages, and costs from the person possessing the property. A plaintiff may sue for damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years.[52]

Non-Intimate Partner Violence Specific Civil Legal Remedies

Recognition for LGBTQ relationships is new in New York State, and non-discrimination protections are still evolving for transgender and gender non-conforming people. The legal system may fail to provide many of the "safety" protections that we count upon when working with survivors. Lawyers can nevertheless be effective, by using to the fullest the remedies that are available and using creative legal means to achieve a good outcome when standard legal routes are not available. Such actions can include breach of contract action,[53] or the laws of partnership,[54] constructive trust,[55] conversion,[56] replevin,[57] or tort. Clients may also want to consider using Small Claims Court.[58]

Conclusion

As LGBTQ communities and allies continue to press for full legal recognition and protections for themselves, their partners, and their children, laws and regulations are constantly changing and evolving. LGBTQ communities are confronting intimate partner violence and have the right to access the legal and social services that are available. Anti-violence service providers must be aware of, and educated about, issues specific to the LGBTQ communities, and they must be willing to work in coalition with LGBTQ organizations to address LGBTQ intimate partner violence.

Notes

1. Lesbian, gay, bisexual, transgender (also referred to as "trans") and queer communities can also be referred to as the "queer" community and include people who identify as queer, questioning, two-spirited, gender variant, genderqueer, bigendered, intergender, intersex, same gender loving, and/or by any other terms that indicate self-definition of gender identity and/or sexual orientation. For a description of all of these terms, see the National Coalition of Anti-Violence Programs' National LGBTQ Training and Technical Assistance Center resource *Sexual Orientation and Gender Identity Terms and Definitions*, avp.org/storage/documents/Training%20and%20TA%20Center/2007_AVP_Glossary_of_Terms.pdf.
2. A cisgender person is someone whose gender identity matches the sex they were assigned at birth; someone who is not transgender.
3. For more information on LGBTQ intimate partner violence and referrals throughout the state, contact: The New York City Anti-Violence Project, 240 West 35th Street, Suite 200, New York, New York 10001, (212) 714-1184, www.avp.org, or visit the websites found in the endnotes of this article.
4. New York is home to many leading advocacy groups that have won significant advances for LGBTQ victims and survivors. Useful resources for practitioners include, in addition to the New York City Anti-Violence Project (note 3, above), the Office for Prevention of Domestic Violence (www.opdv.ny.gov/whatisdv/lgbtq/dvprogandvictims.html), Sanctuary for Families (www.opdv.ny.gov/whatisdv/lgbtq/dvprogandvictims.html); Le-Gal (le-gal.org/resources/domestic-violence-resources/).
5. *See* New York City Anti-Violence Project's *Power and Control Wheel*, available at www.avp.org/storage/documents/Training%20and%20TA%20Center/2000_AVP_IPV_Wheel.pdf (Last visited September 18, 2014).
6. Centers for Diseases Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation (2013), www.cdc.gov/ViolencePrevention/pdf/NISVS_SOfindings.pdf. This study did not include data on gender identity and, thus, we do not have prevalence data on transgender and gender non-conforming people.
7. The CDC found the following lifetime prevalence rates of intimate partner violence, including physical assault, rape or stalking: bisexual women (61%), lesbians (43.8%), bisexual men (37%), heterosexual women (35%), heterosexual men (29%), and gay men (26%). *Id.*

8. The CDC found these prevalence rates for sexual violence experienced over the course of lesbian, gay and bisexual people's lifetime, by any perpetrator. *Id.*
9. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender and Queer Intimate Partner Violence in the United States in 2012* (published October 1, 2013), www.avp.org/storage/documents/ncavp_2012_ipvreport.final.pdf.
10. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender and Queer Intimate Partner Violence in the United States in 2013.*
11. National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender and Queer Intimate Partner Violence in the United States in 2013.*
12. For training and information, the New York City Anti-Violence Project has excellent resources and its National Coalition of Anti-Violence Programs runs the National LGBTQ Training and Technical Assistance Center. *See* www.avp.org/resources/training-center.
13. Family Court Act § 812 "(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.…"
14. Domestic Relations Law § 10-a(2) states: "…When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such source of law."
15. *United States v Windsor*, 570 US --, 186 L Ed2d 808 (2013); *Obergefell v Hodges*, 2015 US LEXIS 4250 (US June 26, 2015). For an update on marriage laws, visit the National Center for Lesbian Rights at www.nclrights.org.
16. In 2001-2002, the Governor and the State Legislature also recognized same-sex surviving partners of gay victims of the September 11, 2001, World Trade Center attacks as "surviving spouses" for the purposes of receiving benefits from the Crime Victims Board (Exec Order No. 113.30, 9 NYCRR 5.113.30 (Oct. 10, 2001)), for the September 11 Federal Fund awards (*see also* September 11th Victims and Families Relief Act, L 2002, ch 73, workers compensation death benefits L 2002, ch 467, and the State's World Trade Center Memorial Scholarship Program L 2002, ch 176. This law includes same-sex surviving partners and their children. In 2004, the Governor and the State Legislature passed a bill allowing domestic partners the right of visitation accorded to spouses and next-of-kin at any hospital, nursing home or health care facility. Public Health Law § 2805-q. The State has extended the right to same-sex partners of credit union members to become members and have full access to banking services, Executive Law § 296. In February 2006, the Governor signed the Control of Remains Bill that extends control of a partner's corpse to include domestic partners, both same-sex and opposite-sex. The bill gives equal standing to spouses and domestic partners above blood relationships like adult children, parents and adult siblings. www.prideagenda.org/news/2006-02-03-governor-signs-control-remains-bill.
17. Insured same-sex live-in partner was not a "spouse" entitled to underinsured motorist coverage under the supplementary uninsured motorist clause in the named insured's automobile policy, even if the word "spouse" could be understood to include same-sex partners living together in a spousal-type relationship, absent evidence that the relationship between the two was of this nature. Dicta suggested that with evidence, same-sex couples might qualify as "spouse." *Ortiz v NYC Transit Authority*, 267 AD2d 33 (1st Dep't 1999). Unmarried same-sex couples are not considered "surviving spouses" under the Estates Power and Trust Laws (EPTL). *In the Matter of Cooper*, 149 Misc 2d 282 (Sur Ct, Kings County 1990), *affd* (2d Dep't 1993), *lv dism*, 82 NY2d 128. Nor was a domestic partner of a flight attendant who died in an airplane crash a "surviving spouse" for purposes of seeking death benefits. *Valentine v American Airlines*, 17 AD3d 38 (3d Dep't 2005). Similarly, derivative loss- of-consortium claim can not be maintained based on claimant's status as registered domestic partner in New York City because lawful marriage is required. *Lennon v Charney*, 8 Misc 3d 846 (Sup Ct, Westchester County 2005). The Appellate Division, Second Department held that a surviving partner of a same-sex Vermont civil union was not a "surviving spouse" within the meaning of the EPTL's definition of classes of decedent's distributees and therefore could not bring a wrongful death action arising from his partner's death. The Court of Appeals dismissed appeal from the Second Department. *Langan v St. Vincent's Hospital of New York*, Langan v St. Vincent's Hospital of New York, 196 Misc 2d 440 (Sup Ct, Nassau County 2003), revd 25 AD3d 90 (2d Dept 2005), app dism, 6 NY3d 890 (2006). *But see Debra H. v Janice R.*, 14 NY3d 576 (2010) (New York Court

of Appeals granted the legal status of "parent" to the non-biological parent of a child who was born after the parties entered into a Vermont Civil Union. The Court granted comity and looked to Vermont law. Because Vermont awards parentage status to children born of a Civil Union, the Court followed suit.)

18. *See e.g.* New York City (NYC Admin. Code § 3-241 (2000)), Buffalo, Westchester County (Westchester County Domestic Partnership Registry), City of Rochester (Roch Charter & Code v 9 § 47B), City of Ithaca (1990), and Albany (1996).
19. Domestic partnerships confer privileges and legal status to same-sex couples who are so partnered. *See* www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml. In New York City, these rights include: bereavement leave and childcare for NYC employees; visitation in correctional and/or juvenile detention centers; visitation in facilities operated by the NYC Health and Hospitals Corporation; eligibility to qualify as family member to be added by New York City Housing Authority (NYCHA) to an existing tenancy as a permanent resident; eligibility to qualify as family member entitled to succeed to the tenancy or occupancy of a tenant or cooperator in buildings supervised by or under the jurisdiction of the Department of Housing Preservation and Development; health benefits provided by NYC to its employees and retirees and eligible members of their family pursuant to stipulation or collective bargaining.
20. *See* www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml#termination.
21. A discussion of the difficulties in securing dissolution of civil unions can be accessed at www.empirejustice.org/issue-areas/civil-rights/case-law/dickerson-v-thompson.html. Importantly, the State of Vermont has recently amended its civil union laws to allow dissolution actions by non-residents. *See* www.vermontjudiciary.org/eforms/InstructionsforFilingNonResidentCUDissolutionOrMarriage.pdf.
22. 9 NYCRR § 525.1, 525.2.
23. *See* Office of Victim Services, the Rights of Crime Victims in New York, www.ovs.ny.gov/files/ovs_rights_of_cv_booklet.pdf, see also www.criminaljustice.ny.gov/pio/crimevictims/cvb_brochure.pdf.
24. DRL § 24, Effect of Marriage on Legitimacy of Children; DRL § 73, Legitimacy of Children Born by Artifical Insemination; *but see Counihan v Bishop*, 111 AD3d 594 (2d Dep't 2013).
25. *Debra H. v Janice R.*, 14 NY3d 576 (2010); *Jann P. v Jamie P.*, NYLJ 1202664272007 (Fam Ct, Nassau County 2014). (Despite planning for a child and marrying subsequent to the child's birth, a child born prior to the marriage does not have a legal relationship with the non-biological parent and therefore the co-parent does not have standing to petition for custody or visitation).
26. Child Parent Security Act, A6701-2013, S4617-2013; but see *Estrellita A. v Jennifer D.*, 40 Misc3d 219 (Fam Ct, Suffolk County 2013). (Non-bio, non-adoptive mother was granted standing in custody proceeding where biological mother had previously asserted in prior child support proceeding that non-adoptive mother was co-parent; biological mother was estopped from arguing otherwise in custody matter).
27. Family Court Act § 812(1), 821.
28. It should be noted that one form of relief when requesting an order of protection is to include pets on the order; we have found that for many LGBTQ clients this is a critical form of relief and protection.
29. CPL 170.55 (2).
30. Domestic Relations Law §170.
31. Domestic Relations Law §236 B, Equitable Distribution, Maintenance, Child Support.
32. Domestic Relations Law §236 B(5-a)(e)(1)(g).
33. *Obergefell, supra* note 15.
34. Violence Against Women Act, 42 USC 136(3).
35. L 2002, ch 2.
36. Notably, SONDA does not protect transgender people from discrimination based on gender identity, although if a transgender person identifies as gay, lesbian or bisexual, and is discriminated against because of sexual orientation and not gender identity, the discrimination would be prohibited under SONDA. Many argue that the "gender" and "sex" clauses in the New York State Human Rights Law protect trans people from gender identity discrimination; however, the New York City Administrative Code was recently amended to more clearly and accurately reflect this intention in New York City. *See* guide-

lines interpreting the Human Rights Law that was passed to protect New Yorkers from discrimination on the basis of gender identity or expression in 2002, www.transgenderlaw.org/ndlaws/nyccompliance.pdf. The New York State Legislature has introduced legislation to prohibit discrimination on the basis of gender identity and expression (GENDA) in employment, housing, credit, education and public accommodations since 2003, but it has yet to pass both Chambers. Jurisdictions that offer protections based on gender identity include:

New York City (Administrative Code of City of NY § 8-101 et seq.); Albany City Code Art III, § 48-1; Binghamton City Code, Part I, § 45, 45-A; Ithaca City Code, Part II, § 39-1, 215); Rochester City Code, Part II, § 63-1 to 63-11; and Syracuse Gen Ordinances Part L, § 8-1 to 8-10. County codes include Suffolk Cty Code Part I, § 189-24 and Part II § 528-1 to 528-10; Tompkins Cty Code Part II, § 92-1 to 92-6; and Westchester Cty Code Part IV, § 700.01-700.35. Two New York towns have such ordinances as well (Brighton, Minutes of Town Board Exhibit No. 9 [Oct. 26, 2011]); (Rhinebeck, Minutes of Town Board (Dec. 11, 2006).

37. For a detailed discussion on the Family Violence Option and other public assistance considerations for intimate partner violence survivors, see Chapter 27, *Public Assistance and Housing: Navigating Difficult Benefits Systems.*
38. 42 Misc 3d 502 (Sup Ct, NY County 2013). (Jane Doe was denied a request to change her name on her HRA benefits card after receiving a civil court order for adult name change and also experienced discrimination based on her gender identity. The City's motion to dismiss was denied as a *prima facia* case was put forth and the Court went on to say, "…accepting the allegations as true for the purposes of this motion to dismiss, the purposeful use of masculine pronouns in addressing plaintiff, who presented as female, and the insistence that she sign a document with her birth name despite the court-issued name change order, is not a light matter, but one which is laden with discriminatory intent." *Id.*
39. For a discussion of other intimate partner violence related housing options, *see* Chapter 27, *Public Assistance and Housing: Navigating Difficult Benefits Systems,* in this publication.
40. *See* NY City Human Rights Law [Adminstrative Code of City of NY] § 8-107(5)(k): Applicability; dormitory-type housing accommodations. The provisions of this subdivision that prohibit distinctions on the basis of gender and whether children are, may be or would be residing with a person shall not apply to dormitory-type housing accommodations including, but not limited, to shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children.
41. For further information, see the Frequently Asked Questions (FAQ's) issued in April 2014 at: www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf.
42. Holistic healing for transgender clients may include representation with a legal name change that may include motion practice to seal the client's proceeding, assisting with gender marker changes on government identification, assistance accessing and changing legal name and gender marker on birth certificates within or outside of New York State depending on the client's place of birth. *See Transgender Litigants in the Court System: Providing Equal Access and Impartial Justice*, nycourts.gov/ip/judicialinstitute/transgender.shtml
43. DHS Policy No. 06-1-31 (Jan. 31, 2006).
44. Although lesbians and bisexual women generally do not have trouble finding shelter space designated for women, a shelter is often not equipped to address issues of sexual orientation or LGBTQ violence. Gay men, as all men do, have a more difficult time finding domestic violence shelter, because many such shelters have dormitory style housing and therefore may be designated as single sex. VAWA 2013's non-discrimination protections, as described above, prohibit such discrimination, however, and we expect to see shifts in shelter policies in future years. Transgender clients, particularly those whose birth certificates reflect their sex assigned at birth and not gender identity, and transgender clients who do not "pass" as easily in their gender identity presentation *(e.g.,* a "masculine" looking transwoman), are often denied shelter or are sheltered in a single sex shelter based on incompatibility with their sex assigned at birth, not their present gender identity. The most commonly heard reason for turning transwomen away from women-only domestic violence shelters is that the other shelter residents "will not feel comfortable with a transwoman."Such transphobia must be addressed through education of shelter staff

and residents. Many shelters are beginning to change their policies both to be responsive to the needs of LGBTQ survivors and in light of VAWA's first LGBT-specific non-discrimination laws.

45. *Braschi v Stahl Assocs.*, 74 NY2d 201 (1989). The First Department has extended *Braschi* to protect same-sex partners in rent-stabilized apartments. *East 10th Street Assocs. v Estate of Goldstein*, 154 AD2d 142 (1st Dep't 1990). A lower court in the Second Department has also extended *Braschi* to protect same-sex partners in rent-stabilized apartments. *Lamarche v Miles*, 2005 NY Misc LEXIS 3514 (Civ Ct, Kings County 2005), No. 078102/04.
46. *Rosentiel v Rosentiel*, 20 AD2d 71, 2452d 395 (1st Dep't 1963).
47. *Minors v Tyler*, 137 Misc 2d 505 (Civ Ct, NY County 1987).
48. *Blake v Stradford*, 188 Misc 2d 347 (NY Dist Ct, 2001), held that a domestic partner was a licensee and subject to eviction. In 196 Misc 2d 881 (Civ Ct, Richmond County 2003), the New York City Civil Court specifically declined to follow *Blake*.
49. Real Property Law § 235-f.
50. Before the Roommate Law was enacted in 1983, leases could prohibit tenants from living with anyone other than "family members." Landlords regularly used these lease restrictions to evict unmarried couples, including lesbian and gay couples. The State Legislature passed the Roommate Law specifically to prohibit landlords from evicting these families based on their marital status.
51. Administrative Code of City of NY § 26-521(a). "It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer.…"
52. McKinney's RPAPL 601.
53. Generally New York does not recognize an implied contract for the rendition of services by an unmarried couple living together because courts assume the relationship between the parties makes the rendering of such services naturally gratuitous. *Morone v Morone*, 50 NY2d 481 (1980). However, in *Moors v Hall*, the Second Department suggested that an individual may be entitled to *quantum meruit* recovery for the reasonable value of the domestic services rendered while in an unmarried relationship. 143 AD2d 336 (2nd Dep't 1988). It is important to note that in *Moors v Hall*, the couple maintained separate residences and the male partner acknowledged on several occasions that he would pay his female partner for the services rendered. Generally, a major obstacle to recovery in *quantum meruit* is the presumption that services rendered between members of the same household have been performed gratuitously. 46 AMJUR POF 2d 495 (2006). Presumably, LGBTQ partners could similarly sue for services rendered and face the same obstacles.
54. In *Cytron v Malinowitz*, the Kings County Supreme Court determined a intimate partner partner seeking a portion of the proceeds from the sale of a jointly-owned property in partition action could be determined by the laws of partnership. 1 Misc 3d 907(A) (Sup Ct, Kings County 2003). In determining whether the laws of partnership were appropriate, the Court looked at whether the parties had so joined their property, interests, skills and risks so that contributions have become as one and interest of the parties has been made subject to each of the parties. Such a partnership need not have been agreed to in writing. The fact that there is no written agreement will merely be one element to be considered in determining whether a partnership existed. A court will look at the relevant testimony, conduct, and documentary evidence. *Hanlon v Melfi*, 102 Misc 2d 170 (Sup Ct, NY County 1979). However, courts have held that oral contracts are unenforceable under the statute of frauds. *Robin v Cook*, NYLJ, Oct 30, 1990 at 21, col 1 (Sup Ct, NY County).
55. A court may impose a constructive trust as to property to prevent one party from being unjustly enriched. Generally, such a trust may be imposed upon a showing of the following four factors: (1) a confidential or fiduciary relationship; (2) a promise or agreement, express or implied; (3) a transfer in reliance on such promise or agreement; and (4) unjust enrichment. Thus, in *Minieri v Knittel*, the Supreme Court of New York County indicated that a constructive trust might be appropriate in the case where one party to a lesbian couple transferred nominal and joint title to her real and personal assets to her partner in reliance on an oral agreement between them that it was being held for the transferor and would be conveyed to the transferor upon request. 188 Misc 2d 298 (Sup Ct, NY County 2001). Importantly, in

Mineri, the Supreme Court also noted that the above enumerated factors are not necessarily determinative for the imposition of a joint trust.

56. Conversion is defined as an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property. *Black's Law Dictionary, 8th ed.* (2004). Thus it would include such acts as taking possession of a partner's property, refusing to give up on demand, disposing of the goods to a third person, or destroying them. In *Tucker v Evanczik*, the Fourth Department determined that by the act of fraudulently signing a partner's name on a vehicle registration and then selling the vehicle to a third party constituted conversion. 78 AD2d 993 (4th Dep't 1980).
57. Replevin constitutes an action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it. *Black's Law Dictionary, 8th Ed.* (2004). Generally, replevin is applicable only when the property or thing is capable of specific identification or certain designation. Replevin may be employed to permit the recovery of chattels of a wide variety of goods including motor vehicles and computer equipment. Although rarely used, replevin may be a powerful weapon when an abuser wrongly holds property belonging to the victim.
58. Small Claims Court may be used to recover money for damages or property taken by an abusive partner up to a value of $5,000 ($3,000 in Town and Village Courts). The Small Claims Court is a simple, inexpensive and informal court where people can sue for money without a lawyer. For more information, *see* www.courts.state.ny.us/courts/nyc/smallclaims/general.shtml.

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Teen Victims of Intimate Partner Violence

by Andrew Sta. Ana & Stephanie Nilva

Advocates working with teen victims of intimate partner violence must address an issue that is multifaceted, rapidly developing and commonly misunderstood.[1] Preliminary understanding begins with recognizing the intersections of intimate partner violence, age and the legal system; more comprehensive examination of these intersections uncovers significant nuance and complexity, encompassing adolescent development, advocacy within educational systems, the legal responsibilities of other youth-serving professionals, the role of parents or guardians, technology abuse, and ethical rules for attorneys regarding the representation of minors, among many other concerns. Recent years have brought significant advances in the law, technology, education and activism regarding online harassment, stalking, affirmative consent in sexual relationships and creative interventions and responses to dating violence. Effective client-centered advocacy on behalf of young survivors may require advocates to have a deeper understanding of youth development, and to conduct a review of organizational procedures to address possible biases or assumptions about youth and survivors.

Teen Dating Violence Is Not Domestic Violence "Light"

Advocates unfamiliar with the complexity or scope of teen dating violence may incorrectly dismiss violence perpetrated by young people as less severe than violence perpetrated by adults. Indeed, according to one study, up to 80% of parents do not perceive dating violence as a serious concern for their children and consequently have few conversations with their children about it.[2] Despite the misleading label, teens inflict violence at rates that belie this common misconception. In fact, one in three teens knows someone whose dating partner has abused them.[3] Women aged 16 to 24 suffer the highest rates of intimate partner violence of any age group.[4] A 2013 study found that, among students who dated, 21% of female students and 10% of male students were abused by a dating partner in the preceding 12 months.[5]

When working with young clients, the phrase "domestic violence" can be clumsy and inaccurate. "Domestic" may not resonate with youth who are being abused by a partner, and can be a barrier to screening and intervention. For young people in romantic relationships, dating violence may be far from "domestic," committed in schools, public places, online and sometimes their homes. Young people may not describe their relationship with their partner as "dating," but as "hanging out," "messing around," "fooling around," or as "a friend with benefits."

Similarly, for many young people, forms of abuse and the exercise of power and coercive control can include many legal behaviors, some seemingly innocuous conduct and other tactics that a young survivor may not perceive as manipulative or abusive. Forcing a young person to share an email password, monopolizing a person's time, isolating him or her from friends or tracking a partner's location on Facebook are all examples of behaviors that can be used to isolate a survivor and can exist in a context of other troubling behaviors.

Intersectionality Matters

The term "intersectionality," advanced by legal scholar Kimberle' Crenshaw, employs critical legal theory to address how forms of oppression (including sexism, racism, homophobia, ableism and classism) interact.[6] Young people of all genders, sexualities, races, ethnicities, abilities and socioeconomic groups can be abused by a dating partner, and their experiences defy simple categorization. For example, one study indicates that in the United States, black girls and other African-American girls are six times more likely to be punished in school than white girls.[7] Furthermore, survivor experiences are deeply influenced by factors such as immigration status, teen pregnancy, reproductive health, and poverty in ways that create significant nuance. A thoughtful understanding of survivors' experiences must be responsive to complex reasons that inform decisions about how and when to end a relationship or that tie a survivor to the person committing the abuse, as well as to their communities, families, cultures and identities.

Some studies indicate that young people from various minority groups are at increased risk of an intimate partner abusing them. Other research indicates that lesbian, gay, bisexual and transgender youth are abused by partners more frequently than heterosexual youth.[8] These intersections of race, gender, sexual orientation and gender identity, along with other aspects of identity, are highly relevant to effective advocacy. Race, identity and experience should not be seen as afterthoughts, and should be given meaningful consideration when discussing legal options, safety planning and advocacy. Ultimately, advocates working with young survivors should strive to understand them as individuals with complex experiences, identities and opinions.

Adolescence and Dating Violence

During the span of adolescence, young people experience profound changes in mental, emotional and physical development. Developing senses of self-identity, community, family and culture, along with exposure to new levels of stress, emotion and conflict, combine to impact teens' responses to and perceptions of dating violence. These developmental responses can include boundary-testing, defying authority, increasing reliance on friends, exploring risky behaviors and rejecting family and community standards. For example, a survivor seeking to determine her own identity separate and apart from her family and community may not disclose that she is in a romantic relationship at all, let alone an abusive one. She may fear judgment, or even punishment, from her family members. She may not disclose that she is sexually active, or that she has exchanged intimate pictures with her partner. In other cases, she may only disclose a select portion of her experience, withholding details to protect herself or her abusive partner. Another young survivor may rely heavily on a peer group for advice on his relationships, or idealize and confuse images of relationships in the media and through culture as demonstrative of actual relationships. He may not disclose that his dating partner may be of the same sex, or that he is exploring his emerging sense of sexual orientation or gender identity. Other young people may substitute the influence of their families with the influence of an abusive partner before they have developed independent decision-making skills in a safe and supportive environment. In all of these scenarios, as counsel the ability to offer nonjudgmental understanding will enhance open communication with the client and improve advocacy on behalf of young people.

> ***Promising Practice*** *- Identify and explore counseling support for teen survivors. While attorneys can provide critical advice and representation around the legal issues involving teens, counselors and other mental health professionals who specialize in youth development can identify and address needs that an attorney*

cannot. Seek partnerships and training opportunities with professionals that specialize in recognizing the developmental needs of young people.

Disclosures of Dating Violence

Given their developmental stage and mistrust of authority figures, young people may engage in what at first seems to be risky or self-destructive behavior. The ability to reserve judgment and focus on the support you can provide to a young survivor may make all the difference in encouraging help-seeking behavior. Some teen survivors may not fully appreciate future and long-term implications of their behaviors. These can include engaging in risky sexual behaviors or unprotected sex, the exchange of sexually suggestive or explicit text messages ("sexts"), or revealing personal or family secrets, all without a full appreciation of the consequences of those behaviors. Given the response they can reasonably expect from adults, teens are much more likely to disclose an incident of dating violence to a friend than to a parent or an attorney.[9]

Youth-serving programs that understand the dynamics of adolescent development should invest in developing trusting relationships between survivors and advocates so that young people can disclose their experiences without fear of judgment. Simultaneously, as an individual provider, you can establish clear boundaries by explaining an advocate's role and its limitations. Establishing these boundaries can include discussing confidentiality and safety concerns up front, using a non-judgmental tone, and working through a young survivor's immediate needs before exploring deeper and perhaps more challenging topics. Be aware that disclosures of sexual assault or misconduct will be very sensitive in most cases and challenging for young people to reveal. Actively listening to a survivor's story, validating those experiences and understanding what social or cultural pressures may influence the young person can be very beneficial in making a client comfortable while establishing a professional relationship. In many cases, a relationship of trust and confidence can lead to disclosure of experiences that have not been revealed previously to friends, parents or other adults.

***Promising Practice** - Disclosure vs. Reporting. Appreciate the difference between a young survivor's simple disclosure of an incident of abuse versus the reporting of an incident with the desire to take further action.*

While working with young people sharing an experience of dating or sexual violence, advocates must distinguish between clients' intent related to disclosure or reporting. *Disclosure* refers to the telling or recounting of an incident of trauma or violence without the explicit direction to take further action based on that disclosure; *reporting* refers to the telling or sharing of an incident of trauma or violence combined with action to take additional steps, such as share the incident with law enforcement, pursue legal action, seek accommodations or remedies at school, involve parents and other professionals or engage in different forms of advocacy. Of course, counsel should advise a young survivor about the range of possible outcomes should she or he choose or decline to report an incident, and that advice can help a young survivor decide whether to proceed.

Effective service to young survivors requires ongoing evaluation, of yourself and your organization, to gauge the openness of your services to young people. You can review initial client assessment questions; edit to incorporate accessible language in written forms, website content and outreach materials, and assess how young people will need or use organizational material (e.g., will it need to be hidden or shared easily). In other aspects of an organization, examine the availability of appointments beyond traditional hours so as to be responsive to young people who attend school or work, increase accessibility via text and instant messaging, and reconsider the office's layout or location. If a young client will need ID to get in the building where you work or need assistance paying for transit to get to an appointment or to court, these are obstacles to securing help. In addition to ensuring your client can reach you, be sure you have discussed with your client a range of options for keeping in touch.

Your client may not have a cell phone and may need you to leave messages at a friend's home to keep your communications private from an abuser or parents. Effective services for young people require serious, comprehensive evaluation beyond simply labeling a practice as youth-friendly.

If a young survivor chooses to involve family members in advocacy or as a source of support, an attorney should continually reaffirm a survivor's boundaries about what they are comfortable discussing around family members. In some cases, trusted family members can be essential and beneficial resources for the survivor. In other cases, you might find that family members of your client are affecting your ability to advocate successfully. You might find a parent to be helpful or a barrier in achieving your client's goals. Occasionally caregivers of youth will support the relationship whether or not they know about the abuse. A parent may believe the abuser to be a good match for any number of reasons. Sometimes, authority figures will discourage a young person from accessing or following through with professional help because they mistakenly think the abuse could not be severe or that ties between teenagers are more easily severed. Family members may prioritize their own interests ahead of the survivor or excessively insert themselves into advocacy in order to compensate for their own feelings about the abuse to their child. Be sure to communicate with your client about whether or to what degree parents or other relatives should be involved in legal proceedings.

Technology: A tool of power and control, a tool for survival

Young people actively use technology to discover new and innovative ways to connect, communicate and explore their identities and relationships. Some popular forms of communication include apps and social media that did not exist even a few years ago, yet seem essential for communication today. In appreciating these rapid advances, attorneys must adapt and learn how young survivors use and experience technology.

Technology abuse can take the form of monitoring messages and calls; forced sharing of passwords; threatening to release intimate messages or pictures; shooting videos of a sexual assault; anonymously posting secrets and rumors on social media; the use of tracking software to monitor the movement of a partner; and creating fake profiles to manipulate a survivor. Young people and their online or digital connections to others, whether intimate, casual, fleeting, friendly, surreptitious, experimental or meaningful, should be taken seriously. Whether made abruptly or deliberately, these communications provide an opportunity for genuine connection, intimacy and independence. Online and through social media, young people flirt, joke, fight, make up, fall in love and experience a full range of emotions. Occasionally, these communications can include casual and intimate sexual encounters, including the exchange and use of pictures, the use of webcams and explicit text messages.

Rather than quickly dismissing or judging communications in these settings, you must recognize and appreciate the atmosphere in which these exchanges occur. Private information may initially be exchanged in a friendly or experimental context, perhaps with the promise from the abuser that it be deleted, kept secret or not used against the sender; however, circumstances and motivations can change and escalate quickly. Private information may have been exchanged following significant pressure, or it could have been given under the influence of alcohol or other drugs. In other cases, personal information may be obtained surreptitiously by an abuser, a common friend or another third party.

A young survivor's reactions and responses to the release of personal information or even the threat of release are diverse and case specific. Young people may experience guilt or shame about the nonconsensual release of personal information. As a result, one survivor might want to keep a minimal, hidden or non-existent profile. Responsive to the survivor's preference, you might explain how a young person can document abuse while maintaining a reduced or modified presence online. Your response to a young survivor can be critical in identifying protective measures and what steps

she or he is comfortable taking. Successfully assisting young survivors may mean supporting a young person's presence online, while helping them identify ways to stay safe, maintain connections and access safety and resources when necessary.

Just a few years ago, when an abuser contacted the victim through email, social media, or even telephone, a common response was to advise a survivor to delete an account, change a password, "block" the abuser or change a phone number. In many cases this can be an effective and powerful strategy. However, for many young survivors, disconnecting from their online community and friends can mean cutting them off from sources of support, resistance and resilience. A survivor's disappearance from online communities also might trigger renewed or increased abuse. Staying online can serve as an important tool to document evidence and maintain connections through apps and social media. Some receive information about their abuser's location through friends and family, and others refuse to compromise their lives and online presences because of harassment. Regardless of the motivation, you should reserve immediate judgment and discuss with your clients what options are available to maximize safety and explore the related risks of other behaviors.

> ***Promising Practice*** *- Online communication can foster genuine emotion and a true sense of connection and intimacy. However, any sense of privacy or confidentiality can be false.*

Despite their intimacy, online exchanges come with tremendous risk to the survivor should they be exposed. In some instances, the non-consensual release and distribution of intimate encounters is seen as a form of sexual violence and can result in trauma to a survivor. Trauma from violence online can be coupled with feelings of shame and embarrassment in spaces outside the digital world. Furthermore, these communications are rarely private, if ever. Through the use of screenshots, third-party apps and spyware, the sharing of passwords and numerous recording devices, the most personal and intimate connections can be corrupted and spread very quickly. Abusers can use disclosure of intimate messages or pictures to keep survivors in a relationship or to coerce them to engage in non-consensual sex. Images can be manipulated digitally or shared with peers and family members to shame a survivor. With these risks in mind, work with survivors to balance various safety concerns with the desire to connect with others.

> ***Promising Practice*** *- Not all screenshots are created equal. Documentation of technology-based abuse can be critical for effective advocacy and representation of teen survivors.*

Screenshots can provide valuable information about an incident and the context in which it occurred. Evidence that clearly indicates timestamps, dates, sender and recipients can be very helpful in allowing an attorney or third party to follow the sequence of communication. Additionally, you must keep in mind that despite the benefit of having numerous ways to document behavior there are also many online resources to create fake profiles, fabricate a chain of text messages or otherwise call into question the accuracy of evidence collected.

Representation and Advocacy of Young Victims of Intimate Partner Violence

A critical element of advocacy and representation of young survivors involves making sure counsel's role and the boundaries of the relationship are clear to the client. Consider what if any exposure a client may have had to the legal system and take time to dispel fears or misconceptions. This includes advice on the potential consequences of any proposed legal action, exploring options other than litigation, proposing measures that can be taken in addition to litigation and how disclosing different elements of abuse can impact litigation. For example, a young survivor may not be aware that pursuing

an order of protection in Family Court requires that the abuser be served with a copy of the petition and the release of the allegations of abuse. A victim of both physical and sexual violence may not want to detail the extent of the sexual violence in a petition. Work with the survivor to determine if such disclosure is necessary to obtain an order of protection. Upon entering into an attorney-client relationship, explain attorney-client privilege in language that is accessible to a young person and include examples of what could eliminate the privilege. (Be aware that a young person may not understand attorney-client privilege as you explain it, and may still believe it does not apply to the client's parents, for example.) In the course of advocacy and representation, a teen may want to disclose his or her story to a number of adults and youth serving professionals — such as prosecutors or child protective workers. It is important to explain that not all attorneys or professionals have an obligation to keep disclosures confidential. In fact, some have an incentive to reveal them to others. This is a unique opportunity to educate a young person about the difference between attorney-client privilege and confidentiality, and to support a young survivor in making informed choices about whether and to whom to disclose their story.

Family Court and Civil Legal Responses to Dating Violence

The New York State legislature and the courts have made significant advances in being responsive to and inclusive of teen survivors of dating violence. The 2008 amendments to the New York State Family Court Act expanded access to Family Court to allow those in an "intimate relationship" to petition for an order of protection.[10] This amendment expanded the previous categorization of "members of the same family or household" by adding persons who have been in an intimate relationship.[11] The criteria for what constitutes an intimate relationship are "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship." Since then, the determination of what constitutes an intimate relationship has been made by case law and has included the experiences of teens seeking protection from Family Court. In 2014, the Appellate Division, Third Department affirmed the right of a teenager to petition for an order of protection based on an intimate relationship.[12] Because these legal responses were not initially designed with teen survivors in mind, however, prepare to educate the court about the experiences of teen survivors within Family Court and appreciate what distinguishes the experiences of teen survivors from adults.

The law places a variety of restrictions upon minors under the age of eighteen, primarily with the intent of shielding them from liability. Because statutes conflict as to the capacity and rights of minors depending on the area of law, remain alert to young clients receiving inaccurate information about their right to access civil relief, particularly without a guardian's knowledge. The capacity of minors under the age of eighteen is assessed within a particular legal framework: while the opinion of a seventeen-year-old can be weighed more heavily than that of a much younger child, youth are still grouped together under the categories of "juveniles," "minors," "infants," "children" and as having "diminished capacity." Attorneys should be mindful that their minor clients will be viewed in context, such as previous history with the legal system, or perceived lack of support from family. These added layers of legal and ethical complexity pose unique challenges in representation and litigation.

Attorneys should not assume that the law will apply to a case of teen dating violence in exactly the same way as in cases involving adult litigants. The Family Court Act states that "[n]o clerk of the court or probation officer may prevent any person who wishes to file a petition from having such petition filed with the court immediately."[13] The Family Court Act does not set forth any age requirement for petitioners, nor does it specifically exclude minors from filing petitions. In addition, the Family Court Act notes that "any person" may originate family offense proceedings under Article 8.[14]

In regard to Family Court advocacy, you should focus attention on the provisions of an order of protection that may particularly resonate with a teen survivor. This may include detailed explanation

of how a stay away order of protection could apply in situations where a survivor attends the same school as the abuser; securing safety when communication has taken place through third party contact such friends and peer; and incorporating provisions in no-contact orders that explicitly exclude social media websites or communication via text and apps.

> ***Promising Practice*** *- Review ethical rules for professional conduct that apply to legal representation of minors. Additionally, familiarize yourself with state laws regarding consent, mandated reporting and access to benefits.*

Attorneys representing teen survivors should review applicable rules that apply to litigation involving minors. Specific rules provide guidance on the legal representation of minors. Rule 1.14 regarding a "client with diminished capacity" addresses an attorney's responsibilities regarding representation and advocacy.[15] Though a young person can be regarded as a "client with diminished capacity," the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. When working with a teen survivor, be wary of "talking down" to a client versus openly discussing legal options and remedies with her, or suggesting options that are unrealistic or not practical for a young survivor. Rule 8.4 regarding "Misconduct" addresses unlawful discrimination in the practice of law on the basis of "age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."[16] When working with a survivor whose experiences of identity may differ from your own, you should be mindful of how those experiences may provide nuance and depth to that survivor's experiences. A survivor's age should be considered alongside their other experiences of identity including gender, race, poverty and trauma related to the abuse.

In the course of Family Court litigation, attorneys working with young survivors should review applicable statutes as they relate to service of process, representation, involvement of parents, guardians and the possible appointment of an Attorney for the Child. The Civil Practice Law and Rules (CPLR) and the Family Court Act provide a statutory framework that allows young survivors to access the legal system. However, because the Family Court was not initially designed to be responsive to teen survivors, courts may be unfamiliar with how to apply the law to their experiences and may seek to involve parents, guardians and others, unnecessarily. Attorneys advocating for young survivors can remind the court of its discretion under certain provisions of the CPLR to the extent that they are "suitable to the proceeding involved."[17] Family Court Act §165 goes on to state that "where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved."[18] While many youth may seek to involve parents and other adults to support them, an attorney must keep in mind that the circumstances under which a young person seeks an emergency protective order may be volatile. The survivor may fear that disclosing the full nature of the abuse to parents may increase the risk of danger. Prepare to advocate for the clients' interests in whether or how they will be represented or have their parents involved. Keep in mind that although the Family Court Act allows teen survivors access to the courts, there may be continued resistance or difference of opinion as to the degree of involvement of other parties with competing interests.

In litigation and advocacy, you may confront any number of assumptions and implicit biases about clients, their experiences or the people that abuse them. You may confront assumptions that violence involving young people is not serious, that litigation is unnecessary, that young people cannot make decisions on their own, or that as young people they are not responsible for exercising poor judgment. While courts and advocates may view young people as not quite adults, they will likely judge them based on behavior that is more commonly seen by the court as "adult behavior," including sexual intimacy, violence or substance use. In settings that regularly address intimate partner violence between adults, you may need to educate the court on matters such as technology and abuse.

While advocating for a teen survivor, you should be mindful that in addition to laws regarding orders of protection, and applicable education laws (discussed below), middle schools and high schools are also required to operate in compliance with New York law concerning child abuse and neglect. School administrators, teachers and other youth serving professionals are required in their professional capacity to report instances of abuse of a parent or guardian and require reporting of information related to suspected child abuse and neglect.[19] However, abuse by an intimate partner is distinct from abuse by a parent or guardian.[20] Attorneys working with young survivors should review applicable requirements of the social services law, and prepare for advocacy and education on behalf of young survivors in instances where child protective reports may have been made in error.

Advocacy

Criminal Justice System

Teen survivors of dating violence seeking safety from an abuser are supported by various legal systems, including the criminal legal system. In the criminal system, the rights of both the survivor and those of the abuser will differ significantly. Review the law so that you can discuss with your client how the law may apply to a criminal case against the abuser based on his or her age.[21] Attorneys working with victims should be mindful of whether the perpetrator will be charged as a juvenile or as an adult, and explore the potential consequences of each scenario with the client.

The issues of statutory rape and child pornography arise for teen survivors of dating violence, who may have partners their own age or far older. Courts will seriously examine allegations that relate to sexual intercourse and contact between an adult and a minor. If you are representing survivors in civil litigation, be sure to examine and consider the potential impact of raising the issue of statutory rape. For example, a fourteen-year-old survivor whose partner is eighteen or nineteen may wish to explore criminal justice remedies in addition to civil ones.[22] Serious legal issues are also triggered in cases involving the possession, creation of distribution of sexually explicit images of minors. Possession of child pornography violates both state and federal law. The release or distribution of these images is often referred to as "Revenge Porn," and many states around the country are seeking to find ways to protect victims, and to be responsive to the complicated circumstances under which these images are created or distributed. In 2014, New York passed legislation to address the issue of "revenge porn," which criminalizes the recording and posting of intimate images of a partner without their consent.[23] The potential for harm is significant in cases involving sexually explicit images and young people and penalties can include requiring a convicted person to register as a sex-offender and significant jail time. New York, along with other states around the country, are re-examining their laws as they relate to the release of sexts, sexually explicit images or videos without the consent of the individual involved. Attorneys should be vigilant as to the developments and advances to this area of law.

Title IX & School-Based Relief

Title IX of the Education Amendments of 1972 (Title IX) is a federal law that prohibits discrimination on the basis of sex in educational programs and activities.[24]

> *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*

All public and private schools (including elementary, middle and high school), school districts, colleges and universities that receive any federal financial assistance must comply with Title IX. Non-compliance with Title IX could result in the loss of federal funding. While many associate Title IX with protections against gender-based discrimination in athletics, Title IX protections are far broader and

include forms of discrimination that have broad application for advocacy in the areas of sexual harassment and intimate partner violence.

Title IX covers a school's responsibilities to address sexual harassment and violence. The scope of Title IX addresses issues such as confidentiality of the students involved, the type of students protected, provisions for school based hearings, the types of remedies available and requirements for training of employees. Protections under Title IX apply to many kinds of students, and are not exclusive to protections for female-identified students. Title IX applies to sex discrimination regardless of gender, sexual orientation or gender identity, full and part time students, students with or without disabilities, and students of different races and national origins. In particular, Title IX discrimination prohibition includes claims based on an individual's failure to conform to stereotypical notions of masculinity or femininity or gender identity.

In 2011, the US Department of Education's Office of Civil Rights issued a "Dear Colleague" letter, which provides guidance on a school's obligation to address sexual harassment and violence.[25] In 2014, it issued a document entitled "Questions and Answers on Title IX and Sexual Violence" that includes additional information.[26] Together, these documents provide a foundation and guidance on implementation, compliance and enforcement. Title IX requires schools to create a procedure outlining the complaint, as well as impartial investigation of complaints and disciplinary process for addressing sex discrimination, sexual harassment and sexual violence, which includes domestic or dating violence.

> ***Promising Practice*** *- Attorneys as Advocates & Advisors. When a school uses a hearing process to determine an alleged abuser's culpability for sexual violence, attorneys can play a critical role, which differs from traditional civil or criminal litigation. In some cases, an attorney may be present during a hearing, but not have a speaking role. However, attorneys can play a valuable role in assisting a survivor prepare for the hearing including opening and closing statements and responses to questions.*

Compliance and enforcement of Title IX also applies to high schools and middle schools. However, though policies of a university or college campus may be distributed or posted online, many high schools and secondary schools do not have policies that are as fully developed or accessible. An attorney working with a young survivor in high school should prepare for the school's unfamiliarity with the application of Title IX and its enforcement outside of a university setting, including the involvement of school administration and the responsibilities of other staff. Within the 2014 letter from the Department of Education, it states that "a school must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees." Further, Title IX provides guidance on how to address confidentiality when a student reports sexual violence, a school's investigation process, and limiting information that is revealed in the course of an investigation.

In addition to Title IX, intimate partner violence against a young person triggers both state and federal legislation and protections. Together, these additional measures are meant to improve academic responses to sexual violence.

The Jeanne Clery Act requires colleges and universities in the United States to document incidents of violence, abuse and crime on their campuses and share that information with students and their families.[27] This information includes reported rapes, intimate partner abuse and other forms of sexual assault and harassment. This act provides a measure of reporting and transparency for individuals seeking data on the prevalence of violence on any particular campus.

In New York, additional educational legislative protections can provide additional protections for survivors. The Dignity for All Students Act (DASA) amended the state's Education Law, aiming to address harassment, discrimination and bullying in public school settings to create safer educational

environments. Its protections include harassment based on a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. The law requires schools to take steps to create a safer educational environment. Some of these steps include requiring schools to develop curricula that support diversity and mandating one staff member from each school to handle incidents of bullying and harassment and to undergo specialized training.

Some states, including New York, are re-evaluating the educational system's responses to sexual violence. A new analysis of consent is developing and expanded protections against campus-based or student related sexual assault and violence are materializing. Additional enhanced responses are likely in the coming years. In July 2015, New York enacted ground-breaking legislation mandating adoption of an "affirmative consent," or "Yes Means Yes," standard for campus sexual conduct. The legislation includes a uniform definition of Affirmative Consent, a Sexual Violence Survivor and Victim Bill of Rights, and an Amnesty Policy that ensures that students reporting incidents of sexual assault or violence are granted immunity from certain campus violations, such as drug or alcohol use. An example of one institution's implementation of this new law can be found on the SUNY Binghamton website, system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/.

When working with a young survivor, particularly one who is engaged in multiple fronts of advocacy that include the Family Court, criminal court or even school-based advocacy, you should take time to educate a young survivor about the different definitions of consent and the burdens of proof in each system. The definition of consent will differ in a university context, and the definitions dramatically differ between the standards used in criminal and civil legal systems. Under the criminal definition, courts will looks to what constitutes "forcible compulsion" rather than what is consensual. You should also take time to explore what remedies are available through each, as well as the benefits and limitations of each system.

Safety Planning

Inevitably, safety planning – in which a step-by-step strategy for keeping safe is developed with the client – will play a critical role for survivors. Assisting teens successfully means understanding the world of youth. A relationship between two young people may appear to you to be more ambiguous than one between adults, which may be defined by marriage or a shared household. A successful safety plan for a teen will probably be designed for the routines and schedules of a young person, which can encompass a school setting, neighborhood and a young person's presence online. Be aware that your client's relationship status with the abuser may change many times between appointments or before court dates. Be prepared to discuss how your client, when ready, can safely break up with someone attending the same school or living in the same neighborhood. The client will need to think carefully through how the 'break-up' will occur. He or she should avoid terminating the relationship in a private place. Having a friend around or ending the relationship over the phone or by email could help reduce risk. You might rehearse with your client the things to say if the abusive partner tries to insist on continuing the relationship. Still, a young person's safety plan must reflect his or her own reality; you will be most effective by offering your client support and the tools to keep safe in the event the relationship does continue.

Because a teen's social circle or schedule may vary by day or by week, the safety plan must adapt to those circumstances. A sixteen-year-old survivor involved with an abusive partner in the same school will have different needs than one involved with a twenty-five-year-old. A teen may fear the abuser's gang or circle of friends. Young people can feel hopeless about pursuing help because the abuser will likely remain in the same school. A client involved with an older abusive partner will be particularly subject to such a person's controlling behavior. An adult partner may exert more influence

over your client. The abuser's age, resources or mobility may make the young client feel more powerless. Someone more adept at technology may terrorize your client as a result of online stalking that makes the survivor feel watched at all times.

Remind your client to alter his or her route to school, know the location of local police stations, travel with friends or family, and keep a charged cell phone or change for a phone call on hand. If the abusive partner is in the same school, you might offer to speak to the school principal or other school contacts about alerting security personnel, changing a student's schedule or locker location or obtaining a safety transfer.[28] If your client has a job, offer to speak to your client's employer about a new work schedule or arranging time off to come to court. New York has provisions that protect the jobs of employees who must attend court dates for certain domestic violence proceedings.[29] The decisions whether or when to change online passwords, or delete one's online presence, should be made carefully with your client, to ensure she or he is comfortable with the decision and any risks or consequences have been explored.

When developing a safety plan, you may find that young people are vague or wary about telling you where they go and with whom. You should curb any inclination to challenge your client's behavior, even if you think your client spends time in places you think are inappropriate or unsafe. When discussing your clients' behavior, be sure to address the conduct without passing judgment but in the context of how it may affect the safety plan. They may have engaged in intimate or sexual activities that they have not disclosed to their parents or others. They may feel guilt about fighting back or participating in behaviors that their parents would disapprove of or forbid. The teen may be using drugs or drinking around the abusive partner. If the client's judgment is impaired by substance abuse, he or she may be unable to leave a dangerous situation easily, or police may question his or her credibility.

Instead of telling your clients what to do, ask what ideas they have for how to keep safe. Young people who feel like an equal partner in developing a safety plan will be more likely to use it. The plan should be reviewed in subsequent meetings with your client. Ask what has been working and what hasn't been working, and make adjustments as needed. As you continue to demonstrate that your clients' perspective is important, you will build a foundation of trust, and empower your client to feel comfortable speaking to you about experiences as they arise. Respecting your clients' autonomy will improve the likelihood that they will see you and other service providers as resources in the future.

Notes

1. Throughout this chapter, the terms "teen survivor," "young survivor" and "young victim" will be used interchangeably. For the purpose of this chapter, it refers to an adolescent individual nearing adulthood, typically between the ages of 14-17. Day One serves young people 24 years of age and under, and has advocated for many young people at each end of this spectrum.
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8. Meredith Dank, Pamela Lachman, Janine M. Zweig & Jennifer Yahner, *Dating Violence Experiences of Lesbian, Gay, Bisexual, and Transgender Youth*, Journal of Youth and Adolescence 2013, www.urban.org/UploadedPDF/412892-Dating-Violence-Experiences-of-Lesbian-Gay-Bisexual-and-Transgender-Youth.pdf
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10. Office for the Prevention of Domestic Violence, www.opdv.state.ny.us/law/expandedaccess/index.html.
11. Family Court Act § 812(c).
12. *Matter of Samantha I. on behalf of Emily K. v Luis J.,* 122 AD3d 1090 (3d Dep't 2014).
13. Family Court Act § 216(c) [emphasis added]. The Act also directs the clerk to accept petitions without regard to questions of personal jurisdiction, leaving all issues of law to be determined by the court.
14. Family Court Act § 822.
15. Rules of Professional Conduct (22 NYCRR § 1200.0), Rule 1.14.
16. *Id.* Rule 8.4.
17. Family Court Act.
18. *Id.*
19. Social Services Law § 413(1).
20. Family Court Act § 1012.
21. Currently, the State Legislature is examining its response to young people in the criminal justice and Family Court systems, and there may be amendments to the law as it applies to defendants under that age of eighteen. In the current model, When an abusive partner or defendant is under the age of eighteen, additional protections and procedures are applicable. When the police are contacted and when an arrest is made, cases involving a minor defendant can proceed in either criminal court or Family Court depending on the age of the accused and the facts of the case. A modified approach is triggered when the person accused is under the age of eighteen, and there are different venues, procedures and terminology that are used. For example, the term "Juvenile Delinquent" is used when an individual who is under sixteen years old, but is at least seven years old, commits an act which would be a "crime" if he or she were an adult, and is then found to be in need of supervision, treatment or confinement. The term "youthful offender" applies to a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old. In these cases, regardless of the terms used to describe the person accused or the victim, the standard burden of proof, "beyond a reasonable doubt," still applies. The framework differs from the traditional court process because there is an increased interest by the state in deterring a young person from committing another crime, and exploring other supportive services rather than incarceration.
22. Penal Law §§ 130.25, 130.30,130.35.
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24. 20 USC §1681 *et seq.*
25. Ali Russlyn, *Dear Colleague Letter from Assistant Secretary for Civil Rights.* US Dep't of Education, April 2011, www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html
26. *Dear Colleague Letter from Assistant Secretary for Civil Rights.* US Dep't of Education, April 2014, www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
27. 20 USC § 1092(f).
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29. Penal Law § 215.14.

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Remedies for Immigrant Victims of Domestic Violence

by Melissa Brennan & Pooja Asnani

Immigrant victims of domestic violence face all of the same fundamental issues as those of their American-born counterparts, but often far more intensely. Feelings of powerlessness, isolation, and fear of both the abuser and the authorities increase exponentially when the victim has journeyed to the United States from another country. Immigrant victims may also fear the struggle to gain secure status in this country. With its contradictory or overlapping forms of relief, the American immigration system may not seem navigable—but legal practitioners should take heart. Despite the declining availability of relief for most other categories of immigrants, there are now more avenues to assist immigrant victims of domestic violence than have ever existed in this country's history. Help from multiple sources will be necessary, but absent extenuating factors such as criminal convictions or fraud (and even in those cases, waivers may be available), a domestic violence victim's carefully executed application for immigration relief stands an excellent prospect for success. This chapter will help practitioners understand the complicated remedies and potential pitfalls specific to immigration law so that effective help can be offered.

Barriers to Protection Faced by Immigrant Women[1]

Foreign-born victims of domestic violence—with or without immigration status—face many barriers to seeking help from police, advocates, shelters and others. Yet armed with knowledge of the obstacles these victims face, attorneys can effectively assist battered immigrants.

Fear of Deportation

Fear of deportation is a primary and powerful deterrent that prevents immigrant victims of domestic violence from receiving help. For a battered immigrant, particularly one who lacks lawful immigration status, fear of being deported may cause her to avoid interaction with law enforcement and social service providers. This fear is compounded when a batterer threatens to have the victim deported if she calls the police or seeks professional help. In recent years, federal immigration enforcement authorities have enlisted the support of local law enforcement in identifying immigrants for possible deportation.[2] This entanglement of local policing and federal immigration law has intensified pre-existing fears within immigrant communities that any contact with law enforcement could lead an immigrant down a path to deportation.

In most cases, immigrant victims can safely avail themselves of the protection of law enforcement without fear of negative immigration consequences.[3] However, complications can arise when police wrongly arrest the victim. Victims of domestic violence are at particular risk of dual arrest, where police arrest both parties involved in an incident, and retaliatory arrest, where a victim is arrested as a result of a false or exaggerated allegation maliciously made by the batterer. (For further discussion, see Chapter 4, *Mandatory Arrest*.) When an undocumented victim is arrested, she may be at risk of

apprehension by federal immigration enforcement agents.[4] In such cases, attorneys should consult with a local immigration legal service provider.

Unfamiliarity with United States Law

Protections available to battered women in New York State and federal remedies for immigrant victims of domestic violence are well-established yet women emigrating from countries that explicitly or tacitly condone domestic abuse may have little or no awareness that such measures exist. For example, the concept of an "order of protection" may be entirely foreign to a victim. Even in countries where legislation criminalizing spousal abuse exists, it may not be enforced or may be enforced inconsistently, because of prevailing social norms or corrupt law enforcement. As a result, immigrant women in the United States may not view the law as an ally in their quest for protection.

Language

Immigrant victims who lack English proficiency may be further discouraged from seeking help. While some immigrant victims of domestic violence speak English, many do not, even if they have lived in the United States for a number of years. Women raised in poverty or in regions where the formal education of girls is discouraged or prohibited may be illiterate in their native language as well, compounding the difficulties in studying English. In some cases, the abuser may use his command of English to further isolate the victim, forbidding her to study or telling her that she is "too stupid" to learn a new language. A woman who cannot leave home to study, work, shop or even associate with neighbors has little chance of gaining a command of English. To perpetuate control, the abuser may even rely on his victim's inability to communicate with the authorities in English. In the rare event that police are called, the abuser may explain that the call was a mistake or that the victim was the aggressor, while the victim remains powerless to ask for aid. State and local executive orders guarantee the availability of translation and interpretation services to people with limited English proficiency,[5] and New York State and New York City Domestic Violence hotlines offer multilingual accessibility,[6] but it remains a challenge to share this information with isolated victims.

Lack of Family Support

In addition to the isolation created by language barriers, many immigrant women are physically separated from their families, who may live thousands of miles away. If sympathetic to the victim, her family can provide crucial emotional and financial support, as well as a safe escape from an abusive relationship. Without family members, the victim may feel that she has nowhere to turn for help and may remain with her batterer. Unfortunately for some abused immigrant women, even when family members are physically present in the United States they may side with the abuser. Physical abuse of wives is openly accepted in some countries as a husband's right, treated as a private domestic matter. A woman raised in an environment in which her female relatives are routinely abused is not likely to be encouraged to leave her abuser. Even when the victim suffers broken bones or requires stitches, her relatives may scold her for angering her husband.

Isolation from the Victim's Ethnic and Religious Community

Just as the victim may be isolated from her blood relatives, so too may she be cut off from her larger "family" in the form of her ethnic or religious community. Ethnic-based community organizations have made important inroads by educating their constituencies that domestic violence is not only socially unacceptable and illegal in the United States, but also at odds with their own cultural and religious traditions.[7] Consequently, an immigrant domestic violence victim seeking assistance can turn to a variety of organizations in the metropolitan New York area where caseworkers share her ethnic background, speak her language, and understand her cultural concerns. To offset this support, however, a batterer may move her to a neighborhood where no one shares her cultural background.

Additionally, despite ethnic-specific support groups, religious authorities within that community may serve as countervailing forces. While some religious leaders have been vocal in criticizing domestic violence, others reject the American "rush" to divorce, urging instead that victims respect their religious vows. Immigrant women commonly report being counseled by a spiritual leader to remain in a marriage despite evidence of severe physical abuse, and of being chastised for failing to accept their husbands' authority.

Concern for the Children

The presence of children, often a complicating factor in the victim's decision to seek help, gains particular urgency when she is an immigrant. If the abuser is a United States citizen ("USC") or lawful permanent resident ("LPR") and the victim is undocumented, the abuser may tell the victim that only someone who is "legal" could win a custody battle.[8] Alternatively, he may threaten to "turn her in" to the immigration authorities and have her deported, while the children, who may be U.S. citizens, remain behind with him. In other cases, if the husband also holds foreign citizenship, he may kidnap the children to his country of birth, abandoning his battered wife and preventing her from ever seeing them again.[9] Should the victim possess sufficient resources for travel to the abuser's home country to reclaim the children, custody laws may favor the father nevertheless.

Preliminary Notes on Representing Immigrant Domestic Violence Victims

Establishing the Attorney-Client Relationship

As explained in the above section, foreign-born victims of domestic violence face a multitude of barriers and threats, in addition to the abuse and betrayal of trust by their abusive partner. These factors may create fear and distrust of the victim's surrounding social and legal systems, specifically of the lawyers working with her—individuals who appear to be in a position of relative authority and belong these systems. Owing to their lack of knowledge about immigration laws and procedures, especially for those in deportation proceedings, immigrant victims may be confused about the role of the immigration lawyer. For example, an immigrant victim might be unsure as to whether her lawyer is actually an agent for the immigration officials who might share her information with the government or, worse, "turn her in" the client to the authorities.

Many immigration clients have heard about or encountered dishonest immigration consultants who prey on immigrants. These are sometimes known as "notarios" in the Spanish speaking community but are prevalent among a variety of ethnic communities. A battered immigrant, unfamiliar with the notion of "pro bono," or "nonprofit," may also worry than an attorney not asking for money in return for her services may not be a "real lawyer."

Immigration attorneys must be attentive to these client concerns, and cautious in establishing the attorney-client relationship. It is therefore essential for an immigration attorney to explain the lawyer's role and responsibilities, including the concept of confidentiality, to the client at the outset to help establish a foundation of trust. A retainer agreement is advisable as a means to set forth and clarify the conditions of representation of the immigrant victim. Additionally, an immigration lawyer must make efforts to understand the foreign-born client and her cultural background, and guard against stereotyping based upon the client's country of origin, style of dress, religion, educational background, or manner of entry.

Confidentiality of the Application Process

A victim of domestic violence will understandably be worried that any information she discloses on an immigration application may be shared with her abuser, putting her at risk for further abuse. In addition to explaining the attorney-client privilege that protects communications between attorneys and their clients, an immigration lawyer must also advise an immigrant victim regarding the implication of sharing private, identifying information in her immigration applications. Specifically, U.S. Citizenship and Immigration Services (USCIS) is mandated to keep confidential all information provided by the victim.[10] As part of that effort to ensure confidentiality, applications pertaining to domestic violence relief contain provisions for a "safe" mailing address so that correspondence will not be forwarded to the abuser. Lawyers still must exercise extra care where the victim and her abuser share a common address, phone number, or electronic mailing address, as mistakes can happen.

Working with an Interpreter

Representing a battered immigrant may be more complicated where the client and attorney do not speak the same language and require the assistance of an interpreter. Working with interpreters poses several challenges, including achieving clear and accurate communication and establishing confidence and trust via an intermediary. However, adopting certain practices can help overcome some of these difficulties. Attorneys must always explain to the client the role of the interpreter and that the interpreter is bound to maintain confidentiality. It is also important to speak directly to the client and to look at the client when speaking, even when the attorney does not understand the client. This engagement communicates to the client that the attorney is interested in what she has to say, and enables the attorney to gain insight into the client's frame of mind by observing body language and non-verbal cues. Short, concise sentences further allow for a more accurate and complete interpretation. The interpreter, on the other end, should function as the voice of the client or the attorney, and should simply repeat questions, responses, and statements in a way that maintains the client's or the attorney's original meaning and tone, without embellishment.

In the case where the interpreter can only meet with the victim a limited number of times, it may be necessary for the victim to write the details of her abuse and have her statement translated. Immigrant victims occasionally prefer to write about the abuse than to discuss it. The document not only will serve as the basis for her "personal statement" to be included in the majority of applications for immigration relief, but also can form a foundation for dialogue with the client.

Note that in some cases, the client may wish to rely upon a family member or close friend to interpret. While a relative may help the client feel more at ease, family members can make poor interpreters. Regardless of the admonition to translate accurately, some relatives may try to "help" the victim by embellishing her story. Embellishments are not only unnecessary, but they can undermine a legal claim if they do not accurately represent the client's story. Perhaps even more common is the opposite problem—a relative may be so uncomfortable with the abuse that he or she may soften or omit it entirely. The victim may also be uncomfortable describing any sexual abuse in a relative's presence. Family members also experience difficulty observing the rules of confidentiality and, even if they believe they have the victim's best interests in mind, may take it upon themselves to share the translated confidences with other relatives or with the abuser. Relying upon friends of the victim to translate carries similar risks.

Seeking interpretation assistance from a local notary public or a "notario," discussed above, is similarly discouraged, as many immigrants might mistakenly accept conflicting and erroneous legal advice from the notary public while seeking translation services. The notary public might even share the immigrant client's information with the batterer, a devastating and dangerous betrayal of confidence.

For these reasons, attorneys working with immigrant victims should ideally find a professional interpreter, or, some other equally disinterested and qualified third party who is not otherwise interested in the facts or the outcome of the case. If the client is staying in a battered women's shelter or working with an immigrant outreach organization, a bilingual caseworker may be available. Other possible sources for interpreters may be the local bar association, or bilingual students, who are often eager to use their language skills and gain practical experience.

Inability to Pay for Filing Fees

In many, if not most cases, an individual fleeing from an abusive relationship will not have the financial means to pay the specified filing fees on the applications for immigration relief. Although many immigration applications available to victims of domestic violence do not require a filing fee, several related applications may require a fee. For certain applications that do require fees, fee waivers are available upon a demonstration of inability to pay.[11] Applicants seeking fee waivers should mark correspondence with red ink indicating "FEE WAIVER REQUESTED."

Note, however, that not all application fees for remedies available to victims of domestic violence can be waived.[12] Accordingly it is always important to confirm the fee requirements for individual applications.

Immigration Status of the Victim's Children

If a victim has children, her concern that they remain with her in the United States may eclipse any fears about her own safety. If her children were born in the United States, the fear may be assuaged by explaining that they are citizens and not subject to deportation. Under certain circumstances, even children born abroad to a U.S. citizen parent may also be citizens.[13] Where the immigrant victim's children are not citizens by birth, however, certain remedies may be available to the children, either as derivatives on their mother's applications, or as principal applicants, described below in more detail.

Factors in Determining Eligibility for Relief

The type of immigration relief for which a domestic violence victim may be eligible depends upon a number of variables, including marital status, current immigration status, immigration history, and the immigration status of her abuser.

Brief Overview of Family-Based Immigration Law

Family-based immigration is the most common way for foreign-born individuals to gain permanent legal status in the United States. Approximately three-fifths of all immigrants to the United States each year obtain permanent resident status (commonly called a "green card") based upon a qualifying family relationship.[14] Permanent residence allows an individual to work in the United States, to travel abroad, and, after either three or five years, to naturalize. To initiate the immigrant visa process, a U.S. citizen or lawful permanent resident (the "petitioner") files a document known as a "Petition for Alien Relative" with USCIS and submits documentation in support of the qualifying family relationship (such as marriage or birth certificates).[15] Certain categories of family members (the "beneficiaries") are assigned a "priority date" based upon the date of the application, and wait until an immigrant visa is available. The beneficiaries then become eligible to obtain "adjustment of status" to that of lawful permanent resident. Because of annual caps on visas based upon familial relationships and countries of origin, the current wait ranges from 2 (e.g., British-born spouse of a permanent resident) to 24 years (e.g., a Philippine-born sibling of a U.S. citizen).[16]

Individuals who are married to a United States citizen and minor, unmarried children (under 21) are not subject to annual caps and so avoid the waiting period for an immigrant visa. These individuals,

known as "immediate relatives," can obtain lawful permanent residence within months of filing the Alien Relative petition, although disparities exist in processing times throughout the country because of case backlogs and security clearances.[17] While the application is pending, an immediate relative may be eligible for employment authorization.

Until recently, the relative petition process was predicated on the assumption that a permanent resident or U.S. citizen sought legalization of a spouse's status to attain family unity. While the assumption held true if the couple was happily married, it functioned as a weapon in the abuser's arsenal against the domestic violence victim. As the sole holder of lawful immigration status, the abuser could refuse to file on behalf of his family members or withdraw a pending application, and the intended beneficiaries would have little recourse. Moreover, all possibilities for the victim to obtain relief would terminate in the event of divorce or the abuser's death, even if the couple had been married for years. A victim could remain imprisoned in an abusive marriage forever, fearful of deportation if she left.

In recognition of the immigrant victim's dilemma, and thanks largely to the efforts of domestic violence and immigration activists, Congress passed the 1994 Violence Against Women Act (VAWA), which included unprecedented protections for immigrant victims of domestic violence.[18] The VAWA immigration provisions allow spouses of abusive U.S. citizens or permanent residents and their children to self-petition, as well as to receive public assistance benefits. Congress has continued to refine the VAWA provisions to correct initial flaws, and has expanded the categories of aliens eligible for VAWA relief.

Evaluating the Client's Immigration Status

To assist a foreign-born victim who may be in need of immigration representation, it is essential to understand her current status. In some cases, this may be a straightforward task; other times, as described below, it may be a more complicated endeavor. In every case, the practitioner should consult with the victim to explore the particulars of her immigration history.

What Documents Does the Victim Have Access to?

The immigration laws of the United States are complex and individuals often do not have an accurate understanding of their own status. Accordingly, it is a good idea to begin with a review of any immigration documents to which the victim has access, mindful that a batterer may confiscate his victim's identity documents and immigration-related paperwork as a way of exerting control. Immigration documents could include a "green card" evidencing lawful permanent residence; a "work permit" indicative of employment authorization; a passport with a visa and/or entry stamp inside; and notices from the U.S. Citizenship and Immigration Services (USCIS).[19]

Under What Circumstances Did the Victim Enter the United States?

The manner in which an immigrant entered the United States may shed light on her current status as well as her future options. For example, an individual bearing a K-1 or "fiancée" visa is essentially "pre-approved" for a family-based petition if she marries her petitioning fiancé within 90 days of entry to the United States.[20] Conversely, if the client entered without inspection, that is to say, crossed the border without official permission, she will generally be precluded from deriving benefits from a family-based petition filed on her behalf. Additionally, the period of time lapsing between date of entry into the United States and eligibility for certain applications, such as asylum, can be very important.

Has the Victim Previously Applied for Any Immigration Benefits?

A prior application or petition submitted on behalf of the immigrant may have bearing on her future eligibility for immigration benefits. An immigrant with a pending application may be in line to receive

an immigration benefit and should ensure that her current mailing address is on file with USCIS.[21] Depending on the type of application and its processing status, she may be required to appear at an immigration interview. A prior denial of any immigration application or petition should be carefully examined. Consequences vary depending on the basis for the denial but may include placement in removal proceedings.

Has the Victim Had Prior Contact with Immigration Enforcement Authorities?

An immigrant who has had prior contact with United States immigration enforcement authorities may be subject to various consequences. For example, an immigrant who was issued a "Notice to Appear"[22] is required to appear in immigration court at a specified date and time; failure to appear will result in issuance of a removal order.[23] An immigrant who was apprehended by immigration authorities at or near a United States border, and sent away from the United States without a formal hearing, may have been subject to an expedited removal;[24] if she subsequently entered the United States without authorization, she is likely at risk of "reinstatement of removal"[25] and could be again removed from the country without hearing. To best protect an immigrant victim who may have had contact with immigration authorities in the United States, attorneys should gather all available immigration records from federal authorities.

Requesting Immigration Records from the Federal Government

If an immigrant has had any contact with the immigration authorities in the United States—whether in applying for benefits or during an enforcement-related encounter—she may be the subject of a file at USCIS, called an "Alien file" or "A file."[26] The A file may provide valuable information, including any immigration documents filed on her behalf and any record of immigration proceedings initiated against her. To obtain a copy of an A file, one can submit a Freedom of Information Act (FOIA) Request to USCIS.[27] It is often also necessary to submit FOIA requests to United States Customs and Border Protection, Immigration and Customs Enforcement, and the Executive Office for Immigration Review in order to obtain a complete and clear picture of a noncitizen's immigration history.

What is the Abuser's Immigration Status?

In addition to examining the status of the victim, the practitioner should attempt to verify the immigration status of the abuser. This can be a surprisingly difficult task—withholding legal documents such as a birth certificate or a green card constitutes one manner in which the abuser exerts control over his victim. Still, in some cases, the victim can discover the abuser's birth or naturalization certificate, green card, or passport in her home. If the victim is married to a native-born U.S. citizen, she may be able to obtain a copy of the abuser's birth certificate from a government office.[28] If the abuser is either a naturalized citizen or a permanent resident, USCIS should be able to verify his status through its own records.[29]

Categories of Immigration Relief for Domestic Violence Victims

The immigration laws of the United States are generally quite strict and for the vast majority of persons in the United States who lack immigration status, there is no relief available. However, our laws offer special protection to foreign-born victims of domestic violence for whom a variety of family-based and humanitarian options exist.

A Preliminary Note about Inadmissibility

The following includes a discussion of various forms of immigration relief commonly available to victims of domestic violence. It is important to keep in mind, however, that eligibility for a particular

remedy will not be enough to allow a victim to obtain lawful permanent residence in the United States. Rather, she may still be denied an immigration benefit if any of a number of grounds of "inadmissibility" apply to her. The Immigration and Nationality Act delineates categories of inadmissibility grounds including health-related grounds, criminal and security-related grounds, and grounds related to violations of our immigration laws.[30] Many of the grounds of inadmissibility can be waived though the availability of waivers varies with the form of relief sought. Thus, when weighing which forms of relief an individual might pursue, inadmissibility must be considered.

Family-Based Options: The VAWA Self-Petition and Battered Spouse Waiver

For victims who have been married to their U.S. citizen or lawful permanent resident spouses, two distinct but related forms of relief exist: the VAWA Self-Petition and the Battered Spouse Waiver. Both remedies allow battered immigrants to seek legal status without relying upon their abusive USC or LPR spouses to sponsor them. Congress created these remedies mindful of the fact that our immigration laws enabled abusive USCs and LPRs to withhold immigration sponsorship from their immigrant spouses.

A VAWA self-petition allows current or former spouses of U.S. citizens or permanent residents and their children to seek permanent residence, regardless of whether the abusive spouse has ever initiated an immigration petition.[31] To qualify for a VAWA Self-Petition, victims must establish that:

- They are lawfully married[32] to a current or former[33] U.S. citizen or LPR or that such marriage was terminated by divorce within the last two years;[34]
- Their marriage was entered into "in good faith," not solely for immigration benefits;[35]
- They resided with their spouse;
- During the marriage, the USC or LPR spouse subjected them to battery or extreme cruelty;[36] and,
- They are a person of good moral character.[37]

Approval of a VAWA Self-Petition on its own does not afford an immigrant victim with legal status. Under current practice, USCIS provides all approved VAWA Self-Petitioners with Deferred Action, a type of temporary protection from removal. Though Deferred Action does not confer lawful status upon a recipient, it does enable her to apply for employment authorization. Additionally, approval of a VAWA Self-Petition provides a foundation to allow the immigrant victim to apply for lawful permanent residency. Where the Self-Petition was founded on a relationship with the abusive USC, the victim will be immediately eligible to apply for lawful permanent residency upon approval of the VAWA Self-Petition.[38] Where, however, the Self-Petition was founded on a relationship with an abusive LPR, the victim will be assigned a "priority date" (essentially a marker of her place in line)[39] and will be subject to an elaborate quota-based waiting system.[40]

The Battered Spouse Waiver is similar to the VAWA Self-Petition but is designed to assist victims who already hold or have held "conditional residence" based on having been petitioned for by their abusive USC or LPR spouse. A victim who holds conditional residence will have been granted permission to live and work lawfully in the United States for a two-year period. In a standard family-based case, near the end of this two year period, the USC or LPR spouse and the immigrant spouse would jointly petition immigration authorities to remove the conditions on the immigrant spouse's status, allowing the applicant to obtain lawful permanent residency. However, the Battered Spouse Waiver empowers an abused immigrant spouse to independently petition USCIS to remove the conditions on her residency, with no involvement on the part of the batterer.

To qualify for a Battered Spouse Waiver, applicants must show that:

- They are currently or previously have been a conditional resident;
- They are currently or previously have been married to a USC or LPR;
- They entered the marriage in good faith, not solely for immigration benefits;
- They suffered, or their children suffered, physical battery or extreme cruelty perpetrated by the USC or LPR spouse.[41]

Upon approval of a VAWA Self-Petition, the victim will be granted lawful permanent residence and will receive a "green card" valid for 10 years.

VAWA Cancellation of Removal

Among common immigration relief options for victims of domestic violence, VAWA Cancellation is unique in that it can only be granted by an immigration judge to a victim facing removal or deportation proceedings. Victims who are in removal or deportation proceedings and are either married to or have a child in common with an abusive USC or LPR may be eligible for VAWA Cancellation.

To prevail in an application for VAWA Cancellation, individuals must show that they have been battered or subjected to extreme cruelty by their spouse who is or was a USC or LPR or that they are the non-abusive parent of a child who has been battered or subjected to extreme cruelty by a USC or LPR parent.[42] It is notable that VAWA Cancellation affords relief to victims who have a child in common with but are not and have not been married to an abusive USC or LPR. In addition, VAWA Cancellation applicants must show that:

- They have been physically present in the United States for a continuous period of at least three years prior to the date of application;
- They have been a person of good moral character;
- Removal would result in extreme hardship to themselves, their child or parent.[43]

Where VAWA Cancellation is granted, removal proceedings are terminated and the victim may adjust her status to that of a lawful permanent resident.

U Nonimmigrant Status

The VAWA remedies described above offer critical protection and benefits to qualifying relatives of current and former US citizens or permanent residents. These forms of relief, however, do not assist victims who lack a qualifying family relationship or those whose batterers lack legal status in the United States. Fortunately, alternate options exist. Among these, arguably the most prominent is U nonimmigrant status, also known as the "U visa", which affords lawful status to victims of domestic violence and other qualifying crimes. Congress created U nonimmigrant status, in part, to encourage immigrant victims of crimes, who might otherwise fear contact with authorities, to provide assistance to law enforcement.

To establish eligibility for U nonimmigrant status, applicants must show that:

- They have been a victim of domestic violence or other qualifying criminal activity;[44]
- They have suffered substantial physical or mental abuse as a result of having been a victim;
- They possess information about the qualifying criminal activity; and,
- They have been helpful, are being helpful, or are likely to be helpful in an investigation and/or prosecution of the qualifying criminal activity.[45]

It is not enough for a U nonimmigrant status applicant to assert that she has been, is being, or will be helpful to law enforcement. Rather, she is required to include with her application a certification of helpfulness signed by a law enforcement agency.[46] For a victim who has reported her batterer to police, prosecutors, child welfare officials, a family court judge, or others in law enforcement, U nonimmigrant status may be a readily attainable option. However, for a victim who has not reported her batterer's actions to authorities of any kind, U nonimmigrant status is likely out of reach.

Upon approval of an application for U nonimmigrant status, a victim will receive four years of lawful status in the United States and will become eligible for employment authorization. After three years in U nonimmigrant status, victims may apply for lawful permanent residency.[47]

USCIS only began granting U nonimmigrant status in 2008, but since that time awareness of this form of relief has spread rapidly and applications have surged. By statute, USCIS is only permitted to issue 10,000 grants of U nonimmigrant status per fiscal year ("the U cap")[48] and every year since 2009, USCIS has reached this statutory cap.[49] Where an immigrant's application is approvable but for the U cap, USCIS will send her a letter notifying her of placement on a waitlist (the U cap waitlist).[50] At the time of writing, it is fair to expect that a victim applying for U nonimmigrant status today will wait at least seven years, possibly longer, before her U nonimmigrant status application will be approved.[51] The lengthy wait for status may be disheartening but eligible victims should still be encouraged to apply. Under current practice, at the time of placement on the U cap waitlist, USCIS provides the applicant with a grant of Deferred Action, a form of temporary protection from removal. Once granted Deferred Action, a victim may apply for employment authorization.

T Nonimmigrant Status

Like U nonimmigrant status, T nonimmigrant status is a remedy designed to encourage immigrant victims of crime to assist law enforcement. While U nonimmigrant status is available to victims of various forms of criminal activity, T nonimmigrant status, often referred to as the "T visa," provides relief only to victims of the crime of human trafficking. To qualify for T nonimmigrant status, applicants must establish not only that they are victims of human trafficking but that they are victims of a severe form of human trafficking.[52] Severe forms of trafficking are defined to include:

- Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or,
- The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[53]

Because domestic violence and human trafficking often overlap, T nonimmigrant status should not be overlooked as a possible remedy for an immigrant victim of domestic violence. In fact, sex trafficking often manifests as an extreme form of intimate partner violence in which the trafficker and batterer are one and the same. Similarly, where a batterer compels his victim to perform household or other labor, the circumstances should be explored as this may qualify as labor trafficking.

Applicants seeking T nonimmigrant status must show that:

- They have been a victim of a severe form of trafficking in persons;
- They are physically present in the United States on account of trafficking;
- They have complied with any reasonable request for assistance from law enforcement into the acts of trafficking or related crimes committed against them, are unable to assist law enforcement due to physical or psychological trauma, or are under 18; and,

- They would suffer extreme hardship upon removal from the United States.[54]

Whereas an applicant for U nonimmigrant status must present a signed certification confirming her helpfulness to law enforcement, applicants for T nonimmigrant status have flexibility in establishing cooperation with authorities. An applicant who is unable to present a signed certification from law enforcement may rely solely on secondary evidence to demonstrate that she has complied with reasonable requests for assistance from law enforcement.[55] Additionally, by statute, an applicant need not provide evidence of cooperation if she can show that trauma prevents her from assisting law enforcement or that she is under 18.[56]

Those granted T status receive four years of lawful status in the United States and eligibility for employment authorization. A victim granted T nonimmigrant status will generally become eligible to apply for lawful permanent residency upon accrual of three years of continuous presence in the United States.[57] However, where the victim can present documentation from an official within the Department of Justice that the investigation or prosecution of the acts of trafficking has been completed, the victim will be immediately eligible for make an application for residency.[58]

Just as with U nonimmigrant status, there is a statutory cap on the number of grants of T nonimmigrant status that USCIS may issue in a fiscal year. While the U cap, which is set at 10,000, has consistently been reached, the T cap, set at 5,000, has never been reached.[59]

Asylum and Related Remedies

Domestic violence survivors, as victims of gender-based persecution, also may seek immigration relief in the United States by filing an application for asylum. An asylum applicant must show that she is unable or unwilling to return to her home country because she suffered persecution or has a "well-founded fear" of future persecution on account of her race, religion, nationality, political opinion, or membership in a particular social group. A "well-founded fear" of persecution does not require absolute certainty of persecution, and the Supreme Court has found that an individual who has a 10% chance of being persecuted may meet the standard.[60]

Asylum applications based upon gender-related persecution are typically categorized as "social group" claims. Members of a "particular social group" share an immutable characteristic that they cannot change or should not be required to change, such as gender, family membership, or marital status.[61] While initially resistant to gender-based social group claims, U.S. immigration law has evolved to offer protection to women fleeing severe domestic violence, female genital mutilation (also referred to as "female genital cutting"), forced arranged marriage, honor killing, and prostitution.[62] Gender-based claims often overlap with other protected grounds such as political opinion and religion, however, and the asylum applicant should include as many of them as possible in her application.[63]

Although the current legal landscape is still in flux, asylum or its related remedies, withholding of removal and Convention Against Torture (CAT) relief, may be the only route for some women who fear domestic violence or other forms of gender-based persecution abroad and now seek shelter in the United States.

Case Law Recognizing Domestic Violence as a Basis for Asylum

In the first significant case to create the possibility of asylum eligibility for domestic violence survivors, *Matter of R-A-*,[64] a Guatemalan woman named Rodi Alvarado sought asylum after suffering substantial violence at the hands of her husband, a former soldier. After the Guatemalan authorities rejected her plea for help, Ms. Alvarado fled to the United States and was placed in deportation proceedings. An initial decision by the BIA in 1999 concluded domestic violence did not constitute a "particular social group" for asylum purposes.[65] However, in 2003, the Attorney General certified

Matter of R-A- to himself to decide, pending the issuance of final regulations on gender-based asylum claims, and ordered briefing on Rodi Alvarado's eligibility for relief. The Department of Homeland Security ("DHS") prepared a brief which essentially adopted many of the points long articulated by domestic violence advocates, including the formulation of Rodi Alvarado's membership in a particular social group.[66] The Immigration Court ultimately granted the applicant asylum based on a stipulation between the parties, but the Immigration Judge's one sentence ruling did not address the issue of the particular social group and has no precedential value. The government's brief on Rodi Alvarado's eligibility, however, made a profound impact on the adjudication of domestic violence-based asylum claims, and enabled women fleeing domestic violence to seek and prevail in their asylum claims.

Similarly, in *Matter of L-R-*,[67] an asylum claim of a Mexican woman based on severe domestic violence led to an important Department of Homeland Security brief stating that, in certain cases, domestic violence can be grounds for asylum. As in Matter of R-A-, an immigration court granted asylum based on a stipulation between the applicant and DHS, which has no binding precedential value. But in its brief, DHS proposed two particular social group formations "which outline a framework under which victims of domestic violence might be able to advance cognizable asylum claims": "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship." Asylum litigants may seek guidance from the DHS brief on the issue of particular social group in asylum claims based on domestic violence as it represents the position of the agency and is binding on asylum officers and DHS trial attorneys.

In a more recent and groundbreaking precedential decision, issued on August 26, 2014, the Board of Immigration Appeals (the nation's highest immigration tribunal) *Matter of A-R-C-G-*,[68] formally recognized domestic violence as a basis for asylum. Specifically the court held that "Married women in Guatemala who are unable to leave their relationship" is a cognizable social group. The court further indicated that particular social groups defined by gender, nationality, and status in a domestic relationship may meet the immutability, particularity, and social distinction requirements.

Procedural Elements for Asylum Seekers

Asylum claims may be brought either affirmatively or in removal proceedings, and involve the filing of an asylum application,[69] the asylum applicant's personal statement, research on conditions in the applicant's home country, and any other supporting documentation, such as witness affidavits, photographs, news reports, and medical evaluations that corroborate physical and psychological trauma. Children living in the United States should be included in the principal application. An affirmative asylum application should be mailed to the USCIS Service Center for the applicant's region.[70]

The Affirmative Interview

The affirmative asylum process is non-adversarial and conducted by specially trained interviewers (a female interviewer may be requested) at a USCIS Asylum Office.[71] While attorneys should attend the asylum interview to observe, make a closing statement, and point out relevant supporting material, they are discouraged from otherwise participating in the process. Typically, applicants return to the Asylum Office two weeks after the interview to personally receive their decision. The regulations mandate that an applicant be interviewed and receive a decision within 150 days of filing her application or she will become eligible to apply for employment authorization.[72]

If the application is granted, the applicant will be designated an asylee, along with any immediate family members included in her application, receive employment authorization, and become eligible to apply for adjustment of status to permanent resident after one year.[73] In addition, she may petition for children living abroad who were not included in the original asylum application.[74]

Asylum In Removal Proceedings

If the application is not approved and the applicant does not have valid immigration status, she will receive a "Notice of Referral" and be placed in removal proceedings, where an immigration judge will hear testimony on the filed application, and a trial attorney representing the government will cross-examine her. If the client had not filed for asylum affirmatively, but only raised the claim after being placed in removal proceedings, she may file the application directly with the immigration court. If the court grants the application, the asylee has the same status as if she had been granted asylum affirmatively. If the application is denied, the applicant may appeal the decision to the Board of Immigration Appeals,[75] and, subsequently, to the U.S. Court of Appeals.[76]

The One-Year Filing Deadline and Withholding of Removal

A grant of asylum offers the promise of sanctuary and stability to the woman fleeing from gender-based persecution. Congress modified the law in 1996 to require that the asylum application be filed within one year of her arrival to the United States.[77] Limited exceptions exist to the one-year bar, and an applicant may file late if she experienced either "changed circumstances" or "extraordinary circumstances."[78] In some cases, a victim may successfully assert that the abuse suffered constituted such an extraordinary circumstance as to prevent a timely filing. Others victims, unable to overcome the strictures of the filing deadline, have sought relief in the form of "withholding of removal."

Withholding of Removal

Like asylum, withholding of removal provides protection to individuals fleeing persecution based upon one of the five enumerated categories.[79] However, while an asylum applicant need only demonstrate a "well-founded fear," an applicant seeking withholding must demonstrate that she faces a "clear probability of persecution," which courts have interpreted as "more likely than not."[80]

Individuals granted withholding are denied many of the benefits available to asylees. While they may work and obtain public assistance, they may not petition for their children or obtain permanent residence.[81] In addition, a grant of withholding of removal only assures that the victim will not be returned to her home country —should the United States find an alternate country that is willing to accept the victim, it may remove her to that country,[82] although this rarely occurs.

Although withholding of removal is seen as a less desirable option compared to asylum, it offers certain protections unavailable in asylum. First, while asylum is a discretionary form of relief, an immigration judge must grant withholding if the applicant meets the standard and is not subject to certain criminal or other statutory bars.[83] Second, the statute and regulations do not preclude applications for withholding of removal that have been filed past the one-year deadline.[84] Consequently, withholding has become an increasingly significant tool for individuals fleeing gender-based persecution who were unable to qualify as an exception to the filing deadline.

Applying for Withholding of Removal

An application for asylum automatically includes a request for withholding of removal.[85] As a practice pointer, it is nonetheless advisable to indicate that the applicant is seeking both forms of relief. While asylum can be granted by either an asylum officer or an immigration judge, withholding can only be granted by an immigration judge.[86]

Convention Against Torture (CAT) Relief

In some circumstances, an applicant for asylum or withholding of removal may not qualify for relief, either because she does not fall within one of the protected grounds or because of statutory bars.[87] In that case, she may seek protection in removal proceedings under the Convention Against Torture

(CAT), which prohibits the return of a person to a country where it is more likely than not that she will be tortured.[88] While the definition of "torture" under CAT differs from "persecution" under asylum law, rape and female genital mutilation have been held to be forms of torture for purposes of a CAT claim.[89] There is no separate application for CAT relief, but the asylum application contains a box to be checked if the applicant seeks CAT relief, and also asks if the applicant has been tortured or fears torture in her home country. If an applicant indicates that she fears torture in her asylum application, the immigration judge is required to consider eligibility for CAT relief.[90] When preparing a request for CAT relief, consult with an experienced mentor.

Special Immigrant Juvenile Status

Immigrant victims under the age of 21 and unmarried who have been abused, abandoned, neglected or otherwise mistreated by one or both parents may be eligible for Special Immigrant Juvenile Status ("SIJS"). Although SIJS was traditionally created as a form of immigration relief for children in the foster care and public child welfare system, since 2009, SIJS' legal definition was expanded to cover children in various forms of state court proceedings, which can include guardianship, custody, juvenile delinquency, and order of protection proceedings.[91] For a young person who has experienced domestic violence at the hands of a parent, or witnessed domestic violence perpetrated by a parent, SIJS may be a viable pathway to lawful immigration status.

To establish eligibility for SIJS, a foreign-born victim present in the United States must demonstrate the following:

- He or she is a child, unmarried and under the age of 21;
- He or she has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States;
- He or she cannot be reunified with one or both parents due to abuse, neglect, abandonment or a similar basis under state law; and
- It would not be in his or her best interest to be returned to his or her country of origin, as determined in a judicial proceeding.[92]

In creating SIJS, Congress delegated to state juvenile courts the task of making these requisite findings of abuse, abandonment, neglect and the best interests of children, thereby recognizing juvenile courts' unique expertise in these matters. SIJS is thus distinct among immigration remedies in that it depends on a predicate order by a state juvenile court judge prior to filing an application with the immigration authorities. To obtain SIJS, a state court must first assume jurisdiction over the child[93] and make requisite findings describing the child's eligibility for SIJS. Typically these findings are set forth in the form of a state court order, referred to in many jurisdictions as a "Special Findings Order."

In addition to the other factual findings regarding the child's age and marital status, the order must clearly state that reunification is not viable with one or both parents and the basis for this finding.[94] The findings of non-viability of reunification due to abuse, neglect, or abandonment depend solely on the applicable law of the state in which the order is being sought. Note that in certain jurisdictions, a parent who perpetrates domestic violence in the presence of a child may be found to have neglected the child.[95] Additionally, the order must state that it is not in the child's best interest to return to her country of origin.[96]

Once these findings are issued by the state court, a child victim can then petition United States Citizenship and Immigration Service (USCIS) for Special Immigrant Juvenile Status and, generally at

the same time, for adjustment of status, commonly referred to as legal permanent residence. While the child's application for permanent residency is pending, the child may also seek work authorization. For child victims in removal proceedings before the Executive Office for Immigration Review (EOIR), the Immigration Court has jurisdiction over the child's application for adjustment of status instead of USCIS.

The benefits for a child with an approved SIJS petition are significant and numerous. The child victim can relatively quickly become a lawful permanent resident, avoid the threat of deportation, work lawfully in the United States, apply for federal financial aid, and ultimately become a United States citizen. The stability to the youth incident to the approval of a SIJS petition may be critical to ensuring her protection from ongoing and future harms including as domestic violence and trafficking.

It should be noted that a child victim who later becomes a United States citizen after having obtained SIJS is not ever able to petition for immigration status on behalf of their parents—even a "non-offending" parent who did not abuse, neglect or abandon the child.[97] A child in a similar situation may, however, submit immigration petitions on behalf of other siblings.

Deferred Action for Childhood Arrivals

While not a form of relief specific to foreign-born victims of domestic violence, Deferred Action for Childhood Arrivals or "DACA" can offer a much-needed avenue to obtain work authorization for certain immigrant victims who might not otherwise be eligible for an immigration remedy. A discretionary administrative relief program announced by President Barack Obama on June 15, 2012, DACA offers individuals who came to the United States at a young age an opportunity to live in the United States without fear of deportation and work lawfully.[98] A subsequent memorandum issued by DHS Secretary, Janet Napolitano, issued on June 15, 2012, sets forth the criteria an immigrant seeking DACA must satisfy:[99]

- He or she must have come to the U.S. before his or her 16th birthday;
- He or she has continuously resided in the U.S. since June 15, 2007 up to the present time;
- He or she was present in the U.S. on June 15, 2012;
- He or she under the age of 31 on June 15, 2012;
- He or she did not have valid immigration status on June 15, 2012;
- He or she is currently in school, has graduated from high school, is working towards a GED, or has obtained a GED certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S., and
- He or she has not been convicted of a felony offense, a significant misdemeanor offense, three or more misdemeanor offenses, or doesn't otherwise pose a threat to national security or public safety.

If eligible for this program, a foreign-born individual may obtain an employment authorization document, valid for two years, and subject to renewal. A grant of DACA may also enable an individual in removal proceedings to argue for administrative closure or termination of the removal case.

Crucially, however, the benefits of DACA are limited. It is not and was not intended to be a pathway to lawful immigration status, permanent residence, or citizenship. An individual who obtains DACA approval, moreover, may not include other family members as beneficiaries in their application.

As a practical matter, an applicant for DACA must submit extensive documentation proving his or her eligibility for the program, particularly for the requirements of physical presence in the country on June 15, 2012, and of continuous residence from June 15, 2007 to the present. Documents that

may be used to satisfy these requirements can be varied and may include employment records, IRS tax transcripts, letters from employers, lease contracts, rent receipts, bills, bank statements, letters from service providers, medical records, birth certificates and other miscellaneous documents indicating a presence in the United States. Note also that the application for DACA requires a considerable fee, which unlike fees for other humanitarian remedies, cannot be waived.

Notes

1. While the remedies discussed are available for domestic violence victims of either gender, this article assumes that the victim is female and the abuser is male.
2. *See* Dep't of Homeland Sec. (DHS), *SecureCommunities*, U.S. Immigration and Customs Enforcement (ICE). www.ice.gov/secure-communities.
3. Of particular note, New York City's Executive Order 41 forbids city agencies, including NYPD, from inquiring about or disclosing the immigration status of a victim who seeks to report a crime. NYC Executive Order [Bloomberg] No. 41 (Sept. 17, 2003), www.nyc.gov/html/imm/downloads/pdf/eo-41.pdf.
4. Pursuant to modified immigration enforcement policy announced by President Obama, Nov. 20, 2014, immigration authorities will focus their enforcement efforts on those who have prior criminal convictions or who pose "a danger to to national security." The highest priority levels for apprehension includes individuals who have been convicted of one "significant misdemeanor," three or more misdemeanors, any felony or "aggravated felony," and any person who poses a risk to national security. Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep't of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodrigues, Directors, U.S. Citizenship and Immigration Services, Aland D. Berson, Acting Assistant Secretary for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.
5. At the State level, on Oct. 6, 2011, Governor Andrew M. Cuomo signed Executive Order 26, which directs certain state agencies including the New York State Police to offer translation and interpretation to people with limited English proficiency. See Executive Order [Cuomo] No. 26 [9 NYCRR 8.26]. Similarly, in New York City, Executive Order 120, signed into law by Mayor Michael Bloomberg in July 2008, requires the New York Police Department (NYPD) and other city agencies to provide translation and interpretation services to all New Yorkers. See NYC Executive Order [Bloomberg] No. 120 (July 22, 2008) www.nyc.gov/html/om/pdf/2008/pr282-08_eo_120.pdf; *see also* Press Release, NYC Office of the Mayor, *Mayor Bloomberg Signs Executive Order 120 Requiring Citywide Language Access* (July 22, 2008) www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2008b%2Fpr282-08.html&cc=unused1978&rc=1194&ndi=1.
6. *See* New York State Office for the Prevention of Domestic Violence, New York State Domestic Violence Hotlines (2014) www.opdv.ny.gov/help/dvhotlines.html; *see also* NYC Mayor's Office to Combat Domestic Violence, Domestic Violence Hotline (2015), www.nyc.gov/html/ocdv/html/help/311.shtml.
7. For example, SAKHI for South Asian Women offers outreach, education and social assistance to domestic violence victims from Bangladesh, India, Nepal, Pakistan, Sri Lanka, and the South Asian Diaspora. *See* SAKHI for South Asian Women Services (2015), www.sakhi.org/programs.
8. New York courts award custody and visitation based on what is best for the child. *See* Domestic Relations Law § 240. This is known as the "best interests" standard. In making a best interests determination judges weigh a variety of factors. *See Friederwitzwer v Friederwitzwer*, 55 NY2d 89 (1982). However, no legal impediment prevents an undocumented parent from prevailing in a custody suit against a parent with immigration status.
9. U.S. law requires that both parents appear in person to apply for the passport of a child under the age of 16, or the non-applying parent must execute an affidavit giving her consent. 22 USC § 213; 22 CFR § 51.28(a). While intended to safeguard minors from being kidnapped abroad, it does not protect children

over the age of 16 or children who carry a foreign passport. Nor are there safeguards to ensure that an abused spouse will not be coerced into executing the requisite affidavit.

10. Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Div C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub L 104-208, 110 Stat 3009 (Sept. 30, 1996), 8 USC § 1367; Memorandum from Paul Virtue, Acting Exec Assoc Comm'r, to all INS Employees, INS File No. 96, act. 036, *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA* § 324 (May 5, 1997) www.asistaonline.org/legalresources/policymemos/384_memo_-_clean_copy.pdf (last accessed July 6, 2015). Separate provisions guard confidentiality of asylum applications. 8 CFR § 208.6; § 1208.6. USCIS is one of three bureaus that replaced the Immigration and Naturalization Service ("INS") as a result of reorganization under the Homeland Security Act of 2002, Pub L 107-296, 116 Stat 2135 (Nov. 25, 2002).
11. 8 CFR § 103.7(c). For guidance on fee waivers, see USCIS Policy Memorandum, *Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions To Adjudicator's Field Manual (AFM) Chapter 10.9,* (Mar. 13, 2011) www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf.
12. For example, the application fees for Deferred Action for Childhood Arrivals, discussed below, cannot be waived.
13. INA § 301 (generally); § 309 (children born out of wedlock).
14. U.S. Department of Homeland Security, Office of Immigration Statistics, U.S. Legal Permanent Residents: 2012 (July 2013), www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.
15. Form I-130. The Petition for Alien Relative, as well as other forms discussed in this article, can be found at the USCIS website, www.uscis.gov/i-130 .
16. Visa eligibility based upon "priority dates" can be checked monthly on the US State Department's website, travel.state.gov/content/visas/english/law-and-policy/bulletin.html.
17. For example, an immediate relative seeking permanent residence in New York City can currently expect to wait about one year before obtaining a green card, while her neighbor in Albany faces approximately a three-month wait. Information on application processing dates can be found at egov.uscis.gov/cris/processTimesDisplayInit.do.
18. The Violence Against Women Act ("VAWA") is part of the Violent Crime Control and Law Enforcement Act of 1994, Pub L 103-322, § 40701-03, 108 Stat 1796, 1902-55 (Sept. 13, 1994).
19. The U.S. government has issued a myriad of types of immigration-related documents. For assistance in understanding the significance of any particular document, see The Forensic Document Library, U.S. Immigrations and Customs Enforcement, *Guide to Selected U.S. Travel and Identity Documents*, Form M-396 (2008), *available at* e-verify.uscis.gov/esp/media/resourcescontents/traveldocguide2.pdf.
20. INA § 101(a)(15)(K), 8 USC § 1101(a)(15)(K).
21. *See* INA § 265(a), 8 USC § 1305(a); 8 CFR § 265.1. A change of address may be reported to USCIS either by sending Form AR-11 by mail or through online submission. Dep't of Homeland Security, *AR-11, Change of Address*, U.S. Citizenship and Immigration Services (Dec. 18, 2014), www.uscis.gov/ar-11.
22. *See* 8 USC § 1229(a); *see also* 8 CFR § 1003.15(b)-(d).
23. INA § 212(a)(6)(B); 8 USC § 1182(a)(6)(B); 8 USC § 1229a (b)(5).
24. INA § 235(b)(1)(A)(i), 8 USC § 1225 (b)(1)(A)(i).
25. INA § 241(a)(5), 8 USC § 1231(a)(5); 8 CFR § 241.8.
26. The Immigration and Naturalization Service (INS) began issuing Alien Registration numbers and creating individual case files, called Alien Files or A-Files, in the 1940s. A-Files contain "all records of any active case of an alien not yet naturalized as they passed through the United States immigration and inspection process. An A-File might also be created without any action taken by the alien, for example if INS initiated a law enforcement action against or involving the alien." National Archives, *Alien Files (A-Files) at the National Archives*, The U.S. National Archives and Records Administration, www.archives.gov/research/immigration/aliens/.

27. FOIA requests must be in writing. Form G-639 may be used, but is not required. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, *How to File a FOIA/PA Request* (Dec. 19, 2014), www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request. See also 28 CFR § 16.3; U.S. Citizenship and Immigration Services, *FOIA Request Guide* (May 6, 2013) www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/How%20to%20File%20a%20FOIA%20Privact%20Act%20Request/USCIS%20FOIA%20Request%20Guide.pdf.
28. For a state-by-state listing of where to direct requests for vital records see Centers for Disease Control and Prevention, *Where to Write for Vital Records* (June 30, 2014) www.cdc.gov/nchs/w2w/w2w.pdf.
29. Pursuant to 8 CFR § 204.1(g)(3), if a VAWA self-petitioner is unable to present primary or secondary evidence of the abuser's status, USCIS will attempt to electronically verify the abuser's citizenship or immigration status from information contained in USCIS records.
30. *See* INA § 212(a), 8 USC § 1182(a).
31. INA § 204(a)(1)(A)(iii), 8 USC § 1154 (a)(1)(A)(iii); INA § 204(a)(1)(B)(ii), 8 USC § 1154 (a)(1)(B)(ii). Children of an abusive USC or LPR parent may self- petition independently. INA § 204(a)(1)(A)(iv), 8 USC § 1154 (a)(1)(A)(iv); § 204(a)(1)(B)(iii), 8 USC § 1154 (a)(1)(B)(iii). In addition, parents of abusive U.S. citizen sons or daughters may self-petition. INA § 204(a)(1)(A)(vii), 8 USC § 1154(a)(1)(A)(vii).
32. The marriage need not have occurred in the United States.
33. The fact that a batterer lost or renounced U.S. citizenship or lawful permanent residence within the prior two years in connection with an incident of domestic violence will not preclude a victim from establishing eligibility. *See* INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb), 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb); see also INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(aaa), 8 USC § 1154(a)(1)(B)(ii)(II)(aa)(CC)(aaa).
34. INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc); INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb), 8 USC § 1154 (a)(1)(B)(ii)(II)(aa)(CC)(bbb). Relief is also available to individuals who believed they were legally married to their abusive U.S. citizen or LPR spouse but the marriage was not legitimate solely because of the bigamy of the abusive spouse and to an individual whose abusive U.S. citizen spouse who died within the past two years. *See* INA § 204(a)(1)(A)(iii)(II)(aa)(BB)-(CC)(aaa), 8 USC § 1154(a)(1)(A)(iii)(II)(aa)(BB)-(CC)(aaa); *see also* INA § 204(a)(1)(B)(ii)(II)(aa)(BB), 8 USC § 1154 (a)(1)(B)(ii)(II)(aa)(BB).
35. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, *Battered Spouse, Children & Parents* (June 18, 2015), www.uscis.gov/humanitarian/battered-spouse-children-parents. *See* INA § 204(a)(1)(A)(iii)(II)(aa), 8 USC § 1154(a)(1)(A)(iii)(II)(aa).
36. *See* INA § 204(a)(1)(A)(iii)(I)(bb), 8 USC § 1154(a)(1)(A)(iii)(I)(bb).
37. INA § 204(a)(1)(A)(iii)(II)(bb), 8 USC § 1154(a)(1)(A)(iii)(II)(bb). The inquiry into good moral character focuses on the three years immediately preceding the filing of the Self-Petition though adjudicators have discretion to look beyond this time period if there is reason to believe that the self-petitioner may not have been a person of good moral character in the past. *See* Preamble to Interim Regulations, 61 Fed Reg 13065-66 (Mar. 26, 1996). Under INA §101(f), certain classes of people are precluded from establishing good moral character including but not limited to habitual drunkards; those whose income is derived principally from illegal gambling; and those convicted of aggravated felonies. INA §101(f), 8 USC § 1101 (f).
38. It is common practice for immigrant spouses of abusive USCs to file the VAWA Self-Petition and application for an adjustment of status (lawful permanent residency) concurrently. Once USCIS has approved the Self-Petition, it will consider the adjustment of status application.
39. Note, however, that if the victim is the beneficiary of an approved family-based petition (Form I-130) filed by her abusive US citizen [USC] or lawful permanent resident [LPR] spouse, she will retain the Priority Date originally assigned to her.
40. *See* U.S. Dep't of State, *Visa Availability & Priority Dates* (Dec. 18, 2014), www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates; see also U.S. Department of State, Bureau of Consular Affairs, Visa Bulletin (2015), travel.state.gov/content/visas/english/law-and-policy/bulletin.html.
41. INA § 216(c)(4)(C), 8 USC § 1186a(c)(4)(C); 8 CFR. § 216.5(a)(1)(iii) (2015).

42. INA §240A(b)(2)(A), 8 USC § 1229b(b)(2)(A).
43. *Id.*
44. Other qualifying crimes include but are not limited to rape, torture, trafficking, incest, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, involuntary servitude, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion and felony assault. INA 101(a)(15)(U)(iii), 8 USC § 1101(a)(15)(U)(iii).
45. INA §101(a)(15)(U)(i)(III), 8 USC § 1101(a)(15)(U)(i)(III).
46. *See* 8 CFR § 214.14(b)(3) (2015); *see also* 8 CFR § 214.14(c)(2)(i) (2015). This may be done with Form I-918 Supplement B.
47. INA §245(m), 8 USC § 1255(m).
48. INA §214(p)(2)(A); 8 USC § 1184 (p)(2)(A).
49. Note that this cap only applies to principal applicants seeking U-1 nonimmigrant status. There is no cap for family members, such as spouses or children, who derive eligibility from the principal.
50. *See* Press Release, Dep't of Homeland Security, U.S. Citizenship and Immigration, *USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year* (Dec. 11, 2014), www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year.
51. *See* Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Performance Analysis System, *Number of I-914 Applications for U Nonimmigrant Status by Fiscal Year, Quarter, and Case Status 2008-2015* (Jan. 2015), www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2015_qtr1.pdf.
52. INA §101(a)(15)(T)(i)(I), 8 USC § 1101(a)(15)(T)(i)(I).
53. Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub L 106-386, § 103, 114 Stat. 1464, 1469-71 (codified as amended at 22 USC § 7102 (2010)).
54. INA § 101(a)(15)(T)(i), 8 USC § 1101(a)(15)(T)(i).
55. 8 CFR § 214.11(h) (2015).
56. *Id.* A signed certification from law enforcement confirming the assistance provided by the applicant will serve as primary evidence of cooperation.
57. INA § 245(l); 8 USC 1255(l).
58. *Id.*
59. *See* Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Performance Analysis System, *Number of I-914 Applications for T-Nonimmigrant Status by Fiscal Year, Quarter, and Case Status 2008-2015* (Jan. 2015), www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2015_qtr1.pdf.
60. *Abebe v Ashcroft,* 379 F3d 755 (9th Cir 2004); *rehearing en banc,* 432 F3d 1037 (9th Cir 2005).
61. *Matter of Acosta,* 19 I&N Dec. 211, 233-34 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *Matter of C-A-,* 23 I&N Dec. 951 (BIA 2006) (social visibility of group an important consideration).
62. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (female genital mutilation); *Gao v Gonzales*, 440 F3d 62, 66-70 (2d Cir 2006) (forced marriage in China). For asylum case outcomes in various gender-based cases, see Center for Gender and Refugee Studies, cgrs.uchastings.edu/search-cases (accessed July 6, 2015). Unpublished grants, while persuasive in some instances, do not have precedential value. At least one court has rejected classifying "young, attractive women" at risk for prostitution as a social group for asylum purposes, *Rreshpja v Gonzales*, 420 F3d 551 (6th Cir 2005), and a practitioner submitting an application on these grounds should consult a mentor experienced in gender-based asylum law.
63. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2002) (woman with liberal Muslim beliefs who suffered abuse at the hands of her father); *Ali v Ashcroft*, 394 F3d 780 (9th Cir 2005) (rape on account of social group membership in a clan and political opinion), *Safaie v INS*, 25 F3d 636 (8th Cir 1994) (opposition to the Iranian government may be both political opinion and particular social group).
64. *Matter of R-A-*, 22 I&N Dec. 906 (AG 2001; BIA 1999), remanded by AG, 23 I&N Dec. 694 (AG 2005).

65. *Id.* at 917.
66. For a summary of the procedural history of *Matter of R-A-*, see Joe Whitley, General Counsel, US Dep't Homeland Security, File No. A73 753 922, Dep't of Homeland Security's Position on Respondent's Eligibility for Relief, 7-8 (Feb. 19, 2004) (hereinafter "DHS 2/19/04 Brief") cgrs.uchastings.edu/our-work/matter-r.
67. *Matter of L-R-*, summary order issued by Immigration Judge, Aug. 4, 2010; Dep't of Homeland Security's Supplemental Brief, Apr. 13, 2009.
68. *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (BIA 2014).
69. Form I-589, www.uscis.gov/sites/default/files/files/form/i-589.pdf.
70. *Id.*
71. Affirmative Asylum Procedures Manual, AAPM], Asylum Division, RAIO, USCIS (Nov. 2013), www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf (accessed July 6, 2015).
72. 8 CFR § 208.7(a)(1).
73. INA § 209; 8 CFR § 209.2.
74. Form I-730, Petition for Refugee/Asylee, www.uscis.gov/sites/default/files/files/form/i-730.pdf.
75. 8 CFR § 1003.1(b).
76. INA § 242(a)(1).
77. INA § 208(a)(2)(B). For the government's analysis of the one-year filing provisions, see USCIS, *Asylum Officer Basic Training Course, One-Year Filing Deadline* (2009) www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf.
78. INA § 208(a)(2)(D); 8 CFR § 208.4(a)(4), (5).
79. INA § 241(b)(3).
80. *INS v Cardoza-Fonseca*, 480 US 421, 423 (1987); *INS v Stevic*, 467 US 407 (1984).
81. *Camara v Holder*, 705 F3d 219, 224 (6th Cir 2013); *Cendrawasih v Holder*, 571 F3d 128, 133 (1st Cir 2009).
82. *Cardoza-Fonseca, supra* 480 US at 428-29.
83. INA § 241(b)(3)(B); 9 USC § 1231(b)(3)(b) (sets forth grounds for disqualification for withholding); *see also Matter of Lam*, 18 I&N Dec. 15 (BIA 1981); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); Osorio v INS, 18 F3d 1017, 1021-1022 (2nd Cir 1994); *INS v Aguirre-Aguirre*, 526 US 415, 419-20 (1999).
84. INA § 208(a)(2)(B); 8 CFR §§ 208.4(a), 1208.4(a).
85. 8 CFR §§ 208.3, 1208.3.
86. 8 CFR § 208.16(a); § 1208.16(a) (Asylum officer may not decide withholding claim); *see also Matter of I-S- & C-C-*, 24 I&N Dec. 432 (BIA 2008).
87. INA § 241(b)(3)(B).
88. 8 CFR §§ 208.16, 208.17; §§ 1208.16, 1208.17; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, G.A. Res. 29/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/Res/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985) (entered into force June 26, 1987). The CAT was enacted into U.S. law on Oct. 21, 1998 by Fiscal Year 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, PL 105-277, Div. G, Sub. B., Tit. XXI § 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, 112 Stat. 2681-822, 105th Cong. 2d Sess. (1993) [FARRA]; 144 Cong. Rec. H110444-03; 136 Cong. Rec. S17486, 36198 (1990); Committee on Foreign Relations, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, S. Ex. Rept. 101-30, 101st Cong. 2d Sess. (Aug. 30, 1990).
89. 8 CFR § 208.18(a), § 1208.18(a) (definition of "torture" under CAT); *see Tunis v Gonzales*, 447 F3d 547, 550 (7th Cir 2006) (affirming that FGM may be considered torture); *Kone v Holder*, 620 F3d 760, 765-66 (7th Cir 2010) (where child may be subject to FGM if returned to country, parent may suffer direct psy-

chological harm cognizable under CAT); *Zubeda v Ashcroft*, 333 F3d 463, 472-73(3d Cir 2003) (finding that rape can constitute torture).

90. *See Eduard v Ashcroft,* 379 F3d 182, 195-96 (5th Cir 2004); 8 CFR § 208.18(b), § 1208.18(b).
91. *See* 8 USC § 1232(d)(2).
92. *See* INA § 101(a)(27)(J).
93. Federal law requires that a "juvenile court" issue an order with factual findings establishing SIJS eligibility. *See* INA § 101(a)(27)(J). A juvenile court is defined as any "court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 CFR § 204.11(a). Depending on state law, an attorney may seek SIJS findings before local courts that exercise jurisdiction over children in a wide variety of settings, including dependency, family, probate, and delinquency courts. The specific court to which an attorney petitions on behalf of the child will vary in each jurisdiction.
94. *See* 8 CFR § 204.11(d)(2).
95. *See e.g. In re Ezekiel C.*, 12 AD3d 333 (1st Dep't 2004).
96. 8 CFR § 204.11(d)(2).
97. INA § 101(a)(27)(J)(iii)(II).
98. Note that although President Obama announced a more expansive version of DACA on November 20, 2014, sometimes referred to as "DACA-E", this new program is currently and indefinitely unavailable as an immigration remedy. A related program announced by President Obama for parents of United States citizens, and known as Deferred Action for Parental Accountability ("DAPA") is similarly unavailable due to recent judicial intervention. On Feb. 17, 2015, a Federal District Court in Texas issued a preliminary injunction preventing USCIS from accepting requests for DAPA and the expansion of DACA, a decision affirmed by the Fifth Circuit Appellate Court on May 26, 2015.
99. USCIS Memorandum, Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 14, 2012) www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

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Emerging Issues: FGM, Forced Marriage, Honor Violence & Trafficking

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Like other domestic violence victims, abused immigrant women have often been subjected to multiple forms of violence and exploitation throughout their lives, from rape and workplace sexual harassment to child sexual abuse. Lawyers representing victims of spousal and intimate partner abuse who have endured other forms of gender-based violence must be aware that these experiences often intensify the victim's trauma and may require referrals to specialized social service and health care providers as well as to other legal professionals. Advocates for immigrant women may find this situation particularly daunting; the violence may have taken place in a form with which you are unfamiliar by perpetrators other than a spouse or partner. Your client may also be more forthcoming about domestic violence than other forms of abuse — for example, forced marriage or female genital mutilation (FGM) — because they are unaware that there are also legal protections in the United States against these other practices. As a result, your client may have urgent needs that you are unaware of and rights that, as a consequence, are never vindicated.

This article will explore several prevalent forms of gender-based violence and exploitation with which lawyers representing immigrant domestic violence victims should be acquainted. Awareness of them will not only enable you to understand better your client's experience and make appropriate referrals; it may also strengthen her immediate legal case and enable you to pursue all available legal strategies that will further her safety and stability.

Trafficking and Prostitution

You may learn that your client was subjected to trafficking and/or prostitution. Trafficking in persons, in essence, is the reduction of human beings to chattel bought and sold for sexual exploitation or forced labor.[1] While both sex trafficking and labor trafficking are severe human rights violations, the former, which typically involves rapes by multiple strangers on a daily basis, often for years, is the most prevalent form of trafficking[2] and is often the most devastating to victims' physical and mental health. Most victims of trafficking — the U.S. government estimates approximately 80% — are women and girls.[3] For trafficked women and girls, labor trafficking may resemble sex trafficking: female labor trafficking victims are often sexually exploited and abused by their male employers.

Many sex trafficking victims are recruited through fraudulent offers of legitimate work as nannies or receptionists, and then forced into prostitution through debt bondage and threats of violence. Traffickers often confiscate their victims' passports and other documents in order to solidify their control. Other victims are driven into sex trafficking, not through fraud or coercion by a trafficker, but as the result of pressure to provide income to their impoverished families or an attempt to escape an abusive family member, usually a sexually abusive male relative or battering spouse. Some

trafficking victims are sold into sex slavery by members of their families or communities. Trafficking victims may have been exploited in local sex industries before being trafficking internationally.[4]

Domestic violence victims have been induced into trafficking through all of these routes. In one case handled by Sanctuary for Families, the New York City-based domestic violence service provider for which we work,[5] the client, a young mother from Hungary, was brought into the United States by her abusive husband who forced her to work in a strip club in the Bronx and give him all of her earnings. He later returned to Hungary with their son and told her that she would never see the child again if she didn't continue to work in the club and send him the money she earned. Another victim told her story at a conference in Dhaka, Bangladesh organized by the Coalition Against Trafficking in Women.[6] A battered wife in rural Bangladesh, she fled from her brutal husband to her childhood home, only to discover that her family refused to take her back. With few if any options, she acquiesced to the demands of traffickers and, resigned to fate, entered a brothel in Dhaka.

The number of trafficking victims is hard to pin down because definitions of trafficking vary, trafficking is usually hidden, and most victims are afraid to report. The United Nations has estimated that between 700,000 and 2 million women and girls are annually trafficked across international borders.[7] The U.S. State Department estimates that as many as 17,500 victims of trafficking cross U.S. borders each year.[8] None of these figures includes the most prevalent form of trafficking — domestic trafficking that takes place within countries.

Many prostituted women are domestically trafficked — subjected to commercial sexual exploitation by pimps or other traffickers within national borders. Although trafficking need not involve movement, domestic trafficking victims are frequently moved by their exploiters to locations far away from the victims' support systems both to cement the traffickers' control and because sex buyers like novelty. Like abusive partners, traffickers and pimps employ all of the strategies of coercive control — isolation, threats, sexual abuse, and economic control — and may not even need to resort to overt violence to secure control because they have obtained it through more subtle means of domination.[9]

Immigrant women, especially undocumented immigrants in conditions of economic hardship, are particularly vulnerable to domestic traffickers. One such victim, a client of Sanctuary for Families, had been a successful model in her native Brazil and came to the United States to advance her career. When her visa expired, she could no longer obtain legitimate work. A limo driver, who served as a recruiter for traffickers, encouraged her to work for an "escort" agency and began supplying her with drugs that "eased" her transition into prostitution. Before long the limo driver was not only her drug supplier, but her boyfriend, batterer, and pimp.

Domestically prostituted women have often endured many different kinds of gender-based violence, beginning in childhood and continuing through adolescence and adulthood. Research demonstrates that between 60% and 80% of prostituted adults are victims of incest and related forms of child sexual abuse.[10] Indeed many experts believe that most people in prostitution are first exploited as minors.[11] Cross-culturally, prostituted adults sustain exceedingly high rates of battering, rape, and murder and are the targets of many different kinds of predators, including pimps, sex buyers, and even serial killers. One Canadian study found that prostituted adults have a mortality rate that is forty times higher than that of adults who have not been subjected to prostitution.[12]

Whether your client has been trafficked across international borders or subjected to trafficking or prostitution here in the United States, her experiences may have considerable ramifications for her legal situation. If she wants to initiate a criminal case against her exploiters or obtain protection from the criminal justice system, you will need to help her make a police report, arrange a meeting with the local district attorney, or contact federal criminal justice authorities, such as the FBI and the U.S. Attorney.[13] Before your client meets with criminal justice authorities, you should obtain the assurance that she will not be charged criminally and will not be pressured or forced to cooperate.

If your client has been arrested for prostitution, you may need to intervene with law enforcement to help the authorities understand that she is not a criminal but a victim. A conviction for prostitution is far from trivial. If your client has children, a criminal investigation or conviction for prostitution could result in the initiation of a child welfare investigation or a civil charge of child neglect or could be used against her in a custody dispute. You may confront and have to challenge a double standard that blames your client for her sexual exploitation while ignoring the role that her male partner played as pimp or customer. Educating investigators, prosecutors, law guardians and fact-finders about trafficking and sexual exploitation and helping them understand that victims of these practices are often good, protective mothers will be a critical part of your advocacy.

Prostitution arrests and convictions could also defeat your client's efforts to win legal immigration status, although in certain circumstances she can obtain a waiver from this bar to admissibility into the United States.[14] If your immigrant client has been convicted of prostitution, refer her immediately to an immigration lawyer with expertise in immigration law remedies for victims of gender-based violence.

Your client's ordeal as a victim of trafficking or other form of sexual exploitation may render her eligible for certain kinds of immigration relief. Victims of "severe trafficking" (trafficking involving force, fraud, or coercion) who are willing to cooperate with the investigation or prosecution of their exploiters and can demonstrate that they would suffer "extreme hardship" if returned to their home countries may be eligible for T Nonimmigrant Status under the Trafficking Victims Protection Act (TVPA).[15] If your client has suffered substantial physical or mental abuse as the result of having been prostituted or trafficked and cooperates with the investigation or prosecution of her exploiters, she may be eligible for three-year U Nonimmigrant Status.[16] If your client's ordeal as a victim of trafficking or prostitution resulted in persecution in her country of origin or if your client faces a well-founded fear of future persecution because traffickers and/or their confederates may harm her upon her return to her native country, or because she may be severely ostracized by others in her country for having been prostituted, she may be eligible for asylum.[17] Finally, if your client in good faith married her pimp, trafficker, or customer, if he was a US citizen or permanent resident, and if she was subjected to "battery or extreme cruelty," she may be eligible under the Violence Against Women Act (VAWA)[18] or to self-petition for permanent residence[19] or to apply for a battered spouse waiver to remove conditions on her temporary green card.[20]

In addition to immigration relief, your client is likely to face hurdles in obtaining employment and housing without assistance.[21] You may need to help her to vacate her convictions so that she can finally move forward and rebuild her life. Several states have passed vacatur statutes for victims of trafficking, beginning with New York State in 2010.[22] In 2013, New York also became the first state to establish a statewide system of Human Trafficking Intervention Courts, in which specially trained judges identify individuals with convictions who are in fact trafficking victims and refer them to appropriate services, including immigration, health care and drug treatment, housing, and job training.[23]

Even if your client's experience as a victim of trafficking and/or prostitution is irrelevant to her legal case, it will likely have an impact on your interaction with her. She may feel mistrust, fear, and shame that will make it difficult for her to disclose information about the exploitation and abuse. You should remind her of your duty of confidentiality and reassure her that she is not to blame for what was done to her. Your client may also have mental and physical health needs triggered by the sexual exploitation. Research demonstrates that, cross-culturally, people exploited in prostitution sustain exceptionally high levels of post-traumatic stress disorder and other psychological harms, such as depression. Prostitution often has a devastating effect on victims' physical health, leading to sexually transmitted diseases, including HIV/AIDS, which can severely damage the reproductive and immune systems. Some individuals who have been sexually exploited become dependent on alcohol or drugs either because their abusers sought their addiction as a tactic of control or because the victim used substances to numb the psychic pain caused by sexual exploitation and abuse.

Identifying appropriate and available health services and substance abuse programs can be challenging.[24] Just as few of these programs were designed to address the complex needs of victims of domestic violence, even fewer are capable of addressing the multifaceted needs — cultural, linguistic, psychological, and medical — of victims of trafficking and prostitution. You should connect with an organization with experience serving victims of trafficking to help you explore clinics offering free/affordable and tailored healthcare.

Internationally-Brokered Internet Marriages

Exploitation by the international marriage broker (IMB) industry is closely akin to exploitation by the sex industry. IMBs, some of which double as sex tourism operators, recruit girls and young women from developing countries as brides for comparatively affluent Western men. Typically the brokers promote racial and ethnic gender stereotypes that portray the potential "Internet brides" as willing sex objects and happily submissive domestic servants.[25] Here is a testimonial displayed on one website: "Russian Brides' Live Chat should be re-named Hot Chat, it's so over the top rousing and really get's [sic] my juices flowing.… The photos on this site are even hotter than what you'll find in Playboy or Maxim. These girls are naturals, such specimens.… The chicks in these places are unbelievable, and Russian Brides has them, served up on a silver platter with all the garnish!"[26]

At the same time that IMBs recruit potential grooms by promoting such sexist and racist stereotypes, they recruit immigrant brides by promising them that their future American husbands will be more understanding and egalitarian than men from their own countries. The result is a clash of expectations and gross imbalance of power that all too frequently results in domestic violence. There have even been several highly publicized deaths of Internet brides.[27] To try to prevent such abuse, Congress passed the International Marriage Broker Regulation Act of 2005 (IMBRA).[28] The law requires background checks for all marriage visa sponsors, limits serial visa applications, and requires background checks for American citizens using IMBs.

In a 2003 conference for domestic violence service providers organized by the New York State Coalition Against Domestic Violence, half the counselors in attendance had assisted immigrant women in Internet brokered marriages who had become victims of domestic violence.[29] Interviews with victims of the Internet bride trade represented by Sanctuary for Families reveal that the women, several of whom came to the United States with their children, genuinely hoped for warm, loving, and supportive husbands with whom they could build families. Often the men portrayed a falsely wholesome and affluent picture of their lives in the United States that induced their victims to give up apartments and jobs in their home countries. Soon after they arrived, the women were confronted with a depressing and violent reality. Their new husbands were substance abusers, sex industry consumers, or men with criminal backgrounds, including a history of prior domestic violence.

When Internet marriages turn violent, victims need the same kinds of protection as other domestic violence victims. Explore with your client the possibility of calling the police to initiate a criminal prosecution and obtain a criminal order of protection. Also discuss with her the advantages and disadvantages of filing for a civil order of protection in Family Court or as part of the interim relief in a matrimonial action.

Like women and girls who have been prostituted, victims of the Internet bride trade are often subjected to misogynistic stereotypes. The popular media and commercial movies have portrayed the immigrant Internet bride[30] as a gold-digging "Natasha," in pursuit of a green card, who preys on vulnerable, lovelorn American men.[31] Be prepared to confront the derogatory stereotypes of victims of the IMB industry and educate the court and any other key players in your case about the reality of your client's situation. Unless challenged, these stereotypes will undercut your client's credibility

and increase the difficulty of persuading authorities to pursue appropriate action, such as prosecuting her American husband for marital rape or granting her immigration relief.

Even when their husbands refuse to serve as their immigration sponsors, victims exploited by IMBs and their clients are likely to be eligible for immigration law relief. Women who can establish that they married their American husbands in good faith and were subjected to battery or extreme cruelty may be eligible to self-petition under VAWA or, if already a temporary permanent resident, to apply for battered spouse waivers. Women in IMB marriages subjected by their husbands to forced labor or sexual exploitation through fraud, force, or coercion may be able to establish the requirements of "severe trafficking" under the Trafficking Victims Protection Act. If they are willing to cooperate with the investigation and prosecution of a trafficking case and they face "extreme hardship" in their home countries, they may be eligible for T Nonimmigrant Status. Victims of the IMB industry who have suffered substantial physical or mental abuse as the result of crimes committed against them by their husbands, such as rape and domestic violence, and who cooperate with the investigation and prosecution of these crimes are eligible for U Nonimmigrant Status. For further discussion, see chapter 22.

Regardless of whether or not your client's exploitation through the IMB industry is relevant to her legal case, keep in mind the vulnerable situation she is in. As you would for other domestic violence victims, engage in safety planning, explore whether domestic violence shelter is an option, and discuss referrals for counseling to help her cope with her trauma.

Child Marriage and Forced Marriage

You may discover that your client was betrothed and married as a child and/or was forced into a marriage as an adult against her will. Child and forced marriage is a global phenomenon affecting every region of the world. In 2011, the United Nations estimated that one in three women age twenty to twenty-four were married as minors.[32] In 2011, a national survey by the Tahirih Justice Center also revealed as many as 3,000 known and suspected cases of forced marriage in the United States, in immigrant communities from at least 56 different countries as well as nonimmigrant communities.[33] Based on experience and significant anecdotal evidence, however, advocates believe this figure to be significantly lower than the actual prevalence of forced marriage in the United States.[34] Forced marriage is highly underreported because victims may first report spousal abuse after the marriage has already taken place and because forced marriage is often confused with arranged marriage.

Forced marriages should be distinguished from arranged marriages, where family matchmakers recommend but do not impose eligible suitors on marriage-aged sons and daughters.[35] In contrast, a forced marriage is a marriage without full, free, and informed consent of one or both spouses.[36] A victim of forced marriage may lack capacity to give valid consent to marry for reasons such as age or disability. Other victims of forced marriage may be married against their will under intense pressure and coercion, emotional abuse, deception or fraud, physical violence, and threats of harm to the victim herself or to vulnerable family members close to her, such as her mother or younger sibling. Even if a client said "yes" to a marriage, her acquiescence is only as meaningful as her ability to say "no."

The dynamics of intimate partner violence are often seen in forced marriages. Power and control tactics used by abusers to prevent victims from refusing a marriage are often similar to those used by abusive spouses to prevent victims from leaving a marriage. Sanctuary advocates have worked with women and girls who were raped by their partners and then coerced into marriage under threats to expose their "sexual history" to family and community members. Even if the woman opens up about the sexual abuse to relatives, her family might turn her away, blaming her for being "promiscuous"

and bringing the situation on herself, or viewing this as an opportunity to pass her off as someone else's financial burden.

Family members are not only bystanders and accomplices to forced marriage cases; they may be the primary perpetrators in carrying out a forced marriage. Forced marriages are often justified by abusive relatives as a necessary way to control their children's sexual behavior. In one Sanctuary for Families case, an Ecuadoran woman was forced by her parents to marry a male classmate when she was a young teenager after a relative saw them speaking after church and her parents falsely accused her of dating and having sex with him. Later the husband subjected her to years of severe physical violence, all the while reminding her that he never wanted to marry her and blaming her for ruining his life.

Parents who fear the "westernization" of their daughters may also take them back to their home countries, perhaps on the pretext of a vacation, the illness of a family member, or another relative's wedding, and force them into marriages. Sanctuary's legal staff represented a Palestinian-American teenager, whose father had forced her into a marriage during a family vacation in Jordan, in a divorce action against her husband, who raped and beat her until her mother engineered her escape. Back in the United States, the young woman was beaten by her older brother, who was furious that she had defied her father's wishes. Lawyers have also encountered cases in which immigrant parents pressure or force their daughters, who hold permanent resident status or U.S. citizenship, to sponsor a fiancé or husband from their home country. Assisting families to carry out such plans is highly unethical. Alerting immigration authorities to the plight of such a victim, while stressing the importance of keeping her communication confidential, may protect her from having to marry or cohabit against her will.

Forced marriage victims may need protection from the criminal justice system to prevent family members from coercing them into marriages or retaliating against them. Protection is also available in Family Court, where victims can initiate family offense proceedings to obtain civil protective orders against coercive relatives and child welfare authorities can initiate neglect and abuse proceedings against abusive parents. In New York State, criminal and family offenses applicable in forced marriage situations include assault, sexual abuse, stalking, reckless endangerment, and, as of 2013, coercion which may be grounds for preventing a forced marriage even before the abuser has resorted to physical violence.[37]

If your client has already been forced into marriage, she may be able to dissolve it. A marriage is voidable and may be annulled by the New York Supreme Court if the victim was under the age of consent, was unable to consent due to lack of mental capacity, or was subject to fraud or duress.[38] Alternatively, if annulment is not a practical option for your client, she may file for divorce on grounds of irretrievable breakdown of relationship or cruel and inhuman treatment.[39]

Forced marriage victims are also eligible for a wide range of immigration options available to other victims of gender violence. If your client is under the age of 21, cannot return to her home country, and was abused by one of her parents through coercion into marriage,[40] she may be eligible for Special Immigrant Juvenile Status, as long as she has not already been married.[41] A child under 21 who is facing forced marriage but has not yet been married may also be able to self-petition under VAWA or obtain a battered child waiver if the abusive parent is a permanent resident or U.S. citizen.[42] See Chapter 22.

Forced marriage is often followed by forced consummation of the marriage and continued rape, forced pregnancy, and other physical violence. If your client has been forced into marriage, she may self-petition for permanent residence or obtain a battered spouse waiver if her permanent resident or U.S. citizen spouse subjected her to battery or extreme cruelty. Regardless of age or current marital status, a victim of child or forced marriage may be eligible for U nonimmigrant status if she suffered substantial physical or emotional harm as a result of crimes committed by her family members or

partner and cooperated with law enforcement. Women and girls who have been coerced into domestic servitude or sexual slavery, perhaps through the payment of a "bride price" from the groom, may be eligible for T nonimmigrant status as a trafficking victim willing to cooperate with law enforcement.

Finally, victims of child or forced marriages who reject suitors picked by their families or flee the spouse imposed on them may face retaliation in their home countries, ranging from ostracism to outright violence and even death. Such persecution may form the basis of a viable asylum claim, especially if there is evidence that the government sanctions child or forced marriage and/or is unwilling or unable to protect girls and young women forced into such marriages.

Female Genital Mutilation

Your client may have been subjected to or fear female genital mutilation (FGM), also known as female genital cutting (FGC).[43] The World Health Organization, which defines FGM as "the partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons," estimates that as many as 140 million women and girls have been subjected to FGM with at least 30 million girls at risk each year.[44] FGM is most prevalent in 29 countries in Africa and the Middle East, with the highest prevalence rates in Somalia, Guinea, Djibouti, Egypt, Eritrea, Mali, Sierra Leone, and Sudan, and is also practiced by certain groups in Asia.[45]

Although there is a common misconception that FGM is a religious requirement, particularly under Islam, FGM is not specific to any one religious group and is practiced by Muslims, Christians, and animists alike in some countries.[46] In fact, FGM has been specifically condemned by religious leaders as contrary to Islam and Christianity.[47] FGM is rooted not in religion but in the patriarchal belief that female sexuality is dangerous to the stability of families and communities and that women's genitalia is unclean; it goes hand-in-hand with the kinds of subjugation of women that breed severe and pervasive domestic violence.[48] In countries in which FGM is systematically practiced, girls and women who have not been cut are considered dirty and unchaste and are not marriageable. FGM is therefore a common prerequisite to forced marriage. As one client from Burkina Faso told Sanctuary for Families: "In my village, FGM is seen as a way to 'clean' a girl of whatever she might have done before, to make her pure for her husband."[49] FGM is also frequently followed by domestic violence and marital rape. Victims are often cut in order to ensure they conform to preconceived notions of femininity, such as docility. Moreover, in spite of her gynecological trauma, a woman who has undergone FGM is still expected by her spouse to perform sexually.

FGM is demanded not only by families but also by communities and is often performed while the girl is only a baby or toddler. In some communities, young adolescent girls are gathered as a group and cut as part of an initiation ceremony into womanhood. Victims often believe that they have been invited to a joyous feast, and are shocked and terrified when they learn that they will be cut. Mothers and other family members reluctant to have their daughters cut face enormous community pressure to accede to the practice, and they must vigilantly guard their daughters so that they are not spirited away during "cutting" season and subjected to FGM against the parent's will. Mothers of uncut daughters who wish to return to their FGM-prone home countries for a visit should be warned that extended family members, often grandmothers and aunts, and even unrelated community members have been known to take girls to be cut while their mothers are otherwise occupied.

Adult women may also be subjected to FGM, often as a form of punishment for transgressing gender norms. A FGM survivor from Egypt explained to Sanctuary lawyers that her parents forced her to be cut after she fled from her abusive husband and sought to divorce him. Other women are forced to undergo repeated FGM if, for example, their husbands or in-laws believe they were not cut sufficiently the first time around.

The severity of FGM varies. The most common forms of FGM include clitoridectomy, which involves the removal of the clitoris, and removal of some or all of the labia minora. The most drastic form is full infibulation, in which all of the external genitalia is removed and most of the vagina is sealed shut with stitches or glue. The effects of FGM on adult women who have survived the practice range from diminished or extinguished sexual pleasure to excruciating pain, infections, and injury during urination, menstruation, sexual intercourse, and childbirth. Because the procedure is usually performed with unsterilized tools, such as knives, scissors, broken glass, and razor blades, and without anesthesia or antiseptics, by elderly women assigned the role of "traditional cutters," many girls subjected to FGM are infected by the cutting and a number die from septic shock and unchecked loss of blood.[50]

Although FGM is illegal in several of the countries in which it is systematically practiced, few governments have the resources and political will to investigate and prosecute crimes of FGM. Indeed, in most such countries, perpetrators operate with impunity. Lawyers representing immigrant women who suffered from FGM often learn that their clients fled to the United States to protect their daughters from being cut.

Unfortunately moving to the United States does not necessarily extinguish the risk of FGM. Evidence has surfaced that FGM has been practiced in some immigrant communities of major American cities, including New York City.[51] It is believed that FGM has been carried out covertly in the United States by traditional practitioners and by health care providers, who agree to make symbolic "clitoral nicks" so as not to question the "cultural practices" of their patients' families. International human rights organizations and advocates have opposed such symbolic practices, contending that they violate women and girls' right to bodily integrity and autonomy.[52]

Many states, including New York, have passed legislation criminalizing the practice of FGM.[53] At the federal level, subjecting minors to FGM has been criminalized since 1996.[54] The criminal statutes do not make an exception for clitoral nicks, and the federal law explicitly excludes "culture" as a defense to the performance of FGM. In recent years, however, advocates have become aware of a growing phenomenon called "vacation cutting," in which girls and young women are sent abroad — often under the pretext of learning more about their parents' home countries while on vacation — and are forced to undergo FGM once there.[55] In response, the US government banned the transport of minors overseas for the purpose of FGM through the 2013 Transport for Female Genital Mutilation Act.[56] Lawyers representing victims of domestic violence from countries in which FGM is systematically practiced should warn their clients with daughters who have not yet been cut that FGM is a crime in the United States and that parents could be subjected to prosecution if they cooperate with the practice of FGM or knowingly consent to the procedure.

Be aware that opposition to the practice of FGM could put your client at odds with the wishes of her husband and extended family and could heighten the risk of domestic violence. If your client and/or her daughter are at risk of harm because of your client's opposition to FGM, explore with your client the viability of initiating criminal action or a civil protection order case. Because FGM is included in the list of qualifying criminal activities for the purposes of U nonimmigrant status,[57] your client may also be eligible for immigration relief if the crime occurred in the United States and she cooperated with law enforcement.

If your client has survived FGM or if she or her daughter(s) are at risk of the ritual upon return to their home country, they may be eligible for asylum. In a landmark case in 1996, the Second Circuit Court of Appeals granted a young woman from Togo asylum after she fled Togo into first Germany and then the United States to prevent her extended family from subjecting her to FGM.[58] Since then, immigrant mothers living in the United States who face violence due to their opposition to their daughters' FGM if forced to return to their home countries have won battles against deportation and for asylum.[59]

"Honor" Killing

Tragically, the lives of many victims of gender-based violence end in homicide at the hands of abusive spouses and relatives. You may learn that your client's life is in imminent danger of such violence in the purported defense of spousal or family "honor" ("honor killing").

Violence in the name of "honor" is not condoned by any religion.[60] Although such honor killings have been reported in the Middle East and South Asia and covered by the media, the United Nations has found that such crimes also occur in other countries in Latin America and Sub-Saharan Africa, as well as in Western Europe and North America.[61] In Brazil, for example, husbands who murdered their wives were able to assert a government-recognized "defense of honor" up until 1991, when honor killings were outlawed.[62] In such cases, domestic violence often plays a role in honor-related violence. Jealousy is a hallmark of batterers, who often become convinced without a shred of evidence that their wives or girlfriends are cheating on them. And abusive spouses often believe their partners dishonored them by attempting to leave the marriage, seek divorce, or pursue legal action against domestic violence.

For some victims of domestic violence, their own natal families pose as much of a danger as their abusive spouses. In some traditional societies, a family's honor is measured by the perceived chastity and fidelity of the women in that family.[63] Even a rumor, however ill-founded, can stain the family's honor and leave the men of the family convinced that they have only one choice: to eliminate the stain by eliminating its perceived source — the woman or girl who is the subject of the rumor.

When a jealous husband confides his unfounded suspicions to his wife's family members in a society that supports honor killing, the outcome can be deadly. In one case handled by Sanctuary for Families, an honor killing plot against a young mother was triggered by her husband's discovery that a pair of her underwear was missing. Convinced that she had betrayed him, the husband tortured her by burning her all over her body with a heated drill bit, taped a forced confession he elicited from her through this torture, left her comatose, and then reported back to her brothers in Syria that his actions were justified in the name of "honor." The young woman's brothers immediately convened a family meeting at which they concocted a plot to kill her.

Although honor killings are commonly assumed to be punishment for adultery, women and girls have been threatened with death or killed by their families for leaving the family compound without an explanation, for having a friendly conversation with a male neighbor, for rejecting a suitor selected by the family, and for running away from her husband after being forced to marry him.[64] In another Sanctuary for Families' case a young mother from the Punjab region of Pakistan—the region with the highest global incidence of honor killings—fled her abusive husband and entered a domestic violence shelter in Brooklyn. Her husband contacted her brothers in Pakistan and informed them that she had left him for another man. At a family meeting held soon after, the brothers vowed to kill her.

Other Sanctuary clients have been threatened with honor killings by relatives even without any involvement from an abusive husband. One Gambian client fled to the United States from her extended family's death threats after she resisted FGM, married a foreign man of her own choosing, and refused to have their daughters cut. Her relatives saw her actions as an affront to the norms of their community and accused her of disgracing the family's reputation and honor. Some women and girls are also at risk of murderous retaliation by their relatives not because of any actions of their own, but rather because of they were raped or trafficked into prostitution. Ignoring their victimization, relatives blame these women for transgressing and thereby shaming their families.[65]

Women and girls threatened with honor killing are not only in danger in their home countries; they can be at grave risk here in the United States. If you learn that your client has been the target of honor-related threats or violence, discuss with her the option of notifying criminal justice authorities

and obtaining a criminal order of protection. If your client remains in the same home as those who are threatening her, she should be made aware that a police visit could trigger plans to remove her from the United States to a country where honor violence is treated with impunity. Shelter can be the only way to protect the safety of a victim in this situation. Pursuing a civil order of protection or other family law relief may not be advisable in these situations because such court action will require the victim to serve the threatening family members, who will then have access to her during court dates.

In such cases, the victim's own community may pose a danger. It is important that your client avoid locations where community members may spot her and report her whereabouts to her family. Lawyers representing victims of honor violence must work closely with domestic violence service providers to insure that the victims' locations are kept confidential. Although there are no shelters or safe houses specially tailored to the needs of victims of honor violence, you can help advocate for your client to enter a confidential domestic violence shelter by educating staff of the imminent danger facing your client and the similarities between honor violence and the kind of family violence the shelters are familiar with. In some cases, however, to protect your client's safety, it may be necessary for her to relocate to another jurisdiction within New York State or even to another state.

Women and girls threatened with death by their families in their home countries often have strong claims for asylum because most of the countries where honor killing is practiced have not taken adequate steps to protect victims. In some of these countries perpetrators of crimes of honor are rarely brought to justice. If your client was threatened and abused in the United States, she may be eligible for remedies available to other domestic violence victims, such as VAWA self-petitions or battered spouse/child waivers if the perpetrator is a U.S. citizen or permanent resident spouse or parent, as well as U nonimmigrant status if the victim cooperates with U.S. law enforcement. If your client is a victim of honor killing conspiracy and does not have U.S. citizenship or permanent resident status, immediately contact an immigration legal services provider to explore whether she is eligible for immigration law protection and relief. Securing immigration relief can help ensure that your client is not deported to a country where she could face severe violence with little to no recourse.

Conclusion

Immigrant victims of domestic violence often suffer multiple layers of victimization and trauma. They may have fled violence in their home countries only to be further exploited in the United States while at risk of deportation to the very countries they escaped from. Immigrant women and girls may also face racism and xenophobia alongside misogyny. Although representing immigrant victims of domestic violence poses unique challenges that may require you to immerse yourself in legal areas and "cultural"[66] practices far outside your experience, it is also uniquely gratifying. You have the ability to serve as a catalyst to better the lives of your immigrant client and her children. Thanks to changes brought about by domestic violence victim and immigrant rights advocates over the past decade, lawyers for immigrant victims can pursue a wide array of remedies from civil and criminal court systems and immigration authorities that can help their clients move from violence, destitution, and fear to safety, stability, and empowerment. In the process of serving your client, you may find that the tables have been turned — that your client has become your guide and mentor, leaving you with unforgettable lessons about courage in the face of overwhelming adversity and about survival.

Notes

1. The Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organized Crime, also known as the Palermo Protocol, signed by the United States in December 2003, defines trafficking in persons as "the

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation," and specifies that "[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." The definition also specifies that "[t]he consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used."

2. According to the United States government, "[t]he majority of transnational victims [of trafficking] are females trafficked into commercial sexual exploitation." Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report,* Department of State (2008).
3. *Id.*
4. Janice G. Raymond *et al.,* eds, *A Comparative Study of Women Trafficked in the Migration Process: Patterns, Profiles and Health Consequences of Sexual Exploitation in Five Countries (Indonesia, the Philippines, Thailand, Venezuela and the United States)* (Coalition Against Trafficking in Women 2002).
5. Sanctuary for Families, PO Box 1406, Wall Street Station, New York, NY 10268, www.sanctuaryforfamilies.org.
6. Coalition Against Trafficking in Women, PO Box 7160, JAF Station, New York, NY 10116, www.catwinternational.org.
7. United Nations Population Fund, *Global Summit Urges to End Sexual Violence in Conflict,* June 10, 2014, www.unfpa.org/news/global-summit-urges-end-sexual-violence-conflict.
8. Liana Sun Wyler & Alison Siskin, *Trafficking in Persons: U.S. Policy and Issues for Congress* (Congressional Research Service 2010).
9. Dorchen A. Leidholdt, *Prostitution and Trafficking in Women: An Intimate Relationship,* in *Prostitution, Trafficking, and Traumatic Stress*, Melissa Farley, ed (Routledge 2004) at 167-183.
10. Richard J. Estes & Neil Alan Weiner, *The Commercial Sexual Exploitation of Children in the US, Canada and Mexico*, University of Pennsylvania School of Social Work, Center for the Study of Youth Policy, September 18, 2001; Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 Michigan Journal of Women and Law, 91 (1993); Mimi H. Silbert & Ayala A. Pines, Entrance Into Prostitution, 13 Youth & Society 471, 479 (1982).
11. D. Kelly Weisberg, *Children of the Night: A Study of Adolescent Prostitution* (1985); Mimi H. Silbert and Ayala A. Pines, *Victimization of Street Prostitutes*, 7 Victimology: An International Journal 122 (1982).
12. Melissa Farley, Isin Baral, Merab Kiremire, Ufuk Sezgin, *Prostitution in Five Countries: Violence and Post-traumatic Stress Disorder*, 8:4 Feminism & Psychology 405 (1998); Special Committee on Prostitution and Pornography, Pornography and Prostitution in Canada (1985).
13. Note that the penal and victims services provisions of the federal Trafficking Victims Protection Act of 2000 apply only to situations of "severe trafficking," which, if the victim is age eighteen or older, requires proof of force, fraud, or coercion. Pub L 106-386, §§ 101–113, 114 Stat 1464 (codified as amended at various sections of the USC).
14. Under the Immigration and Nationality Act (INA), any person who "is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status" is inadmissible. INA § 212(a)(2)(D). However, this ground of inadmissibility may be waived under certain circumstances. INA § 212(h).
15. Victims under the age of 18 need not demonstrate cooperation with law enforcement to be eligible for T nonimmigrant status, and victims who are unable to assist law enforcement due to physical or psychological trauma may be exempted from the cooperation requirement. INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T).
16. INA § 101(a)(15)(U), 8 USC § 1101(a)(15)(U). The Battered Immigrant Women Protection Act (BIWPA) of 2000 introduced U nonimmigrant status as a form of immigration relief for victims of certain crim-

inal activity. Pub L 106-386, §§ 1501–1513, 114 Stat 1464 (codified as amended at various sections of the USC).

17. INA §§ 101(a)(42); 8 USC §§ 1101(a)(42), 1158.
18. Violence Against Women Act (VAWA) of 1994, Pub L 103-322, 108 Stat 1954 (codified as amended at various sections of the USC).
19. INA § 204(a)(1)(A); 8 USC § 1154(a)(1)(A).
20. INA § 216(c)(4)(C)-(D); 8 USC § 1186a(c)(4)(C)-(D).
21. In a case from New York, a Dominican woman forced by her abusive husband into prostitution, drug possession, and other crimes was granted T nonimmigrant status after being found to be a victim of severe trafficking. Notwithstanding her status, she was terminated from her job as a home health care attendant after a state agency conducted a criminal backgrounds check. In 2011, a criminal court finally vacated all her convictions, including those based on drug possession and non-prostitution crimes, recognizing that all her charges were connected to her trafficking experience. *New York v G.M.*, 32 Misc 3d 274 (Crim Ct, Queens County 2011); Polaris Project, *2013 Analysis of State Human Trafficking Laws* (2013).
22. CPL 440.10(1)(i). At least 15 states—Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Vermont, Washington, and Wyoming—have passed similar vacatur statutes, with legislation pending in some other states.
23. New York State Unified Court System, Press Release, *NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative* (Sept. 25, 2013).
24. Melissa Farley, Isin Baral, Merab Kiremire, Ufuk Sezgin, *Prostitution in Five Countries: Violence and Post-traumatic Stress Disorder*, 8:4 Feminism & Psychology 405 (1998); Special Committee on Prostitution and Pornography, Pornography and Prostitution in Canada (1985); Rita Belton, *Assessment, Diagnosis, and Treatment of Prostitution Trauma:* Paper presented at symposium — Prostitution: Critical Aspects of the Trauma, American Psychological Association, 106th Annual Convention, San Francisco, August 17, 1998; Cecilie Hoigard & Lin Finstead, Backstreets: Prostitution, Money and Love (Pennsylvania State Univ Press 1992).
25. *See International Matchmaking Organizations: A Report to Congress* (Immigration & Naturalization Service 1999), catalyst.library.jhu.edu/catalog/bib_2369188; Asjlyn Loder, *Mail-Order Brides Find US Land of Milk, Battery,* Women's E-News, July 13, 2003; *Human Trafficking: Mail Order Bride Abuses,* Hearing before the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations, U.S. Senate, 108th Cong, 2nd Sess (July 13, 2004).
26. Russian Brides, www.russianbrides.com/mail-order-brides.htm.
27. In one high profile case, a young woman from Kyrgyzstan recruited by an IMB was murdered by her American husband, a convicted sex offender whose ex-wife had obtained an order of protection against him. Janet Burkitt, *Mail-order bride's last moments: Alleged murder cohort testifies*, The Seattle Times, Feb. 1, 2002; Joel Arak, *Mail-Order Bride Bill In Works*, CBSNews, July 5, 2003.
28. International Marriage Broker Regulation Act (IMBRA) of 2005, Pub L 109-162, §§ 831–834, 119 Stat 2960 (2006), codified at 8 USC § 1375a(d).
29. Albany, New York, Nov. 6, 2003. Contact information for the New York State Coalition Against Domestic Violence can be obtained on its website, www.nyscadv.org.
30. International marriage brokers are more commonly known as "mail-order bride" agencies. However, the term "mail-order bride" is associated with cultural stereotypes as well as negative views of women who were married through such agencies. These public perceptions further shame and marginalize victims of the IMB industry.
31. *See e.g.* Arak, *supra* n 27 ("[One IMB founder] contended that mail clients, not the women, are the most likely to be victimized in mail-order marriages. Some women, she said, enter such marriages solely to gain U.S. citizenship, then falsely complain of physical abuse as a ploy to remain in America despite divorce.… . 'Some of these women are sharks,' she said").

32. The countries with the highest number of women aged 20 to 24 married before age 15 are India, Bangladesh, Nigeria, Brazil, Ethiopia, Pakistan, Indonesia, the Democratic Republic of Congo, Mexico, and Niger. Rachel Vogelstein, *Ending Child Marriage: How Elevating the Status of Girls Advances U.S. Foreign Policy Objectives,* Council on Foreign Relations (May 2013) (citing data provided by the Statistics and Monitoring Section, Division of Policy and Strategy, UNICEF, Jan. 2013).
33. Tahirih Justice Center, *Forced Marriage in Immigrant Communities in the United States: 2011 National Survey Results* (Sept. 2011).
34. The Tahirih Justice Center notes, "[t]his figure does not even include a potentially large number of 'hidden' victims who have not yet come to the attention of the authorities or service providers." Id.
35. The U.S. Department of State recognizes this distinction, stating: "Arranged marriages have been a long-standing tradition in many cultures and countries. The Department respects this tradition, and makes a very clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage, but the choice whether to accept the arrangement remains with the individuals." 7 Foreign Affairs Manual 1743.
36. Commonly accepted definitions of forced marriage derive from rights defined under international conventions. For example, Article 23 of the International Convention on Civil and Political Rights, to which the United States is a signatory, states that "[n]o marriage shall be entered into without the free and full consent of the intended spouses."
37. Family Court Act § 812 (governing which New York criminal offenses will constitute family offenses for the purposes of civil orders of protection). Coercion in the second degree appears under § 135.60 of the Penal Law, and is also a family offense under the Family Court Act:

    A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has the legal right to abstain from engaging in… by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:

    Cause physical injury to a person; or

    Cause damage to property; or

    Engage in conduct constituting a crime; or

    Accuse some person of a crime or cause criminal charges to be instituted against him or her; or

    Expose a secret or publicize an asserted fact, whether true of false, tending to subject some person to hatred, contempt or ridicule; or

    Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.
38. Domestic Relations Law § 7.
39. Domestic Relations Law § 170.
40. The U.S. Department of State has explicitly stated that it considers "forced marriage of a minor child to be a form of child abuse, since the child will presumably be subjected to non-consensual sex." 7 US Dept of State Foreign Affairs Manual 1741 (2012).
41. INA § 101(a)(J).
42. Under Violence Against Women Act (VAWA) provisions in the Immigration and Nationality Act, immigration remedies available to victims of domestic violence at the hands of spouses are also available to victims of children under 21 who are subjected to "battery and extreme cruelty" at the hands of their permanent resident or U.S. citizen parents. INA § 204(a)(1)(A) ("VAWA self-petitions"); INA § 216(c)(4)(C)-(D); 8 USC § 1186a(c)(4)(C)-(D) (waivers for battered spouses, children, and parents).
43. FGM is sometimes referred to as "female circumcision." However, the terms female genital mutilation and/or female genital cutting are preferred by many victims, advocates, and the international community, as the term female circumcision underplays the brutality and discriminatory reasoning inherent in the practice of FGM.
44. World Health Organization, *An update on World Health Organization's work on female genital mutilation: Progress report* (2011), www.who.int/reproductivehealth/publications/fgm/rhr_11_18/en/.

45. UNICEF, *Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change* (2013), www.unicef.org/publications/index_69875.html.
46. *Id.*
47. Sheikh Mohammed Sayed Tantawi, the former Grand Imam of the Al-Azhar Mosque, has stated that there is no basis in Islam for FGM. The Representative of the late Pope Shenouda III of the Coptic Orthodox Church also noted that there is no verse in Judaism or Christianity that supports the practice of FGM. UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* (2005), www.unicef-irc.org/publications/396.
48. The World Health Organization notes that FGM "reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women." World Health Organization, *Female genital mutilation: Fact sheet No 241* (Feb. 2014), http://www.who.int/mediacentre/factsheets/fs241/en/.
49. Sanctuary for Families, *Female Genital Mutilation in the United States: Protecting Girls and Women in the U.S. from FGM and Vacation Cutting* (2013), www.sanctuaryforfamilies.org/index.php?option=content&task=view&id=618.
50. World Health Organization, *supra* n 44; *see* Rogaia Mustafa Abusharaf, *I Will Never Forget the Day of My Circumcision*, The Sciences, March/April 1998, at 23-27.
51. Mark Mather & Charlotte Feldman-Jacobs, *Women and Girls at Risk of Female Genital Mutilation/Cutting in the United States*, Population Reference Bureau (Feb. 2015), www.prb.org/Publications/Articles/2015/us-fgmc.aspx.
52. In 2010, the American Academy of Pediatrics revised a former statement accepting "clitoral nicks" and instead expressed its complete opposition to all forms of FGM in the United States and abroad. *Policy Statement: Ritual Genital Cutting of Female Minors*, 126:1 Pediatrics 177 (July 2010), pediatrics.aappublications.org/content/early/2010/04/26/peds.2010-0187.short. The World Health Organization has also expressed concern over the growing participation of health professionals in FGM and urged medical staff to cease such actions. World Health Organization, *supra* n 48, *Global strategy to stop health-care providers from performing female genital mutilation* (2010), www.who.int/reproductivehealth/publications/fgm/rhr_10_9/en/.
53. Penal Law § 130.85 (making it a felony to "knowingly circumcise, excise, or infibulate the whole or any part of the [female genitalia] of another person who has not reached 18 years of age; or being a parent, guardian or other person legally responsible and charged with the care or custody of a child less than 18 years old, knowingly consent to the circumcision, excision, or infibulation of whole or part of such child's [female genitalia]"). The New York State criminal statute only refers to minor victims of FGM, although some states, including Minnesota, Tennessee, and Rhode Island, do not require victims of FGM to be minors. In New York, FGM of an adult woman may be investigated and prosecuted under other criminal statutes against bodily harm and threats thereof, such as assault and coercion.
54. 18 USC § 116.
55. Holly Maguigan, *Will Prosecutions for Female Genital Mutilation Stop the Practice in the US?* 8 Temple Pol & Civ Rts L Rev 391 (Spring 1999); Nadia Sussman, *After School in Brooklyn, West African Girls Share Memories of a Painful Ritual*, NY Times (Apr. 25, 2011).
56. Transport for Female Genital Mutilation Act, HR 4310 § 1088, 112th Cong (Dec. 31, 2012) (amending 18 USC § 116).
57. 8 CFR § 214.14(a)(9).
58. *In re Kasinga,* 21 I&N Dec 357 (BIA 1996). FGM was the first form of gender violence to be recognized by the Board of Immigration Appeals as a form of persecution for the purposes of asylum. Subsequent case law established that FGM that has already occurred in the past could also be grounds for asylum. *See e.g. Bah v Mukasey*, 529 F3d 99 (2d Cir 2008); *Matter of S-A-K-& H-A-H-*, 24 I&N Dec.464 (2008).
59. *See e.g. Abay v Ashcroft*, 368 F3d 634 (6th Cir 2004).
60. BBC Ethics Guide: Honour crimes, www.bbc.co.uk/honourcrimes/crimesofhonour_1.shtml; *see also Study: Jordan 'honour killing' support strong*, Al Jazeera (June 20, 2013) (finding that justifications for

honor killings in Jordan were not connected to religious beliefs and "even irreligious teenagers… consider honour killing morally right").

61. *Civil and Political Rights, including Questions of Disappearances and Summary Executions:* Report of the special rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 1999/35 (Jan. 25, 2000) (noting that the Special Rapporteur received reports of honor killings in countries including Bangladesh, Brazil, Ecuador, India, Israel, Jordan, Morocco, Pakistan, Sweden, Turkey, Uganda, and the United Kingdom).
62. James Brooke, *'Honor' Killing of Wives is Outlawed in Brazil*, NY Times (Mar. 29, 1991).
63. The UN High Commissioner for Human Rights has called honor killing "one of history's oldest gender-based crimes. It assumes that a woman's behavior casts a reflection on the family and the community. If women fall in love, seek a divorce even from a battering husband, or enter into a relationship outside marriage, they are seen as violating the honor of the community." Mary Robinson, Speech: The United Nations High Commissioner for Human Rights for the United Nations Special Rapporteur on Violence Against Women before the United Nations Human Rights Commission, April 10, 2000.
64. Mark Rice-Oxley, *Britain Examines Honor Killings*, The Christian Science Monitor, July 7, 2004 (noting that according to UN estimates, "at least 5,000 women worldwide are killed each year as a matter of so-called family honor").
65. Amnesty International USA, *Culture of Discrimination: A Fact Sheet on "Honor" Killings* (2012).
66. *See e.g.* Government of the United Kingdom, *The Right to Choose: Multi-agency statutory guidance for dealing with forced marriage* (June 2014) ("Often perpetrators are convinced that they are upholding the cultural traditions of their home country, when in fact these practices and values may have… changed."); *see e.g.* Sanctuary for Families, *supra* n 45 ("Women and men in Senegal, The Gambia, Mali, Egypt, Iraq, Indonesia, and many other countries where FGM is practiced are using advocacy, art, drama, music, and literature to educate communities about FGM and to try to stop families from putting girls and women through this medically unnecessary procedure.").

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Disabled Victims of Domestic Violence

by Mary Rothwell Davis

The Americans with Disabilities Act (ADA) of 1990 created legal recognition and rights for disabled individuals on the basis of their status.[1] While persons protected by the ADA have in common their disabled status, their circumstances may otherwise be completely different. The challenges of a blind individual are quite different from those of a person with intellectual impairment. Statistically, however, disabled persons all face increased risk of family violence and sexual abuse.[2] When disabled persons are victims of domestic violence, they may face common barriers to seeking help and securing safety that are of a different magnitude than those faced by other victims.[3] Gaining freedom from abuse can be extraordinarily difficult for a person whose disability makes it hard to live independently. If the choice is between remaining in one's own home and enduring abuse or living in an institution, many victims will choose the former. For disabled victims living in extreme isolation, help can seem impossibly out of reach.[4]

SafePlace, one of the few advocacy centers in the nation with a strong focus on assisting disabled victims of domestic and sexual violence, notes in its extensive materials:

> Perpetrators may perceive individuals with disabilities as easy targets for victimization. In some ways, they are correct. Individuals with physical disabilities may be less able to defend themselves or to escape violent situations. Individuals who have speech impairments may have limited communication abilities that can pose barriers to disclosing abuse and to seeking appropriate help (i.e., when calling a hotline, a person with cerebral palsy may be perceived as being drunk or making a prank call). People with developmental disabilities often go through life without receiving correct information or education about sexuality, abuse prevention and self-protection strategies, or they may not be given any information on ways to develop and maintain a healthy and supportive relationship.[5]

Representing a disabled victim of domestic violence is in many ways no different from representing any other victim, and all of the other chapters of this book will be useful in preparing your case. New York offers very limited services dedicated to disabled victims, although we do have one of the few providers in the nation, Barrier Free Living. This means that as counsel for a disabled victim, your advocacy is more critical than ever. Effectively assisting your client may require dual efforts, both in the area of domestic violence and in the area of the particular disability. Reaching out to persons or agencies knowledgeable in providing assistance to individuals with the particular disability in question may be the best starting point, as it is unlikely you will find services tailored to your client's multiple needs. This Chapter will give an overview of common challenges and provide a framework for effective representation.

Disability Defined

Title III of the Americans with Disabilities Act defines "disability" as any "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[6] Such "major life activities" include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as major bodily functions.[7] The major categories of disabilities include: intellectual disabilities (such as autism, Down syndrome, dyslexia, and ADHD), mental health disabilities (such as depression, schizophrenia, post-traumatic stress disorder, and obsessive-compulsive disorder), mobility disabilities (such as partial or total paralysis, amputation, arthritis, and cerebral palsy), and sensory disabilities (such as blindness and deafness).[8]

The ADA means that domestic violence victims should be able to receive the same level of services and access to services as all other victims. The Equal Rights Center, a national advocacy center, has detailed materials on disabled domestic violence victims and the ADA, including suggestions on making an office more accessible.[9]

Heightened Prevalence of Domestic Violence Among Disabled Persons

A 2015 Centers for Disease Control report on the association between disabilities and intimate partner violence (IPV) found that women with a disability were significantly more likely to report experiencing each form of intimate partner violence measured, which includes rape, sexual violence other than rape, physical violence, stalking, psychological aggression, and control of reproductive or sexual health. For men, disability was associated with a high incidence of stalking and psychological aggression by an intimate partner.[10]

Domestic violence can itself cause temporary or permanent disability. Nearly 14% of women (13.4%) and 3.54% of men have been injured as a result of IPV that included contact sexual violence, physical violence, or stalking by an intimate partner in their lifetime.

Apart from deaths and injuries, physical violence by an intimate partner is associated with a number of adverse health outcomes. Several health conditions associated with intimate partner violence may be a direct result of the physical violence (for example, bruises, knife wounds, broken bones, traumatic brain injury, back or pelvic pain, headaches). Other conditions are the result of the impact of intimate partner violence on the cardiovascular, gastrointestinal, endocrine and immune systems through chronic stress or other mechanisms.[11]

Representing a Disabled Victim

Barriers to Seeking Help

While people with disabilities are at a greater risk for domestic violence, they also often face more obstacles to accessing help and justice, including physical barriers that prevent them from meeting with an attorney or entering a courthouse, for example. In enacting the ADA, Congress recognized that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion."[12] This means that the obstacles in accessing justice can often prevent the disabled from trying at all.

Disability.gov is a comprehensive website that can help you guide your client through obstacles to receiving assistance. The site connects disabled people, their families and caregivers with helpful resources on topics such as how to apply for disability benefits, find a job, get health care or pay for

accessible housing. The site also has links to organizations in your community to help support your client.[13]

It may be harder for people with disabilities to leave their abusers than it is for people without disabilities. If the victim's disability is developmental, for instance, she may not know that the behavior constitutes abuse.[14] And those who recognize the abuse may believe that they can't escape it due to their disability, especially if their abuser is also their caretaker.[15] This belief may stem from a disability that physically prohibits the victim from fleeing her abuser but also can result from financial dependence on the abuser, the victim's belief that she has nowhere to go, or a fear that fleeing would enrage the abuser and result in heightened domestic violence.[16] The worry that a call to authorities to report abuse may leave the victim with no one to help care for her can be a daunting barrier to freedom from abuse.

Furthermore, people with disabilities can experience mobility or communication barriers, fear that they won't be understood or believed, and feelings of shame and self-blame associated with having a disability.[17] Disability adds high risk factors for victims; the combination of disability and domestic violence increases the lethality of abuse, causes extreme isolation, limits access to services and can have detrimental effects on the self-esteem of the victim.[18] People with disabilities also tend to be older, poorer, less educated, and less often employed than people without disabilities, and thus have access to fewer resources.[19]

Barriers to Access to Justice

Courthouses are important to individuals who need to access the justice system but are not wholly accessible to people with disabilities, despite the ADA. In its report *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities*, New York Lawyers for the Public Interest detailed its findings that New Yorkers with physical disabilities face "an array of accessibility barriers in all areas of courthouses throughout New York City, denying them meaningful access to justice in a most fundamental way, in violation of federal, state and local laws."[20] NYLPI visited courthouses throughout New York City to assess their accessibility for people with mobility impairments, and found numerous accessibility problems at every single courthouse. In many instances, they found that the only way for a person who uses a wheelchair to access a space in a courthouse is through a makeshift arrangement that negatively draws attention to her disability; for example, a person with a disability might have to get the attention of a courthouse staff person to move a barrier blocking a path, or to operate a freight elevator leading to the only accessible entrance to the courthouse.

Planning ahead for a visit to Family Court with a disabled client may help for a smoother experience, but in general needs should be accommodated without extra fuss or burden on your client. Each county has an ADA liaison; the directory is located at www.nycourts.gov/accessibility/listbycounty.shtml. Court policy and procedure concerning accessibility are set forth on the website. Most requests should be routinely accommodated, with the exception of those that "impact a judge's handling of pending court proceedings"; those are left to judicial discretion.[21]

Attorneys and other service providers who need to meet and communicate effectively with clients are responsible for locating and paying for American Sign Language interpreters, Computer Assisted Realtime Translation, and materials in formats such as Braille and large print. This is both an ethical duty and a duty under the Americans with Disabilities Act.[22] Courts pay for services needed to communicate with the court. If a client's first language is not English, he or she will often benefit from having a foreign-language interpreter. Clients with intellectual disabilities often especially need this help.

Disability-Specific Domestic Violence

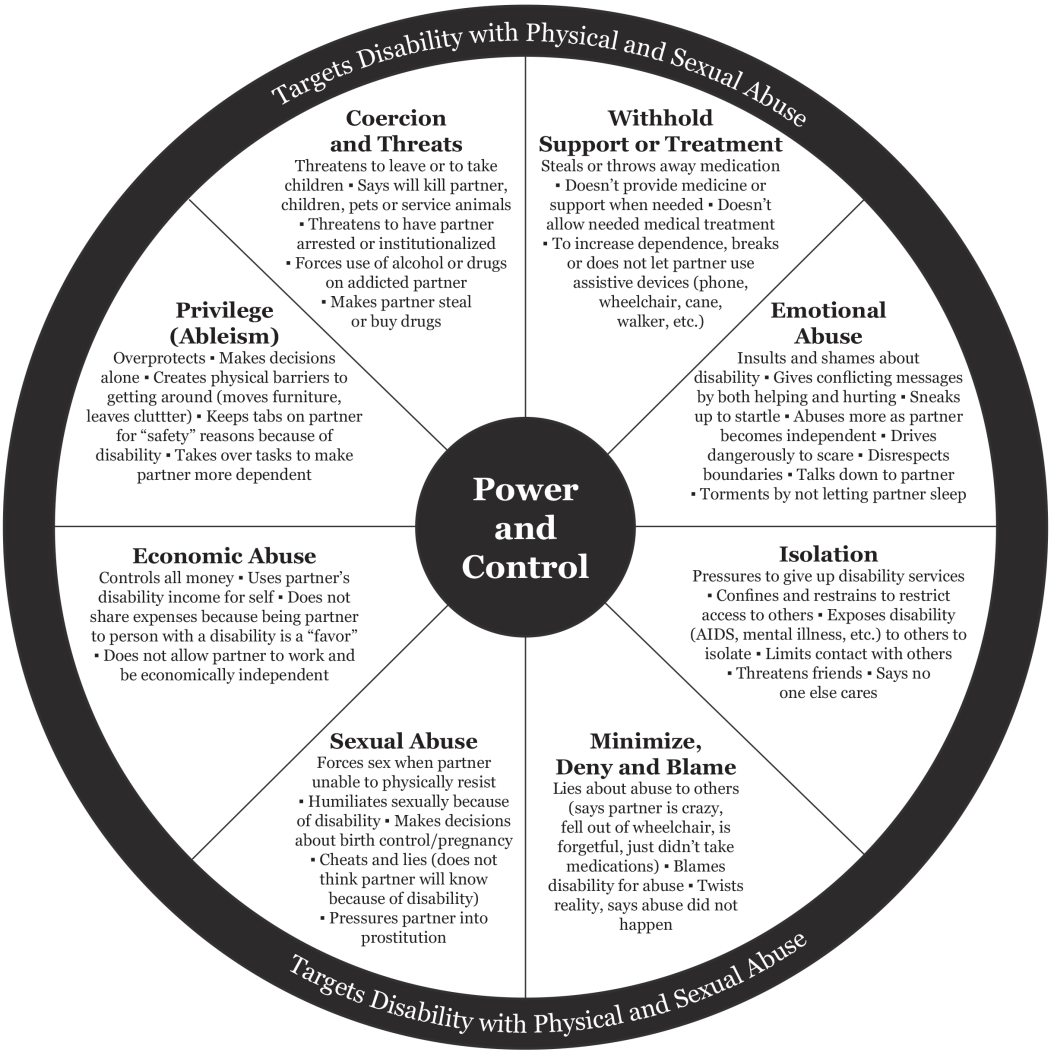
While the dynamic of power and control that characterizes all domestic abuse is fully present when the victim is disabled — for domestic violence is the same, no matter what the victim's circumstances may be — some manifestations of the abuse may be unique.[23] Moreover, endangering the welfare of an incompetent or physically disabled person is a distinct crime in New York. Penal Law § 262.

What is specific to disabled victims is the tendency of abusers to exploit their victims' disabilities to abuse them, for instance:[24]

- Abusing or threatening to abuse the victim's service animal;[25]
- Breaking equipment or devices like wheelchairs, TTY devices, hearing aids, respirators;
- Interfering with prescriptions—withholding medications or overmedicating;
- Interfering with public benefits, for instance, being the benefits payee and then controlling the money;
- Interfering with equipment used for communication and to call for help, including cell phones, TTY devices, or videophones—taking out the batteries or breaking it entirely;
- Interfering in the relationship between the victim and his/her personal care attendants, health care aides, and medical professionals;
- Spreading rumors or lies about the victim within his or her disability community;
- Verbal abuse targeted at the disability;
- Using the privilege that comes with not having a disability to convince police, courts, or health care providers to be on the abuser's side—telling the cops the victim is "crazy" or her senses can't be trusted.

It can be very useful to review a Power and Control Wheel with a client to help her understand how conduct she may be accepting as "normal" is a manifestation of domestic violence. A Power and Control Wheel specific to disabled victims, created by SafePlace, is here:[26]

People with Disabilities in Partner Relationships



Created by

SafePlace

with in-depth input from people with disabilities.

Adapted with permission from
DOMESTIC ABUSE INTERVENTION PROJECT
202 East Superior Street
Duluth, MN 55802
218.722.2781
www.theduluthmodel.org

DisabilityServices@SafePlace.org | www.SafePlace.org | Austin, Texas
24-hour Hotline: 512.267.SAFE (7233) or 512.967.9616 TTY for the Deaf community

Warning Signs of Abuse

While many disabled persons will be fully able to communicate their circumstances to a third party, others may be unable to reach out either because of the disability or because of the abuse. Sometimes the signs of abuse are mistakenly attributed to the disability.[27]

Indications of abuse include:[28]

- Feeling angry, overwhelmed, numb, withdrawn, detached or crying for no apparent reason
- Feelings of being unclean
- Mood swings and/or emotional outbursts
- Expresses desire to die, loss in faith, attempts suicide
- Difficulties with concentration
- Overly compliant
- Regression in behavior (bed-wetting, thumb-sucking, or rocking)
- Fear of being alone or with a particular person
- Fear of being touched or shying away from being touched
- Alcohol or substance abuse
- Eating disorders or a sudden increase or decrease in eating
- Nightmares, restlessness or difficulty sleeping
- Rapid progression of physical deterioration
- Vaginal or rectal pain, bleeding, itching, swelling, infection or discharge
- Unusual or inappropriate expression of affection
- New or detailed interest in or knowledge of sexual matters that are unusual for developmental age
- Self-injurious behaviors
- Poor hygiene
- Bed sores
- Dehydration or malnutrition
- Lacking needed adaptive devices such as a wheelchair, hearing aid, walker, dentures, communication device
- Person discloses abuse or neglect

Finding Resources

The challenge in assisting a disabled client is that very few providers address both disability and abuse. It may take effort and creativity to piece together the appropriate services for your client, as the standard domestic violence providers may have limitations in access, staffing or offerings, and the disability agencies may lack expertise in responding to domestic violence. For example, there are only two domestic violence programs in the state that serve members of the deaf and deaf-blind community.[29] New York is fortunate to have these, as there are only 15 in the entire country. If you are not in Rochester or New York City, however, your client will not have easy access to existing

counseling and other services. But you may be able to reach out to a domestic violence agency and help locate a sign language interpreter who can make this important resource available to your client.

Municipal responders, such as police and district attorneys victims units, in general may have more resources and protocols for disabled crime victims than many private nonprofit domestic violence agencies.[30]

If you are uncertain about what is needed, it is often highly beneficial to reach out to service providers who are experienced in these areas. Picking up the phone and calling both domestic violence agencies and social service agencies that serve persons who share the same disability or other challenges as your client can yield fortuitous results and lead to resources in your particular region that are not possible to include here.[31] As isolated as your client may have felt, there are highly dedicated professionals throughout New York State who have spent much of their time thinking about just the kinds of challenges your client may be facing, and may be enthusiastic about assisting you. If you are not located near a large city, there is every chance a provider in another city may be aware of someone near you working in this area, as professional networks tend to stay in touch. Don't try to go it alone. This book includes many resources along these lines as a starting point; those specific to particular disabilities are included below. Chapter 24 in this volume, Abuse in Later Life, can also yield helpful information; these vulnerable clients share some similarities and may in fact overlap in many instances.

The New York State Office of Children and Family Services offers resources for a wide range of needs, including specific disabilities.[32] Adult Protective Services (APS) is a state-mandated case management program that arranges for services and support for physically and/or mentally impaired adults who are at risk of harm. APS seeks to promptly resolve the risks faced by eligible clients with service plans that will enable these individuals to live independently and safely within their homes and communities. Prospective clients may be referred by anyone.[33] Another important statewide resource is the New York State Justice Center for the Protection of People with Special Needs. This office supports "the health, safety and dignity of persons with special needs and disabilities," providing advocacy, investigation and collaboration with other providers to obtain relief from abuse.[34]

Look into your city's services as well. New York City and other large urban centers have municipal agencies that serve the disabled; for smaller locales, these can be found at the county level. The Centers for Independent Living are a nonprofit national network with multiple offices throughout New York that serve as an important resource.[35]

Training resources include materials available through the Equal Rights Center on *Serving Survivors of Domestic Violence Who Have a Disability*.[36] SafePlace has also created extensive materials on assisting disabled victims through its program, Disability Services ASAP.[37]

Specific Disabilities and Domestic Violence

Deaf and Hard-of-Hearing Victims

The victim in *Matter of V.C. v H.C.*, 257 A.D.2d 27 (1999), a groundbreaking opinion on excluding batterers from the home, was profoundly deaf, isolated from the outside world and completely entrapped by her abusive spouse and son. Her spouse, who was confined to a wheelchair but kept a gun by his side at all times, used her as a mule to sell drugs. Her son would awaken her in the middle of the night to prepare food for him and perform menial tasks. Freeing her from this desperately oppressive and dangerous family was both challenging and very successful. Her limited self-expression made it difficult at first to learn her circumstances; her attorney relied on careful joint examination of

the Power and Control Wheel to help V.C. understand what had happened to her. Marshaling the right team of interpreters to support her testimony at trial took legwork.

The complexity of working with a profoundly disabled client can seem daunting, but there are resources available to you that can help you lead your client to a much better place in life. With assistance from her attorney, V.C. found a safe, comfortable subsidized apartment, was able to secure disability benefits to sustain her, and became involved in a signing church choir that grew into a strong and supportive community for her.[38]

Vera Institute of Justice published a comprehensive policy paper in January 2015, entitled *Culture, Language, and Access: Key Considerations for Serving Deaf Survivors of Domestic and Sexual Violence*.[39] For practitioners seeking deaf-specific guidance, their materials will be helpful. The two agencies that offer service for deaf victims of domestic violence are Barrier Free Living in New York City and Advocacy Services for Abused Deaf Women in Rochester.[40] Empire Justice Center has created a training for lawyers representing hearing-impaired victims that is free and available on its website.[41] Your client can also access the National Deaf Hotline Videophone.[42] In 2013, the New York State Office for the Prevention of Domestic Violence (OPDV) published a short article about working with deaf survivors of domestic violence.[43]

The court system will provide sign language interpreters and other support for your client in the courtroom. As her attorney, however, you may need to arrange for these services for client interviews.[44] People with varying levels of hearing loss communicate via sign language, including American Sign Language or spoken English. If needed, a person may use an American Sign Language (ASL) interpreter and also a Certified Deaf Interpreter.

A Certified Deaf Interpreter is a person whose native language is ASL and have skills/experience in working with individuals who are deaf and have difficulty with ASL due to language deprivation, psychiatric or cognitive disability. While hearing aids may be used, not all hearing aids allow individuals to hear speech; they may be used to hear loud sounds.

When speaking with a person who uses an interpreter, maintain eye contact with the individual, not the interpreter. To get attention, tap the person on the shoulder or arm. Keep hands or objects away from mouth, and use short sentences. A small percentage of deaf individuals can read lips; the average accuracy of lip reading is about 30%.[45]

Visual Impairment

In New York, Barrier Free Living's Secret Garden program provides generalized support and advocacy for disabled victims of domestic violence.[46] The New York State Commission for the Blind maintains a centralized listing of resources.[47] For the visually impaired, isolation can be an overwhelming problem. Domestic violence support services are a crucial piece of helping these clients.

There are many types of visual impairments, and only a small fraction of these individuals are totally blind. Even if a person is determined legally blind, forms and shapes may still be distinguished. Eighty percent of all visually impaired persons have some remaining vision.

Visually impaired victims face a great deal of mobility problems. A visually impaired victim may need the use of a cane, a guide dog, or a sighted escort. It is essential that service providers recognize the importance of these aides to the victim, and efforts should be made to ensure that the appropriate accommodations are given to the victim. Transportation issues should be discussed to help the visually impaired victim to and from your office or court as necessary. It is also appropriate to allow the visually impaired victim to become acquainted with the physical surroundings of your office, as well as the courtroom if necessary, where he/she may be coming for interviews and/or hearings. Additionally, victim service providers should not assume that a visually impaired person wants a

guided escort; rather the victim service provider should extend his/her arm to the victim while asking the victim if he/she wants guidance.

Tips for Effective Communication with Visually Impaired Victims

- Whenever a visually impaired person enters your office, immediately indicate your presence verbally, approach him/her, and give your name.
- When speaking to a visually impaired person, use a normal tone and pace your speech patterns; it is not necessary to speak louder. Do not stop talking when a blind person is approaching you because he/she relies on the sound of your voice for direction.
- Speak directly to a visually impaired victim, not to a third party who may accompany the victim.
- When a blind person enters your office, it may be helpful to extend your arm to take and guide the victim to a chair. Then, place his/her hand on the back of the chair and tell the victim whether "the chair has arms" in order to direct the victim as he/she sits down.
- If there are other individuals in your office, a blind person may be unaware of this. Introduce each person by name and indicate where they are sitting in the room relative to where the blind person is seated.
- If you must leave the visually impaired person's presence for some reason, tell him/her you are leaving for awhile.
- It is not necessary to avoid using the words "see," "look," or "blind" with a visually impaired person because he/she is used to these words also.
- When giving a visually impaired person directions, be as clear and specific as possible. Make sure to identify obstacles in the direct path of travel. Since some visually impaired persons have no visual memory (having been blind since birth), be careful of using descriptions containing numbers of feet or yards, rather use the number of steps for a distance measure. If you are unsure of how to direct a visually impaired person, say something like, "I would be happy to give you directions. How should I describe things?"[48]

Mobility Impairment

One of the primary concerns of a mobility impaired victim will be transportation and access to venues where help can be secured, including the courtroom. There are very few domestic violence shelters with facilities for disabled victims. In New York City, Barrier Free Living's Secret Garden program and Bronx Independent Living Services provide a full range of accessible services to victims.[49] Many domestic service providers, while lacking dedicated programs for disabled victims, may have accessible facilities that will allow a client to access their regular services as well as accommodating staff who will be very helpful to your client in locating resources.

Neurodevelopmental Disorders

Neurodevelopmental disorders include intellectual disabilities, communication disorders, autism spectrum disorders, specific learning disorders, and motor disorders.[50]

Intellectual or Developmental Disability

Victims who have developmental or intellectual disability are extremely vulnerable and often have limited communication abilities that inhibit them from seeking help or even recognizing victimization. All too often, victimization occurs at the hands of the caretaker, and reporting is further inhibited in these cases by the victim's disability, fear of perceived retaliation, and isolation. Spectrum Institute's Disability & Abuse Project, overseen by Nora J. Balderian, Ph.D., provides resources for a wide range of materials concerning intellectual and developmental disabilities and abuse.[51]

The National Victim Center estimated that approximately three percent of the population have cognitive disabilities. Intellectual disability may be congenital or it may have occurred after birth due to some other cause. It results in below average intellectual functioning and a limited learning capacity. However, it is not a mental illness.

The Diagnostic and Statistical Manual V (DSM) of Mental Disorders identifies four levels of disability, and they range from mild disability to profound disability. Each level reflects the degree of difficulty a person has in learning. A person with a mild intellectual disability is likely to have difficulty learning but the person is usually capable of living alone.[52] The National Victim Center states that as many as 90 percent of persons who have intellectual disabilities have minor difficulties in learning and functioning in society, and are in the mild to moderate range. Many individuals with severe or profound intellectual disabilities require constant care and often have physical disabilities and sensory or coordination impairments. Only a small percentage of people with intellectual disabilities live in institutions.[53]

The New York State Office for People With Developmental Disabilities is a good starting point for learning more about this condition and locating resources.[54]

Communication with Victims with Intellectual Disability or Developmental Disabilities

Begin by treating each person according to chronological age, and with respect for life experiences and perspectives. People with intellectual disabilities can receive the same benefits from counseling as any other survivors, but may take longer to process emotions. Be flexible about the number and length of counseling sessions allowed. A Power and Control Wheel specifically tailored to victims with developmental disabilities is available through the Wisconsin Coalition Against Domestic Violence.[55]

Reassure the abuse survivor that she did nothing wrong. Avoid asking leading questions, as people with intellectual disabilities may be eager to please and may have been trained to be compliant with authority figures. Consistency and familiar routines (e.g., meeting at the same time on the same day of the week) may be helpful to people with intellectual disabilities. Shorter or more frequent sessions may also be helpful in processing feelings and experiences.

- Be understanding, calm, friendly, patient and firm with a victim who has an intellectual disability.
- In some cases, the person with an intellectual disability may seem to react to situations in an unconventional manner or may appear to be ignoring you. The person may be slow in responding.
- Rapid or intense questioning is likely to cause confusion. Talk slowly and calmly, using easy-to-understand language with clear, concise concrete terms. Do not use complex sentences.

Accommodations

For clients with brain injury, auditory processing disorders, intellectual disabilities or developmental disabilities, accommodation will vary depending on need, but may include:

- having the court and witnesses talk slowly or simply; write things down; or break questions or processes down into smaller, constituent parts;
- when necessary, repeating information using different wording or a different communication approach,
- when necessary, taking periodic breaks;
- providing a coach or support person at the proceeding;
- allowing videotaped testimony or the use of video conferencing technology in lieu of a personal appearance.

All courts should allow the presence of service animals. New York courts may permit companion animals to assist with anxiety in testifying as well.[56]

Mental Health and Substance Use Disorders

Some victims of domestic abuse may have had symptoms of mental illness that preceded the abuse; victims with mental illness suffer abuse at very high rates.[57] Others may exhibit PTSD and related problems such as depression and anxiety as a result of living with the abuser's violence toward them. Substance abuse also occurs at a very high rate among victims of domestic violence.[58]

This is again an area where creative partnering of existing providers may be required. While there are many learning resources and toolkits available on these topics, very few domestic violence providers work expressly with patients with mental illness. The National Center on Domestic Violence, Trauma and Mental Health is one such resource.[59] For victims whose condition emanates from the violence, support for post-traumatic stress disorder may be essential. Addressing PTSD demands 1) establishing safety; 2) remembrance and mourning; and 3) reconnection.[60] Connecting with other survivors of domestic violence can be essential to moving forward.

Accommodations in Court

Clients with PTSD, mental illness, or other conditions which can make sensory experiences difficult may need accommodations. These may include:

- multiple short hearings instead of one long one;
- hearings in the judge's chambers instead of a public courtroom;
- allowing a party/witness to wait someplace other than the waiting room;
- allowing a party to sit where she needs to (without her back facing the door, for instance);
- avoiding loud noises like gaveling or dropping files.

Housing for Disabled Clients

Far too many domestic violence shelters lack accessible facilities. Depending on the client's disability, local emergency housing may not be an option. Chapter 26 of this volume provides more information on housing options.

Conclusion

The most important aspect of representing a disabled client is taking the time to truly understand what her circumstances are and identifying strengths as well as areas where she will need support. Educate yourself about the particular disability presented, and help her to access as full a range of

services as possible. Be prepared to educate others involved in addressing her case about the additional risk factors associated with a particular disability and also the accommodations your client will need to fully participate in her case. Be prepared to assist your client with a safety plan that adequately accounts for the impediments her disability may pose. Allow extra time and patience. These vulnerable clients need the help of able advocates to navigate a system that rarely has their interests in mind. Resounding successes are possible, however, with persistence and creativity.

Notes

Christina Brandt-Young of Disability Rights Advocates and Alexa Davis, a summer law student intern at Sanctuary for Families' Center for Battered Women's Legal Services, contributed to preparation of this article.

1. 42 USC § 12102.
2. Matthew J. Breiding & Brian S. Armour, *The Association between disability and intimate partner violence in the United States*, 25:6 Ann Epidemiol 455-7 (June 2015), www.annalsofepidemiology.org/article/S1047-2797(15)00127-1/abstract#?via=sd.
2. *Id.*
3. The Equal Rights Center, *Serving Survivors of Domestic Violence Who Have a Disability*, www.equalrightscenter.org/site/PageServer?pagename=issues_domesticviolence (2010).
4. *Id.*
5. 42 USC § 12102.
6. *Id.*
7. The Equal Rights Center, *Serving Survivors of Domestic Violence Who Have a Disability, supra.*
8. *See* www.equalrightscenter.org/site/PageServer?pagename=access_DV_DR_toolkit.
9. Breiding *et al., supra n 2.*
10. *Intimate Partner Violence: Consequences*, Centers for Disease Control and Prevention www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html (March 3, 2015).
11. *Tennessee v Lane*, 541 US 509, 531 (2004).
12. *See* www.disability.gov.
13. Nora Baladerian, *Abuse of People with Disabilities: Victims and Their Families Speak Out*, Report on the 2012 National Survey of People with Disabilities, disability-abuse.com/survey/survey-report.pdf (Spectrum Institute 2013).
14. *Id.*
15. *Id.*
16. The Equal Rights Center, *supra.*
17. *Breiding, supra n 2.*
18. Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, available from the National Organization for Victim Assistance (April 2001)
19. New York Lawyers for the Public Interest, *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities*, www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf.
20. *See* www.nycourts.gov/accessibility/courtusers_guidelines.shtml.
21. 42 USC § 12182(b)(1)(b)(2)(a); 28 CFR § 36.201; 28 CFR § 36.303; New York City Bar Formal Ethics Opinion 1995-12, *Competent and zealous representation; Unlawful discrimination in the practice of law; Confidentiality; Use of interpreters* (July 6, 1995); New York State Bar Association Committee on Professional Ethics Opinion 1053, *Attorney-Client Privilege; Sign Language Interpreters; Communication; Competence* (Apr. 10, 2015).
22. *See* Chapter 2, *Interviewing Domestic Violence Victims*, for a general discussion of the dynamics of domestic violence.

23. *See Domestic Violence and Specific Populations: People With Disabilities,* www.opdv.ny.gov/whatisdv/specificpops/peoplewdisab.html
24. Interfering with service animals is a crime in New York. Penal Law § 242.
25. *See People With Disabilites in Partner Relationships Power and Control Wheel,* reproduced by National Center on Domestic and Sexual Violence, www.ncdsv.org/images/SafePlace_PowerControlWheelDisabilities_2011.pdf.
26. Nora Baladerian, *Trauma and People With Intellectual Disabilities: Recognizing Signs of Abuse and and Providing Effective Symptom Relief*, www.dhhr.wv.gov/bhhf/Documents/2013%20IBHC%20Presentations/Day%203%20Workshops/Healing%20the%20Trauma.pdf.
27. SafePlace, *Detecting and Reporting Abuse*, safeplace.org/about/programs-and-services/disability-services-asap/red-flags-disability-services/.
28. www.bflnyc.org/blog/working-with-deaf-survivors-of-domestic-violence/; Advocacy Services for Abused Deaf Women, asadv.org/.
29. *See e.g.* www.victimsofcrime.org/training/responding-to-crime-victims-with-disabilities/2009-responding-to-crime-victims-with-disabilities-national-training-conference.
30. A directory of regional service providers is found at www.disabilityresources.org/NEW-YORK.html
31. *See* ocfs.ny.gov.
32. *See* ocfs.ny.gov/main/psa/.
33. *See* www.justicecenter.ny.gov/about/faq.
34. *See* www.ilru.org/projects/cil-net/cil-center-and-association-directory-results/NY.
35. *See* www.equalrightscenter.org/site/PageServer?pagename=issues_domesticviolence.
36. *See* safeplace.org/about/programs-and-services/disability-services-asap/
37. Conversation with Dorchen A. Leidholdt, Sanctuary for Families' Center for Battered Women's Legal Services, counsel for V.C.
38. *See* Nancy Smith and Charity Hope, Center on Victimization and Safety, www.vera.org/pubs/special/serving-deaf-survivors-domestic-sexual-violence.
39. *See* www.bflnyc.org/blog/working-with-deaf-survivors-of-domestic-violence/; Advocacy Services for Abused Deaf Women, asadv.org/.
40. *See* www.empirejustice.org/training-center/publications/training-material/rochester-model-training.html#.VcJAirc9UqA
41. National Deaf Hotline Videophone 9am-5pm M-F 1-855-812-1001 or deafhelp@thehotline.org
42. Available through Barrier Free Living, www.bflnyc.org/blog/working-with-deaf-survivors-of-domestic-violence/.
43. New York City providers are listed here: www.nyc.gov/html/mopd/html/specific/dhh_asl.shtml. Statewide resources are here: www.empireinterpreting.com/. Consult Advocacy Services for Abused Deaf Women, asadv.org/for additional guidance, particularly in upstate New York. Outside of New York, the Abused Deaf Women's Advocacy Service in Seattle has been provided leadership in this area for thirty years, www.adwas.org.
44. All Walks of Life: Responding to Victims with Disabilities, www.awol-texas.org/articles/article8.htm.
45. *See* www.bflnyc.org/programs-services/secret-garden/.
46. *See* ocfs.ny.gov/main/cb/comm_resources.asp.
47. *See* All Walks of Life: Responding to Victims with Disabilities, www.awol-texas.org/articles/article8.htm
48. *See* Secret Garden, www.bflnyc.org/programs-services/secret-garden/; Bronx Independent Living Services, www.bils.org.
49. Diagnostic & Statistics Manual of Mental Disorders (DSM-5) at 30 (2013).
50. *See* disability-abuse.com/
51. *See Intellectual disability (intellectual developmental disorder)*, www.healthyplace.com/neurodevelopmental-disorders/intellectual-disability/mild-moderate-severe-intellectual-disability-differences/.

52. *Id.*
53. *See* www.opwdd.ny.gov/.
54. *See Power & Control Wheel: Abuse of People with Developmental Disabilites*, www.endabusewi.org/power-control-wheel-abuse-people-developmental-disabilities-caregiver.
55. *People v Tohom*, 109 AD3d 253 (2d Dep't 2013); www.nytimes.com/2015/06/10/nyregion/therapy-dog-helps-woman-testify-at-assailants-sentencing-hearing.html?_r=0.
56. *See Intimate Partner Violence and Lifetime Trauma*, National Center on Domestic Violence, Trauma & Mental Health, www.nationalcenterdvtraumamh.org/
57. Mental Health/Substance Use Disorder, OPDV, www.opdv.ny.gov/professionals/guidingprinciples/mhsubstance.html
58. *See* www.nationalcenterdvtraumamh.org/publications-products/resource-for-advocates/
60. Dawn Johnson & Carol Zlotnick, *Hope for Battered Women with PTSD in Domestic Violence Shelters*, www.ncbi.nlm.nih.gov/pmc/articles/PMC2825898/(2009).

25

Abuse in Later Life: Domestic Violence and the Older Client

by Mary Rothwell Davis

> *There is a popular misunderstanding that violence among the elderly is triggered by "caregiver" stress. When abuse happens in the context of an intimate relationship, however, it is almost always an outgrowth of domestic violence. Once an elderly couple reaches a certain age, we label it "elder abuse" when, in fact, it is the similar pattern of domestic abuse that we see among younger couples. The overall pattern of behavior in violent relationships is similar regardless of the age of the abuser or the victim.*[1]
>
> *– Cheryl Hanna*

New York Responds to Abuse in Later Life

A groundbreaking 2011 report on abuse in later life among New York's older citizens, entitled *Under the Radar: New York State Elder Abuse Prevalence Study*, found that for every case of such abuse that is reported, 24 more occur.[2] This study was the first in the nation to look comprehensively at the problem of elder abuse; awareness and action around this heartbreaking problem have lagged behind public sensitivity to child abuse and domestic violence. As recently as 2009, for example, there was not a single federal employee working full-time on elder abuse.[3] Demographic changes, as well as increased awareness, are beginning to remedy this lack of focus. New York's population is increasingly older; by 2030, more than a quarter of all New Yorkers will be over the age of 60. As these cases are brought out of the shadows, they will form an ever-growing part of family law practice and judicial dockets. Vulnerable clients—whose once-trusted protectors have often betrayed them at the most fundamental levels—can be helped tremendously by a knowledgeable advocate.

The National Clearinghouse on Abuse in Later Life (NCALL), based in Madison, Wisconsin, is an essential resource for practitioners; its website offers a wide array of resources. Together with Lifespan of Greater Rochester (New York), Inc., these two groups have been at the forefront of pushing for an informed, enlightened, consistent and effective societal response to elder abuse.[4] VAWnet.org, the National Online Resource Center on Violence Against Women, has recently published a comprehensive Special Collection entitled *Preventing and Responding to Domestic & Sexual Violence in Later Life*.[5] This July 2015 resource can provide the practitioner with additional in-depth, general guidance and access to a broad collection of informative and current articles on a wide range of elder abuse topics.

New York has become increasingly responsive to domestic abuse affecting older New Yorkers. In 2008, the Division of Criminal Justice Services issued a report, *Domestic Incidents Involving Elderly Victims*.[6] This was the first time that domestic violence matters involving an adult in later life were

separately identified and analyzed. Perhaps one of the most striking statistics from that study is one that demonstrates the intractability of these cases: over 80% of the orders of protection were violated. This study was followed by the 2011 report, *Under the Radar*,[7] that provided the first comprehensive look in the country at elder abuse. In July 2015, the Chief Administrative Judge appointed Justice Deborah A. Kaplan as the Statewide Coordinating Judge for Family Offense Cases, a new position, and charged that office with developing programs to handle the state's growing number of elder abuse cases.[8]

Increasingly, at the county and municipal level, there exist coordinated and persistent efforts among social service providers, law enforcement and advocates. New York has been the fortunate recipient of several grants from the U.S. Department of Justice Office on Violence Against Women that support community coordinated response to elder abuse among law enforcement and social services. Known as the *Enhanced Training and Services to End Abuse in Later Life [ALL] Program*, these grants provide training to criminal justice professionals "to enhance their ability to address elder abuse, neglect and exploitation in their communities; provide cross-training opportunities to professionals working with older victims; establish or support a coordinated community response to elder abuse; and provide or enhance services for victims who are 50 years of age or older."[9] Four of these three-year grants have been awarded to New York providers.[10] These enhanced opportunities for education, training, and shared resources and experiences will help New York, going forward, to develop best practices and provide better responses to elder abuse.[11]

New York still lags in many areas, however. It is one of the only states in the country that does not require mandatory reporting of suspected elder abuse; a bill to require this languished in 2015 and was not passed.[12]

Understanding Domestic Violence In Later Life

Distinguishing Elder Abuse and Abuse in Later Life

Elder abuse is a broad term used to describe harmful conduct towards an older person perpetrated by someone in a trusting relationship with the offender. Commonly recognized types of elder abuse include physical abuse, emotional abuse, sexual abuse, financial exploitation, abandonment, neglect, and self-neglect.[13] It can include telemarketing scams, or institutional abuse in a nursing home. A person above the age of 50 generally qualifies as "elder" in this context.[14]

Domestic abuse in later life is a subset of elder abuse.[15] Abuse in later life (ALL) focuses on cases where the perpetrator is in an ongoing relationship with the victim—a spouse, partner, family member or caregiver. The term *abuse in later life* encompasses domestic violence, sexual assault, and elder abuse.[16]

Men and woman alike can be victimized as they age; statistically, however, the problem remains predominantly one of gender-based violence, as it is much more prevalent for women in every category except abandonment.[17] Notably, for LGBTQ elderly, hostility and discrimination can make their experiences even more desperate; additional resources for these communities are found in the notes to this chapter as well as Chapter 20 of this volume.[18] Nationally, women make up 66 % of elder abuse victims.[19] In New York State, more than half of the abusers are male, and nearly three-quarters are family members.[20] This chapter focuses on abuse of women later in life, providing a broad overview of special challenges in these cases, with a particular focus on domestic violence and sexual assault, and concrete guidance on how to help clients in New York find safety and security in their later years.

These victims face many of the same challenges as other domestic violence victims, as well as many unique to their time and circumstances in life. As the OVW recognized in establishing the *Abuse in Later Life [ALL] Program*,

> While sexual assault, domestic violence, dating violence, and stalking affect victims in all age groups, older victims face additional challenges in accessing services to enhance their safety. Appropriate interventions may be compromised by misconceptions about older individuals. Some may think that domestic violence does not occur or lessens in later life, or that older persons are not victims of dating violence. Myths about sexual assault coupled with a failure to see older individuals as sexual beings can hinder professionals from recognizing indicators of sexual assault when dealing with older victims. Older victims may not be believed if they report stalking, particularly if the victim has dementia or psychiatric disabilities. An appropriate response to older victims of these crimes must take into account the unique challenges they face.[21]

Often there are intersecting types of abuse at work, just as in other domestic violence cases: financial exploitation can leave a victim completely dependent on the abuser for all needs, and deliberate isolation render her unable to leave home.

Dynamics of Abuse in Later in Life

Important characteristics of abuse in later life that can make it distinct from that in earlier years include:

A Relationship Between the Victim and Abuser

In most cases of abuse in later life, the perpetrator is an intimate partner or a family member, and sometimes a caregiver or other person in position of authority. Intimate partner violence may have been present throughout the relationship ("domestic violence grown old") or only emerged in later years as the couple has aged ("late-onset domestic violence"). Late-onset domestic violence in particular may be related to dementia or other health problems exacerbated by aging, both for the abuser and the victim.

Many victims want to maintain a connection to the abusive family member. It may be an intimate partner or child. Approach safety planning and seek out resources that will help the victim remain comfortable with the decision to receive help.[22]

Power and Control

Power and control dynamics, similar to those seen in domestic violence and sexual assault cases involving younger victims, are often present in abuse in later life;[23] *see* Chapter 3 of this book, *Interviewing Domestic Violence Victims*, for a fuller discussion. The operative impulse is the abuser's drive for power and control over the victim. The increased vulnerability of the victim, who may be completely dependent on the abuser for every bodily need or any access to the outside world, renders the intensity of this interaction even more disturbing.

Both societally and by perpetrators, harm to an elderly person is often ascribed to "caregiver stress." While caregiving can be stressful, it is not a "cause" of abuse. The safety of the victim will often require that the abuser's rationalizing be challenged through prosecution or through counseling that confronts and changes this thinking.[24]

Abusers of the elderly target the victims' special vulnerabilities. Glasses or dentures might be broken or hidden, mobility aids placed out of reach, important information not translated into the victim's native language. Isolation can be achieved by refusing to transport the victim, cutting her off from religious communities, friends, family or community activities. They may feed on the fears of

the older person, confusing them about their resources and convincing them their only option is life with the abuser or a nursing home.[25] Financial abuse may be woven in, as the abuser takes control of the victim's finances and other resources. Hiding behind the front of "caretaker," often lying to others in order to hide or justify their behavior, the abuser dominates the victim absolutely.[26] It can be helpful to discuss the abuser's behavior with your client while referring to a Power and Control Wheel. This one has been adapted for abuse in later life:[27]

According to a comprehensive study by NCALL,[28] tactics employed by abusers of older victims that are typical of the behavior on the power and control wheel may include:

Physical Abuse

- Hits, chokes, burns, pinches, throws things
- Restrains elder to chair or bed

Sexual Abuse

- Sexually harms during care giving
- Forces sex acts
- Forces elder to watch pornography

Psychological Abuse

- Engages in crazy-making behavior
- Publicly humiliates

Emotional Abuse

- Yells, insults, calls names
- Degrades, blames

Targets Vulnerabilities and Neglects

- Takes or denies access to items needed for daily living
- Refuses transportation
- Denies food, heat, care, or medication
- Does not follow medical recommendations
- Refuses to dress or dresses inappropriately

Denies Access to Spiritual & Traditional Events

- Refuses transportation or access
- Destroys spiritual or traditional items of importance

Ridicules Personal and Cultural Values

- Disrespectful of cultural practices
- Ignores values when making decisions

Uses Family Members

- Misleads family members regarding condition of elder
- Excludes or denies access to family

Isolates

- Controls what elder does, who they see and what they do
- Denies access to phone or mail

Uses Privilege

- Speaks for elder at financial and medical appointments
- Makes all major decisions

Financially Exploits

- Steals money, titles, or possessions
- Abuses a power of attorney or guardianship

Threatens

- Threatens to leave or commit suicide
- Threatens to institutionalize
- Abuses or kills pet or prized livestock
- Displays or threatens with weapons

Sexual Abuse and Assault

Older victims can be especially vulnerable to sexual abuse. The National Center on Elder Abuse defines sexual abuse as "non-consenting sexual contact of any kind" including unwanted touching; sexual assault or battery, such as rape, sodomy, and coerced nudity; sexually explicit photographing; and sexual contact with any person incapable of giving consent."[29] The National Sexual Violence Resource Center is a good resource for learning more about this underreported type of abuse, which can carry especially devastating consequences for an older person. Victims may be unable to report or disbelieved, telltale injuries may be overlooked, and serious injuries are far more likely to lead to hospitalization and death for an elderly person.[30]

Determining the Facts

It may be difficult for an older victim to disclose that she is being abused. Counsel should be alert to indicators that abuse may be ongoing. Understanding the entirety of a client's situation can be especially difficult if a family member is undermining efforts at detection or disclosure by explaining or countering evidence of abuse.[31]

If the victim has unexplained or poorly explained injuries, the abuser may minimize the complaints or attempt to convince others the victim is incompetent or mentally unsound. Repeated "accidents" leading to injury will be blamed on the clumsiness or lack of balance of the victim. If the victim appears unusually isolated, the abuser may try to convince you that this is for the victim's own good, because she is dangerous to others. There may be excessively loving, compassionate and attentive behavior toward the victim while the victim is hinting at danger, to try to give the impression the victim is paranoid. The victim may attempt or consider suicide, abuse alcohol or drugs, including prescription drugs.

The abuser may continually speak on behalf of the victim, insisting on being present at all interviews. The victim may be financially dependent on the abuser, or the abuser may be financially dependent on the victim. Appointments may be cancelled, both by the victim and the abuser. Medical help may be disorganized, with multiple care providers and refusal to provide needed medicine or supplies.

In these highly charged situations, counsel must proceed carefully but persistently to understand what is occurring and help find suitable approaches to assisting the victim.

Barriers to Help-Seeking

Older victims of abuse often stay with an abuser or return to an abuser after they have left. They may be very deeply attached to the loved one who is harming them, even while wanting the abuse to end. Understanding and identifying these obstacles can help an advocate find alternatives for the victim. Common reasons why a victim might be reluctant or unable to leave an abuser include:[32]

- Isolation
- Intimidation
- Protecting family
- Self-blame
- Powerlessness

- Religious, cultural or financial concerns
- Generational values
- Hopelessness
- Secrecy
- Concern for abuser
- Past failure at leaving or seeking help

It may take time for the victim to trust you. Listen carefully, respect your client's values and choices, acknowledge the enormity of her task with compassion and hope, support her decisions and make sure she is aware of all the help that is available.[33]

Equally important as these guidelines are the actions to avoid. Do not discuss the abuse in front of the abuser or others; take great care in reaching out to the victim by phone or otherwise (*see* Chapter 3, *Interviewing Domestic Violence Victims*); do not express incredulity or blame at the victim's painful living situation.

Avoid Assumptions

Abuse in later life happens to many kinds of people. Many are not frail or limited in their capabilities; others are. Some may be survivors of a lifetime of abuse; others may be experiencing it for the first time. As you meet with your client, take care to fully understand who she is, what her history is, what is happening to her, and what her full circumstances are. Figure out what strengths and skills your client has that can continue to support her through this process. In particular, be very aware of how important cultural tradition and religious practices may be and try to help your client move within those structures. Understanding what is best for the victim may take time, investigation and careful thought.[34]

Your client may have cognitive limitations due to illness or injury. This can make it difficult to determine what the client wants to do, and also make follow-through challenging. An assessment of this aspect of your client's health may be essential.[35]

Confidentiality

Your client may arrive at your office in the company of a concerned family member. It is important to remember that confidential and privileged communications must be safeguarded; a family member who has become accustomed to full access and control over the victim may expect full disclosure of everything regarding your client. Without knowing and voluntary waivers, however, such conversations or sharing of information are inappropriate. Bear in mind that while the accompanying family member who appears before you may be highly trustworthy and have your client's safety and best interests at heart, this person could also be exerting undue influence over your client. Take time and care to sort out the situation.[36] Remember who is your client and the limitations on extending attorney-client privilege.

Remedies for Victims of Abuse in Later Life

Victims of abuse have multiple layers of need that may need to be addressed in order to achieve safety and freedom from an abuser. For the older client, existing services may not be attuned to her time in life, or equipped to cope with medical needs or limited independence. Many agencies will work hard to adapt their offerings to a victim in need, however, and the best course of action is to call and talk with staff about what might be available for your client.

Your client's needs may include:

- A help/crisis line
- Peer or individual counseling
- Support groups
- Emergency housing
- Information and referral, including information about victim's rights, sources of support, housing, health care, mental health services and aging network services.
- Safety planning
- Assistance in going to court for an order of protection
- Police intervention

Help in these areas may be available through one or more of a number of state, county or local providers:

- Domestic violence and sexual assault advocacy programs[37]
- Criminal justice system[38]
- Civil justice system[39]
- Aging services network[40]
- Adult protective services[41]
- Community-based programs[42]
- Faith-based organizations
- New York State Office of the Aging Ombudsman[43]

Criminal Justice System

If the prosecutor's office in your county has dedicated staff who will investigate elder abuser, it may be useful to have a conversation with them about your client's situation. While the regular Penal Law offenses are all applicable to these crimes, article 260 of the Penal Law addresses offenses relating to children, disabled persons and vulnerable elderly persons. In particular, § 260.32 and 260.34 set forth the offenses of endangering the welfare of a vulnerable elderly person in the second and first degrees, respectively.

Penal Law § 260.30 defines a "vulnerable elderly person" as 60 years of age or older who is impaired in some manner:

> For the purpose of sections 260.32 and 260.34 of this article, the following definitions shall apply: * * *3. "Vulnerable elderly person" means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.

The same essential definition of "age" applies to Penal Law § 485.05, which sets forth New York's "Hate Crime" provisions. Offenses committed against a person based on that person's age can be subject to separate prosecution as hate crimes.

Thus these special criminal offenses would not apply to abuse in later life in which the victim is not subject to disease or impairment in some form.

Civil Justice Remedies

Article 8 of the Family Court Act provides the framework for family offense proceedings. Family Court Act § 812 states that such proceedings may be brought against "members of the same family or household," which means:

> persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another regardless of whether they still reside in the same household; (d) persons who have a child in common regardless of whether such persons have been married or have lived together at any time; and (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

A successful family offense petition must make out an enumerated family offense. For a fuller discussion of these proceedings, *see* Chapter 9, *Litigating Family Offenses*, in this volume.

Such offenses include acts which would constitute disorderly conduct, harassment in the first or second degree, aggravated harassment in the second degree, stalking in the first, second, third or fourth degree, criminal mischief, menacing in the second or third degree, reckless endangerment, sexual abuse in the second or third degree, forcible touching, criminal obstruction of breathing or strangulation, identity theft in the first, second or third degree, coercion in the second degree, grand larceny in the third or fourth degree, and assault in the second or third degree, or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household (Family Court Act § 812).[44]

As of this writing, there are no special provisions that address abuse in later life separately from other types of family offenses, nor are there special Family Court parts for these proceedings. Kings County has initiated the "Elder Temporary Order of Protection" Initiative (ETOP), sponsored by the New York City Family Justice Center in Brooklyn. The program assists eligible victims of domestic violence who are 60 or older and unable to travel and appear in court personally or for whom it is a great hardship due to infirmity or disability in obtaining temporary orders of protection. Social workers and lawyers from the New York City Department for the Aging and the Jewish Association for Services for the Aged Legal/Social Work Elder Abuse Program are available to provide emergency counseling, direct services, and other information regarding services for the elderly. The Family Court and its Clerk's Office also play significant roles in the initiative.[45] The Center for Elders and the Courts, a project of the National Center for State Courts, may provide useful guidance on how a Family Court can effectively intervene in these matters.[46]

Bear in mind that the remedy most often issued in Family Court pursuant to an article 8 family offense proceeding is an order of protection. If that is the best remedy for your client, then Family Court may provide effective relief. Your client may still require significant support and problem-solving that will not be resolved just by barring the abuser. An approach that considers all of her needs, perhaps in conjunction with a social services or advocacy group, may be the most effective route.

Guardianship Proceedings

Article 81 of the Mental Hygiene Law governs guardianship of incapacitated persons. When a person is under the control of an abuser and not able to advocate for herself, guardianship may provide a means of wresting control from the abuser.

Upon a proper showing, the court may appoint a guardian to meet the personal needs of an incapacitated person or manage his or her property.

Mental Hygiene Law § 81.06 defines "interested persons" who may file a verified petition for a judicial order appointing a guardian. The court must find that the "alleged incapacitated person" (AIP) is unable to manage her affairs or properly care for herself. The AIP has due process rights and may have counsel appointed. The personal wishes of the AIP will be strongly weighed in reaching a determination.

The matter is referred to a Court Evaluator, who will communicate with the AIP, investigate the person's circumstances, and report in writing to the court. The evaluator may be an attorney, physician, psychologist, accountant, social worker, nurse or other person properly trained for the task at hand. Following a hearing, within 28 days, the court will issue a decision. The duties of the guardian may be narrowly drawn to meet the needs of the alleged incapacitated person—medical, financial, seeking orders of protection on behalf of an abused person.[47]

Conclusion

Assisting victims of abuse in later life is a developing area of practice that can benefit from all of the tools familiar to the domestic violence practitioner. Working cooperatively with professionals whose focus is on aging and geriatric issues, attorneys can achieve tremendous good for these often fragile clients. The next few years promise to be a time of great progress in this still-young area of jurisprudence and practice, and your preparation and care in representing your client will contribute to it.

Notes

1. Cheryl Hanna, *Sex Before Violence: Girls, Dating Violence, and (Perceived) Sexual Autonomy*, 33 Fordham Urb L J 437 (2006).
2. A joint report from Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center & New York City Department of Aging prepared for William B. Hoyt Memorial New York State Children and Family Trust Fund & New York State Office of Children and Family Services, ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf (May 2011).
3. *See* Foreword of Donna Wagner (President of OWL-The Voice of Midlife and Older Women), *Elder Abuse: A Women's Issue*, OWL Mother's Day Report 2009, www.owlnational.org/Mothers_Day_Reports_files/OWL_MothersDay_Report_09_Final_2.pdf
4. *See* www.ncall.us and www.lifespan-roch.org/.
5. *See* vawnet.org/special-collections/DVLaterLife.php?utm_source=NRCDV+eNewsletter&utm_campaign=4e464dec34-NRCDV_eNewsletter_JunJul2015&utm_medium=email&utm_term=0_a72338d7f0-4e464dec34-30734805
6. Adriana Fernandez-Lanier, www.criminaljustice.ny.gov/crimnet/ojsa/2008_dir_elderly_report.pdf (Feb. 2010).
7. *Supra n 2.*
8. News & Announcements, www.nycourts.gov/courts/1jd/supctmanh/news_&_announcements.shtml (July 1, 2105).
9. *See* The OVW ALL Grant Program, www.ncall.us/resources /6.OVWGrantProgramREV2014.pdf.
10. New York State recipients of these three-year grants include the Kings County District Attorney's Office, Westchester County (White Plains), Syracuse, and Lifespan of Greater Rochester, Inc. New York State also funds programs through its Office for the Aging, www.aging.ny.gov/NYSOFA/Programs/Community-Based/ElderAbuse.cfm
11. There are increased protections for the elderly on the federal level as well. Title VII , Older Americans Act, *Vulnerable Elder Rights* aging.dhs.georgia.gov/title-vii-vulnerable-elder-rights-protection-activity; Elder Justice Act, Public Law §111-148 (2010) gerontology.usc.edu/news-resources/news/what-is-the-elder-justice-act/

12. *See* assembly.state.ny.us/leg/?default_fld=&bn=A6555&term=&Memo=Y
13. Elder Abuse, *Basics*, Center for Elders and the Court, A Project of National Center for State Courts, www.eldersandcourts.org/Elder-Abuse/Basics.aspx.
14. National Clearinghouse on Abuse in Later Life (NCALL), *An Overview of Abuse in Later Life*, www.ncall.us/resources/whatisALL.pdf.
15. Bonnie Brandl, NCALL Coordinator, Assessing for Abuse in Later Life, www.ncall.us/sites/ncall.us/files/resources/Assessing%20and%20Responding%20to%20ALL.pdf (Wisconsin Coalition Against Domestic Violence).
16. A starting point for a practitioner seeking to gain expertise in this area is a free, one-hour online training offered by the Office for Victims of Crimes Training and Technical Assistance Center. This course, entitled *Online Elder Abuse Training for Legal Service Providers: Domestic Violence and Sexual Assault*, includes substantive material and guidance in interviewing older clients, including interactive materials, www.ovcttac.gov/views/dspLegalAssistance.cfm?tab=1#onlinetraining.
17. *See* ocfs.ny.gov/main/psa/victim_stat.htm.
18. *See Elder Abuse*, Services and Advocacy for Gay, Lesbian, Bisexual & Transgender Elders, www.sageusa.org/issues/abuse.cfm; *Mistreatment of Lesbian, Gay, Bisexual & Transgender* (LGBT) Elders, www.centerforelderabuse.org/docs/ResearchBrief_LGBT_Elders_508web.pdf.
19. *See* Ashley Carson, *Elder Abuse: A Women's Issue, supra at n 2, at p 6*.
20. *Id The Abusers.*
21. www.justice.gov/sites/default/files/ovw/pages/attachments/2015/01/26/end_abuse_in_later_life.pdf
22. *Id 4. Working With Victims.*
23. *Id.*
24. Bonnie Brandl, *Policy Implications of Recognizing that Caregiver Stress is Not the Primary Casue of Elder Abuse*, 36:3 Generations 32-39 (2012).
25. *Id.*
26. NCALL, *supra* What is Abuse in Later Life?
27. *Abuse in Later Life Power and Control Wheel*, adapted by NCALL and developed by the Domestic Abuse Intervention Project, Duluth, MN. www.ncall.us/Abuse in Later Life Wheel.pdf (Resource updated, April 2011).
28. During 2005, NCALL staff asked facilitators of older abused women's support groups to have participants review the Duluth Domestic Abuse Intervention Project's Power and Control Wheel. Over 50 survivors from eight states responded. NCALL created the Abuse in Later Life Wheel from their input. In addition to the tactics on the wheel, many offenders justify or minimize the abuse and deny that they are abusive. Perpetrators of abuse in later life may make comments like "she's just too difficult to care for" or "he abused me as a child" to blame the victim, or try to minimize the abuse by stating the victim bruises easily or injuries are the incidental result of providing care. *See* www.ncall.us/AbuseinLaterLife-Wheel2014.pdf.
29. National Center on Elder Abuse, *Major types of elder abuse*, www.ncea.aoa.gov/NCEAroot/ MainSite/FAQ/Basics/Types_Of_Abuse.aspx (2007).
30. *See Sexual Violence in Later Life Fact Sheet*, www.nsvrc.org/sites/default/files/publication_SVlaterlife_FS.pdf.
31. *See* Bonnie Brandl *et al., Elder Abuse: A Multidisciplinary Approach*, reproduced at *Late Life Domestic Violence: What the Aging Network Needs to Know*, a publication of the National Center on Elder Abuse, www.ncea.aoa.gov/Resources/Publication/docs/nceaissuebrief.DVforagingnetwork.pdf.
32. *See* Burton D. Dunlop *et al., Domestic Violence Against Older Women: Final Technical Report*, www.ncjrs.gov/pdffiles1/nij/grants/212349.pdf, NIJ 2002-WG-BS-0100 (The Center on Aging of Florida International University 2005).

33. Ada Albright, Bonnie Brandl *et al., Building a Coalition to Address Domestic Abuse in Later Life*, NCALL and AARP Foundation National Legal Training Project, 2004.
34. NCALL, *supra Working With Victims*.
35. *See* Aileen Wigglesworth *et al, Screening for Abuse and Neglect of People with Dementia*, 58 Journal of the American Geriatrics Society 493-500 (2010), onlinelibrary.wiley.com/doi/10.1111/j.1532-5415.2010.02737.x/abstract.
36. *See Technology and Confidentiality Resources Toolkit for Non-Profit Victim Service Agencies & Advocates Working to Provide Safe & Effective Services to Victims of Domestic Violence, Dating Violence, Sexual Assault & Stalking*, National Network to End Domestic Violence, tools.nnedv.org//faq/faq-flc.
37. *See* New York State Coalition on Elder Abuser for local, regional and statewide programs that address abuse in later life, www.nyselderabuse.org/resources-links.html.
38. For example, the New York County DA's office has resources available for victims of elder abuse: manhattanda.org/resources-victims-elder-abuse. The Kings County DA also has extensive services and expertise: www.brooklynda.org/elder-abuse-unit. Consult the prosecutor's office for the county in which your client resides.
39. *Elder Abuser: Going to Court*, www.lawhelpny.org/issues/family-juvenile/elder-abuse?channel=going-to-court&location=all&page=5.
40. New York State Office for the Aging provides extensive resources, www.aging.ny.gov/NYSOFA/Programs/CommunityBased/ElderAbuse.cfm.
41. New York State Office for Children and Family Services, ocfs.ny.gov/main/psa.
42. For example, the Weinberg Center for Elder Abuse Prevention at the Hebrew Home for the Aged offers excellent services as well as safe harbor for older victims of abuse, www.riverspringhealth.org/elder-abuse-shelter.aspx.
43. www.ltcombudsman.ny.gov.
44. A sample Article 8 petition is available at www.nycourts.gov/forms/familycourt/pdfs/8-2.pdf.
45. See Lori A. Stiegel & Pamela B. Teaster, Report to the American Bar Association, *A Multi-Site Assessment of Five Court-Focusd Elder Abuse Initatives*, www.ncjrs.gov/pdffiles1/nij/grants/241707.pdf (April 2013).
46. *See* www.eldersandcourts.org. California in particular has developed dedicated court parts to address elder abuse. *See* www.courts.ca.gov/5981.htm.
47. *See Overview of Guardianship Proceedings*, www.nycourts.gov/courts/1jd/supctmanh/GShip%20Forms/OV%20of%20GS%20Proceedings%204-12.pdf. Sample forms are available at www.nycourts.gov/forms/surrogates/guardianship.shtml. For best practices, the National Center for State Courts has materials on guardianship, www.ncsc.org/Topics/Children-Families-and-Elders/Guardianship-Conservatorship/Resource-Guide.aspx.

Section 6
Employment, Housing and Benefits

26

Domestic Violence Victims and Employment Law: Safeguarding the Workplace

by Wendy R. Weiser & Deborah A. Widiss
updated
by Christina Brandt-Young & Jelena Kolic

Employment is often a lifeline for victims seeking independence from an abuser. The process of separating from an abuser can be fraught with complications that may affect a client's ability to maintain employment, including lack of safety in the workplace, the need to miss work days for court appearances, and other challenges to maintaining a regular employment schedule. Because an abuser senses how crucial employment is to a victim's struggle to gain independence from domestic violence, the victim may find that the abuser makes every effort to sabotage her employment.[1] Employment is essential to the client's long-term success. Discussing hurdles in the workplace is an important part of effective representation.

New York Offers Strong Workplace Protection to Victims

Recognizing the importance of employment to domestic violence victims, New York amended its Human Rights Law in 2009 to provide civil rights protection to domestic violence victims and prohibit workplace discrimination against them.[2] This critical step forward has been paralleled by reforms in federal and local laws, agency regulations, and implementation of workplace policies. Together this protective framework can give life-saving security to a victim seeking to establish independence from an abuser. The decisions when, whether and how to disclose domestic violence to an employer and invoke these new rights is often fraught with complication, but a lawyer who is sensitive to the nuances of a client's workplace can provide highly effective representation, in ways that were not possible a decade ago.[3]

Developing familiarity with these laws will improve advocacy on the client's behalf should she decide to press for workplace accommodations.[4] An employer who will not initially agree to help its employee because it is the right and wise thing to do may comply when it learns that it is legally obligated to do so.

Understanding Domestic Violence and the Workplace

Employment can provide a victim with the economic independence needed to leave an abuser, but all too often violence and abuse follow the victim into the workplace and interfere with the ability to maintain employment.[5] For many victims, the employer and co-workers are well aware of the domestic violence that is plaguing her. An abuser may call incessantly, come to the workplace, or

take other steps to disrupt a victim's work life as a means of exerting control.[6] Studies confirm the prevalence of such experiences:

> In 2005, a national benchmark survey of 1,200 employed adults by the Corporate Alliance to End Partner Violence found that intimate-partner violence has a wide-and far-reaching effect on Americans' working lives: Forty-four percent of employed adults surveyed personally experienced domestic violence's effect in their workplaces, 21 percent of respondents (men and women) identified themselves as victims of intimate-partner violence, and 64 percent of domestic violence victims indicated that their ability to work was affected by the violence (National Benchmark Telephone Survey on Domestic Violence in the Workplace 1 (2005)).[7]

Stalking behavior in the workplace, frequently connected to intimate partner violence, is both dangerous and disruptive.[8] Between 35% and 56% of domestic violence victims in three separate studies reported that they were harassed at work by their batterers.[9] Half of all female victims of violent workplace crimes know their attackers, and nearly one out of every ten violent workplace incidents is committed by partners or spouses.[10] At the most severe level, a 2012 Centers for Disease Control study found that for women, intimate partner violence is the leading cause of workplace homicide.[11]

Even more pervasive are the indirect effects of violence. A victim distracted by domestic violence may falter in job performance.[12] The need to take time off during business hours to address the effects of violence in her life may result in excessive absences. Although New York law prohibits such action (see note 2), in more than thirty states a victim may still be fired or penalized at work when an employer learns about the domestic violence.[13] According to a 1998 report of the U.S. General Accounting Office, between 25% and 50% of domestic violence victims surveyed reported that they lost a job due, at least in part, to domestic violence.[14]

Victims of domestic violence who are employed often feel trapped in a Catch-22. They need work accommodations, such as time off, to take essential steps to address the violence, but are often afraid to tell their employers for fear of retaliation or losing their jobs. A victim who loses a job may no longer have the economic means to make necessary changes that would lead to independence from the abuser. In New York State, and especially in New York City, most employers are required by law to accommodate victims of domestic violence. Understanding the scope of a client's rights can help reassure her that taking affirmative steps to improve her work situation will be both feasible and successful.

Domestic Violence Victims are Protected Against Discrimination in the Workplace

Expanding reforms have brought domestic violence victims under the protection of civil rights laws, disability laws, and strong workplace policies aimed at helping victims maintain employment while remaining safe from domestic violence. These laws recognize how critical maintaining employment is for domestic violence victims, how domestic violence can pervade the workplace for a victim, and how the status of a person as a domestic violence victim can lead to inequalities and discrimination.[15]

State Workplace Protections

New York has created workplace protections for domestic violence victims. The New York State Human Rights Law expressly protects domestic violence victims from employment discrimination.[16] To qualify as a domestic violence victim under this anti-discrimination provision, the person must be the victim of an act that would constitute a family offense under the Family Court Act section 812(a).[17]

Such offenses include, among others, harassment, stalking, and assault between spouses or former spouses, between parent and child, or between members of the same family or household.[18] As with other protected categories, employers are prohibited, because of an individual's status as a victim of domestic violence, from refusing to hire or employ, barring or discharging from employment, or discriminating with respect to compensation or terms, conditions and privileges of employment.

Local Workplace Protections: New York City and Westchester County

For victims who work in New York City, the New York City Human Rights Law includes domestic violence, stalking and sex offense victims as members of a protected class, and prohibits discrimination against them.[19] The New York City Human Rights Law has included domestic violence victims since 2003, and also prohibits discrimination against those who are in relationship to someone who is, or is perceived to be, a member of one of the protected classes of individuals, and makes clear that an employer may not discriminate against an employee because of the acts of her abuser.[20] The law is administered by the City Commission on Human Rights which, among other powers, has the authority to impose civil and monetary penalties on employers found to have violated the provisions of the City law.[21] Westchester County also prohibits all forms of employment discrimination against domestic violence victims.[22] In particular, its laws make it illegal for an employer to discriminate against an actual or perceived victim of domestic violence in hiring, firing, compensation or other privileges and conditions of employment.

Employer Policies that Benefit Victims

While corporate awareness of the costs of domestic violence in the workplace is growing, only thirty percent of companies have in place effective domestic violence policies.[23] If a client's employer has such a policy in place, it can be an important source of protection. A model policy might include provisions:

- Prohibiting discrimination against employees because they are victims of domestic or sexual violence
- Establishing confidential means for reporting domestic or sexual violence
- Defining domestic or sexual violence broadly to include dating and same-sex violence
- Providing education and training on domestic and sexual violence to all employees and designating a coordinator
- Posting resource and referral information in easily accessible and highly visible locations
- Recognizing that domestic or sexual violence victims may have performance or conduct problems and providing them with assistance and a reasonable amount of time to address these problems
- Adjusting work schedules and providing flexible paid and unpaid leave so that victims can obtain necessary medical care, counseling, or legal assistance
- Increasing the safety of the workplace by reviewing the safety of parking arrangements, strictly enforcing civil protection orders, screening phone calls, developing safety plans with victims, and relocating employees to an alternative worksite, if necessary
- Disciplining, up to and including discharge, employees who threaten or abuse others on work time or use work resources, and consider sanctioning those who perpetrate unlawful violence outside the workplace

- Ensuring that health insurance policies do not discriminate against domestic or sexual violence victims[24]

In New York, federal, state and municipal employees benefit from domestic violence policies. By presidential executive order in 2012, the federal Office of Personnel Management was directed to lead creation of workplace domestic violence policies for federal agencies. If a client is a federal employee, therefore, domestic violence policies are in place.[25]

In 2008, by executive order, each New York State agency was mandated to adopt a domestic violence policy, with the assistance of the Office for Prevention of Domestic Violence.[26] New York City and Westchester require accommodations, as noted above.[27]

Workplace Accommodations for Domestic Violence Victims

Workplace accommodations that allow a victim the flexibility needed to move forward with whatever steps she must take to address the domestic violence can be crucial to maintaining employment through this difficult period. Workplace policies, and federal regulations can compel the employer to provide what is needed.

A client who works in New York City or Westchester County is probably eligible for workplace accommodations under local laws specifically aimed at helping victims of domestic violence, sex offenses and stalking in the workplace. The specificity of these laws eliminates the need to resort to creative invocation of other laws, such as the Americans with Disability Act [ADA] and sex discrimination claims (see below).[28] Under New York City's law, an employer must make reasonable accommodations for an employee whom it knew or should have known was a domestic violence victim, if those accommodations would enable the victim to satisfy essential requisites of employment. While there is little case law interpreting this provision,[29] the legislative history makes clear that the law was intended to cover requests for leave, security measures, scheduling or worksite changes, as well as other accommodations.[30] Accommodations must be "reasonable."[31] An employee may be required to provide her employer with certification that she is a victim of domestic violence, sex offenses, or stalking. The certification requirement may be satisfied by "documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider… ; a police or court record; or other corroborating evidence."[32] The employer is required to keep all such information "in the strictest confidence."[33] The Westchester County law includes similar provisions.[34]

Americans with Disabilities Act and Domestic Violence Victims

In 2013, the Equal Employment Opportunity Commission concluded that discrimination against domestic violence victims or victims of stalking or sexual assault could implicate both Title VII and the ADA, and would therefore be unlawful.[35] Thus workplace discrimination against a domestic violence victim can lead to federal civil rights or ADA-related claims. Similar protections for disabled victims of domestic violence are found in the New York State Human Rights Law,[36] and comparable local laws such as the New York City Human Rights Law.[37] These laws prohibit employers from discriminating against employees who have qualifying disabilities or who are perceived as having disabilities, provided that the employees can perform the essential functions of their jobs. In addition, disabled employees are entitled to reasonable accommodations.

Disabilities laws can be useful for domestic violence victims who suffer long-term physical or mental injuries, including post-traumatic stress disorder or depression. Common accommodations under disabilities laws include time off, and modification of equipment. A victim may seek a changed work schedule to enable time for counseling or treatment for injuries. To qualify for protection under the

ADA, which was substantially expanded in 2012, a person must have a physical or mental impairment that "substantially limits" a "major life activit[y]."[38] The definition of disability under the New York State Human Rights Law (and many local laws, including New York City's) is considerably broader than that under the ADA.[39] Accordingly, some individuals who may not have qualifying disabilities under the ADA may nonetheless have disabilities that must be accommodated under state or local law.

Helping a Client Keep Employment While Addressing Intimate Partner Violence

Once the basis for requesting accommodations has been determined, counsel should help a client determine the most effective way to approach an employer. Questions to consider include:

- What accommodations would be helpful—time off, leave of absence, change in schedule, change in work site?
- Has she disclosed her situation to her employer?
- If so, has she requested time off or accommodations, and what has been the reaction?
- Does her employer have a workplace violence or domestic violence policy?
- Does she have accrued leave of any kind? Has the domestic violence been affecting her work performance?
- Is she suffering from specific physical or mental health conditions?
- Is she a member of a union?
- How many people does her employer employ?

In many cases, informal advocacy may be sufficient to bring about needed support or accommodations. The client may advocate for these independently; or with the assistance of a union representative, attorney, or any other advocate. Advocacy is most likely to succeed when the client or the advocate has an understanding of what the employer is legally obligated to provide.

Whether the Client Should Tell the Employer About the Violence

At the outset, in addressing employment-related needs, a domestic violence victim must weigh whether to disclose very personal circumstances to an employer. There can be important advantages to disclosure. First, it may allow the client to work with the employer to take steps to address the violence and to help keep the workplace safe for her and for co-workers. If the employer has a policy concerning domestic violence, it will allow the victim to invoke whatever protections or accommodations the employer has in place. Disclosing the violence may also explain a period of poor performance; this may be especially helpful if she has taken steps to address the violence so that her employer will have reason to believe that problems affecting her performance will abate. Both state and city laws protecting domestic violence victims against discrimination, and requiring reasonable accommodations, require the victim to notify her employer.

There are, unfortunately, some very real downsides to disclosing. Despite progress on many legal and societal fronts, some employers may fire a victim simply because she is a victim of domestic violence, even though doing so is unlawful. (see note 3, *supra*). But the fact that a client might have a good legal claim in the future against an employer who fires her may be less significant than ensuring that she has a regular paycheck at present. Short of termination, an employer may set conditions on continued employment that might not be right for the client, such as pressuring her to obtain a

protective order. Even if her employer has a duty to keep her situation confidential or if she asks her employer to be discreet, once she has talked about the violence at work, the story may begin to circulate at the office and expose her to prying questions.

Unfortunately, it can be impossible to know in advance how an employer will react. Employment policies may offer a clue. If an employer has affirmatively committed to a proactive domestic violence policy, there is less risk in disclosing. If your client does decide to disclose the violence to her employer, she should ask her employer to keep her situation confidential. In New York City and Westchester County, employers are legally obligated to maintain the confidentiality of most information relating to domestic violence.[40]

It is in the employer's interest to keep employees safe and able to perform effectively at work. A proposed plan that furthers those interests is more likely to be well received. Framing a request so that it sounds like something any employee with pressing personal circumstances would be granted increases the chances of success.

If independent advocacy fails, a letter from an attorney simply setting forth the situation and applicable law may be sufficient to secure the requested accommodation or otherwise induce the employer to do the right thing. If a lawyer's letter fails to yield results, litigation may be necessary. Because some claims have strict (and short) time limits, it is essential to make all relevant employment inquiries as soon as possible.

Effective Workplace Accommodations

Examples of common accommodations include:

- Allowing time off to obtain a protective order, seek medical or legal assistance, find safe housing, or take other steps to deal with the abuse
- Changing a telephone number or extension or routing calls through the office receptionist to curtail phone harassment
- Keeping the employee's home address and telephone information confidential
- Transferring the employee to a different desk, department, shift, or work site
- Having a security guard escort her to her car or the nearest public transportation stop
- Registering a protective order with security or office reception staff; posting a photograph of the abuser at the front desk or with security personnel; and informing the guards or receptionist not to let the person enter the building.[41]

Securing Time Off from Work to Address Domestic Violence

Almost any victim of domestic violence needs at least some time away from work. Essential steps to securing safety require personal appearances that will most often conflict with a regular work week schedule, such as obtaining a protective order, appearing in court to participate in other civil or criminal proceedings against the abuser, seeking help for physical injuries or mental stress from the violence, locating safe housing, or caring for needs of abused family members. These challenges may require full-time leave, a reduced schedule, intermittent leave, or flexibility in work hours. Currently, a patchwork of existing laws and policies, in addition to the New York City and Westchester statutes discussed above, can provide victims with the time needed to address some of the issues.

Employment Policies Addressing Worker Time Off

To determine the extent to which a client is eligible for time off, look first at personnel policies, employment contracts, and collective bargaining agreements. Does the client's employer have a policy specifically addressing domestic violence? Could she use vacation days, personal days, sick days, discretionary days, family and medical leave or other paid or unpaid leave? Are there flex-time provisions that can help her arrange a schedule to provide time for counseling or rearrange her schedule so that her abuser will not know when she will be going to or from work? Does the employer grant accommodation for "special circumstances" that could provide her the flexibility she needs?

Many employee benefit programs and collective bargaining agreements provide generous leave rights, covering employers that may not be covered under other laws. If your client is in a union, a union representative may be a helpful advocate in reviewing the possibilities for time off and in negotiating with an employer for necessary accommodations.

Time Off to Go to Court

A domestic violence victim is entitled by law to participate in criminal proceedings. If criminal charges have been filed, then the New York State Penal Law prohibits an employer from firing or penalizing the victim of the crime if she takes time off to appear in court as a witness, to consult with a district attorney, or to obtain an order of protection in either family court or criminal court.[42] The employee must give her employer notice ahead of the absence, and her employer may withhold wages. Her employer may also ask for documentation, which a prosecutor or court clerk can supply.

Time Off to Address Medical Needs or Accommodations for a Disability

The Family and Medical Leave Act

If a client needs time off to address the health consequences of violence against herself or a family member, she may be able to rely on the federal Family and Medical Leave Act (FMLA).[43] The FMLA requires employers to grant up to twelve weeks of leave to care for "serious health conditions" of employees or their family members. A "serious health condition" is an illness, injury, impairment, physical or mental condition that (a) causes a period of incapacity (including an inability to work, attend school, or perform other regular daily activities), and (b) requires an overnight stay in a medical facility or continuing treatment by a health care provider. Under certain circumstances, FMLA leave may be taken "intermittently," allowing, for example, an employee to take an afternoon off every week for ongoing counseling or therapy. The FMLA, however, only covers employers with 50 or more employees within a 75-mile radius and employees who have worked at least 1,250 hours during the twelve months before taking leave (about twenty hours per week).

If your client might be able to use the FMLA, she should notify her employer of her health or medical condition. Although a victim need not disclose that her condition is a result of domestic violence, she must provide sufficient information so that her employer can understand that she has a serious health condition. Either the employee or the employer may choose to apply any accrued paid leave (e.g., vacation or sick time) to the FMLA leave. Under the FMLA, an employer may not fire an employee for taking up to twelve weeks of leave, must continue to provide the same level of health plan coverage during the leave, and must give the employee the same or an equivalent job upon her return.

Cash Benefits Available for Periods Away From Work Because of the Domestic Violence

Short-Term Disability Benefits

New York State requires that employers provide short-term disability insurance to provide wage replacement because of an off-the-job illness or injury. A domestic violence victim may qualify for this benefit.[44] A qualified claimant will receive 50% of her average weekly wage or the maximum benefit allowed (currently $170), whichever is lower. Benefits are paid for a maximum of 26 weeks of disability during a period of 52 consecutive weeks. Both employed and unemployed persons can receive benefits, but benefits cannot be claimed for any day on which the claimant receives a salary or on which an unemployed claimant receives unemployment insurance benefits. The short-term disability benefits program is administered by the state Workers' Compensation Board, which provides forms that may be used for claiming benefits.

Unemployment Insurance Benefits

A domestic violence victim who is fired or who chooses to leave her job may be eligible for unemployment insurance benefits. To qualify for unemployment insurance in New York, a claimant must demonstrate that (a) if she was terminated, it was not because of her misconduct, or (b) if she left her job voluntarily, she had good cause to do so. Under New York law, if a claimant chooses to leave her job as "a consequence of circumstances directly resulting from the claimant being a victim of domestic violence," she may be found to have "good cause" for a voluntary separation and thus be able to receive unemployment benefits.[45] In addition, if your client lost her job because of alleged "misconduct" that itself was related to domestic violence (such as unexcused absences), she may be able to establish that such consequences of domestic violence are not actually "misconduct" under New York law.[46] To qualify for benefits, a claimant must also certify that she is ready and able to accept work as well as that she is actively seeking work.[47] Some domestic violence victims may not be able to meet this standard.

To obtain unemployment insurance benefits, the client must file a claim with the New York State Department of Labor. Although New York law does not require a claimant to provide any specific documents to verify that domestic violence occurred, providing relevant documents may be helpful to establish coverage under the domestic violence provision. Be aware, however, that documents submitted to the unemployment insurance office may not be kept confidential.

Additional Claims Arising from Unlawful Termination of Employment or Discrimination in the Workplace

If a client was fired, demoted, or otherwise treated badly at work because she was a victim of domestic violence or because of the misconduct of her abuser, she may have a claim under domestic violence anti-discrimination laws.[48] The New York State Human Rights Law expressly protects domestic violence victims from employment discrimination. To qualify as a domestic violence victim under this anti-discrimination provision, the person must be the victim of an act that would constitute a family offense under the Family Court Act. Moreover, victims who live in New York City or Westchester County may have additional employment discrimination claims under those counties' laws. Both counties prohibit all forms of employment discrimination against domestic violence victims. In particular, these laws make it illegal for an employer to discriminate against an actual or perceived

victim of domestic violence in hiring, firing, compensation or other privileges and conditions of employment. The New York City law also makes clear that an employer may not discriminate against an employee because of the acts of her abuser.[49] While the case law remains sparse, at least one court has concluded that victims who establish that the hostile work environment they experienced was at least partially motivated by the employers' knowledge of the abuse can qualify for relief under New York City's provisions.[50]

Claims under the New York City law can be filed with the New York City Human Rights Commission or brought directly in court. Remedies for violation of the law can include reinstatement, back pay, and damages, including punitive damages. Claims under the Westchester law may be pursued by filing a complaint with the Westchester Human Rights Commission.

Sex Discrimination Laws

In jurisdictions that lack domestic violence discrimination laws — which is no longer the situation in New York State — both federal and local sex discrimination laws can quite effectively provide protection for domestic violence victims. Title VII of the Civil Rights Act of 1964[51] as well as local laws may be construed to prohibit discrimination against domestic violence survivors. Various theories of liability may apply.

Disparate Treatment

First, in certain circumstances, an employer may be said to have engaged in *disparate treatment* sex discrimination if the employer treats battered women differently from other employees. The classic prima facie case of disparate treatment sex discrimination is stated in terms of hiring, requiring that an employee establish that (1) she is a woman; (2) she applied for and was qualified for the position in question; (3) she was rejected; and (4) the position remained available.[52] Courts consider comparable factors in assessing other sex discrimination claims (e.g., termination or demotion) in the employment context. If a prima facie case is established, the burden of production then shifts to the employer to show a legitimate non-discriminatory reason for the employment action. The employee must then prove that the employer's reason is merely a pretext for discrimination.

If a client is penalized at work because her employer finds out she is the victim of domestic violence or sexual assault, it can be argued that her employer is treating her differently because she is a woman and hence violating sex discrimination laws. Such a situation may exist when the employee's batterer is also her co-worker. If the employer fires the victim but takes no action against the batterer, there is a clear comparison between male and female workers.[53] Such a comparison is also possible when an employer fires a domestic violence victim for taking time off to secure safe housing but allows a male employee to take time off to move or take similar actions. Other examples can be found in the 2012 publication issued by the Equal Employment Opportunity Commission, titled "Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic and Dating Violence, Sexual Assault, or Stalking."[54]

Disparate Impact

A second theory of liability, perhaps more broadly applicable in the domestic violence context, is *disparate impact* discrimination. The disparate impact theory is generally used to challenge policies or practices that are gender-neutral on their face but in fact fall more harshly on women than men.[55] An employer who applies a policy or practice in a way that negatively affects domestic violence victims may be said to engage in disparate impact sex discrimination. For example, if an employer terminates employees who obtain or seek to enforce protective orders, that would have a disparate impact on women because the majority of people obtaining or enforcing protective orders are women.

There have been successful cases based on a similar theory under federal and state fair housing laws.[56] In those cases, landlords evicted or otherwise discriminated against tenants because they were victims of domestic violence. The adjudicators found that the landlords' policies constituted illegal sex discrimination under the fair housing laws because they had a disparate impact on women. Since housing discrimination laws are interpreted in a manner consistent with employment discrimination laws, those cases could be relevant precedents in the employment context.

Sexual Harassment

For domestic violence victims, a sexual harassment theory may be available when the batterer is a co-worker who creates a hostile work environment for the victim. Domestic violence victims have successfully brought sexual harassment claims against their employers when their abusers were co-workers.[57] The sexual harassment theory may be extended to apply to a situation where a victim of domestic violence obtains a protective order against her co-worker. If her employer knew that the batterer was creating a hostile environment, the employer may arguably be obligated to enforce the protective order under a theory that the employer has a duty to take prompt and effective remedial action to stop the sexual harassment.[58]

Additional Claims if the Violence Occurred at Work

Too often, domestic violence is carried to the workplace, creating risk not only for the victim but for co-workers as well. If your client fears violence at work, or has experienced violence at work, additional laws may apply or provide your client with a claim. These laws may, under certain circumstances, establish a duty for employers to provide a workplace safe from domestic violence.

Workers' Compensation and Negligence Claims

Accidents or injuries that occur at work may give rise to either workers' compensation or negligence claims. Workers' compensation is an administrative system, often faster than a lawsuit, that provides an opportunity for an individual injured at work to recover medical costs but generally not any other damages. If an accident or injury on the job is covered by workers' compensation, then it generally operates as the exclusive negligence-based remedy against the employer, precluding the employee from also recovering under a tort theory. New York's Workers' Compensation Law generally bars common law negligence claims against the employer based on a co-worker assault; it will not, however, preclude a claim based on an "intentional act committed by an employer" directed at "causing harm to a particular employee."[59] A domestic violence victim who seeks to avoid the workers' compensation system — and thus retain the possibility of pursuing negligence tort-based claims — may argue that the workers' compensation law should not apply if her abuser is a high-level supervisor (and hence his acts may be imputed to the employer) or if there is evidence that her assault was motivated to cause harm to her specifically.[60]

Possible negligence claims that may apply if the incident is not covered by workers' compensation include negligent hiring and retention, negligent supervision, failure to warn and respond, and negligent infliction of emotional distress. Domestic and other violence victims have successfully brought negligence claims against their employers in a number of cases. For example, in one case, a victim was permitted to bring a negligent retention claim against her abuser's employer where she alleged that the abuser had used his position as a corrections officer repeatedly to access her unlisted telephone number and to hold off police officers when confronting the victim in public.[61] Another case held that an employer could be liable under a negligence theory where the plaintiff was shot at work by a co-worker who had previously attacked her and another former girlfriend at the work site.[62]

Occupational Safety and Health Act

Finally, failure to take reasonable steps to address potential hazards in the workplace, including danger resulting from domestic violence, may expose an employer to claims of tort-based negligence, discrimination, or violation of OSHA regulations.[63]

A workplace free from recognized safety hazards is the hallmark of the federal Occupational Safety and Health Act (OSHA), expressed in its "general duty clause."[64] To invoke that clause, an employee must show that the danger was reasonably foreseeable. If the danger was foreseeable, an employer is required to take reasonable steps to protect workers from violent attacks, including domestic violence attacks, in the workplace. OSHA rules require employers to consider all injuries caused, in whole or in part, by "an event or an exposure in the work environment" to be "work-related." Domestic violence incidents are not a condition that is exempted from this duty. Thus a tenable argument could be made that OSHA requirements include reasonable protection against foreseeable workplace domestic violence.[65]

Conclusion

Despite the fundamental importance to victims of maintaining employment, domestic violence attorneys and advocates have, for too long, treated employment as an afterthought. Yet for so many women, the ability to maintain employment or economic security may be the deciding factor leaving a violent relationship. Many laws specifically addressing the needs of victims in the workplace — such as the New York State law providing access to unemployment insurance and the New York City and Westchester laws specifically prohibiting discrimination and requiring reasonable accommodations — were passed just in the past decade, and often remain underutilized. Through strong, enlightened lawyering, these laws can become useful tools that will help clients gain the economic independence needed to address effectively, and ultimately end, the violence in their lives.

Notes

1. *See generally* Jody Raphael & Richard M. Tolman, *Trapped In Poverty, Trapped By Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* (1997) (documenting ways in which abusers interfere with victims' ability to work, including preventing them from going to work, harassing them at work, limiting their access to cash or transportation, and sabotaging their child care arrangements).
2. *See* Executive Law § 296, available at www.dhr.ny.gov/sites/default/files/doc/hrl.pdf
3. Legal Momentum's Domestic Violence and Workplace Protections project provides direct representation and technical assistance on employment-related needs of domestic violence survivors. Information on this program can be found at www.legalmomentum.org/employment-and-victims-violence.
4. For access to comprehensive, current articles on a range of topics related to domestic violence in the workplace, *see* VAWnet.org, "Special Collections: Domestic Violence and the Workplace," available at www.vawnet.org/special-collections/DVEmployment.php.
5. *See generally* Partnership for Prevention, *Domestic Violence and the Workplace*, released 2002, available at www.tpchd.org/files/library/c9df481abc6a4b5d.pdf.
6. *See* Workplaces Responds to Domestic and Sexual Violence, *The Facts on the Workplace and Domestic Violence*, available at www.workplacesrespond.org/learn/the-facts/the-facts-on-the-workplace-and-domestic-violence.
7. *See* Robin Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims*, 37:3 ABA Human Rights Magazine, (2010), available at www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/the_legal_response_to_the_employment_needs_of_

domestic_violence_victims_an_update.html, citing survey available at www.ncdsv.org/images/CAEPVSurvey.WorkPlace.pdf.

8. *See* Greg Warchol, US Dept. of Justice, *Workplace Violence*, 1992-96 (July 1998); *see also* Corporate Alliance to End Partner Violence, *Factsheet on Stalking in the Workplace*. Available at www.caepv.org/getinfo/facts_stats.php?factsec=9.
9. *See* United States General Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 19 (Nov. 1998) (summarizing three studies of employed battered women) [GAO Report].
10. *See supra* note 7, *The Facts on the Workplace and Domestic Violence*.
11. *See* The National Institute for Occupational Safety and Health, *New Study Examines the Role of Intimate Partner Violence in Workplace Homicides Among U.S. Women*, www.cdc.gov/NIOSH/updates/upd-05-03-12.html.
12. *See* National Coalition Against *Domestic Violence, Domestic Violence in the Workplace—Job Performance and Productivity*, www.ncadv.org/files/Workplace.pdf .
13. *See States with Pro-Employee Laws: Domestic Violence Workplace Protection, September 23, 2014.* www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2014/09/23/states-with-pro-employee-laws-domestic-violence-victim-workplace-protection.aspx.
14. *See* GAO Report, *supra* note 8.
15. *See Domestic Violence Victims Emerging as New Protected Class*, www.xperthr.com/news/domestic-violence-victims-emerging-as-a-new-protected-class/9567/.
16. *See* New York State Human Rights Law, codified at Executive Law § 296(1)(a); Executive Law § 292(5); *see also* New York State Division on Human Rights, *Employment Rights for Victims of Domestic Violence*. Available at www.dhr.ny.gov/sites/default/files/pdf/domestic_violence.pdf.
17. *See* Executive Law § 292(34).
18. *See* Family Court Act § 812(a).
19. Survivors Workplace Protection Act, Local Law 75 of 2003, codified at Administrative Code of City of NY § 8-107.1.
20. *Id.*
21. *Id.*
22. Westchester Co. Local Law Intro 14-2005, codified at Westchester County Code of Ordinances ch. 700; These provisions apply to employers with four or more employees. Westchester County Code of Ordinances § 700.03(b)(6)(c).
23. *See* Workplaces Respond to Domestic Violence, *Model Workplace Policy*. www.workplacesrespond.org/learn/model-policy.
24. *See* Legal Momentum *State Law Guide: Domestic and Sexual Violence Workplace Policies*, www.scribd.com/doc/160010411/State-Law-Guide-Domestic-and-Sexual-Violence-Workplace-Policies.
25. *See* Presidential Memorandum — Establishing Policies for Addressing Domestic Violence in the Federal Workforce, available at www.whitehouse.gov/the-press-office/2012/04/18/presidential-memorandum-establishing-policies-addressing-domestic-violen; *see* U.S. Office of Personnel Management, *Guidance for Agency-Specific Domestic Violence, Sexual Assault, and Stalking Policies*, www.opm.gov/policy-data-oversight/worklife/reference-materials/guidance-for-agency-specific-dvsas-policies.pdf.
26. *See* Executive Order No. 19 (2008), www.opdv.ny.gov/professionals/workplace/execorder19.html; State of New York Model Domestic Violence and the Workplace Policy, www.opdv.ny.gov/professionals/workplace/statepolicy.html.
27. Administrative Code of City of NY § 807.1; Westchester County Code of Ordinances § 700.03.
28. Administrative Code of City of NY § 807.1; Westchester County Code of Ordinances § 700.03
29. *See Reynolds v Fraser*, 5 Misc 3d 758 (Sup Ct, NY County 2004) (finding failure to accommodate employee's lack of a permanent address violates law).

30. *The Council Report of the Governmental Affairs Division, Marcel Van Ooyen, Deputy Chief of Staff, Committee on General Welfare, Bill DeBlasio, Chair, Report on Int. No. 107-A*, Oct. 16, 2003, legistar.council.nyc.gov/View.ashx?M=F&ID=886908&GUID=DFF3D6DD-5D67-4B6A-91B9-D70D64E03560 (stating reasonable accommodations provision would require employers to allow victims "to take leave from work to seek legal assistance, counseling, or assistance in developing a safety plan [and that] [o]ther reasonable accommodations could include… re-assigning seating so that a victim need not sit near an entrance, changing a victim's telephone number, removing his or her name from the company's phone directory, or adjusting starting and leaving times.")
31. Administrative Code of City of NY § 807.1.
32. *Id.*
33. *Id.*
34. Westchester County Code of Ordinances § 700.03.
35. *See Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm.
36. *See* Executive Law § 296.
37. Administrative Code of City of NY § 8-107.1(2); Westchester County Code of Ordinances § 700.03(a).
38. 42 USC § 12101 *et seq*.
39. Executive Law Art. 15; Executive Law § 292 (21(covering impairments "which prevent[] the exercise of a normal bodily function or [are] demonstrable by medically accepted clinical or laboratory diagnostic techniques").
40. Administrative Code of City of NY § 8-107.1(3)(b); Westchester County Code of Ordinances § 700.03(b)(6)(c).
41. *See* Workplaces Respond to Domestic and Sexual Violence, *Protection Order Guide*, www.workplacesrespond.org/learn/protection-order-guide.
42. *See* Penal Law § 215.14, *Employer unlawfully penalizing witness or victim*.
43. Family and Medical Leave Act, 29 USC § 2601 et seq; see also U.S. Dept. of Labor, Wages and Hours: FMLA, www.dol.gov/whd/fmla/.
44. *See* New York State Worker's Compensation, *Disability Benefits*, available at www.wcb.ny.gov/content/main/offthejob/IntroToLaw_DB.jsp .
45. Labor Law § 593(1)(a); In re Loney, 287 AD2d 846 (3d Dep't 2001).
46. *See Matter of Christina Ramirez-Huie*, ALJ Case No. 001-08794, July 20, 2001 (Unemployment Insurance Appeal Board) (employee who was fired for missing work for circumstances relating to domestic violence, including for medical treatment and child custody disputes, did not commit "misconduct" and hence is eligible for unemployment benefits).
47. Labor Law § 591(2). Note that the requirement involving active job search will not take effect until December 7, 2015.
48. Executive Law § 296; Administrative Code of City of NY § 8-107.1(2); Westchester County Human Rights Law § 700.03(a).
49. Executive Law § 296(1)(a); *see also* New York State Division on Human Rights, *Employment Rights for Victims of Domestic Violence*, www.dhr.ny.gov/sites/default/files/pdf/domestic_violence.pdf. This provision applies to employers with four or more employees. Executive Law § 292(5).
50. *See e.g. Pryor v Jaffe & Asher, LLP*, 992 F Supp 2d 252 (SD NY 2014) (holding that complaint adequately alleged that domestic violence was a factor motivating hostile work environment under the New York City Human Rights Law); *Quick v Horn*, 873 NYS2d 514 (Sup Ct, NY County 2008) (unreported) (holding that termination of employee violated the New York City Human Rights Law to the extent that it was motivated by the false allegations of the employee's batterer).
51. 42 USC § 2000 *et seq*.
52. *See generally McDonnell Douglas Corp. v Green*, 411 US 792 (1972).

53. *See e.g. Valdez v Truss Components Inc.*, 1999 US Dist LEXIS 22957 (US Dist Ct, OR, Aug. 19, 1999), No. CV98-1310.
54. *See* U.S. Equal Employment Opportunity Commission, *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking* (2012) (listing situations in which employers' treatment of domestic violence victims may qualify as employment discrimination under Title VII or ADA).
55. *See e.g. Dothard v Rawlinson*, 433 US 321 (1977); *Griggs v Duke Power Co.*, 401 US 424 (1971).
56. *See Bouley v Young-Sabourin*, 394 F Supp 2d 675 (D Vt 2005) (finding termination of lease because tenant was a victim of domestic violence could state sex discrimination claim); Secretary, US Dep't of Hous & Urban Dev, No HUDALJ 10-99-0538-8 (HUD Ore. Apr. 16, 2001) (HUD charge of discrimination in *United States ex rel. Alvera v C.B.M. Group, Inc.* finding that eviction of woman because she was a victim of domestic violence violated Fair Housing Act), www.legalmomentum.org/issues/vio/ Alvera%20 Charge%20of%20Discrim.pdf; *Winsor v Regency Prop. Mgmt, Inc.*, No. 94 CV 2349 (Wisc Cir Ct, Oct. 2, 1995) (holding that Wisconsin Fair Housing Law, modeled after federal Fair Housing Act, prohibits housing discrimination against domestic violence victims); *O'Neil v Karahlais*, 13 MDLR 2004 (Mass Comm'n Against Discrim. Oct. 21, 1991) (same with respect to Massachusetts law); Formal Op. No. 8F-F15, 1985 Op Atty Gen NY 45 (Nov. 22, 1985) (Attorney General's opinion that sex discrimination provisions of New York State Human Rights Law prohibit denial of rentals to persons based on their status as domestic violence victims).
57. *See e.g. Excel Corp. v Bosley*, 165 F3d 365 (8th Cir 1999); *Fuller v City of Oakland*, 47 F3d 1523 (9th Cir 1995).
58. *See* EEOC Title VII Questions and Answers, *note 56, supra*.
59. *Acedevo v Consolidated Edison Co.*, 189 AD2d 497, 501 (1st Dep't 1993).
60. *See e.g. Peterson v RTM Mid-America*, 209 Ga App 691, 693 (Ga Ct App 1993); *Devault v Gen. Motors Corp.*, 386 NW2d 671 (Mich App 1986); *Morris v Soloway*, 428 NW2d 43 (Mich App 1988).
61. *Prignoli v City of New York*, 1996 US Dist LEXIS 8498 (SD NY 1996).
62. *Crapp v Elberta Crate & Box Co.*, 479 SE2d 101, 102-03 (Ga Ct App 1996). *See also e.g. Haddock v City of New York*, 75 NY2d 478 (1990) (affirming negligent retention holding in case brought by individual raped by a city employee where city failed to follow its procedures regarding conducting criminal background checks and thus was unaware that employee had previously been convicted of several crimes); *Duffy v City of Oceanside*, 224 Cal Rptr 879, 884-85 (Cal Ct App 1986) (reversing summary judgment holding for defendant on negligent failure to warn and respond claim where employer failed to inform plaintiff of co-worker's prior convictions for rape and sexual assault even after plaintiff complained that co-worker had sexually harassed her).
63. 29 USC §§ 651 *et seq. See also* Department of Labor, *Workplace Violence Program*, www.dol.gov/ oasam/hrc/policies/dol-workplace-violence-program.htm.
64. 29 USC §§ 651 *et seq*.
65. 29 CFR 1904.5.

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Public Assistance and Housing: Navigating Difficult Benefits Systems

by Jack Newton, Amy Schwartz & Sharon Stapel

Domestic and intimate partner violence can lead, directly and indirectly, to financial strain that may cause the survivor to despair of gaining independence from the abuser. A survey of women who receive temporary assistance (welfare) revealed that up to 80% may be survivors of, or attempting to escape, domestic violence.[1] Many survivors must depend upon an abuser for basic financial support: rent, food and clothing. Abusers may interfere with employment or childcare arrangements until survivors are fired or forced to quit their jobs. Some abusers will undermine the survivor's opportunities for education or job training. A survivor can be faced with the frightening possibility of homelessness if separated from the abuser. Without necessary resources, many remain trapped. Critical first steps toward economic self-sufficiency may come in the form of public assistance, public housing, or even shelter.

The public assistance, or "welfare," system has many serious challenges, however. The system is intrusive, and grants barely meet a client's most basic needs. The shelter and subsidized housing system can also be confusing and difficult to navigate. Many battered clients face additional challenges securing the documentation necessary to prove eligibility. Confidentiality concerns and language access challenges can complicate matters further. Because successfully accessing these benefits may make all the difference to a survivor seeking independence, it is important to persist. Learning to navigate the obstacles and decipher the confusing alphabet soup of agencies and programs is possible; this chapter will help practitioners new to the area do that. Important starting points are the online portal myBenefits (https://mybenefits.ny.gov), which guides the applicant through available services, benefits and procedures and directs the user to local providers, as well as the Office of Temporary and Disability Assistance portal. That office oversees administration of many programs, and its website provides a centralized, accessible resource for understanding available options at http://otda.ny.gov/programs. This article will help practitioners understand how these many programs interact and supplement one another, and which ones may be available to an individual client.

Part I:

Public Assistance: An Overview

Welfare reforms, which began in the 1990s, have made receiving public assistance, now termed "Temporary Assistance" or "TA," more difficult. In New York State, the basic grant for cash public assistance consists of two parts: the "shelter allowance" and "basic needs grant" or the "food and other" grant, which includes utilities. However, federal funds for the program are limited, immigrant eligibility is significantly restricted (and often misunderstood by public assistance workers), families are subject to a sixty-month lifetime limit in the federally-funded Family Assistance (FA) program, and eligibility requirements are tougher to meet.[2]

TA is administered by the Office of Temporary and Disability Assistance (OTDA), through local social service districts under its authority. New York City is one district and the local district is called the Human Resources Administration (HRA). TA programs include Family Assistance (FA), which is designed for families that include a minor child living with either a parent, two parents, or a caretaker relative, and Safety Net Assistance (SNA), which is intended for individuals and families without children or families with children who have reached the sixty-month time limit. FA and SNA provide similar cash grants, but FA allows working recipients to keep more of their cash or rental benefit than the SNA program. Families with children may also be eligible for childcare benefits.[3] Medicaid and the Supplemental Nutrition Assistance Program (SNAP), formerly known as the "Food Stamps Program," are federal programs administered by OTDA. Families eligible for FA or SNA are generally also eligible for SNAP and Medicaid, unless the adult falls short of five years' lawful permanent resident status.[4] State and federal statutes, implementing regulations, and administrative policies and directives define social service district obligations and applicant or recipient responsibilities.[5]

Public assistance grants are meager at best, as shown in the below New York City monthly grant award chart for families with minor children,[6] and are determined by the number of people in the household eligible for assistance.

Family Size	Basic Needs /Food/Other Grant	Shelter Allowance	Total
1	183.10	277.00	460.10
2	291.50	283.00	574.50
3	389.00	400.00	789.00
4	501.70	450.00	951.70
5	618.70	501.00	1119.70
6	714.20	524.00	1238.20
7	811.70	546.00	1357.70

Governance of benefits is dominated by sub-regulatory agency directives, including informational letters (INF), administrative directives (ADM), memorandums to Local District Commissioners (LCM), as well as New York City policy directives (PD).[7] Welfare caseworkers and supervisors may not be well-versed in these authorities and sources, leading to incorrect and illegal determinations. Recipients can request fair hearings to challenge sanctions or an administrative determination to reduce or deny benefits.[8] Although the fair hearing process does not carry the right to counsel, recipients may be represented by an attorney, an advocate, or represent themselves; counsel can provide guidance to pro se litigants. The regulations and policies governing these areas change periodically, so practitioners should consult advocates with particular expertise.[9]

Informal relief, or systems set up to resolve common issues faced by public assistance applicants or recipients, is also available for some issues, such as adding persons to a public assistance budget or modifying work plans. The National Center for Law & Economic Justice, www.nclej.org, provides up-to-date guidance on these procedures.

The Application and Eligibility Process

Applications, which are available in multiple languages, may be commenced at myBenefits.com.[10] Residents of New York City will be redirected to Access NYC.[11] In New York City; an applicant can also call 311 and provide the ZIP code of residence, or visit the HRA website.[12] An individual can usually fill out one application for general welfare benefits (transitional benefits or TA), SNAP, and

Medicaid through the local welfare district office or welfare center. The programs do not share the same eligibility standards, however. Families not eligible for FA or SNA may still be eligible for SNAP, Medicaid, and/or one of the special programs such as Child Health Plus or medical benefits under the Affordable Care Act.[13]

Clients applying for TA must document their household's identity and eligibility for benefits by presenting birth certificates, Social Security cards, proof of immigration status, or other forms of identification, such as bank statements, proof of earned or unearned income in the household (including pay stubs, support and custody orders, divorce judgments), school records, medical records, leases, and any other resources (such as cars, real property, stocks, bonds, retirements accounts). Intimate partner violence survivors who don't have access to these types of papers because they fled their homes or had these documents were wrongfully retained or destroyed by their abuser may have difficulty providing this information. Advocates may be able to assist the client to obtain this information more safely. If the abuser is retaining necessary documents or they remain in the home from which the survivor fled, the survivor may consider asking the Family Court for *document return relief* as part of an order of protection in family offense proceedings under Family Court Act § 842(j).

Transgender or gender non-conforming survivors may have challenges with providing identity documents if their documents do not accurately reflect their gender marker or the name they use. (For further discussion, see Chapter 20 of this Manual.)

Sometimes survivors change their names or Social Security numbers as a safety planning measure. Those clients should apply for assistance using their current, legal name. If documents are inconsistent, they might provide the caseworker with a copy of the judicial name change order or Social Security number change.

Caseworkers, although required to assist in obtaining the information, are often reluctant to do so.[14] They are prohibited from contacting the abuser, the abuser's family or other third parties (such as landlords, teachers, mental health professionals, etc.) to verify information if it would place the applicant in danger or make it more difficult for the client or children to escape abuse.[15] Nor can they compel survivors to contact abusers directly as a condition of receiving public assistance benefits.[16] A confidential intermediary must be designated to gather documentation, provided the survivor gives informed, written consent to outreach to the abuser.[17]

The decision on the FA (TA for households with children within the federally-mandated 60-month time limit) application must be made within 30 days of the application. Determinations of eligibility for SNA (TA for households not eligible for FA) applications must be made within 45 days. Social services districts across the state have had difficulty meeting these application processing and decision deadlines, resulting in multiple class action lawsuits. Clients experiencing an application delay are entitled to a fair hearing. In a county where an application delay class action was brought, they may reach out to the plaintiff's counsel for individual relief under the order.[18]

Emergency Applications

Applicants facing an emergency (such as having little cash or food, a utility cut-off notice or an eviction) may be eligible for an immediate, same-day interview for emergency cash assistance.[19]

The applicant should advise the caseworker of their needs and be prepared to provide documentation of the emergency (e.g., the notice of petition and petition if facing eviction). Applicants with less than $100 savings and $150 monthly income are eligible for "expedited" SNAP (issued within five days of application). Emergency SNAP is available if rent and utility costs exceed gross income and available resources. A denied application can be challenged through an expedited fair hearing. [20]

Eligibility for assistance is usually investigated by a caseworker or, in New York City, by a Bureau of Eligibility Verification (BEV) worker. Applicants must advise their caseworker that they are abused to invoke the domestic violence protections around communicating with or contacting the abuser, the abuser's family, or third parties. If an applicant no longer lives with the abuser but together they have joint assets (such as joint bank accounts), these resources should not be considered "available" for the purpose of determining eligibility, unless the survivor has safe access to them. The 2002 Family Violence Option INF contains useful guidelines and rules on these issues.[21]

Recertification

Following the issuance of an assistance grant, recipients must "re-certify" eligibility every six months. Recipients must also satisfy demanding program requirements, such as participation in "work activities" that may include rote office work or cleaning streets or parks. Educational activities of programs for up to 35 hours per week may be approved. Recipients with minor children must cooperate with child support collection and enforcement, including establishing parentage or providing locating information about the non-custodial parent and appearing in court. Failure to comply will result in reduction or discontinuance of benefits, and possible sanctions. Applicants whose FA or SNA cases are closed due to a sanction may remain eligible for short-term benefits, including Medicaid and SNAP.

All of these programmatic requirements can be waived for survivors of intimate partner violence under the Family Violence Option (discussed below). Survivors in shelter may have some of these program requirements modified by a program called ADVENT, also described below.

Advocacy efforts concerning public assistance problems must be frequent, consistent and well-documented. Efforts to resolve a client's problem should start by telephoning the caseworker and noting the dates, times, and substance of the conversation. If the caseworker lacks the authority to resolve the issue, the caseworker's supervisor (or, in New York City, the director or administrative assistant to the director of the welfare center) should be contacted. If these supervisors cannot, or will not, resolve the issue, call the regional directors or managers. Reaching a caseworker or supervisor can require multiple or even daily phone calls. All conversations should always be confirmed in writing and faxed or e-mailed, if possible, to the relevant staff person. Welfare offices are generally large, busy, and uncoordinated, so documents are lost or misplaced with great frequency. Clients should also be directed to similarly track their own advocacy efforts with caseworkers. When provided with documentation, welfare caseworkers should issue standardized receipts.[22] Clients (or advocates representing them) should request a "document receipt" or ask the public assistance worker to date and time-stamp any document and photocopy the time-stamped copy for the client's records. In New York City, supervisors and, to a lesser degree, caseworkers increasingly communicate via email with advocates. Public assistance caseworkers may use email communications with advocates but are not likely to use email with clients. Often, the more informal advocacy routes fail, so the client should simultaneously request a fair hearing, which can be withdrawn later if the informal route succeeds, and/or even re-apply for benefits.

The Family Violence Option (FVO)

The Family Violence Option allows states to adopt welfare-related protections for survivors. New York requires that all adult applicants for, and recipients of, TA receive information about intimate partner violence, and the protections and local services available to survivors.[23] They must also be screened[24] for the presence of intimate partner violence and sexual assault during a face-to-face application or recertification interview, without regard to marital status, gender identity or expression, or sexual orientation.[25] Eligible applicants may request waiver of programmatic requirements that place the survivor or survivor's children at risk.[26]

Local social services districts must use a standardized, confidential screening form.[27] Completing the screening is not a requirement of eligibility. Meeting with a Domestic Violence Liaison (DVL, discussed in greater detail below) is not optional, however, for certain battered noncitizens who apply for benefits, such as persons with pending I-360 Self-Petitions who do not yet have a prima facie determination notice from USCIS.[28]

Screening is not without its challenges.[29] Survivors and abusers may apply and appear together at the local district, inhibiting disclosure. Each adult should be screened separately where possible.[30] Survivors may not recognize abusive tactics and mistakenly believe that they qualify for FVO protections only if subjected to physical violence. Others may feel more comfortable disclosing abuse issues after learning about programmatic requirements and the benefits of FVO-related waivers. Retaliation for disclosure is a risk. The survivor may be embarrassed, ashamed or suspicious of revealing sensitive and confidential information to caseworkers, as well as mistrustful. Caseworkers may appear judgmental, insensitive, or hostile to intimate partner violence concerns. Advocates should advise clients about their rights to disclose intimate partner violence concerns and assess how a disclosure may or may not be helpful.

Those with intimate partner violence concerns should be referred immediately to a DVL[31] to assess whether compliance with programmatic requirements would place the client or the client's children in danger or make escape from abuse more difficult.[32] The FVO does not alter basic financial eligibility requirements.[33] Although applicants and recipients of "SNAP only" or "Medicaid only" are not required to be notified of, and screened for, intimate partner violence under the FVO, some local districts screen these individuals as well, sending them to the DVL for referral to local intimate partner violence services.[34] These individuals may be able to take advantage of some limited DVL time and expertise, but will not be eligible for any FVO-related waivers.

The Domestic Violence Liaison (DVL)

A DVL is available within every local social services district, including New York City. The DVL receives special training about intimate partner violence issues, and may be on staff or at an approved off-site domestic violence service provider.[35] In some communities, the DVL may wear other hats, such as child or adult protective services caseworker, eligibility caseworker, or supervisor. A DVL worker is bound by confidentiality provisions specifically outlined for that position.[36]

DVLs conduct waiver assessments, provide emergency safety planning, inform participants and benefits programs about waiver decisions, and develop service plans, in collaboration with the survivor.[37] DVLs also assess the applicant's "credibility" and the necessity for a waiver.[38] One policy directive defines domestic violence as follows:

> …a pattern of coercive behavior perpetrated by one family/household member (they do not have to be related) or partner/ex-partner on another with the purpose of establishing and maintaining power and control.
>
> The pattern does not necessarily include physical violence. Coercive behaviors involve a range of actions that can include psychological, emotional, financial, or sexual abuse. It is a fixed imbalance of power created by the batterer over time. Behaviors that are abusive and controlling are designed to instill intimidation and/or fear in the victim.[39]

To verify and establish credibility, the DVL looks at relevant documentation, such as police reports, court records, medical records, photographs, and orders of protections. The minimum documentation required is a sworn statement alleging the abuse.[40] The DVL cannot require the survivor to provide additional documentation. When documentation is unavailable, a DVL may use collateral contacts

(e.g., domestic violence shelter staff, clergy, community agency staff, co-workers, family and friends) but only with the applicant's or recipient's written permission.[41]

When an FVO-related waiver is granted, the DVL must prepare a service plan individually designed to help lead the client to safety and self-sufficiency. The plan should list recommendations, referrals to services, such as a local domestic violence program, and available options, such as securing an order of protection. A client is not required to follow the service plan's recommendations and cannot be sanctioned for failure to heed the DVL's suggestions.[42]

Clients report that when they finally have the opportunity to meet with DVLs, many are helpful and more sensitive to intimate partner violence issues than regular caseworkers. DVLs are usually more knowledgeable about FVO legislative and policy directives. DVLs too often do not perceive themselves as having discretionary power, however, and regularly ask for unnecessary supervisor approval before granting waivers and exemptions. This arises most frequently when clients do not report specific instances of physical abuse or if clients lack traditional "systems" evidence of abuse, such as orders of protection or police reports—none of which is required by law or policy.

Family Violence Option Waivers

Some of the programmatic requirements of public assistance can place a domestic violence survivor or the survivor's children at greater risk.[43] Demanding compliance may endanger or frustrate the survivor to such an extent that the survivor considers returning to the abuser. *Family violence option waivers* provide temporary relief; these can be granted for a minimum of four months,[44] but are renewable and should be continued for as long as necessary.[45] They remain subject to the DVL's ongoing review and must be re-determined at least every six months, and can be modified, terminated or extended at any time. Waivers automatically expire if not renewed. A client may also decline a waiver or terminate an existing waiver at any time.

Waivers may encompass residency rules, child support and paternity establishment and cooperation, employment and work training, participation in alcohol and substance abuse screening and treatment, alien eligibility and deeming requirements, spousal support requirements, minor parent education and living arrangement requirements, and lien requirements.[46] DVLs are also able to grant exemptions from the 60-month lifetime limit for the receipt of TANF-funded public assistance benefits.[47]

A full waiver will completely relieve the client of fulfilling any part of a programmatic requirement, while a partial waiver[48] modifies some of these, most often for child support enforcement and establishment of parentage requirements,[49] as well as employment requirements and spousal support enforcement.[50] A "partial child support waiver" allows the agency to proceed with child support collection and enforcement activities, but with precautions to protect the survivor and her children while support is pursued.[51] For example, the DVL may request the Child Support Collection and Enforcement Units to maintain confidentiality of certain information about the client or limit the abuser's contact with the client in court. Partial employment waivers may mandate the client to be involved with work activity, but require travel to a different job site outside of the abuser's community. HRA has recently changed how it administers waivers. Survivors in New York City may either receive a full waiver of all requirements or no waiver of any requirement. For those who receive a full waiver, they may be able to "opt in" to certain requirements, such as work or child support. HRA no longer offers a "partial" waiver.[52]

Usually, minimal advocacy such as speaking directly to the DVL or sending a compelling advocacy letter on the client's behalf will result in a full or partial waiver. Advocates must explain clearly and convincingly how intimate partner violence makes it unsafe for the applicant or recipient to comply with programmatic requirements. These letters must be explicit. For example, "X is a survivor of intimate partner violence and needs a waiver" is helpful, but "X's abuser constantly threatens harm

if served with a petition for support. X's abuser has in the past acted on threats to kill by choking and hitting until the police were called or X managed to escape. If X's abuser receives a petition for child support, the abuser will not distinguish between the agency's actions and X's actions. Abuser will blame X and will likely act on the threats to kill. X must be given a permanent full child support waiver to stay safe and to escape the abuser's threats of violence" is more likely to be successful. If the request for a waiver is denied, or a full waiver was requested but a partial waiver was granted, the client may (and should) pursue a fair hearing.

Some communities have alternative programs that do not waive but instead modify the welfare requirements that domestic violence survivors must fulfill. HRA has a long-established program known as ADVENT (the Anti-Domestic Violence Eligibility Needs Team), which administers housing programs and options for survivors in shelter (such as LINC III, discussed in greater detail below).[53] ADVENT allows survivors in confidential shelters to include "domestic- and intimate partner-violence related services" when satisfying their work requirement. Take note, however, that waiver is always more beneficial than an alternative program like ADVENT, because recipients cannot be sanctioned for not fulfilling waived requirements.

Confidentiality Concerns

Disclosure of intimate partner violence concerns is voluntary and confidential, and information about applicants or recipients who are identified as survivors of intimate partner violence may not be disclosed to any outside parties or governmental agencies without written authorization.[54] Reports of child abuse may mandate the caseworker to alert child protective services.[55] For further discussion, *see* Chapter 16, C*hild Welfare Cases and Domestic Violence*, in this Manual.

DVLs are required by these rules to maintain their own files to safeguard client-identifiable information available only to the DVL, and not accessible to other DSS employees. If a survivor reveals information to the DVL that may affect the benefits case, the DVL may not transmit this information to the client's public assistance caseworker without the client's consent.[56] If a survivor tells the DVL that the abuser forcibly re-entered the home but did not disclose the abuser's presence in the household during recertification with the caseworker, the DVL may not reveal this information to the caseworker without the client's consent, even though it may technically constitute welfare fraud. Although the DVL should not be perceived as condoning or encouraging the client to withhold information, the DVL's primary goal is to preserve client safety and confidentiality. When, for example, the client reveals additional income, the DVL must tell the client of the potential negative consequences for non-reporting (e.g., sanction, re-budgeting, recoupment, criminal liability), as well as the potential benefits of reporting (e.g., possible employment retention, simple re-budgeting, access to certain employment-related benefits). Because the DVL cannot pass along or act on this disclosure, reporting this information only to the DVL will not be considered "reporting" to the public benefits caseworker or to the agency. The client will also need to officially inform the public assistance caseworker as well. If the DVL wears multiple hats for the agency (e.g., is a caseworker or CSEU worker), the DVL must specifically ask the client if the survivor wants to report the information to that particular division.

Public Benefits and Battered Immigrants

Non-citizens are eligible in varying degrees for public benefits including Family Assistance, Safety Net Assistance, Medicaid, SNAP and public housing. Benefits differ depending upon immigration status[57] and date of entry into the United States. United States citizen children may be eligible even when their parents are not.

Many battered immigrants may not know their immigration status because abusers have purposefully withheld information or destroyed immigration documents. A survivor may have fled home without paperwork needed to document immigration status, or lost documents because of frequent relocations.

Generally, applications for public assistance cannot lawfully be denied or delayed because of lost documents.[58] As a practical matter, however, the lack of immigration documents can make it very difficult to establish eligibility for benefits.

Undocumented battered immigrants in New York State can become eligible for public benefits by taking steps to adjust their immigration status.[59] For additional information, see Chapters 22 and 28 on *Immigrant Victims* and *Immigrant Victims and Public Benefits*.[60]

Childcare Subsidy Program

Childcare subsidy assistance benefits vary from county to county.[61] To qualify for childcare, families must be receiving public assistance benefits or be deemed income-eligible.[62] Once qualified, local districts must guarantee free childcare services to families with children under thirteen years of age.

Families not on public assistance must contribute towards the cost of services and the family's co-payment amount also varies widely statewide.[63] While they are no longer required to pursue child support or otherwise cooperate with establishment of parentage and support collection and enforcement activities as a condition for receipt of child care subsidy benefits, applicants for this assistance are "encouraged to obtain a child support order and shall be advised of the benefits of obtaining such orders."[64]

Child Support, Spousal Support, Maintenance, and Equitable Distribution Issues

As a condition of eligibility, public assistance recipients assign their rights to collect child support, spousal support, or maintenance to the local DSS district.[65] In other words, the local social services district, and not the public assistance recipient, receives these support payments and may pass along some or none to the recipient. This is especially problematic for survivors who may face violence or other retaliation when the local district files a petition for support, enforces an existing order, or attempts to establish the abuser as a parent of the child in Family Court. Recipients lack control of the petitioning process and often do not even know a petition has been filed by DSS. Recipients cannot file for child support without the knowledge and assistance of DSS, although they may request child support and maintenance as a part of a Family Court or divorce action, so long as this money is payable to the Office of Child Support Enforcement (CSE). Applicants and recipients who receive money directly from their abuser must report this money as income. If DSS obtains child support on the client's behalf, the recipient will be entitled to up to a $100 "pass through" (or $200 if there are two or more children) child support payment each month in addition to the monthly cash grant and DSS will retain the remainder of the support payment to cover the cost of the grant.[66]

If an applicant or recipient indicates domestic violence concerns to the TA or CSE caseworker, the worker must suspend collection activities and refer the applicant or recipient to the DVL. Only DVLs are allowed to determine the need for a domestic violence waiver related to support. However, with the client's permission, the DVL may consult with the CSE caseworker to assess the impact of collection activities on safety planning.[67]

Changes in Circumstance

If applicants who receive benefits for themselves or for their children lose primary custody and residency of their children, they must report this to their caseworker within 10 days. The household budget will be adjusted and the grant may change significantly or even be terminated. If a client fails to report a change in custody, the survivor may face a sanction or prosecution for welfare fraud.

If, pursuant to equitable distribution in the divorce case, the client receives property, cash or a lump sum distributive award, the client, the client's attorney, and an expert in welfare law should strategize together to structure a settlement that maintains the client's eligibility for public assistance.

Language Access for Survivors with a Disability or Limited English Proficiency

Social services districts must ensure that disabled applicants and recipients have equal access to all benefits, programs and services for which they are eligible.[68] Where the survivor is limited English proficient (LEP) or a person with a disability, the local district has a duty to make appropriate accommodations, coordinate services, document any challenges or necessary accommodations to ensure access, assign a person to serve as the agency's ADA or LEP contact, and inform applicants and recipients of complaint procedures and investigate complaints of discrimination or improper case administration.

For LEP survivors,[69] the district should make language posters available in all client areas, make interpreter services desk guides available to staff and obtain a qualified interpreter or interpreter services (such as LanguageLine). Application and recertification forms are available in numerous languages.[70] Using a trusted friend or relative as an interpreter is often not appropriate. Friends and relatives are generally not trained to correctly interpret or translate and may themselves have limited written or oral English skills. In some cases, the abuser or someone chosen by the abuser may accompany the survivor and report back what the survivor has disclosed. In no cases should the survivor's children be used to interpret. The local district may not deny access to an application for services based upon inability to provide adequate interpretation services.

Where the survivor is deaf, hard-of hearing, or a person with a disability,[71] the district has the responsibility to ensure access to offices, make reasonable accommodations, and eliminate non-essential rules or procedures that deny equal access to services. Information must be accessible. Interpreters, auxiliary aids and other services can ensure effective communication.

Part II

Housing Options: Domestic Violence Shelters, Early Lease Termination, and Public Housing

Survivors need not leave home to escape abuse. Regardless of who holds the lease or title, orders of protection can direct the abuser to vacate the residence and the Supreme Court may grant exclusive possession and occupancy of the home as a part of a divorce proceeding. These remedies are often helpful for survivors who desire to remain in their own home, cannot afford alternative housing, and do not want to needlessly uproot their children and leave their possessions and their pets behind. For many survivors, though, remaining in a location known by the abuser can be extremely frightening and dangerous. For those who choose to relocate for safety reasons or lose their housing due to abuse,[72] intimate partner violence shelters and public housing programs may offer safer and affordable places to go. For certain survivors locked in leases for rental units, early lease termination may allow them to end a lease prior to its contractual termination date or bifurcate leases they share with their abuser or others. Before doing anything that may affect a client's housing, advocates should attempt to speak to a local intimate partner violence program or a housing expert who is familiar with local resources, practices, and policies.

Residential Domestic Violence Programs

Domestic violence survivors over age sixteen who are in imminent danger and have no safe place to live are eligible for shelter regardless of sex, gender identity or expression, sexual orientation, immigration status, family size, marital status, income, disability, community of origin, or any other factor. Residents must be able or willing to reside in a congregate living facility. However, because of physical space challenges or inability to provide attendant care services, some shelters may limit

access for large families, single people, male survivors[73] or older male children, or residents (or their children) with certain disabilities or health problems.[74]

All local districts are required to offer and provide residential domestic violence services.[75] Most local districts have chosen to contract with not-for-profit, non-governmental residential domestic violence service providers ("approved providers") in their county. The New York State Office of Children and Family Services ("OCFS") licenses these programs and local districts reimburse approved providers for per diem services.[76]

For reimbursement, each resident must apply for public assistance at the time of admission, regardless of immigration status, income, or resources.[77] Residents already receiving TA benefits merely have to alert their caseworker to their new living situation. If a resident is ineligible for public assistance[78] (or for a full grant), the domestic violence program may be able to cover the cost of the resident's stay with different grants or funds from other sources. However, if the shelter is unable to secure other resources to pay for the resident's stay, the shelter may ask for payment directly from the resident.[79] This budgeting should be done in accordance with public assistance regulations (including income disregards,[80] which lower the resident's contributions), but is often done improperly, causing the resident to pay more money than mandated by law. Seeking reimbursement from a legally responsible abuser is strongly discouraged.[81] If a client is being asked to pay for a domestic violence shelter stay, it is best to contact a welfare law attorney to review the budgeting.

The nature and extent of residential domestic violence services varies by community.[82] Some communities with smaller populations or limited shelter needs operate safe homes networks in private homes, safe dwellings or apartments, or programs that provide shelter to both intimate partner violence survivors and other homeless individuals. Other communities may have one or more "approved" shelter providers offering services at a multiple bed intimate partner violence shelter. By law, street addresses of domestic violence residential programs are confidential.[83]

In addition to safe housing, these programs offer supportive services such as crisis intervention, 24-hour hotlines, advocacy, court accompaniment, individual counseling, transportation, support groups, case management, and children's services. Programs may impose restrictive rules and curfews. At some, attendance at support groups or other educational sessions is mandatory.

Shelters are only temporary solutions. Residents in programs may stay for up to 90 days with the possibility of up to two 45-day extensions.[84] In New York City, after the 180 total days, residents may request an additional 30-day extension. Presently, with the introduction of the new LINC subsidy programs, discussed below, family stays in DV shelters are being extended.[85]

When clients are discharged from a residential domestic violence program and re-housed in unfurnished housing, the local district must provide essential furnishings, equipment, and a small grant to establish a home.[86] Some domestic violence programs also operate transitional housing programs that allow longer stays in more permanent housing. Currently, only a handful of these programs exist throughout the state. To find out about services in your community, contact the local domestic violence service provider.

Early Termination of Residential Leases:

Real Property Law Section 227-c

Despite receipt of an order of protection and other safety interventions, for some survivors, remaining in their rental unit and home community is still unsafe. Such survivors, if bound by a lease, would face an untenable choice—remain in the unit until the lease term ended and hope for the best, or flee and endure the inevitable steep financial penalties that flowed from violating the lease agreement.

In a majority of jurisdictions in the United States, when a tenant moves out of a residence prior to the expiration of a lease, the landlord should use reasonable efforts to re-lease the residence to another tenant and is not supposed to sit on its hands and wait for the lease to expire. This duty is called a "duty to mitigate" and, when available, is used as an affirmative defense when landlords sue former tenants for rent due during the remainder of the lease term. New York State, however, is among a minority of jurisdictions in the United States that do not impose a duty to mitigate, absent a lease provision to the contrary.[87] Survivors who flee prior to lease expiration could face a civil court suit for the rent balance of the lease, even if safety concerns warranted flight.

New York has a law to help survivors of intimate partner violence cancel leases early under certain circumstances and thus avoid the ongoing financial obligation of the lease term. The law is complicated, however, with rigid standards.

To seek early lease termination relief, the survivor-tenant needs to be a protected party in a temporary or permanent order of protection (criminal, family or Supreme Court issued) and have unsuccessfully sought early lease termination from the landlord directly. Advocates have found that in many instances sending a letter or otherwise reaching out to the landlord and explaining the survivor's need to relocate together with the tenant's early lease termination rights has been enough to convince the landlord to voluntarily agree to end the survivor's lease without penalty or judicial intervention. However, if the landlord does not agree to allow the survivor out of the lease early, the survivor can petition the court that issued the order of protection for such relief.

The survivor must provide ten days' notice to the landlord and any other joint tenants (including the abuser).[88] The same court that issued the order of protection is the only court with jurisdiction to terminate the lease.[89] The survivor must prove that: (1) despite the order of protection, the survivor and/or survivors' children is/are still at substantial risk of physical or emotional harm if the parties remain at the residence and relocation will substantially reduce this risk;[90] (2) the survivor requested the landlord's voluntary consent to end the lease and the landlord refused;[91] (3) all rent through the premature lease termination date is timely paid;[92] and (4) the residence has no other occupants, except that the survivor is not responsible for evicting the abuser against whom the order of protection is issued.[93] Courts may set the lease termination date between 30 and 150 days after the due date of the next rental payment following service.[94] The court may also sever a joint tenancy if the survivor shares the lease with the abuser or another third party.

Subsidized Housing: A Brief Primer

The primary subsidized housing programs available to survivors of intimate partner violence are the two federal tenant-based subsidy programs known as *Housing Choice Voucher Program* (formerly "Section 8"), and *Public Housing*. The U.S. Department of Housing and Urban Development ("HUD") grants funds for these programs; local public housing agencies ("PHAs") administer them. PHAs may tailor policies and procedures to community needs. As a result, policies and procedures vary regionally throughout the state and even within a single county. In New York State, local PHAs may be a municipal "Housing Authority" created under the state's public housing law. In New York City, the local PHA is New York City Housing Authority ("NYCHA").[95] For the Housing Choice Voucher Program, the PHA may be a housing authority, the municipality itself, or a not-for-profit corporation. The size of PHA service areas also vary and may sometimes overlap.

The portal for all low-income HUD housing programs is found under "Public and Indian Housing" at portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing. Lists of the PHA programs operating in each county are available from the HUD website at: portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/pha/contacts/ny.

Eligibility and admission policies and administrative procedures vary by program. For local public housing program policies, practitioners should request the PHA's "Admissions and Continued Occupancy Plan" and its "Tenant Selection and Assignment Plan." For the Housing Choice Voucher Program, practitioners should request the "Administrative Plan" for that PHA. Additionally, practitioners can obtain a copy of the PHA's overall operating plans (referred to by both the Housing Choice Voucher administrators and public housing authorities as the "PHA Plan").

PHAs are required pursuant to VAWA to formally address intimate partner violence, stalking, and dating violence survivors' needs in both their annual[96] and their five-year plans. HUD has adopted regulations and rules governing survivors in federally-subsidized housing.[97]

Because demand for public housing and Housing Choice vouchers exceeds available resources, PHAs may establish local preferences for selecting priority applicants from its waiting list. These might include homelessness, involuntary displacement, high rental costs or intimate partner violence. Priority preferences are not a guarantee of housing or a voucher, but offer those who are otherwise eligible quicker access to this scarce resource. Although VAWA does not require the creation of such preferences, providers have successfully advocated with their local PHAs for preferences by utilizing both the HUD policy guidance and the broad policy directives of VAWA, domestic violence service.[98] Importantly, the regulations provide that an individual's status as a survivor of intimate partner violence, dating violence, or stalking is not a basis for denial for admission or denial of housing assistance to an otherwise qualified applicant into the public housing or the tenant-based Housing Choice Voucher program. The regulations also provide that survivors of intimate partner violence should not be denied assistance or have housing assistance terminated solely based on criminal history that includes domestic or intimate partner violence, dating violence, or stalking.[99]

The Housing Choice Voucher Program: Tenant-Based Subsidies

The Housing Choice Voucher program is the primary "tenant-based" assistance program. "Tenant-based" assistance means that an eligible household (which can consist of a single individual) applies for a subsidy and, once the subsidy is obtained, looks for a landlord willing to accept it. In contrast, a "project-based" subsidy is one attached to an apartment; if the tenant moves, the subsidy does not go with the tenant. The Housing Choice Voucher program is referred to by many as "Section 8," its former designation. It makes up the bulk of HUD's tenant-based subsidies.[100] Unfortunately, Housing Choice is not available to new applicants in New York City at this time because of federal restrictions on funding. www.nyc.gov/html/nycha/html/home/home.shtml.

Under the Housing Choice Voucher Program, people use vouchers to help pay for their own housing in the private rental market. Once the voucher holder finds a landlord willing to participate in the program, that landlord will enter into a subsidy contract called a "Housing Assistance Payments" contract. The housing subsidy is then paid directly to the landlord by the PHA on the participant's behalf. The participant must pay the landlord the difference between the subsidy and the actual rent charged. The size of the voucher will vary based upon income and family size.[101] Local "payment standards," based on the housing market in the community, are also a factor.[102] For example, in 2015, the fair market rent for a two-bedroom is $1,481 in New York City and $867 in Rochester. For other areas of the state, see the HUD Fair Markets Rents for FY 2015 published at 70 Fed. Reg. 57654, or available online at: www.huduser.org/portal/datasets/fmr.html (select "Individual Area Final FY____ FMR Documentation" for the most recent year then follow the instructions, which allow selection of either fair market rates by county or by metropolitan area). A voucher holder is free to choose any housing type (house, apartment, or townhouse). To be approved, the landlord must consent to rent under the terms and conditions of the PHA contract and the housing unit must be formally approved as meeting "Housing Quality Standards ("HQS"). Because private landlords are not required to accept Housing Choice vouchers, as a practical matter, a voucher holder's options may still be severely

limited. Several jurisdictions in New York State have adopted local laws barring discrimination based on source of income, including housing subsidies.[103]

Eligibility for the Housing Choice Program is determined by the local PHA based upon the applicant's total annual income and family size, as well as other federally-imposed eligibility requirements, such as immigration status.[104] Certain non-citizens with eligible immigration statuses may apply. However, income eligibility levels vary depending on where the client chooses to reside.[105] Generally, applicants will need to be below 50% of the area median income, but, in some cases, they can have an income of up to 80% of the area median. Practitioners should contact the local PHA for the income limits for the area and family size.

Because this program is dependent upon federal funding, Housing Choice vouchers may at times be unavailable or severely limited. Many local PHAs close their waiting lists. When lists are open, they are only for a short time. Applications are often ranked by lottery to determine the order in which subsidies are allotted. As current participants leave the program or have subsidies terminated, vouchers become available even when there is no new funding for additional subsidies, although waiting lists can be long.[106] Advocating for establishment of a specific domestic violence preference with each PHA in your community may be the best way to enable these clients to be given priority when vouchers actually become available.

Portability of Housing Choice Vouchers

As vouchers are not attached to specific housing, clients may be able to transport (also known as "port") the voucher if they relocate, even on an emergency basis.[107] This feature can be particularly useful for survivors who must flee their home or their community but want to retain their crucial housing subsidy. VAWA provides that voucher holders who are survivors of intimate partner violence, dating violence, and stalking may move to another jurisdiction or within their own jurisdiction if they have complied with all other obligations and are relocating to protect health or safety of a victim because they reasonably believe that they are imminently threatened by further violence if they remain in the unit.[108]

Public Housing Programs

There are many different Public Housing Authorities through New York State. Also HUD-subsidized, these are the housing developments often referred to as the "projects." Public housing projects, which may vary from single-family homes to townhouses and large multi-family apartment buildings, are available to applicants who meet income and other eligibility requirements (such as immigration status and criminal record status) developed by both HUD and the local public housing authority.[109]

The public housing authority operates like a landlord and is responsible for collecting rent, selecting tenants and managing the units. The amount of rent a tenant pays will vary depending the tenant's income and sometimes by the size of the unit. Some public housing authorities may also offer additional services such as on-site employment training and children's services.

New York City Housing Authority's Public Housing Programs

NYCHA offers domestic violence survivors priority when applying for an apartment in NYCHA housing or when requesting a transfer within the housing authority. Priority status allows quicker processing, but approval can take several months. Once approved, applicants will be placed on a waiting list until an apartment becomes available. Applicants do not have to be in the shelter system to qualify for the domestic violence priority, but shelter residents may obtain a priority after meeting with a worker from HRA's No Violence Again ("NoVA") for assessment.[110]

NYCHA maintains an online portal for applicants, including information about domestic violence assistance. *See* www.nyc.gov/html/nycha/html/assistance/vdv_zipcode_exclusion_unsafe_zones.shtml. NYCHA's documentation requirements are quite stringent and exceed the documentation recommended under VAWA.

In New York City, applicants may not move within specified ZIP code zones (e.g., the ZIP code in which they lived when the violence occurred and surrounding zip codes).[111] Staten Island has not been divided into zones, and Staten Island residents will not be able to remain on Staten Island.

Additional Requirements for New York City's Public Housing Options

Every member of the family on the Housing Choice or NYCHA application is subject to a criminal background check, which NYCHA runs based on name, date of birth and Social Security number. Criminal convictions could affect eligibility.[112] Applicants who owe past rental arrears for a NYCHA apartment are not eligible to apply for these programs until arrears have been paid. Although some categories of immigrants are eligible to apply for public housing and Housing Choice assistance, in cases in which one family member is ineligible, there is a detailed formula to determine the amount that individuals would have to contribute towards rent.

Emergency Transfers in Public Housing

Rather than forfeit public housing, survivors may want to consider seeking a transfer permitting a move to a different unit or to another housing development. The most recent VAWA legislation, VAWA 2013, requires that each agency administering the covered programs adopt a model emergency plan for transfer to another available and safe dwelling unit if: (1) the tenant requests transfer; and (2) the tenant reasonably believes that the tenant is threatened with imminent harm from further violence *or* the tenant was sexually assaulted on premises within 90 days from assault. To determine local transfer policies in accordance with VAWA 2013, advocates will need to examine the local admissions and operating plans. If policies are not survivor-friendly, advocates may lobby their local PHAs to adopt such policies.

For survivors already in NYCHA housing, the Domestic Violence Intervention, Education and Prevention Program (DVIEP) places trained case managers in nine NYCHA housing locations to provide crisis management and emergency response services to residents experiencing domestic violence. These counselors, part of Safe Horizon's staff, can assist with emergency transfers.

Evictions from Public Housing and Terminations of Subsidies in the Housing Choice Voucher Program

VAWA and its regulations specify that an actual or threatened incident of intimate partner violence, dating violence, or stalking does not qualify as a "serious or repeated violation of the lease" or constitute "good cause for terminating the assistance, tenancy, or occupancy rights of the victim."[113] Additionally, criminal activity directly relating to intimate partner violence does not constitute grounds for termination of tenancy.[114] These regulations also make clear that PHAs and Housing Choice landlords may hold abusers accountable by terminating only their voucher assistance or bifurcating the lease by removing the offender while allowing the survivor (who is a lawful tenant or occupant) to remain in the home.[115]

In extremely limited circumstances, when a landlord or PHA proves that allowing a survivor to remain a tenant would pose an actual and imminent threat to other tenants, to employees, or to those providing services at the property, the survivor may be lawfully evicted or have the housing assistance terminated. The regulations define an "actual or imminent threat" as a "threat consist[ing] of physical danger that is real, would occur within an immediate time frame, and could result in death or serious

bodily harm."[116] Further, eviction or termination of assistance of the survivor's housing must be an option of last resort and only may be used "when there are no other actions that could be taken to reduce … the threat, including, but not limited to, transferring the victim to a different unit, barring the perpetrator from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat." The remedies or restrictions considered must be created to address the specific concerns of the residents and not based on stereotypes.[117] Thus, landlords and PHAs must meet exacting standards before terminating survivors' subsidies or evicting survivors from public housing as a result of domestic or intimate partner violence in their homes.

Survivors may also be evicted for lease violation or criminal activity unrelated to the abuse as long as the survivor is not being held to a standard more stringent than other tenants.[118]

Providing Proof of Status as Survivor of Domestic Violence, Stalking, or Dating Violence

Under VAWA and its regulations, public housing or Housing Choice applicants or tenants requesting portability of a voucher or protesting an eviction or denial of housing may be required to provide evidence or certification that they are a victim of violence.[119] Once faced with such a claim, PHAs or landlords will likely request in writing documentation from the survivor, with a deadline of 14 days for receipt of the evidence (which may be extended).[120] Advocates should encourage survivors to submit claims in writing with as much documentation as possible attached via certified mail, return receipt requested, as soon as possible. Certain kinds of documentation are required to prove the claim of domestic or intimate partner violence, but survivors need only provide one of the forms of documentation contained in the regulations.[121] HUD created a self-certification form that can be used by survivors as one of the kinds of documentary evidence to prove their status as survivor, available in multiple languages at portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud5 (select HUD Form 50066, which is entitled "Certification of Domestic Violence, Dating Violence or Stalking"). The HUD form must include the name of the abuser and "may be based solely on the personal signed attestation of the [survivor.]"[122] Other documentary evidence may include police reports, court records, or a signed statement or letter from a victim service provider, an attorney, or medical professional addressing the intimate partner or domestic violence or the effects of the abuse. The professional must state under penalty of perjury that, "to the professional's belief, … the incident or incidents in question are bona fide incidents of abuse." The survivor must also sign the statement.[123]

In the event that there is more than one person claiming to be the survivor, the PHA or landlord will have to make a determination as to who is the "true victim by requiring third-party documentation."[124]

When the survivor provides information, the PHA or the Housing Choice landlord must keep this information confidential, subject to certain exceptions.[125] The survivor seeking admission based upon priority preference also may be asked to supply corroborating information pursuant to local policies and procedures.

New York City Subsidy Programs

In the past ten years, New York City has attempted three different temporary subsidies (not including FEPS, discussed below) to help New York City residents leave shelter for permanent housing.

Living in Communities (LINC)

Faced with record homelessness,[126] DHS and HRA recently introduced a new subsidy aimed at helping families exit shelter and enter permanent housing, named "Living in Communities" (LINC).[127] Over the course of a few months beginning in late 2014, HRA has created six programs under the LINC umbrella, called "LINC I," "LINC II," "LINC III," etc. These programs are limited in scope, and

each category has a fixed number of time-limited subsidies available, subject to funding issues. Thus, not every family who meets the criteria for each category will receive LINC.

Each of these programs requires that applicants reside in HRA or DHS shelter and have an open and active public assistance (or be eligible for a single-issuance public assistance case). Assuming applicants meet the other eligibility requirements of each category of LINC (I, II, III, etc.), then they are eligible for rental assistance based on family size. The maximum enhanced rents are:

Family Size	1	2	3	4	5	6	7	8	9	10
Max Rent	$1213	$1268	$1515	$1515	$1956	$1956	$2197	$2197	$2530	$2530

DHS and HRA created LINC III specifically to help survivors of domestic violence exit shelter. To qualify for LINC III, families need to reside in a DHS or HRA shelter and have been certified as a survivor of violence by HRA. "Certified" includes families that NoVA has found eligible for DV shelter but could not be placed in DV shelter due to capacity issues. Families are issued 90-day certification letters of eligibility for LINC III in batches, with families who have been in shelter the longest given priority. Once approved, LINC lasts for a one-year period with four, one-year renewal maximums (for a total of five years).

Some survivors may be eligible for LINC I and LINC II in addition to LINC III.[128] LINC I provides subsidy for up to three years to families in shelter for at least 90 days who are working at least 35 hours per week and who have been employed at least 90 days. Families approved for LINC I must pay 30% of income towards rent. LINC II is a subsidy available for families who have been in shelter at least twice, including at least one time in the past five years, and whose present shelter stay is at least 90 days. To be eligible for LINC II, families need to have income other than public assistance as well, such as SSI or SSD or employment income. A helpful overview of the LINC system is provided on the New Destiny Housing website (www.newdestinyhousing.org/get-help/living-in-communities-linc). New York City's LINC portal is at www1.nyc.gov/nyc-resources/service/4301/living-in-communities-linc-rent-program

FEPS Shelter Supplements (New York City)

Local social services districts may provide additional shelter supplement to families with children. The basic shelter allowance for families in New York City — and throughout New York state — is woefully inadequate to cover housing costs, whether a rental payment, a mortgage, or maintenance. A public assistance household of two in New York City receives $283/month for shelter expenses, but finding an apartment that rents at $283/month is an impossibility.

The Family Eviction Prevention Supplement ("FEPS")[129] is New York City's response to a 2003 judgment in the lengthy *Jiggetts v Grinker*[130] litigation. OTDA grants local social service districts authority and guidance to create plans to provide for shelter allowance supplements.[131] The local district sets the amount of the supplement and the conditions of eligibility.[132] New York City and Orange, Suffolk, Nassau and Westchester counties have adopted such plans, which can provide a family who is eligible for public assistance with hundreds of additional dollars each month. HRA submitted its plan, approved in 2005, in response to this Administrative Directive and named it the Family Eviction Prevention Supplement (FEPS).[133]

FEPS has several eligibility rules.[134] First, applicants must have an open and active cash public assistance case and there must be a minor child in the household. Second, applicants must have a lease in their name that permits the family to stay for at least one year from the date of application (families who live in a rent-regulated apartments do not need to provide further proof that they can

reside in the apartment for at least one year). Finally, the applicant must have been sued for eviction[135] and owe arrears in excess of the shelter allowance or be subject to a vacate order issued by the City.

Families who have been evicted are also eligible for FEPS if they otherwise meet the other rules and have been out of their homes for a period of one year or less at the time of the FEPS application. If families are in shelter, then they must file an application within the first six months of shelter entry, unless the family can show good cause to extend the six months. In no circumstance, though, will OTDA extend the time to approve a FEPS application for families in shelter longer than one year after having been evicted.[136]

Families must find or remain in apartments that are within the rent maximums set by FEPS at application. If a family finds an apartment that is even one cent above the rent maximum (called a "rent cap" by advocates), then the family is not eligible for FEPS. The rent caps are above the subsidy amount, and families are responsible for the difference between the FEPS subsidy and the actual rent, and families must pay this amount directly to the landlord. The FEPS subsidy is paid through the family's public assistance case. As of March 2015, shelter allowances, FEPS subsidies, and rent caps are as follows:

# on PA	1	2	3	4	5	6	7	8
Shelter Allowance	$277	$283	$400	$450	$501	$524	$546	$546
Family Eviction Prevention Supplement (Subsidy)	$373	$467	$450	$450	$499	$526	$554	$654
FEPS (Shelter Allowance + Subsidy)	$650	$750	$850	$900	$1000	$1050	$1100	$1200
Maximum Rent/Rent Cap	$800	$900	$1050	$1100	$1250	$1350	$1400	$1500

A family with three people receiving cash public assistance has an approved FEPS case with a monthly rent of $1,050. The amount paid through their public assistance case to the landlord each month is $850 (which includes the monthly shelter allowance of $400 and the FEPS subsidy of $450). The family is then responsible for paying the $200 balance ($1,050 - $850) of rent to the landlord from their food and other grant or other source of income.

Sadly, some of the rules regarding FEPS often adversely affect survivors of intimate partner violence, rendering them ineligible for the subsidy. Two rules in particular frequently result in survivors' ineligibility for FEPS. One FEPS requirement is that applicants need to have leases in their names. This rule is often referred to as the "tenant of record" rule. For FEPS purposes, having a lease in the abuser's name will not suffice if the abuser is not the one applying for FEPS.[137] Since many abusers refuse to add the survivors' names to leases, it can be impossible for some survivors to be found eligible for FEPS, even if they meet all the other rules. Another rule that impedes survivors' eligibility for FEPS is the one that requires that the applicant have been sued for eviction in their name. Many survivors flee the household prior to any lawsuit for eviction, such as a nonpayment, for their safety or the safety of their children. Unfortunately, families in this situation will not be eligible for FEPS under the current rules. Advocates should consult with their local legal service providers and review OTDA policy directives.[138] The OTDA web portal for FEPS Is located at otda.ny.gov/about/cees.asp and

explained more fully at the Coalition for the Homeless website (www.coalitionforthehomeless.org/get-help/im-in-need-of-housing/family-eviction-prevention-supplement-feps/how-to-apply-for-feps/).

City FEPS

As this article went to publication in mid-2015, HRA introduced a new FEPS initiative to help families, including survivors of domestic violence, avoid homelessness or exit shelter. This new program is called "City FEPS" and, unlike FEPS discussed above, is administered by HRA. It shares many of the same requirements as FEPS with a few significant differences. The biggest change is the increased rent maximums. City FEPS also allows survivors to access the subsidy without meeting the FEPS "tenant of record" or "lawsuit" requirements. To learn more about the updated program, go to: www.nyc.gov/html/hra/downloads/pdf/news/internet_articles/2015/apr_2015/CITYFEPSFact%20Sheet.pdf. New Destiny Housing provides current information on its website. This program is described at www.newdestinyhousing.org/get-help/cityfeps.

Notes

1. *Desk Reference for DV Screening under the Family Violence Option*, Administrative Directive from the Office of Temporary and Disability Assistance to Local District Commissioners 03 ADM-2 (Feb. 24, 2003), citing a Center for Impact Research study.
2. For an overview *see* otda.ny.gov/programs/temporary-assistance/.
3. *See generally* 18 New York Code, Rules & Regulations [NYCRR] § 415.
4. Families who are over-income for public assistance cash or shelter assistance benefits may still be eligible for SNAP or Medicaid, which have higher income limits. These families should apply for the SNAP and Medicaid programs directly.
5. For domestic and intimate partner violence related public assistance law, *see* 45 CFR § 260.50, *et seq.*, 42 USC § 402, Social Services Law § 131-u, Social Services Law § 349-a, 18 NYCRR §§ 347.5, 351.2 and 369.2.
6. The numbers represented in the chart represent New York City grants for families with children, which are typically higher grant amounts than in other counties or for families without children. Also, in New York City and some other counties, the shelter allowance may be increased by the Family Eviction Prevention Supplement (FEPS).
7. Policy Directives are available online at: otda.ny.gov/legal/
8. A fair hearing can be requested online, in person, by mail, phone, or fax. There is a specific form, the *Fair Hearing Request Form*, to request the fair hearing in writing, available at otda.ny.gov/hearings/request/. Forms are available in English and seven other languages. If the client has a hearing or speech disability, accommodations are provided for Fair Hearing requests. Fair hearings can be requested in person at the local district offices for welfare, Medicaid or SNAP issues. To make a request by mail, send the *Fair Hearing Request Form* to the Office of Temporary and Disability Assistance, Office of Administrative Hearings, Fair Hearing Request Unit, PO Box 1930, Albany, New York, 12201-1930. To obtain proof of service, individuals requesting the fair hearing by mail should send the paperwork certified mail and return receipt requested. To make a request by fax, send the form to (518) 473-6735. On the Internet, applicants/recipients may also directly request a hearing from OTDA's website, errswebnet.otda.ny.gov/errswebnet/erequestform.aspx.

   Regardless of the method, applicants/recipients should keep a copy of the fair hearing request. For information on requesting fair hearings and strategies at fair hearings, *see* The Legal Aid Society's *How to Win Your Fair Hearing*, www.legal-aid.org/media/40735/fairhearing.pdf.
9. For Decisions After Fair Hearing (DAFHs), visit the *Fair Hearing Bank* operated by the Empire Justice Center and the Western New York Law Center, onlineresources.wnylc.net/welcome.asp?index=Welcome. Informational Letters, Policy Directives and Administrative Directives can be found online at the Office of Temporary and Disability Assistance website, otda.ny.gov/policy/directives/2015/. These policy doc-

uments are archived by year from 1990-2015. These documents (including many documents older than 1990) are also archived on the Western New York Law Center's Online Resource Center, onlineresources.wnylc.net/pb/default.asp.

10. mybenefits.ny.gov/selfservice/html/AboutMyBenefits_en.htm.
11. a858-ihss.nyc.gov/ihss1/en_US/IHSS_homePage.do.
12. www.nyc.gov/html/hra/html/services/job_centers.shtml.
13. 18 NYCRR § 351.5 (a); TASB, Chapter 5 Section D(1)(c).
14. Local Law No. 2 (2015), Administrative Code of City of NY § 17-167.2.
15. 18 NYCRR § 351.5 (a); Temporary Assistance Sourcebook, Chapter 5 Section D(1)(c).
16. *See* Social Services Law § 349-a(7) ("Information with respect to victims of domestic violence shall not be released to any outside party or parties or other governmental agencies unless the information is required to be disclosed by law, or unless authorized in writing by the applicant or recipient."); Social Services Law § 357.3(i)(1) ("Information with respect to victims of domestic violence collected as a result of procedures for domestic violence screening, assessment, referrals and waivers pursuant to Part 351 of this Title shall not be released to any outside party or parties or other government agencies unless the information is required to be disclosed by law, or unless authorized in writing by the public assistance applicant or recipient"); Social Services Law § 459-g(1) (public assistance cannot force "the victim to contact the person who perpetrated such domestic violence or [..] requir[e] the person who perpetrated such domestic violence to complete any forms, provide any information, appear in person, or cooperate in any other manner as a part of such victim's application for or process of certification for continued receipt of any services or benefits"); *see also* 94 ADM-11, p. 28.
17. Social Services Law § 459-g(1).
18. *See* Social Services Law § 459-g(2) ("In the event the governmental entity, employee or agent seeks any such information or cooperation to comply with any federal law, regulation or mandate, such entity, employee or agent shall so advise the victim of domestic violence and provide an intermediary to make such contact on behalf of the victim in a manner that will protect the privacy, confidentiality and current location of the victim.")
19. *See* Office of Temporary and Disability Assistance, *SNAP*, otda.ny.gov/programs/snap/. *See also* Community Service Society, *Public Benefits Resource Center Manual*, pbrcmanual.cssny.org to determine the level of benefits for which one is eligible, and Office of Temporary and Disability Assistance, *SNAP Source Book*, otda.ny.gov/programs/snap/SNAPSB.pdf for SNAP rules. For more information, *see* New York State of Health, nystateofhealth.ny.gov.
20. If the client has an emergency (no place to live or no food, notice of eviction, shut off notices for gas or electricity, etc.), she should say so when she is requesting a fair hearing and ask for an emergency fair hearing. An emergency fair hearing is held a few days after it is requested and an expedited Decision After Fair Hearing will be issued. In New York City, call 1 (800) 205-0110 for an emergency fair hearing or go to the Fair Hearing Office, 14 Boerum Place, Brooklyn to request an emergency fair hearing. *See* otda.ny.gov/hearings/request/#phone
21. Available at onlineresources.wnylc.net/pb/showquestion.asp?faq=57&fldAuto=672.
22. 05 INF-02 (Jan. 12, 2005) [mandating distribution of standardized receipt for client's documents], available at onlineresources.wnylc.net/pb/showquestion.asp?faq=84&fldAuto=1728.
23. 98 ADM-3 (March 13, 1998; Errata Sept. 4, 1998); Social Services Law § 349-a(1-3); 18 NYCRR § 351.2(3-4).
24. 18 NYCRR § 347.5; 18 NYCRR § 351.2; 18 NYCRR § 369.2; 08-INF-02, discussing the screen form LDSS-4583.
25. 06 INF-11 (March 16, 2006). Notably, this policy recognizes domestic and intimate partner violence in gay or lesbian relationships and notes that same sex-couples should be screened for domestic and intimate partner violence and both individuals should be screened separately.
26. *See* 08-INF-02, discussing the screen form LDSS-4583.

27. *See* 03 ADM-2 (Feb. 24, 2003) and 06-56-0PE (Apr. 14, 2006). On April14, 2006, New York City Human Resources Administration replaced its Domestic Violence Informational Handout with a Domestic Violence Palm Card, and updated the universal screening form. 06-56-0PE (Apr. 14, 2006).
28. *See e.g. Brown v Giuliani,* 158 FRD 251 (ED NY 1994)
29. New York's screening policies and procedures were specifically evaluated by the United States Government Accountability Office (GAO) in a report entitled, *State Approaches to Screening for Domestic Violence Could Benefit from HHS Guidance,* GAO-05-701 (Aug. 2005).
30. See 10-ADM-03.
31. 18 NYCRR § 351.2(l)(4)(iv); *but see* PD 01-75-OPE (Dec. 21, 2001) which states workers should "*[e]ncourage* the individual to speak to the Domestic Violence Liaison." [Emphasis added.]
32. 18 NYCRR § 351.2(l)(4)(iv).
33. When reviewing financial eligibility, local districts can deem unavailable to survivors of domestic and intimate partner violence (and therefore, not counted in determining eligibility) any income lost when fleeing an abuser, any resources belonging to the batterer and any resources that cannot be accessed without compromising the survivor's safety, 02 INF-36 (Nov. 5, 2002); as well, lien requirements may be waived, *id.* Further, a person who is denied an FVO waiver of the requirement to sign a lien or mortgage against property that he or she owns as a condition of eligibility for public assistance (Social Services Law § 106) may refuse to sign the lien and still receive a public assistance grant for the remaining members of the household. *Temporary Assistance Source Book,* ch 13, Resources, at 9, available at Office of Temporary and Disability Assistance, otda.ny.gov/programs/temporary-assistance/TASB.pdf.
34. Because the FVO applies only in cases involving Temporary Assistance programs such as FA and SNA, DVLs cannot grant individuals with "SNAP only" or "Medicaid only" cases domestic and intimate partner violence waivers from those specific program requirements (such as child support cooperation or work requirements). If family violence is an issue, those clients might consider seeking "good cause" exceptions from those requirements. For a discussion about "good cause" waivers, see section on "Child Support, Spousal Support, Maintenance, and Equitable Distribution Issues," and "Child Care Subsidy Program" *infra.*
35. *See* 18 NYCRR § 351.2(l)(2)(iii), 98 ADM-3 (March 13, 1998; Errata Sept. 4, 1998) for guidelines to local districts for contracting out the DVL services. Depending upon the local district, some domestic and intimate partner violence program-based DVLs conduct client interviews and assessments at locations outside of the DSS office, such as a shelter. Local districts must be able to ensure that the client can get to the alternate location and that her safety and confidentiality will be maintained. Additionally, O3 INF-29 (July 18, 2003), contains a county-by-county list of DVLs and their contact information, including those sub-contracting agencies. *See* onlineresources.wnylc.net/pb/showquestion.asp?faq=61&fldAuto=963.
36. 18 NYCRR § 357(3)(l); *see also* 02 INF-36 (Nov. 5, 2002).
37. PD 01-75-OPE (Dec. 21, 2001); 18 NYCRR § 352.1, which addresses service plans, was amended to include the purpose of the service plans as "designed to lead to work, to the extent that the plan would not make it more difficult for the survivor to escape domestic and intimate partner violence or unfairly penalize those individuals who are or have been victimized by domestic and intimate partner violence or who are at risk of further domestic and intimate partner violence."
38. The applicant is only required to submit a "sworn statement" as proof of domestic and intimate partner violence. Temporary or final order of protection, police and hospital records, letter from domestic and intimate partner violence shelter and/or letter from other advocates can be helpful but are not required.
39. *See* PD 13-09-ELI, available at onlineresources.wnylc.net/nychra/showquestion.asp?faq=3&fldAuto=. *See also* PD 15-08-ELI (Apr. 16, 2015).
40. Social Services Law § 349-a(4); 18 NYCRR § 351.2(l)(5).
41. 98 ADM-3 (March 13, 1998; Errata Sept. 4, 1998); 02 INF-36 (Nov. 5, 2002).
42. 99 ADM-8 (Nov. 2, 1999).
43. For detailed rules, see 18 NYCRR § 351.2.
44. *See* 06-INF-11, at III(A)(1).

45. *See generally* 18 NYCRR § 351.2(l)(7); PD 01-75-OPE (Dec. 21, 2001); credibility does not have to be reassessed when assessing whether to renew waiver; 02 INF-36 (Nov. 5, 2002).
46. 18 NYCRR § 351.2(l)(7)(l); PD 01-75-OPE (Dec. 21, 2001).
47. 18 NYCRR § 369.4; 01 ADM-3 (March 28, 2001; Errata Apr. 20, 2001). Note that the survivors may be exempt from the lifetime limit where they are unable to work because of a verified physical or mental impairment to the parent or child that is the result of domestic and intimate partner violence and is expected to last three months or more.
48. 0 PD 10-08-ELI (Feb. 9, 2010) (emphasis supplied).
49. Unless waived, applicants or recipients are required to assist with establishing the paternity of a child's other parent and his location, as well as assisting with child support actions in Family Court.
50. Unless waived, applicants or recipients are required to participate in employment activities, which can include training and education, but most frequently consist of "Work Experience Program" (WEP) job assignments. The City must conduct an assessment of each public assistance recipient and develop an employability plan based on the assessment, which must include education and training opportunities, if appropriate. Additionally, students attending community colleges cannot be assigned to participate in WEP. They can fulfill their work activity obligations through college attendance and/or work study or internships, *Davila v Turner*, Sup Ct, NY County, July 20, 1998, index No. 407163/96.
51. 02 INF-36 (Nov. 5, 2002); PD 01-75-OPE (Dec. 21, 2001).
52. PD 15-08-ELI (Apr. 16, 2015).
53. PD 01-75-OPE (Dec. 21, 2001).
54. Social Services Law § 349-a(7); 18 NYCRR § 357.3(l); 98 ADM-3 (March 13, 1998; Errata Sept. 4, 1998). HUD requires all PHAs and landlords administering Housing Choice vouchers to provide tenants with notice of the protections available under VAWA, including tenants' rights to confidentiality. HUD further mandates that the leases or lease addenda contain descriptions of VAWA mandated protections for survivors of intimate partner violence.
55. 98 ADM-3 (March 13, 1998; Errata Sept. 4, 1998).
56. *See also* 02 INF-36 (Nov. 5, 2002) where OTDA policy states the administrative intent of this regulation is for the sharing of limited information.
57. For a general description of non-citizens' access to public benefits, *see* Empire Justice Center, *Restrictions on Eligibility of Non-Citizens in NYS for Certain Public Benefits*, revised January 2009, www.empirejustice.org/assets/pdf/issue-areas/immigrant-rights/immigrant-eligibility-chart.pdf.
58. *See* 03 INF-19 (Apr. 28, 2003).
59. *M.K.B. v Eggleston*, 445 F Supp 2d 400 (SD NY 2006), a lawsuit filed filed in the Southern District of New York in 2005, challenged OTDA's practice of systematically denying noncitizens public benefits. The parties reached a settlement in 2007, which created, among other things, an informal relief system to help when battered noncitizens, PRUCOL noncitizens, and certain green card holders were denied public assistance, Medicaid, or SNAP by a NYC Job Center due to immigration status. Among those commonly denied are:

    (1) battered immigrants who have filed Violence Against Women Act (VAWA) self-petitions; (2) battered immigrants married to green card holders or citizens whose husbands filed papers on their behalf (ex. I-130 family-based petition, K or V Visa); (3) those granted deferred action (often due to a U Visa petition based on cooperation with the prosecution in pressing charges against an abuser); and (4) those immigrants who are PRUCOL due to a valid pending application with federal immigration authorities (ex. pending green card application, approved I-130 petition, K or V visa).
60. OTDA Informational Directive, 06INF-14 (Mar. 22, 2006; Errata May 5, 2006), comprehensively outlines OTDA's policies on battered immigrants' eligibility for a myriad of public assistance benefits.
61. *See generally* 18 NYCRR § 415.4.

    For an in-depth treatment of the issues associated with county-specific child care subsidy administration, *see* Empire Justice Center, www.empirejustice.org/MasterFile/IssueAreas/ChildCare/Overview.htm.
62. 18 NYCRR §§ 415.3, 415.4, & 415.8.

63. *See* Empire Justice Center's publication, *Still Mending the Patchwork: A Report Examining County by County Inequities in Child Care Subsidy Administration in New York State* (March 2014) which is available online at: www.empirejustice.org/assets/pdf/publications/reports/still-mending-the-patchwork/still-mending-the-patchwork.pdf.
64. ***See*** Social Services Law § 410-w(6).
65. Social Services Law § 348; this applies to Medicaid only cases. *See* 99 ADM-5 (July 1, 1999).
66. In New York City, HRA has recently informed advocates that all waivers that are given will be for six-month time periods, unless a lesser time period is necessary for a specific reason on a case-by-case basis.
67. 18 NYCRR § 347.5; 03 ADM-5 (June 19, 2003). This Administrative Directive addresses the issue of child support and the FVO and contains a thorough discussion of the required actions for DVLs, TA workers, as well as CSE workers when the TA case is either open or closed.
68. Since late 2014 in New York City, partial waivers are no longer available. Clients are eligible for a full waiver or no waivers at all. However, HRA has noted that exceptions might be made on a case-by-case basis. As this article went to publication, HRA recently issued a new Policy Directive. *See* PD 15-05-ELI.
69. Welfare budgeting rules are complex. Please consult with a benefits practitioner to determine whether child support payments would make a family ineligible for public assistance.
70. *See generally* 06-ADM-05 Revised which thoroughly consolidates state and federal law, as well as policy guidance. *See also* Executive Order 26.
71. *See* 06-ADM-05 for detailed guidance for district workers.
72. Application and recertification forms are available in English, Arabic, Chinese, Haitian Creole, Italian, Russian, and Spanish: otda.ny.gov/programs/applications/
73. For further discussion, see Chapter 20, *LGBTQ Victims of Intimate Partner Violence.*
74. It is a violation of the Americans with Disabilities Act for a violence program to refuse to provide services or accommodations to survivors or their children solely on the basis that they have a disability. As places of public accommodation under Title III, these services are required to comply with the ADA and make appropriate accommodations. If the potential resident requires intensive services, such as a personal care assistant, or has heightened medical needs, a program may be unable to provide and may have to refer the resident for alternative supported housing. These individuals should be provided non-residential services, if requested. Some domestic violence programs are located in older structures or converted houses that are not accessible to people with many different types of disabilities. If a survivor needs services, the attorney or a disability advocate should work with the domestic violence program to help the program determine and meet accommodation requests where possible. In 2006 in New York City, Barrier Free Living opened Freedom House, an accessible domestic and intimate partner violence shelter specifically intended to house domestic and intimate partner violence survivors with disabilities. This shelter was the first of its kind in the US. *See* www.bflnyc.org/about-us/.
75. *See generally* Social Services Law § 131-u; 94 ADM-11 (June 22, 1994); New York shelter regulations state that a person cannot be excluded because of gender; instead, the shelters must accept anyone who is a survivor if the shelters can provide separate living spaces. 02 INF-27 (Sept. 30, 2002).
76. Social Services Law § 131-u(2).
77. 18 NYCRR § 408.5.
78. Residents may not be eligible for reimbursement for their stays if they are on durational sanctions, over-income, under sixteen, do not have qualifying immigration status, or are not abused by a current or former intimate partner.
79. *See also* 02 INF-27 (Sept. 30, 2002).
80. The first $90 of each month's earned income must be disregarded, as must a certain percentage of the remaining earned income. 18 NYCRR § 352.19.
81. 99 INF-10 (July 1, 1999).
82. In New York City, there are two parallel shelter systems. The larger system, consisting of transitional shelters that include "overnight" beds, conditional placements in hotels/motels, scattered site units

and "Tier II" shelters, serves over 9,000 homeless families at any given time and is administered by the Department of Homeless Services (DHS). Families with children under 21 years old or women who are pregnant and applying for shelter must go to the Prevention Assistance and Temporary Housing (PATH) Office in the Bronx at 151 E. 151st Street, Bronx, New York 10451. The Path Office is open daily, 9:00 a.m.-5:00 p.m., including holidays. Adult families with no children under 21 must go to the Adult Family Intake Center (AFIC) in Manhattan at 400-430 E. 30th Street, New York, New York 10016. AFIC is open 24 hours, seven days a week. Single survivors who are applying for shelter without children or other adults must go to one of three different DHS Intake Center, one of which is only for persons who identify as male and two of which are only for persons who identify as female. *See* www.nyc.gov/html/dhs/html/housing/single.shtml. The Emergency Assistance Unit (EAU) was closed on June 30, 2006. The smaller system of shelters, specifically for survivors of domestic and intimate partner violence leaving a domestic and intimate partner violence shelter, is administered by the New York City Human Resources Administration/Department of Social Services (HRA/DSS). There are approximately 155 domestic and intimate partner violence specific Tier II units, administered by DHS and HRA/DSS. Unlike non-domestic and intimate partner violence Tier II shelters, the domestic and intimate partner violence shelters offer services specific to survivors of domestic and intimate partner violence and are in confidential and secure locations. Domestic violence shelters can house up to approximately 650 survivors and 1300 children at one time. Once domestic and intimate partner violence shelter stay time has expired, residents are sent to the HRA No Violence Again (NOVA) office at PATH for determination regarding their Tier II shelter eligibility. Families on average stay in the DHS shelter system for eleven months until they are relocated to permanent housing. Outside of New York City, to obtain space in a domestic and intimate partner violence shelter, survivors can call the local domestic and intimate partner violence program directly or utilize a centralized number for referral. The New York Coalition Against Domestic Violence maintains several 24-hour, toll-free Statewide Domestic Violence Hotlines which are available at (800) 942-6906 (English), (800) 818-0656 (English TTY), (800) 942-6908 (Spanish), and (800) 780-7660 (Spanish TTY). In New York City, survivors must call the City's domestic and intimate partner violence hotline at (800) 621-HOPE.

83. Social Services Law § 459-g; *but see People v Ramsey*, 174 Misc 2d 304 (Sup Ct, NY County 1997).
84. Social Services Law § 459-b; Social Services Law § 131-u, *see also* 94 ADM-11 (June 22, 1994).
85. *Id.*
86. 18 NYCRR § 352.7.
87. *See* 06-ADM-05 for detailed guidance for district workers.
88. Communities across New York are increasingly passing local laws or ordinances that punish landlords and tenants for calling the police for assistance or when certain crimes occur on a property, such as disorderly conduct or assault. These are called " nuisance ordinances" and they undermine housing stability and interfere with a survivor's willingness and ability to call for help or report crimes. Sadly, these laws do not recognize a victim's status and apply regardless of whether a resident was the victim of the nuisance-related conduct. While these types of laws appear to violate numerous state and federal laws, they are still enacted in this state with great frequency. If a survivor loses housing due to a suspected nuisance ordinance, reach out to a civil rights or housing rights attorney for assistance, including Empire Justice Center or the ACLU's Women's Rights Project.
89. *See Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc.,* 87 NY2d 130 (1995); *Rios v Carillo* 53 AD3d 111 (2d Dep't 2008).
90. Real Property Law § 227-c(1).
91. Real Property Law § 227-c((2)(a).
92. Real Property Law § 227-c(2)(b)(ii)
93. Real Property Law § 227-c(2)(c)(i)
94. Real Property Law § 227-c(2)(c)(ii)(a).
95. The New York City Housing Preservation and Development and the New York State Homes and Community Renewal have limited special-purpose Housing Choice vouchers in New York City. While these programs do not presently focus on serving survivors of intimate partner or domestic violence, VAWA protections still apply to these federally-funded subsidies.

96. 42 USC § 1437c-1(d)(13).
97. 24 CFR § 5.2005(e). See Department of *Housing and Urban Development Housing Choice Voucher Guidebook*, Publication No. 7420.10G, ch 4 (Apr. 2001); Department of Housing and Urban Development *Public Occupancy Guidebook*, Part 7, ch 19 at 216-220 (June 2003); 24 CFR§ 960.206(b)(4).
98. As a method to encourage their adoption, VAWA III authorized a new grant program requiring participating PHAs and assisted housing providers to adopt such preference.
99. 42 USC §§ 1437d(c)(3); 1437f(c)(9)(A); 1437f(d)(1)(A); 1437f(o)(B).

    Note the new federal law defines "domestic and intimate partner violence" [42 USC §§ 1437f(f)(8); 1437d(u)(3)(A); 13925(a)(6)], "dating violence" [42 USC §§ 1437f(f)(9); 1437d(u)(3)(B); 13925(a)(8)], and "stalking" [42 USC §§ 1437f(f)(10); 1437d(u)(3)(C)]. Note: In 2005, Westchester County passed a local law prohibiting discrimination against domestic and intimate partner violence victims in both private and public housing. Laws of Westchester County § 700.02. NYS Attorney General's Opinion, Formal Opinion, No. 85-F15, November 12, 1985, 1985 NY Opp Att Gen 45, 1985 WL194069 (ruling that it is unlawful gender discrimination for a landlord to have a policy that denies housing to domestic and intimate partner violence survivors who have no intention of co-habiting with their abusers. This opinion was adopted in an unreported judicial opinion, *Cox v Related Companies*, available from the Empire Justice Center.
100. The regulations governing the programs are found at 24 CFR Part 982. The HUD website is also a good source of general information about the various programs. Housing and Urban Development, *Housing Choice Vouchers* www.hud.gov/offices/pih/programs/hcv/forms/forms.cfm (last visited March 2015). However, practitioners must contact the local PHA to determine a community's specific policies and procedures. Local PHA plans are available at the Department of Housing & Urban Development, Public Housing Plans, www.hud.gov/offices/pih/pha/approved/index.cfm. The most recent fiscal year for which data is available as of March 2015 is the 2011 Fiscal Year. *See also* Probono.net, *Housing*, www.probono.net/ny/housing/ (note that advocates will need to request membership to access the library).
101. In New York City, under the NYCHA Section 8 Housing Choice Voucher program, a family's public assistance shelter allowance cannot exceed 30% of the standard of need for the family size. This is a reduction of shelter allowances for many public assistance recipients. For example, a family of three will receive a maximum shelter allowance (which supplements the Section 8 payment) of $207; for a family of four, the allowance is $248. The shelter allowance can never exceed $421 for a family without children or $546 for a family with children, regardless of how many family members are in the household. However, families receiving Section 8 through the Housing Preservation Department (HPD) or New York State Homes and Community Renewal (HCR) will not be affected by the 30% rule. PD 05-10-SYS (Mar. 23, 2005). There are several other PHAs in New York State that are subject to a similar restriction on the welfare shelter allowance if a recipient participates in their Section 8 program. *See* 18 NYCRR § 352.3(d)(2)(ii)(b) and (c).
102. "Payment standards" are based on area "Fair Market Rents" published annually by HUD and must be between 90% and 110% of fair market rents. *See* 24 CFR § 982.503. Fair Market Rents for each county in New York are available at: www.huduser.org/datasets/fmr.html. Under "Final Data" click on "Schedule B – FMR tables." New York State counties are listed at 34-35.
103. Jurisdictions with local "source of income" discrimination statutes include the City of Buffalo, the Town of Hamburg; Nassau County; New York City; Suffolk County; the Town of West Seneca; and Westchester County. A periodically updated list of jurisdictions is maintained by the Poverty Research and Action Council and is available at its website: www.prrac.org/pdf/AppendixB.pdf.
104. When a member of the household lacks eligible immigration status, the subsidy for the household is decreased by a *pro rata* amount and the remaining family members are responsible for that portion of the subsidy. For assistance in calculating this amount, see New Destiny Housing's site at www.newdestinyhousing.org/userfiles/file/Housing%20Resource%20Center/NYCHA%20Rent%20Calculation.pdf.
105. Income eligibility levels are based on area median incomes. See Department of Housing and Urban Development, *Eligibility Levels*, www.huduser.org/portal/datasets/fmr/fmr_il_history.html.

106. For more information, and updated information about housing options available in New York City, see New Destiny Housing Corporation's HousingLink website,www.newdestinyhousing.org/get-help/housinglink-resource-center.
107. 24 CFR § 982.355.
108. 42 USC §§ 1437f(r)(5). Under VAWA and its regulations, PHAs and landlords are also required to keep information related to victim status confidential.
109. Local PHAs should be contacted to determine specific eligibility requirements.
110. To demonstrate evidence of abuse, an applicant will need to present:

    A current order of protection (with a provision excluding the batterer from the home, if the batterer has ever lived with the applicant) or, in the alternative, a letter from the Court Dispute Referral Center explaining why the applicant does not have an order of protection; AND

    Two police reports regarding incidents that occurred within the last twelve months, OR one incident report regarding an incident other than that alleged in the order of protection petition. NYCHA requires proof of two separate incidents of violence, unless the initial incident resulted in serious injury or a charge of a felony offense; AND

    One of the following attesting to the applicant's status as a survivor of domestic and intimate partner violence:

    1. Letter from Safe Horizon; OR
    2. Letter from a social services agency, medical center or court; OR
    3. Letter from a public/private shelter counseling facility, indicating the name of the survivor, the name of the batterer and an explicit description of where and when the abuse occurred.
111. This rule used to be a "borough of exclusion" rule, where Section 8 applicants were excluded from finding a new apartment in the borough in which the violence occurred. NYCHA, which runs the Housing Choice program in New York City, has changed this policy to a ZIP code exclusion to allow survivors more housing choices.
112. For a list of criminal convictions that may affect Housing Choice eligibility in New York City, see New Destiny Housing Corporation, Criminal Convictions, www.newdestinyhousing.org/get-help/nycha-criminal-background-ineligibility.
113. 42 USC §§ 1437d(1)(5); 1437(f)(c)(9); 1437(f)(d)(1)(B); 1437(f)(o)(7)(C); 1437(f)(o)(20)(A); 24 CFR §§ 5.2005(c)(1)-(2).
114. 42 USC §§ 1437d(1)(6); 1437(f)(c)(9)(C); 1437(f)(d)(1)(C); 1437(f)(o)(7)(D); 1437(f)(o)(20)(B).
115. 42 USC §§ 1437d(1)(6)(B); 1437(f)(o)(7)(D)(ii). 24 CFR § 966.4(e)(9).
116. 42 USC §§ 1437d(1)(6)(E); 1437(f)(o)(7)(D)(v); 1437(f)(o)(20)(D)(iv).
117. 24 CFR § 5.2005(e).
118. 42 USC §§ 1437d(1)(6)(D); 1437(f)(o)(7)(D)(iv).
119. 42 USC §§ 1437d(u)(1)(A),(C).
120. 24 CFR § 5.2007(a).
121. 24 CFR § 5.2007(b)(1)-(3).
122. 24 CFR § 5.2007(b)(1).
123. 5 CFR § 5.2007.
124. 24 CFR § 5.2007(b)(1).
125. *See* 42 USC §§ 1437d(u)(2)(A); 42 USC §§ 1437f(ee)(2)(A). 24 CFR 5.2007(b)(4).
126. DHS publishes a census of its residents on a weekly basis. As of March 2, 2015, DHS housed 57,963 individuals in its shelters, including 24,361 children. *See* www.nyc.gov/html/dhs/downloads/pdf/dailyreport.pdf.
127. DHS and HRA have not yet finalized the policy directives regarding, or conducted full hearings on, LINC as of March 2015. Advocates are relying on data provided on DHS's Website for LINC information. *See* www.nyc.gov/html/dhs/html/home/LINC_Rental_Program_Fact_Sheets.shtml.

128. Families may also be eligible for LINC VI, which is not discussed in this article. LINC VI provides a subsidy to families that stay with a "host" family, which may be a friend or relative, in the community. For more information, see n 132, *infra.*
129. DHS and HRA have not yet finalized the policy directives regarding, or conducted full hearings on, LINC as of March 2015. Advocates are relying on data provided on DHS's Website for LINC information. See www.nyc.gov/html/dhs/html/home/LINC_Rental_Program_Fact_Sheets.shtml.
130. *See Jiggetts v Grinker*, 75 NY2d 411 (1990).
131. 03 ADM 7.
132. 18 NYCRR § 352.3(a)(3); 03 ADM-7, at 9.
133. The details of each of these enacted plans are available on line at the Empire Justice Center's website, www.empirejustice.org/issue-areas/public-benefits/state-local-policy-docs/shelter-supplement-plans/shelter-supplement-plans-for-2.html#.VQbqPMuYa71. Each county has a different name for its supplement plan programs.
134. *See* PD 14-04-ELI. The rules for FEPS are complicated. Please consult with a qualified FEPS provider or advocate. As of March 2015, the community-based organizations with contracts to complete and file FEPS applications are: BronxWorks (Bronx), Catholic Charities (Staten Island, Manhattan, and the Bronx), Queens Community House (Queens), and CAMBA (Brooklyn and Staten Island).
135. The rules of FEPS are too complicated to lay out in this chapter. Certain other persons may be eligible for FEPS, such as persons in holdover proceedings. *See* PD 14-04-ELI for the full set of rules and exceptions.
136. An exception to this rule may exist for a survivor legally married to the abuser (or for the children of abuser) who resides with the abuser for certain periods of time if the apartment is subject to rent regulation. 18 NYCRR § 2522.5(g).
137. *Id.*
138. *See* Office of Temporary and Disability Assistance Policy Directive 05-21-ELI (May 27, 2005).

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Helping Immigrant Victims of Domestic Violence Access Federal and State Public Benefits

by Barbara Weiner

Victims of domestic violence who are also noncitizens may face daunting constraints on their ability to leave their abusers. For those whose immigration status is uncertain, there is constant fear that immigration officials will discover and deport them, perhaps leaving their United States-born children behind in the hands of an abusive spouse. Language barriers, economic dependence on the abuser, and distrust of the law enforcement services to which they must turn – all serve to strengthen the hold an abuser has over a noncitizen spouses.

Compounding a victim's personal challenges are the complicated immigrant eligibility rules of the benefit programs that are so critical to escaping the abusive household. These rules, because of their sheer complexity, erect what often appear to be insurmountable barriers to the achievement of economic independence.

In fact, there are special eligibility rules for victims of domestic violence without legal immigration status but who are married to a United States citizen (USC) or lawful permanent resident (LPR). These victims have access to benefits that would not otherwise be available to undocumented noncitizens. Unfortunately, these rules are often poorly understood and inadequately implemented by the very agencies whose responsibility it is to provide the benefits.[1] It is therefore critical that lawyers and advocates providing assistance to immigrant victims of domestic violence understand these rules sufficiently to assure that their clients receive the benefits to which they are entitled and which can allow their clients to leave their abusers.

Immigrant Benefits Eligibility Rules

In 1996, Congress passed welfare legislation, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which sharply curtailed the eligibility of immigrants for public benefits. A new benefits-related immigrant eligibility category was created, that of "qualified alien" ("qualified immigrant"); a noncitizen must meet one of these qualifications to be considered eligible for public benefits. "Qualified immigrant" is not itself an immigration status but rather encompasses a list of immigration statuses. Included in the qualified immigrant category are:

- lawful permanent residents (LPR or "green card" holders);
- humanitarian-based immigrants (refugees, asylees, Amerasians, Cuban/Hatian entrants, and persons granted withholding of deportation);
- public interest parolees who have been granted entry to the U.S. for a period of at least a year; and
- an immigrant spouse or child of a United States citizen or lawful permanent resident who has been battered or subjected to extreme cruelty and who has filed

or is the beneficiary of a family-based immigration petition that is pending or has been approved.[2]

The 2000 Victims of Trafficking and Violence Protection Act (TVPA) created two new categories of nonimmigrant visas: the T visa for victims of trafficking and the U visa for victims of crime, including domestic violence. Only those in "T" nonimmigrant status are eligible for federal benefits. People in U nonimmigrant status are not considered to be in a "qualified alien" category and so are ineligible for federal benefits. However, as persons considered "permanently residing under color of law" (PRUCOL) they are eligible for state Medicaid and cash assistance benefits. Subsequent federal legislation added noncitizens with T visas, and Iraqi and Afghan special immigrants, to the list of people eligible for benefits. Noncitizens in these statuses are treated like refugees for purposes of qualifying for federal means-tested benefit programs.

To be eligible for means-tested federal benefits, PRWORA required that most qualified immigrants meet additional requirements. The specific requirements depend in part upon the particular program being applied for and the immigration status the person holds. The federal means-tested benefit programs include four major assistance programs:

- the **Supplemental Security Income** (SSI) program, the federal income assistance program for indigent elderly and disabled persons;
- **Temporary Assistance to Families** (TANF), the federal cash assistance program for families with children;
- **SNAP (the Supplemental Nutritional Assistance Program, formerly known as food stamps)**, nutritional assistance for households with net income at or below the federal poverty level; and
- **Medicaid** and **Child Health Plus** programs, the federal and state cooperatively funded program to provide medical assistance to low income persons.

In all these programs, qualified immigrants (with the exception of humanitarian-based immigrants) who arrive in the United States after August of 1996 must reside here in a qualified status for five years before they will be considered eligible for these programs (known as the *five year bar*).[3]

In addition, since December of 1997, relatives who sponsor immigrants to come to the United States must file legally enforceable affidavits of support. These affidavits advise sponsors that they may be required to reimburse a state or local social services agency for the benefits provided by the agency to the sponsored immigrant. The period of sponsor liability runs from the time the immigrant is granted permanent residence status until he or she becomes a citizen or can be credited with a substantial work record under the Social Security Act (40 qualifying quarters).[4]

New York's policy, however, has long been that the state and local social services agencies will not seek reimbursement for SNAP or healthcare benefits even if the immigrant has a sponsor who signed an affidavit of support. Although the same policy does not exist with respect to cash assistance, there have been few attempts by local districts to seek reimbursement from immigrant sponsors for welfare benefits provided to sponsored immigrants.

Restrictions on the access of elderly or disabled immigrants to SSI are particularly harsh. Benefits are virtually unavailable to immigrants who arrive in the United States after August of 1996 unless they become citizens or can be credited with 40 qualifying work quarters.[5] One exception is the humanitarian-based immigrant category.[6] However, even these immigrants are only eligible for SSI within the first seven years. To continue to receive SSI after seven years, they must have naturalized or accumulated a significant work history.

For the other federal means-tested programs — SNAP, cash assistance, and medical assistance — those in a qualified immigrant status who entered the country after August of 1996 must generally wait five years before becoming eligible for benefits. Immigrants in the humanitarian-based categories are exempt from the five year bar. In addition, qualified immigrants who are under eighteen years old or who are disabled are exempt from the five year bar in the SNAP program.

In New York State, with the exception of SNAP (for which there is no state replacement program), the five year bar in the federal means-tested programs has minimal effect because immigrants do not have a five year wait before being able to access the state-funded welfare assistance program (Safety Net), and the state-funded Medicaid and Child Health Plus programs.[7]

Federal subsidies available for the purchase of private insurance under the Affordable Care Act are a complex and separate topic. For purposes of this discussion, these subsidies have not been labeled means-tested benefits, and therefore are subject neither to the five year bar nor to sponsor reimbursement. To be eligible to purchase insurance through the Healthcare Exchange, a noncitizen must be lawfully present in the United States. Everyone who meets the federal definition of a "qualified alien" is considered to be lawfully present, including of course those who meet the definition based on being a "battered qualified alien." In addition, victims of domestic violence with "U" nonimmigrant status are also eligible for benefits through the Healthcare Exchange because they are considered to be lawfully present.

The "Battered Qualified Alien" Eligibility Category

PRWORA created a special immigrant-eligibility category for spouses and children of U.S. citizens and lawful permanent residents who have been "battered or subjected to extreme cruelty." Unlike most other immigrants, they are not required to attain permanent resident status before becoming eligible for benefits. Instead, they are eligible for benefits as soon as they are in the *process* of obtaining permanent status on their own behalf. The ability of immigrant victims of domestic violence to petition for permanent residence on their own behalf was provided by Congress in the 1994 Violence Against Women Act (VAWA).

To be classified as a qualified immigrant for benefits purposes, the battered immigrant must show:

1. That a family-based petition (Form I-130) has been filed on her behalf by her U.S. citizen or LPR spouse or parent and has been approved or is pending; OR
2. That she has filed a self-petition (I-360) on her own behalf that is pending or has been approved;[8] OR
3. That she has filed an application for suspension of deportation or cancellation of removal based on the battery or abuse by her U.S. citizen or LPR spouse that is pending or has been approved; AND
4. That she has been battered or subjected to extreme cruelty; AND
5. That her need for benefits is substantially connected to the battery or extreme cruelty; AND
6. That she no longer resides in the same household as the abuser.

Establishing Immigration Status

The first step in the application process is for the battered immigrant to provide evidence to the benefits agency that an immigration petition has been filed with the United States Citizenship and Immigration Service (USCIS) showing that she is the spouse of a United States citizen or lawful permanent resident, that she entered the marriage in good faith, and that she is a person of good

moral character. Two types of immigration petition meet this requirement: a family-based petition (Form I-130), filed on the immigrant's behalf by the abuser spouse, or a battered spouse self-petition (Form I-360).[9]

Immigration Documents That Prove an I-130 Family-Based Petition is Pending or Has Been Approved

Local social services districts often misapprehend the requirements of the "battered qualified immigrant" category.[10] In particular, an immigrant who is the beneficiary of an I-130 family-based petition and provides evidence to the benefits agency that she has been battered or abused is a qualified immigrant for benefits purposes.

To document that the immigrant is the beneficiary of a pending[11] or approved I-130 petition, any of the following immigration documents should be sufficient:

1. an I-797 Notice of Action indicating receipt or approval of an I-130 Petition for an Alien Relative, naming the immigrant as the beneficiary; or
2. any document, even if it is expired, that shows that the immigrant has been granted an immigration benefit or status that is based upon a pending or approved I-130 petition.[12]

Conditional residence status also is proof that an I-130 petition has been filed. In fact, it is proof that the petition has been approved. Conditional residence status is granted to an immigrant spouse of a United States citizen ("USC") if the marriage is less than two years old at the time of the permanent resident interview.[13] An immigrant who is a conditional resident is treated as a permanent resident for two years. Failure to file a joint petition with the USC spouse to remove the condition ends the conditional status. A battered immigrant is eligible to file a petition on her own behalf to remove the condition and make her status permanent, but even before she does that, she should be treated as a qualified immigrant by the social services district.[14]

Immigration Documents That Show an I-360 Self-Petition is Pending or Has Been Approved

Local social services districts have less trouble recognizing a battered immigrant's qualified status when the documents the applicant provides relate to a self-petition (I-360). In contrast to the I-130 family-based petition, USCIS issues a notice upon receiving the I-360 and the supporting documents as soon as it determines that the immigrant has made out a prima facie case for approval of the petition. This notice is often referred to as "the prima facie notice," but its full title is "Notice of Establishment of a Prima Facie Case." A battered immigrant with such a notice is considered a qualified immigrant.

Although the prima facie determination expires (usually after 150 days), it is renewable until a final decision on the petition is made by USCIS. The application for benefits of an immigrant who presents an expired prima facie notice to the local social services district must be processed and the applicant given thirty days to provide proof that she has applied for an extension.[15] If the I-360 petition is approved, USCIS issues an "Approval Notice." Both a prima facie notice and an approval notice constitute proof not only of the required immigration status but also that the individual is a victim of domestic violence. An immigrant with a prima facie notice or an approved I-360 is not required to provide the benefits agency with any additional evidence that she has been battered or subjected to extreme cruelty to establish her eligibility for assistance.

Establishing that the Immigrant is a Victim of Abuse

Battered immigrants who provide the social services district with evidence that an I-130 family petition has been filed on their behalf must have a determination made by the benefits agency that

she is a victim of battery or extreme cruelty in order to be considered a qualified immigrant. This determination is made by the local social services district's Domestic Violence Liaison (DVL).[16] Similarly, an individual who provides proof that her I-360 self-petition has been filed with USCIS but who has not yet received a prima facie determination must also be referred to the DVL for a credibility determination.[17] Finally, immigrants who have no documents but who attest that they are the spouse of a U.S. citizen or lawful permanent resident and have been battered or abused must be referred to the DVL. If the DVL determines the immigrant is a victim of domestic violence, the local district is authorized to provide assistance to meet her immediate needs. To receive ongoing assistance, she must return to the DVL within 30 days with proof that an I-360 self-petition has been filed with USCIS.[18]

Establishing (1) the Immigrant No Longer Lives with Abuser and (2) a Substantial Connection Between Abuse and Need for Benefits

To be classified as a qualified immigrant, the applicant must show that she no longer lives in the same household as the abuser and that her need for benefits is substantially connected to the abuse.[19] The eligibility worker rather than the DVL makes this determination.

Proof of separate residence can be provided by Orders of Protection requiring the abuser to stay away from the immigrant, by employment records, school records, medical records or domestic violence shelter records. To demonstrate that the need for benefits is substantially connected to the abuse, the immigrant can show, for example, that the benefits are necessary to enable her to become self-sufficient or to enable her to escape the abuse or to make up for the loss of financial support from the abuser or to ensure her safety.

Concerns About "Public Charge"

That an immigrant is or may become dependent on the government for subsistence — a "public charge" — can be grounds for denying an immigrant permanent resident status. Many immigrants wrongly hesitate to seek benefits for fear that accepting public benefits will hurt their chances of becoming a permanent resident and remaining in the U.S., or becoming a citizen. These fears are often without justification.

The use of benefits is rarely, if ever, a ground for deportation and it is never a ground to deny a lawful permanent resident's application for citizenship.

Furthermore, it is not the receipt of any public benefit but only the receipt of welfare benefits or long term institutional care funded by Medicaid that raises potential public charge concerns. Importantly, battered immigrants whose adjustment is based on an approved I-360 self-petition are *exempt* from the public charge ground of inadmissibility.[20]

Permanently Residing Under Color of Law (PRUCOL)

Unlike the federal government, New York provides welfare and medical assistance benefits to immigrants who, though they cannot meet the "qualified alien" conditions, can nevertheless show that they are "permanently residing in the U.S. under color of law" (PRUCOL). New York preserved PRUCOL eligibility for its cash assistance program, the Safety Net, in its 1997 welfare reform amendments to the Social Services Law.[21] In addition, a unanimous decision by the Court of Appeals in June of 2001 required the State to provide PRUCOL immigrants with access to the State's Medicaid program.[22]

Immigrants are considered PRUCOL if they are residing in the U.S. with the knowledge and permission or acquiescence of USCIS. There are no definitive rules about who may be considered PRUCOL. In fact, the Office of Temporary and Disability Assistance, which administers the State's

welfare programs, and the Department of Health, which administers the medical assistance programs, differ in their interpretations of PRUCOL. The Department of Health has issued the most complete and inclusive policy on the question of who is PRUCOL.[23] Those representing immigrants who do not have qualified immigrant status but who have made some contact with USCIS should consult DOH policy to evaluate whether a client's status can be considered PRUCOL.

One PRUCOL factor often applicable to immigrant victims of domestic violence is "U" visa status. "U" nonimmigrant status was established by Congress to encourage crime victims, including victims of domestic violence, to cooperate with law enforcement authorities. Once a noncitizen shows that she has applied for U nonimmigrant status, she is eligible for Medicaid. A victim of crime is not eligible for the State's Safety Net program, however, until she has been *granted* "U" visa status.

The Benefits Rights of All Immigrants and Their Families

Certain benefit programs are available to all immigrants, regardless of status. These programs include:

- Emergency Medicaid
- Medical assistance for children (CHIP)
- Child and Adult Protective Services
- Aids Drug Assistance Program (ADAP)
- Nutritional assistance under WIC
- Medicaid for pregnant women
- Emergency shelter,[24] food pantries, and soup kitchens

In addition, immigrants without status have the right to file an application for benefits on behalf of family members, including their children, who do have an eligible immigration status or who are U.S. citizens. The Office of Temporary and Disability Assistance has instructed local districts that if an immigrant without eligible status files an application for welfare assistance, Medicaid or SNAP on behalf of a U.S. citizen or eligible immigrant household members, the local district must process the application.[25]

Finally, one frequent concern of undocumented immigrants in applying for benefits, even if they are applying only on behalf of other household members, is that the agency may report their presence to immigration authorities if they are unable to provide adequate documentation of legal residence. However, both OTDA and the U.S. Department of Justice have advised agencies administering benefit programs that they have no duty to report an applicant for benefits to immigration authorities absent evidence submitted to the agency by the applicant that the immigration service has found the individual to be unlawfully residing in the U.S. The evidence would have to be, in essence, a non-appealable Order of Deportation, since anything less than that is not proof of a finding by immigration authorities that an individual is unlawfully in the U.S.[26] *In all other cases*, including where the immigrant cannot provide any documentation showing legal residence, the information provided to the eligibility worker in the context of an application for benefits should be protected by the privacy and confidentiality rules of the social services law.

Notes

1. The systemic failure of the Human Resources Administration to correctly determine the public benefits eligibility of immigrant victims of domestic violence was the subject of litigation entitled *MKB. et al. v Eggleston et al.,* 445 F Supp 2d 400 (SD NY 2006) ["MKB"]. The case was ultimately settled by an extensive and detailed agreement requiring training of HRA workers, clarification of policies, creation of spe-

cialized staff to assist local workers in determining eligibility status. Court jurisdiction over the case did not terminate until October of 2014.

Plaintiffs in *MKB* were represented by the New York Legal Aid Society, Scott Rosenberg, Susan Welber and Jennifer Baum, The New York Legal Assistance Group, Jane Stevens and Caroline Hickey, Hughes Hubbard & Reed, Ronald Abrams and Russell Jacobs, and The Empire Justice Center, Barbara Weiner, Of Counsel.

2. Immigrants whose children (or parents) have been abused by a U.S. citizen or Lawful Permanent Resident parent (or spouse) are also eligible to be treated as qualified immigrants for benefits purposes, as long as they are the beneficiary of a family-based immigration petition that is pending or has been approved. 8 USC § 1641(b) and (c).
3. *See* 8 USC § 1613.
4. *See* 8 USC § 1183a.
5. *See* 8 USC § 1612(a)(2).
6. Also exempt from these restrictions, as well as the five year bar in all the other federal means-tested benefit programs, are active duty service members and their dependents and honorably discharged veterans and their dependents.
7. Safety Net and state Medicaid are accessible not only to qualified immigrants but to persons "permanently residing under color of law" (PRUCOL).
8. A child who has been battered by his or her U.S. citizen or LPR parent may also qualify for benefits if an I-130 petition or I-360 self-petition is pending or has been approved. Children listed on the I-130 petitions or I-360 self- petitions of their immigrant parent may also qualify for benefits as derivatives. See 8 USC 1641(c).
9. *See* 8 USC 1641(c). A battered immigrant in removal (deportation) proceedings who provides evidence to the benefits agency that the Immigration Court has granted her cancellation of removal or, if the proceeding is still pending, has found her application for cancellation to make out a prima facie case for relief, also satisfies the immigration related requirements of the qualified immigrant classification.
10. Largely in response to the *MKB* litigation, the New York Office of Temporary and Disability Assistance (OTDA) issued a revised policy and alien desk guide in 2006 that set forth a complete list of the various circumstances under which a battered immigrant is to be treated as a "qualified immigrant" for benefits purposes. *See* OTDA Informational Letter, Revised 06 INF-14, *Battered Aliens Eligibility for Benefits,* May 5, 2006 and OTDA Informational Letter, 06 INF-23, *Alien Eligibility Desk Aid*, June 26, 2006, www.otda.state.ny.us/directives/2006/default.htm.
11. Where the battered immigrant provides a document that shows only that an I-130 has been filed, the social services district is instructed to verify through the SAVE system that the I-130 is still pending and has not been denied. If the inquiry reveals that the I-130 has been denied, which is often the case when the abuser spouse fails to file all the required documentation in support of the petition, the applicant must return to the local district with evidence that she has filed an I-360 self-petition in order to be treated as a qualified immigrant. See Revised 06 INF-14, Section B.2.
12. These documents include:

    (a) a K3 or K4 visa, which is issued to the spouse or child of a USC who is awaiting processing of his/her application for permanent residence (the visa is usually attached to the immigrant's passport);

    (b) V1, V2 or V3 visas, which are issued to the spouse and derivative children of an LPR who filed an I-130 on their behalf on or before December of 2000;

    (c) an I-94 Arrival/Departure record annotated K3, K4, V1, V2 or V3 (this may also be stapled to the immigrant's passport or is sometimes separate), or

    (d) an employment authorization document (EAD) with the code (a)(9), which signifies the holder was granted a K3/K4 visa, or (a)(15), which signifies the holder was granted one of the V visas.
13. The immigration documents of a conditional resident will be annotated with a code CR-1 or -2 or CR-6 or -7. Documents that provide evidence of conditional resident status include a permanent resident card

with a two year expiration date, an I-94 annotated with the CR-1,-2,-6 or -7 code, an EAD similarly annotated or an I-551 stamp in a passport.

14. OTDA has instructed the local districts that someone with documents indicating an expired conditional residence status would have to provide evidence of filing her own petition to remove the condition (Form I-751) under a battered spouse waiver or that she filed an I-360 in order to continue to receive benefits as a qualified immigrant. *See* Revised 06 INF-14 at B.5. Although there appears to be no authority for the imposition of this requirement, since the approved I-130 that is the basis of the conditional resident status is not revoked by the termination of that status, the immigrant should file either the I-360 or I-751 in any case, simply in order to legalize her status.
15. *See* Revised 06 INF-14.
16. This determination is made by the DVL pursuant to the guidelines set out in 98 ADM-3. See Revised 06 INF-14.
17. *See* Revised 06 INF-14.
18. *Id.*
19. 8 USC § 1641(c); *see also* Revised 06 INF-14. 20; 8 USC § 1182(a)(4)(C).
20. 8 USC § 1182(a)(4)(C).
21. *See* Social Services Law § 122.
22. *Aliessa v Novello*, 96 NY2d 418 (2001). For a fuller description of PRUCOL eligibility, *see* Department of Health, Informational Letter 08 OHIP/INF-4, *Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility*, available at www.health.ny.gov/health_care/medicaid/publications/docs/inf/08inf4.pdf.
23. *See* above.
24. *See* Office of Children and Family Services policy memorandum, 09-OCFS-ADM-06, June 2009, *Domestic Violence Services for Undocumented Persons*, with respect to the provision of shelter services for domestic violence victims regardless of their immigration status. Thus, although the state's shelter system generally limits restricts access services to individuals eligible for Safety Net, domestic violence shelters must serve DV victims even if they are undocumented and the local district must provide funding. The ADM is available at ocfs.ny.gov/main/policies/external/OCFS_2009/ADMs/09-CFS-ADM.
25. *See* OTDA Informational Letter 01 INF-9, *Application Access for Non- Citizens: Temporary Assistance and Food Stamps*, March 26, 2001.
26. For New York State's guidance, see OTDA Informational Letter 99 INF-17, Sept. 29, 1999, *Reporting of Aliens Known to be Unlawfully in the United States*; the federal guidance is at 65 Fed Reg 58301, *et seq., Responsibility of Certain Entities To Notify the Immigration and Naturalization Service of Any Alien Who the Entity 'Knows' Is Not Lawfully Present in the United States*, Sept. 28, 2000.

Section 7
Offender Accountability

29

Batterer Intervention Programs: What Criminal Justice Professionals Need to Know

by Rose M. Garrity

The Beginning

In the late 1970s,[1] **batterer programs began to appear in a few areas of the country, and New** York State was no exception. In many areas the impetus for starting these programs came from activists and advocates from the battered women's movement who had helped to develop domestic violence shelters and advocacy programs; the next logical step was to address the men who were committing the abuse. The issue was seen as problematic because, even with changing laws, men who battered and terrorized their intimate partners were rarely held accountable by the criminal legal system. There was also hope that the right program could motivate men to change their abusive behavior. No research on such work existed, however.

The first program in New York (and the third in the country) was The Domestic Violence Program for Men in Rockland County, run by VCS, Inc. in New City and developed by Phyllis B. Frank. Ms. Frank is still active as the director of the current program, which has evolved into The New York Model for Batterer Programs. Ms. Frank had previously been active in helping the Rockland County Shelter (for battered women) to open, and was a trusted ally of the advocates who worked there. As the program grew and evolved, the staff of the Rockland County batterer program, aware of other programs opening around the United States, stayed informed about the ways programs were being developed and run elsewhere. At the same time, they took great care to listen to domestic violence advocates and survivors. The intent was to be sure that their batterer program did nothing that would further endanger battered women, and that they remained aware of and informed about the thinking, realities and experiences of professionals in domestic violence programs. Ms. Frank has consistently led the program with the commitment to "change on a dime" anything in the program that does not fit with the needs, understanding and experiences of survivors, usually as expressed through the domestic advocates who work with the batterer program in monthly supervision and staff training to ensure fresh and accountable content in serving advocates and survivors.

In the 1980s interest in starting batterer programs emerged in other areas of New York. Many professionals who were active in the battered women's movement were concerned, however, about the lack of tested models, safety features, standards and criteria for operating such programs. Discussions began around how to ensure that the programs would be developed and run with guidance, accountability to safety, accountability for offenders, and regular guidance and input from domestic violence advocates and survivors. The desire to address the need led to inquiries, meetings and discussions with staff of the NYS Office for the Prevention of Domestic Violence ("OPDV"). From early meetings and ideas legislation was developed and passed to fund five model programs across NYS and a "Request For Proposals" was released.

NY Model Programs Expand

In 1989 five 'model' programs were funded, including the original one in Rockland County. Two others of the five remain active today, one in Tioga County, and one in Erie County. Onondaga County also has a program that received that funding, but left the NY Model after a few years, although its batterer program remains in operation. The model funding process allowed staff from all of the funded programs to meet regularly, to offer ideas, share understandings, lessons learned and develop what all agreed were the best ways to ensure safety and accountability. Professionals from the three current programs have regularly provided training to other professionals who want to start programs or were running programs; it is hard to ascertain how many projects operate today under the NY Model or incorporate parts of it. (A training institute led by VCS and NY Model professional staff still runs twice every year for those who want to know how the NY Model for Batterer Programs works, and has been attended by hundreds of people from all over the country.)

The NY Model for Batterer Programs was originated, evolved and operated by those committed to remaining accountable to the analysis of domestic violence as it is best understood by the battered women's movement. Their analysis was developed over 20 to 30 years of research, practice and study by activists and survivors who understand that men's abuse of their intimate female partners is based upon a sense of privilege, and is rooted in the abuser's belief that men have the right to control women, and expect obedience and submission from their partners. Their control is based upon a *pattern* of controlling, threatening, demeaning and humiliating attacks as well as varying degrees of physical abuse. Author and researcher Evan Stark calls the pattern "*coercive control*."[2] Most batterers are not "mentally ill" and should not be diagnosed as such solely because of their abusive conduct. (Batterers have the same percentage of mental illness as does any other segment of the population.) The cumulative effect of the pattern of coercive control is entrapment as well as harm to the victim and to any children in the home.

It should be noted that a majority of the pattern of tactics used by batterers to maintain control and fear in the victims are largely ones of psychological abuse, such as humiliating, threatening, and stirring fear of serious repercussions if the victim is not totally compliant to the batterer's wishes. Fear of beatings can be a lasting deterrent and enforce an abuser's demands; victims know that non-compliance with the batterer will be responded to with threatening reminders of potential violence. *Many of the repetitive tactics that make up the pattern of domestic violence are not illegal*. This is just one of the reasons that domestic violence is hugely under-reported to criminal justice systems. Victims come to understand when they seek help that there is often little to nothing that can or will be done to stop the abuse. They also know that the batterer will put all of the blame on the victim, will claim that she is "crazy," and make many other charges about the victim. Too often responders listen to and believe many of these charges and claims. What responders seldom know is that *nearly all batterers believe that their partners do not have the right to leave them*.

The NY Model Batterer Programs are invested in providing sentencing options to give the courts readily available sources for sanctions when other, more serious, sanctions do not fit or are unavailable. Participants in the batterer programs are monitored carefully for compliance and accountability. Weekly education, usually offered in 90 minute sessions for 26 to 52 weeks, depending on the mandate order, is based upon the same information domestic violence professionals share whenever they do training, community education and workshops about domestic violence. All staff of NY Model Programs are carefully trained to treat offenders in their classes with utmost respect at all times. Class discussions cover topics such as what constitutes respect, healthy relationships, equality, and loving partnerships and families.

Participants are held accountable by the programs for attendance, being on time, paying their assigned, sliding scale fees, and respectful behavior in the classroom.[3] Compliance is recorded and

given regularly to the mandating source; consequences for non-compliance are decided by the judge. It is important to note that ***all research on batterer programs has shown that only when the criminal justice system responds quickly and firmly with strong consequences for non-compliance do the programs make any difference*** *in* recidivism. Research has also shown that when batterer programs operate as part of a strong coordinated community response, they are the most successful in demonstrating the community's no tolerance position for intimate partner abuse.

Other Types of Batterer Programs

Programs that do not follow the NY Model represent varied beliefs and processes, including programs that offer the option of on-line certificates (offering NO process at all for accountability); mental health counseling, or "treatment"; education combined with therapeutic approaches (the psycho-educational approach); and family therapeutic interventions where family systems therapy is used. Some batterer programs take offenders who are "self-referred" (usually by a batterer trying to convince a partner to remain together, or to avoid a court mandate). Some programs take court-ordered as well as self-referred offenders; the criteria, length of program and accountability vary greatly.

It is difficult to know what a program believes and how it operates unless you are in a community where a coordinated community response is well developed and meets at least monthly to assure that communication, understanding and coordination exist among all aspects of the criminal legal systems, domestic violence programs, human services, lawyers, courts, mental health, child abuse and social services components. Collaboration is essential to ensuring that all aspects of the system understand and agree to the kinds of accountability and programs being used. Without such a system, it is difficult for judges to become familiar with the range of program approaches, complicating referral and undermining trust in programs. Absence of a coordinated community network misses the opportunity to present a united message that violence against intimate partners is not tolerated. Collaboration and mutual understandings as to domestic violence response protocols will be lacking.

It would be wonderful to be able to say that we have evolved a system of batterer programs and other responses that agree on how to address domestic violence and offenders. Unfortunately this is not the case in 2015. We have at best a patchwork system sewn together by a widely varying practitioners and professionals who are doing their best, in a less than perfect world, to offer services that address the need for their own locations *as they best understand it*. It is also clear that the field became attractive to many practitioners, especially in mental health settings, where the opportunity to grow a new industry appeared. Indeed it now seems to be a large field with a wide variety of ideas, beliefs and practices. While no statistics are readily available it is thought that there are now about 2,500 batterer programs in the country. (This compares to about 3,500 domestic violence programs.[4])

It is incumbent upon court and other system personnel to do their best to ascertain what programs exist in each jurisdiction and to make mandates for accountability and program provision that best fit the needs of survivors and justice systems in their regions.

"Treatment" Versus "Accountability"

Do batterers need treatment? We know that batterers experience the same percentage of mental illness as any other segment of the population. This means that most batterers do not need mental health "treatment," but need to be held to a process of accountability that lets them know that the behavior that they engage in to control their female partners is not acceptable to society or to the courts, and that it will not be tolerated.[5] We might ask ourselves why we so readily want to provide "treatment" for batterers who terrorize, viciously assault, threaten (too often killing their victims), when

we know it would be ridiculous to respond with only an idea of 'treatment' for a bank robber, rapist or even street assault. (It may be illuminating to add here that rape and other sexual assaults are very often routine parts of the abuse suffered by victims at the hands of batterers).

The understanding that abusers use tactics of privilege, power and control to terrorize, control and force submission by their female partners leads us to know that the only way to stop this behavior is by ensuring that all expectations of societal systems of civilized behavior understand that to allow individuals to use such methods of terror and control of intimate partners is to allow totalitarian type behaviors to inculcate into individuals (victims, children of victims, the community, for instance) the idea that it is acceptable to do so. Victims live in terror and are even murdered; children grow up watching the abuse as though it is a normal part of life; and many billions of dollars are spent in medical, criminal, legal, housing, welfare, shelter, transitional housing, job losses, missed work and many other costs.

To provide 'treatment' to address abuse by batterers is to say that their assumed entitlement to abuse is rooted in external situations and circumstances outside of their understanding or ability to change without help. It is to support their claims of others, most often the victim, being the cause of their violence. It provides 'excuses,' reasons for their behavior, affirmations of their "normal" intent, and support for the belief system that underlies their demanding, frightening and manipulative behavior. It allows us to believe that these people do not know how to treat their intimate partners, because they lack the right tools.

A helpful insight as to why "treatment" is not the right approach is to take note that the abuser will often treat a boss, police officer, doctor, etc., better than an intimate partner. The ability to moderate behavior depending on the person with whom the abuser is interacting is contrary to a true disorder; the abuser in fact has control over his responses. In fact this is emphasized in the NY Model; those who wish to avail themselves of this tool have all they need to not only stop abusing their partners, but to make a happy, productive relationship.

Programs that call themselves "batterer treatment" offer sessions based upon psychological, therapeutic practices, giving batterers the opportunity to delve into issues in their past that might be blamed for their behavior, for instance. Some offer 'anger management' even though we know that *one thing batterers do exceedingly well is to control their anger*; for example in the presence of a police officer, one's boss or other powerful person they rarely "lose control."

If it can be shown that a batterer is in a state of *unusual religious, cultural or socially acquired* belief that allows him to perform such intentional abusive acts, then it may be possible to demonstrate that he needs certain "treatment" to overcome his tendency for abuse, but this seems to be a rare occasion, and the vast body of research on batterer programs agree.

This is where the NY Model for Batterer Programs differs with other programs. If one goes to the website for the NY Model For Batterer Programs,[6] it is readily seen that there are options for the programs offered to abusers that will not endorse the batterer's desire to control and dominate with no accountability or consequences.

Victim Contact by the Batterer Program

A great many batterer programs routinely report to and solicit input from victims about the batterer's behavior. They use this information in their "assessment" of the batterer, and make decisions about his so-called progress and whether he will be evaluated as having "successfully completed" a batterer program. Many survivors and advocates consider this practice especially risky with regard to the safety of the victim. When a batterer knows that his victim is giving any input about him he is extremely likely to add manipulative tactics, blame and punishment against the victim for doing so, make serious

threats against the victim to ensure "good" reports, and retain the fear- producing atmosphere in their relationship.

This is also precisely why couples counseling where domestic violence has occurred is never a safe approach. When a victim is encouraged in the therapist's office to reveal her deepest fears and feeling in the presence of the batterer the resulting punishment often begins in the car on the way home and precipitously escalates the danger to the victim. Any approach that blames the victim for causing the abuse, even in the most mild way, supports batterers in their continual tactic of telling victims that they are the cause of his violence. Many battered women internalize this blaming and accept that they "must be doing something wrong" to cause their partner to be so abusive.

NY Model programs understand the danger posed if they have contact with victims and they carefully refer every inquiry from victims to the local domestic violence program. This ensures that well-trained domestic violence advocates can explain the program, how it works and what she might expect as the batterer attends the classes. This partnership and collaboration is just one reason batterer programs need to be in partnership with and accountable to local domestic violence advocates. Informed advocates can tell victims that *they should never base their decisions to stay or leave on his attendance in the batterer program. They are asked to base their decision on the behavior of the man they know, not on the man they hope he will become*.

Most victims simply want the abuse to stop, and would prefer to remain together, often for the sake of the children, often because they have no other financial support, and for many other legitimate reasons. Too often, however, the inquiry turns to questioning the judgment of victims rather than asking why batterers feel entitled to be exercise total control over an intimate partner.

Victim advocates know that batterer programs often generate a great deal of false hope on the part of victims, and can easily result in postponing separation, even when staying may increase the danger. Participating agencies of a coordinated community response also know that mandating batterers to programs can play a significant role in addressing domestic violence by providing consequences for the offenses, yet may not generate significant change in the men who participate.

How Do Batterer Programs Remain Current?

NY Model batterer programs continually evolve as they learn from survivors and advocates as well as observation and reflection of the experiences of their daily programs and classes. *Weekly staff development* sessions run for 90 minutes; they are attended by not only the batterer program staff but by domestic violence advocates, community professionals, such as staff of other parts of the coordinated community response network, colleagues from other community programs, and various experts and professionals who are interested in the accountable way the program operates. Discussions in staff development focus on incidents or questions from classes that staff bring to the room, community or regional news about incidents related to domestic violence, questions or suggestions brought by advocates, and also discussions about behaviors that may have occurred between staff, at a class or following the class. All work of the program is situated within a framework of understanding known as "cultural competency," or "oppression theory." It is important that participants in any batterer or domestic violence program are working with people similar to themselves, or have a full understanding of class, race, gender, sexual orientation, religious, or other group differences and cultural realities that so deeply impact each person's life.

Studies about Batterer Programs: What Does the Research Say?

A great deal of research has been funded to look at hundreds of batterer programs across the country. Studies have delved into differences between the beliefs and practices of a variety of programs. One finding states:

> Batterer intervention programs cannot deter domestic violence unless they are supported by the criminal justice system. For example, the integrated criminal justice responses studied included coordination among agencies; use of victim advocates throughout the system; designation of special dedicated batterer intervention units; and provision of training for agency personnel, probation officers have a key role as the critical link between the justice system and batterer programs.
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> * * *
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> No consensus on psychological categories for batterers has emerged from the research community. Criminal justice-based typologies offer a more practical frontline approach…[i]f the criminal justice system tolerates slow compliance, it creates an appearance of unconcern for the crime and may also endanger the victim.[7]

Completion rates for batterer programs are very low. It should be noted that relatively few batterers are convicted of any offense, partly because rates of reporting of offenses are low, and partly because conviction rates for the small percentage of those who do go to court are also low. Moreover, only a very small percentage of batterers enter batterer programs. If one compares the vast numbers of victims who receive services at about 3,500 U.S. domestic violence programs to the total number of batterers who are sentenced to jail, batterer programs, community service or simple probation, the disparity reveals a huge shortfall of responses toward batterers by the criminal justice system. Again from the previously quoted NIJ report, "Many program providers and probation officers interviewed voiced concern that only a fraction of convicted batterers ever enter interventions."

In a report from December 2009 called *Batterer Intervention: Doing the Work and Measuring the Progress*, published by the Family Violence Prevention Fund with NIJ support, noted *"wide-spread agreement that batterer programs must be accountable to their local battered women's organizations and must define program success in relation to the safety and wellbeing of the women and children affected by the violence."* (Italics by this author.) The evaluators were especially critical of "batterer programs that emphasize a medical treatment model" as "not useful because batterer intervention is not a medical treatment. …. violence against women happens in the context of institutional subordination of women." Accordingly, "to stop their violent behavior and sustain that change over time, men who batter need to be held accountable by their peers, their extended families, and community leaders they respect."

In October of 2006 a research report issued through the Center for Court Innovation in New York, called *Court Responses to Batterer Program Noncompliance, A National Perspective*, was submitted to the National Institute of Justice for Peer Review. The subject of this study is accountability. The report stated:

> We propose that to use batterer programs for promoting accountability, criminal courts must not merely mandate offenders to programs, but must also enforce their orders by imposing meaningful sanctions on those who are noncompliant. …. when courts consistently impose penalties in response to noncompliance, up to and including jail, they show that they take the crime of domestic violence seriously and view a batterer program as an important restorative requirement

that the offenders cannot ignore. Such steps contribute to the ability of the justice system to convey to the larger society a message of intolerance for domestic violence. The goal of accountability is therefore consistent with the original vision of batterer programs as part of a coordinated community response that seeks to change the country's attitudes and priorities with respect to domestic violence.

Where Should We Go From Here in New York?

It seems that many parts of the criminal justice system in New York State may be less informed about batterer programs than is desirable, and others may simply use whichever program is near them. There appear to be some counties with several or even numerous batterer programs, and there are counties with only one, or with none. The information in this chapter should provide a basis for understanding where to look and how to judge what programs may best serve the needs of local courts.

Lawyers for Victims

Lawyers representing victims of abuse want to know how to help victims make decisions concerning their safety, their rights and actions to take. It is important to know that batterer programs too often look like a beacon of hope to a victim who simply wants the abuse to stop.

Batterer programs used as a sanction by the courts, including NY Model batterer programs, cannot and will not promise any change in an offender's actions, and know that many offenders use the program as a reason to lure the victim into remaining in the relationship. Batterers use many tactics to retain control over their victims, and are exceedingly clever at using any part of a system response to attempt to turn attention and blame onto the victim (such as "Look, I am in a program and trying to make things better. What is *she* doing?"). Victims are best advised to make plans and judgments based upon the offender's past behavior, as this is always the best measure of what a person will do in the future. It is also important to know where local shelters and domestic violence advocacy programs are and to refer victims there for free and confidential assistance, information and support throughout the process of escaping abuse and planning for a safer future. These programs are happy to work closely with lawyers and other parts of the criminal legal systems that respond to and affect the lives of the victims they serve.

Lawyers for Offenders

Lawyers who represent domestic violence offenders will find useful information about the roles and processes of batterer programs. They will want to be sure that they do nothing that may further endanger the victim, and help their clients to cooperate with sanctions and stay-away orders. It should be in the best interest of offenders to do the best they can to ensure that the partners and children whom they love can trust them to act in their best interest, and for the children to live in safety, freed from control over their daily activities.

Conclusion

One can only hope that all of those who provide batterer programs can, at some point in the near future, come together in a way that is collaborative rather than competitive in trying to ascertain what is best for those whose lives are scarred and restricted by intimate partner violence. Lives can be saved. Billions of dollars can be saved. Programs for batterers and programs for victims of domestic

violence can finally approach a reasonable plan for helping, through their work, to ensure intimate relationships that reflect the best humanity has to offer for families of the future.

Resources

Court Responses to Batterer Program Noncompliance: A National Perspective, Melissa Labriola, Michael Rempel and Rachel Finklestein, Center for Court Innovation, New York, NY, Chris S. O'Sullivan, Phyllis B. Frank, Jim McDowell, VCS Inc., New City, NY, October 2006.

New York Model Batterer Programs, www.nymbp.org.

Batterer Programs: What Criminal Justice Agencies Need to Know, Kerry Murphy Healy and Christine Smith, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, July 1998.

Batterer Intervention: Doing the Work and Measuring the Progress, A Report on the 2009 Experts Roundtable, Prepared by Lucy Salcido Carter, Family Violence Prevention Fund.

Batterers Programs: Shifting from Community Collusion to Community Confrontation, Ellen Pence, Duluth, MN: Domestic Abuse Intervention Project, February 1988.

Education Groups for Men Who Batter: The Duluth Model, New York: Springer, 1993.

The Re-Normalization of Wife Battering: Therapy for Abusers Does Not Help Reduce Domestic Violence, Martin Dufresne, January 2015, First published in Domestic Violence Action and Resources, September 200, Melbourne, Australia.

Batterer Programs: Model Policies in New York State, Rose Garrity, A Position Paper of the New York State Coalition Against Domestic Violence, November 1999, Rev. December 2014.

National Online Resource Center on Violence Against Women, VAWnet.org, Harrisburg, PA.

MINCAVA electronic clearinghouse, Minnesota Center Against Violence and Abuse.

CAVEAT:

It is imperative to be aware of some of the least effective and potentially dangerous referrals offered as potential mandates for domestic violence offenders. For instance, www.courtorderedclasses.com offers online classes ("all done from your own home"), "court acceptance guaranteed"; they include "anger management" in their menu. They are based out of California. The program director, O. Nardos has been accused of bribery and immigration fraud. See armen.am/eng/news/715051/

Notes

1. It was only in 1977 that violence in the context of marriage was made a crime in New York. Prior to then all cases seeking redress went only through Family Court. Rape in the context of marriage was not made illegal in New York until 1984 (*People v Liberta*, 64 NY2d 152).
2. Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2009).
3. It is important to note here that a batterer program has no way to know what a participant is or is not doing outside of the classes. This includes what he may say or report, and it also includes what a contacted partner may say or report, as any partner/victim is responding under the threat of an abuser's 'mandate' to her. Police reports about a participant may be a more credible source.
4. National Coalition Against Domestic Violence, www.ncadv.org/need-support/get-help.
5. It is important to note that in no way does the NY Model for Batterer Programs feel that anyone who wants or needs mental health services or therapy should be denied this opportunity. We only want responders and courts to understand that it is not an appropriate mandate for domestic violence offenders.
6. New York Model Batterer Programs, www.nymbp.org.
7. U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Batterer Programs: What Criminal Justice Agencies Need to Know*, July 1998.

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The Role of Probation in Domestic Violence Cases

by William M. Schaefer, Jr. & Robert M. Maccarone

Both criminal court and Family Court domestic violence proceedings may lead to involvement with probation. Over the past fourteen years, the New York State Probation Domestic Violence Intervention Project has developed a comprehensive series of guidelines for probation practitioners when domestic violence is part of a probation case. Attorneys representing victims of domestic violence need to know key elements about probation, whether their client is the victim of an offense, a litigant in Family Court or the defendant in a case where the primary aggressor analysis was poorly evaluated. Probation activities and services for victims exist throughout New York criminal and civil legal systems, governed by the Executive Law, Penal Law, Criminal Procedure Law, and the Family Court Act. In addition to statutory provisions for victim-related probation activities and services, the New York State Division of Criminal Justice Services (DCJS), Office of Probation and Correctional Alternatives (OPCA) adopts and promulgates Rules and Regulations with the force and effect of law concerning methods and procedures used in the administration of local probation services, including victim services.

The New York State Probation Domestic Violence Intervention Project has been developed by the former NYS Division of Probation and Correctional Alternatives (DPCA), partnered with domestic violence victim service experts at the New York State Coalition Against Domestic Violence (NYSCADV), the New York State Office for the Prevention of Domestic Violence (OPDV) and probation professionals from across the state. Key elements of the Project, designed to guide practitioners and developed over the years include:

- *Child Custody Investigations: Guidelines for Practice* (June 2008)
- *Intake Guidelines – Completing Petitions for Orders of Protection Involving Family Offenses* (October 2008)
- *Probation Response to Domestic Violence: A Model Investigation and Supervision Procedural Package* (March 2010). This document includes information regarding the issue of intimate partner stalking.
- *Probation Officer Domestic Violence – New York State Policy Guidance* (July 2010)
- *Probation Response to Domestic Violence in Rural and Native American Communities* (July 2010 & June 2011), curriculum for probation and domestic violence advocates.

The *NYS Model Victim Policy for Probation Departments*, which addresses domestic violence victims, is an additional resource that was released by the Division of Probation and Correctional Alternatives in September 2009.

Probation Practice Within the Context of Domestic Violence

The Project has created victim-centric, trauma-informed practices focused on offender accountability and victim safety. The practices are consistent with the *Community Corrections Response to Domestic Violence: Guidelines for Practice* published in 2009 by the American Probation and Parole Association. The Guidelines are made available to attorneys who represent victims of domestic violence, regardless of the victims' legal status in the civil or criminal legal system, so as to provide a better understanding of probation practice and provide a foundation from which to prepare effectively for working with local probation staff.

In domestic violence matters, Probation's role is to focus on offender accountability, work to enhance victim safety, and ensure victims have a voice in all proceedings. Probation's work with victims of domestic violence includes the following:

- Listening – Victim Impact Statement
- Believing – Support Victim/Survivor Decisions. Conduct Initial Safety Planning
- Remunerating – Restitution/Reparation
- Assisting – Referral to Advocates and other Critical Resources
- Documenting – Pre-Sentence Report/Supervision Notes/Court Memoranda
- Reporting – Enforce Court Orders and Conditions of Probation
- Each of these activities and services will be explored below in greater detail.

Victim Impact Statements

Victims have a right to be heard and must be accorded the opportunity to provide the court with input regarding the offense. In New York State, the process is accomplished through a Victim Impact Statement, which is a required element of the Pre-Sentence Investigation and Report process completed by probation staff. The process by which a Victim Impact Statement is obtained and reported in cases involving acts of domestic violence must be guided primarily by a concern for victim safety. Unless alternative methods of safe victim contact are known, the initial outreach to victims of domestic violence is usually in the form of a telephone call or letter sent by the probation department. For victims of domestic violence the probation outreach is usually unexpected because it often occurs several months after the initial crime. The fact that probation is sending correspondence can be confusing for victims because the negotiated plea may not involve probation supervision.

The process can significantly re-traumatize victims for many reasons, including concerns for safety, and probation officers are trained to minimize any negative effects by making it clear that victim participation is completely voluntary. Victims have a right to choose not to participate in the probation investigation process and their decisions will be respected. If a victim decides to participate, probation officers will offer the option of a written statement or an interview conducted at a time and location chosen by the victim. Victims are encouraged to invite an advocate or friend to accompany them. As a matter of convenience, some victims choose to complete the process entirely by telephone.

The victim impact statement process can be brief or it can be extensive depending on the details of the case and history of the relationship. Probation officers budget enough time so the victim can provide as much information as they are comfortable sharing. Before requesting any information, a probation officer will fully explain the law in this area and they will detail department confidentiality policies and mandated reporting requirements if child abuse or neglect is suspected.

Pursuant to Criminal Procedure Law § 390.30(3)(b) and Division of Criminal Justice Services 9 NYCRR § 350, the interview portion of the meeting will focus on the following areas including, but not limited to:

- an analysis of the victim's version of the offense
- the extent of injury or economic loss and the actual out-of-pocket loss to the victim
- the views of the victim relating to disposition including the amount of restitution and reparation sought by the victim after the victim has been informed of the right to seek restitution and reparation

The emotional impact of the offense, the offender's history of abuse toward the victim, and the victim's perceptions of danger can be included as relevant information and should be included so as to provide the court with a more accurate picture of the offense and its impact.[1] For some victims, the act of sharing their version of the crime with someone outside of the relationship, especially with a probation officer trained in active listening and motivational interviewing techniques can be incredibly supportive. For others the experience can be fraught with anxiety and fear. Probation staff are trained to accept as much or as little information as the victim decides to share with the understanding that any disclosure is likely to be incredibly difficult. In order to provide the court with context and document the pattern of offender behavior, probation officers may ask the victim to recount details of the "Last, Worst and First" domestic incidents. The last time their partner was abusive may or may not be the present offense being investigated by the probation department. The worst domestic incident can be defined using any criteria the victim wishes to use including but not limited to fear, physical or mental harm, and threats to self or others. The first time a victim's partner did or said something that made them feel concerned or unsafe establishes a starting point for the offender's dangerous and controlling behavior.

Victim Rights Notification forms will be provided to victims of family offenses. Probation staff will review the rights and offer services accordingly.[2] Probation staff will also review terms of all active orders of protection, obtain file copies and offer to make additional copies for the victim to distribute at places of work, the children's school or day care program, neighbors, friends and police departments in each of those jurisdictions.

In the absence of a victim response, information for the Victim Impact Statement will be obtained from other sources such as the Domestic Incident Report Form, 911 transcripts, police reports, and/or a victim advocate. In addition, where the victim is unable to assist in the preparation of the Victim Impact Statement, the information may be obtained from the victim's family.[3]

Requests for Exception from Disclosure

Due to significant and justifiable safety concerns, some victims of domestic violence are reluctant to make a Victim Impact Statement unless there are assurances that the defendant would not be able to access the information. **Attorneys who represent victims of domestic violence should advise their clients that although confidentiality can be requested by probation it cannot be guaranteed.**

As required by DCJS rules and regulations, exceptions shall be requested by probation where:

- a source has requested confidentiality;
- disclosure would endanger the safety of any person;
- disclosure of portions of the report would not be relevant to a proper disposition;

- a diagnostic opinion might seriously disrupt a program of rehabilitation; or
- disclosure would not be in the interest of justice.

When a victim requests confidentiality, the probation officer will explain that the request can be made to the court to except information from disclosure and the court may still disclose any or all parts of the report regardless of the victim's preferences.[4] If the case is subject to subsequent legal challenge, all case records may be subject to review regardless of prior exemptions.

Initial Safety Planning

Supporting victim decisions and self-determination are critical components of all efforts to provide assistance. Victim Safety Plans are premised on the concept that victims understand their situation better than anyone else. They have experienced and can detect subtle warning signs, triggers, patterns of behavior, threats and abuse that will never be known by anyone outside of the relationship. Most victims have already taken significant steps to keep themselves and their children safe. Victim decisions and choices will continue to be influenced by safety concerns that remain invisible to law enforcement, attorneys, advocates, probation officers, friends and family members.

Victim safety planning is a dynamic process that is best engaged directly with victims by advocates working for Office of Children and Family Services approved domestic violence service providers. Advocates from such programs are domestic violence response experts with the time and training to fully explore and assist victims in the development of safety plans for multiple contingencies such as:

- dealing with an emergency, such as if a physical assault occurs
- continuing to live with a partner who has been and/or continues to be abusive, and
- self-protect after the victim has ended a relationship with an abusive partner.

There are occasions when probation outreach for a Victim Impact Statement is the first contact by anyone in a supportive or official capacity since the date of the crime. Victims are sometimes reluctant or unable to access victim service resources prior to probation contact and the concept of safety planning has not been discussed. In such cases, probation staff are trained to refer victims to the local advocacy program and offer to provide initial information about Safety Plans along with a review of recommended elements to consider, such as planning for methods of safe contact, how to get help in an emergency, planning for the needs of children and care of pets or livestock, and creating "Bug-Out" or "Go Bags" with basic necessities like documentation (identification, credits cards, birth certificates, titles, deeds, orders of protection, medical records, prescriptions), clothes, keys, electronics, cash, and mobility aids.

Attorneys who represent victims of domestic violence should become thoroughly familiar with the services, policies and practices of domestic violence service providers in their community.[5]

Restitution and Reparation

In most jurisdictions in New York State, probation departments have been designated and are responsible for collecting restitution and reparation payments from offenders and distributing them to victims. In New York City, Safe Horizons has been designated as the restitution collection agency. Appropriate documentation is required to support claims for payment including bills for service, insurance claims, and compensation from the New York State Office of Crime Victims. Restitution and reparation "shall be recommended as part of any disposition/sentence where it is sought," up

to maximum amounts permitted by law. Several additional provisions and exceptions are defined in law and the following limits are merely illustrative:

Family Court

- Person In Need of Supervision (PINS) – $1,000
- Juvenile Delinquent (JD) – $1,500
- Family Offense – $10,000

Criminal Court

All criminal cases as permitted under Penal Law §60.27. Generally and except on consent of the defendant, restitution in criminal cases is limited to:

- Felonies – $15,000
- Any offense other than a felony – $10,000

When probation departments prepare pre-plea/sentence reports, where applicable, the recommended restitution condition can include a statement that restitution orders be filed with the county clerk by the district attorney and entered in the same manner as civil judgments per CPL 420.10 (6). This allows for the possibility of civil collection efforts being facilitated even if the term of probation supervision has expired without full satisfaction of the order.

Victims should be advised that payments are generally structured as monthly installments to be paid by the defendant/respondent throughout the period of supervision. Distributions are dependent on valid addresses for victims. **Attorneys who represent victims of domestic violence are advised to contact the probation department or other restitution authority to determine how victim payments are prioritized and scheduled**.

Referrals and Information for Victims

Given probation's broad presence throughout the criminal justice process, probation staff are in a unique position to offer referrals and assistance to victims of domestic violence who may need access to resources in the community. Collaboration activities between probation departments and domestic violence advocates are strong throughout the state and most departments are members of the local domestic violence task force or coordinated community response council working to improve the system response to domestic violence.

In most cases, probation can make a single referral to the local OCFS domestic violence service provider that will result in single-point coordination of services and assistance for multiple co-occurring issues likely to be faced by a domestic violence victim in crisis including counseling, housing, transportation, clothing, food, legal assistance, civil court (i.e. custody and visitation).

Victim Expectations of Probation

Victims of domestic violence are best equipped to make informed decisions when they have clear and accurate information about how probation functions and they are made aware of any changes in offender status that may impact safety plans.

Sentence

Sentences of probation can vary greatly in duration. The following examples are illustrative only. Full details are available in Penal Law § 65.00 and 65.15:

- 1 year – Family offense in Family Court
- 1 year – Class B misdemeanor
- 2 or 3 years – Class A misdemeanor
- 3, 4 or 5 years – Eligible felony
- 1 to 3 years – Class B misdemeanor public lewdness (Penal Law § 245.00)
- 6 years – Class A misdemeanor sexual assault
- 10 years – Felony sexual assault

Split Sentences refer to sentences of incarceration followed by a designated term of probation supervision.

Termination of Sentence

Termination/early discharge of a probation sentence prior to the maximum expiration date is possible; however, it is generally not recommended in cases of domestic violence despite criteria enumerated in CPL 410.90 and 9 NYCRR § 351. If early termination is solicited by the offender or the attorney, it is advised that the victim be notified and that the probation officer provide the court with a supervision summary and advocate against termination of the probation sentence.

Victim Notification

Unless otherwise directed by the victim, probation staff will attempt to establish a safe method of contacting the victim in the event of significant changes in offender status including but not limited to:

- **Final Sentencing** – Plea negotiations can be influenced by information collected in the pre-sentence investigation report.
- **Incarceration Status** – Victims are advised by probation and advocates about the availability of the Victim Information & Notification Everyday (VINELink) System www.vinelink.com to receive free and confidential notifications regarding changes in offender custody and release status.
- **Order of Protection Service** – The period of time immediately following service of an order of protection is recognized as a particularly crucial period for a victim. Abusers are often more violent during a period of separation. The Statewide Automated Victim Information and Notification (SAVIN-NY) system, www.savin-ny.com/, is a free and confidential service available 24 hours a day, seven days a week to victims who have been granted a Family Court order of protection in New York state. Notification may provide an opportunity for the victim to engage or alter safety plans.
- **Conditions of Supervision** – Conditions of probation supervision can be modified (relaxed) or enlarged based on the circumstances of the case during the course of the probation term. Such changes may significantly impact victim decisions.
- **Travel Permits and Potential Transfers** (Inter- and Intra-State) – Requests for travel permits and transfers are closely scrutinized by probation staff and tightly controlled by state and federal regulations. During the course of investigating and evaluating requests, probation staff may consult with victims of domestic violence in order to help determine if the offender is making such efforts to stalk or harass the victim.

- **New Arrests and Violations of Probation** – Efforts by the criminal justice system to hold offenders accountable may result in offenders choosing to behave violently toward their partner.

Violations of Probation

Probation officers monitor offender behavior to ensure compliance with terms of all court orders and conditions of supervision. Observations are documented in supervision notes, case records and memoranda to the court. If an offender fails to abide by judicial directives or the offender is arrested for a new offense, the Violation of Probation process will likely be initiated. The offender may or may not be incarcerated during the pendency of the violation. **Attorneys who represent victims of domestic violence can help by advising their clients that the violation of probation process takes time to resolve and final dispositions are extremely difficult to predict.** The primary stages of a Violation of Probation are as follows:

- Probation gathers/documents evidence
- Probation files Violation of Probation petition with court
- Warrant, summons or letter to offender
- Probationer arrested
- Preliminary Hearing
- Violation Hearing
- Sentencing Hearing

The standard of proof required to sustain a Violation of Probation is "fair preponderance of the evidence" which has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true.

Orders of Protection

If an Order of Protection is issued ex parte and the offender has not been served, it cannot be enforced. Probation officers, as peace officers acting pursuant to special duties, have the statutory authority to perform the service under the Family Court Act § 153-b(b); Family Court Act § 168(1); and Domestic Relations Law § 240 (3-a). Officers performing service must file an affidavit of service with the issuing court.

- Peace officers' authority to arrest for violation of an order of protection issued to a victim of a family offense is found in Criminal Procedure Law § 530.12(8).
- Peace officers' authority to arrest for violation of an order of protection issued to a victim of a non-family offense is found in Criminal Procedure Law § 30.13(6).
- Probation officers' ability to effectuate service or make arrests may be restricted by local department policies and resources; probation departments may work with local police and law enforcement agencies to execute these tasks.

Victims of Domestic Violence on Probation Caseloads

According to the first national survey of female probationers, conducted in 1995, 41% of women on probation experienced either physical or sexual abuse before admission, and 18% experienced both.[6] In some cases, women who are victims of domestic violence may be forced to engage in

criminal activities by the abuser—including theft, prostitution, drug use or drug dealing and other crimes—or may engage in such crimes to obtain the resources needed to flee the abusive relationship.[7] Also common among abused women is the use of illicit drugs to numb the senses and mentally escape the trauma caused by their victimization.[8]

When probation staff are supervising women who are victims of domestic violence, they are trained to provide the same response protocol as for any other domestic violence victim including referrals for service, confidentiality regarding disclosure and offering rather than mandating counseling services. Offender accountability strategies are not suspended merely because of prior or current victimization; rather responses and activities are tailored to enhance victim safety and minimize additional traumatization.

Conclusion

Attorneys who represent victims of domestic violence can be better prepared to assist their clients by being thoroughly familiar with, and advising their clients about, the role of probation in civil and criminal domestic violence matters, namely a focus on offender accountability, working to enhance victim safety, and ensuring victims have a voice in all proceedings. Specific activities and services associated with the probation response are shaped by the unique circumstance of each case and the self-defined needs of the individual victims/survivors. The actual range/scope of probation work may vary by probation staff or jurisdiction; however, the role of probation and the commitment to victims remains universal.

Notes

1. *See People v Whalen, 99 AD2d 883 (3d Dep't 1984); People v Michael M.,* 124 Misc 2d 300 (Cty Ct, Nassau County 1984); and *People v Wright,* 104 Misc 2d 911 (Sup Ct, NY County 1980)
2. Criminal Procedure Law § 530.11(6); Family Court Act § 812(5).
3. *See* 9 NYCRR § 350.5 (DCJS); CPL 390.30(3)(a-b); and CPL 390.30(4)(a-b).
4. *See* CPL 390.50(2)(a).
5. A list of OCFS Approved Domestic Violence Service Providers is available online, ocfs.ny.gov/main/dv/dvList.asp.
6. Lawrence A. Greenfeld & Tracy L. Snell, *Women offenders*, Bureau of Justice Statistics Special Report. U.S. Dep't of Justice, Office of Justice Programs. (Dec. 1999) NCJ 175688; Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers,* Bureau of Justice Statistics, Selected Findings, U.S. Dep't of Justice, Office of Justice Programs (April 1999) NCJ 172879.
7. Barbara Bloom, Barbara Owen & Stephanie Covington, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, U.S. Dep't of Justice, Nat'l Insitute of Corrections (June 2003) NCJ 018017; Dana D. DeHart, *Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women*, The Center for Child & Family Studies, Univ of S Carolina, Unpublished Report to U.S. Dep't of Justice, Nat'l Institute of Justice (Jan. 2005).
8. Stephanie Covington, *Women and Addiction: A Trauma-Informed Approach,* Journal of Psychoactive Drugs 385, SARC Supplement 5 (Nov. 2008); Caron Zlotnick, *Treatment of Incarcerated Women With Substance Abuse and Posttraumatic Stress Disorder, Final Report*, Unpublished Report to U.S. Dep't of Justice, Nat'l Institute of Justice (July 2002).

Appendix

A Time Line of Domestic Violence Advocacy and Reform

Timeline of the Battered Women's Movement

- 1950's & 1960's: The civil rights, anti-war and black liberation movements challenge the country, laying a foundation for the feminist movement.
- 1962: In New York, domestic violence cases are transferred from Criminal Court to Family Court where only civil procedures apply. The husband never faces the harsher penalties he would suffer if found guilty in Criminal Court for assaulting a stranger.
- 1963: Betty Friedan authors *The Feminine Mystique.*
- 1965: Congress passes laws prohibiting discrimination against women in employment and requiring equal pay for equal work. The traditional marriage contract, however, remains legally intact in America.
- 1966: Beating, as cruel and inhumane treatment, becomes grounds for divorce in New York, but the plaintiff must establish that a "sufficient" number of beatings have taken place.
- 1967: The state of Maine opens one of the first shelters in the United States.
- 1968: The Harris poll interviews 1,176 American adults in October. They find that 1/5 approve of slapping one's spouse on "appropriate occasions."
- 1969: California adopts a no-fault divorce law by which either partner can request and obtain a divorce without fear of being contested by the other party.
- Late 1960's & Early 1970's: The women's liberation movement sets the stage for the battered women's movement. The emerging movement details the conditions of daily life that allow women to call themselves battered. Women's hotlines and crisis centers provide a context for battered women to speak out and seek help.
- Early 1970's: Throughout many cities, married battered women who leave their husbands are denied welfare due to their husbands' income.
- 1970's: "We will not be beaten" becomes the mantra of women across the country organizing to end domestic violence. A grassroots organizing effort begins, transforming public consciousness and women's lives.
- 1972: In June, the first emergency rape crisis line opens in Washington, D.C.
- 1973: From 1968 to 1973, the crime of rape increased 62% nationwide.
- 1974: As a result of women's groups' efforts, New York no longer requires a rape victim to give independent corroboration of the crime.
- 1975: Most U.S. states allow wives to bring criminal action against a husband who inflicts injury upon her.
- 1975: In New York, Abused Women's Aid in Crisis is formed after a domestic violence conference held in January. The AWAIC offers referral service and group counseling sessions to wives who need help breaking out of the victim syndrome.
- 1976: In November, the New York City Council passes Resolution 491, introduced by Council Member Miriam Freidlander, urging city agencies to make concrete plans for providing specialized assistance to battered women.

Historical Document: New York Radical Feminist's Consciousness-Raising Guide, p 1 (circa 1969)*

New York Radical Feminists

INTRODUCTION TO CONSCIOUSNESS RAISING

"We'll have our rights; see if we don't; and you can't stop us from them; see if you can. You may hiss as much as you like, but it is coming. Women don't get half as much rights as they ought to; we want more, and we will have it."
-Sojourner Truth, 1853-

One of the purposes of consciousness raising is to make us aware of the societal pressures that oppress women. Some women use the awareness gained from consciousness raising solely in their personal lives without becoming active in the women's movement. This is a valid purpose of consciousness raising. It is hoped, however, that consciousness raising will help to radicalize us, as women, to participate in whatever action is necessary to change our society.

Women often feel competitive with other women or isolated from them. It is another purpose of consciousness raising to break down these barriers and encourage open, honest communication among women.

A third purpose of consciousness raising is to develop pride in being a woman through identification with other women.

The method of consciousness raising may vary from group to group. However, through practice and experience we have developed a format that we have found to be the most effective. Try to follow this format that we have found to be most effective. Try to follow this format with your consciousness raising group for awhile. If it works, fine. If not, experiment with new procedures and stick to the one that works best.

SELECT A TOPIC. A topic is usually selected at the previous meeting so that those who wish to may have time to consider it. The suggested lis of topics that follows is meant as a guideline and not as a questionnai Refer to the list when you need to and include what you like. Sometime you may even wish to spend an entire meeting on a single aspect of a topic. It is a good idea to discuss BACKGROUND EXPERIENCES before moving on to ADULT EXPERIENCES, etc. This is invaluable for developing trust and intimacy within the group. If you plunge into a "heavy" topi such as marriage or lesbianism at your third session, there may be women who will feel threatened or defensive, as you will still be relative strangers to one another.

GO AROUND IN A CIRCLE. This creates a kind of "free space" where women can talk about themselves in a way they may never have before. Going around in a circle enables women who are more reticent to have the same opportunity to talk as more aggressive women. It also helps us to listen to each other and breaks down feelings of competitiveness among

ALWAYS SPEAK PERSONALLY, SPECIFICALLY AND FROM YOUR OWN EXPERIENCE. Try not to generalize, theorize or talk in abstractions.

DON'T INTERRUPT, except to ask a specific informational question or to clarify a point. If someone else's experience reminds you of one of

** the complete document is available at womenshistory.about.com/od/feminism/a/consciousness_raising_groups.htm*

Summary of New York Domestic Violence Legislation

New York State Domestic Violence and Related Laws Legislative Summaries by Year:

www.opdv.ny.gov/law

A comprehensive summary of all domestic-violence related legislation, updated each year, is posted on the Office for the Prevention of Domestic Violence (OPDV) website at the link above. OPDV also provides this list based on subject at the same website location.

Acronyms Used in this Volume

ACA	Affordable Care Act (Social Services and Healthcare)
ACD/ACOD	Adjournment in Contemplation of Dismissal
ACS	New York City Administration for Children's Services
ADA	Americans with Disabilities Act
ADAP	Aids Drug Assistance Program
ADM	Administrative Directives (Social Services)
ADVENT	Anti--Domestic Violence Eligibility Needs Team (New York City Social Services)
AFC	Attorney for the Child
AFIC	Adult Family Intake Center (New York City Housing and Social Services)
BEV	Bureau of Eligibility Verification (New York City Social Services)
BIP	Batterer Intervention Program
CCI	Center for Court Innovation
CHP	Child Health Plus (Social Services and Healthcare)
CHIP	Children's Health Insurance Plan
CPS	Child Protective Services
CSE	Office of Child Support Enforcement
CSCEU/CSEU	Child Support Collection and Enforcement Unit (Social Services)
CSSA	Child Support Standard Act
DASA	Dignity for All Students Act
DCJS	New York State Division of Criminal Justice Services
DHS	Department of Homeless Services (New York City Housing and Social Services)
DHS	US Department of Homeland Security
DIR	Domestic Incident Report (Law Enforcement)
DOCS	Department of Corrections
DOCCS	New York State Department of Corrections and Community Supervision
DOH	Department of Health
DOJ	US Department of Justice
DOMA	Defense of Marriage Act
DOP	Department of Probation
DOP	New York State Division of Parole

DPCA	Division of Probation and Correctional Alternatives
DRL	Domestic Relations Law
DSS	Department of Social Services (Outside New York City)
DVIEP	Domestic Violence Intervention, Education, and Prevention Program (NYC Housing)
DVL	Domestic Violence Liaison (Social Services)
EAU	Emergency Assistance Unit (New York City Housing and Social Services)
EEOC	Equal Employment Opportunity Commission
FA	Family Assistance Program (Social Services)
FCA	Family Court Act
FEPS	Family Eviction Prevention Supplement (New York City Housing and Social Services)
FMLA	Family and Medical Leave Act
FMR	Fair Market Rents (Housing)
FOP	Final Order of Protection
HQS	Housing Quality Standards (Social Services and Housing)
FVO	Family Violence Option (Social Services)
HAP	Housing Assistance Payment (Social Services and Housing)
HCR	NY State Homes & Community Renewal
HIPAA	Health Insurance Portability and Accountability Act
HRA	Human Resource Administration (New York City Social Services)
HPD	New York City Housing Preservation & Development (New York City Housing)
HUD	US Department of Housing and Urban Development
IDV	Integrated Domestic Violence Court
INF	Informational Letters (Social Services)
IPSA	Intimate Partner Sexual Assault
LCADV	Lawyers Committee Against Domestic Violence (New York City)
LCM	Memorandum to Local Social Service District Commissioner (Social Services)
LDSS	Local Department of Social Services
LEP	Limited English Proficiency
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer
LINC	Living in Communities (New York City Housing and Social Services)

Resources

Online Resources

Related Publications & Research

NYS Judicial Committee on Women in the Courts - www.nycourts.gov/ip/womeninthecourts

NYS Office for the Prevention of Domestic Violence - www.opdv.ny.gov

Center for Court Innovation - www.courtinnovation.org

National Online Resource Center on Violence Against Women - www.vawnet.org
Minnesota Center Against Violence and Abuse Electronic Clearinghouse - www.mincava.umn.edu
National Center on Domestic Violence, Trauma & Mental Health - www.nationalcenterdvtraumamh.org
Training Institute on Strangulation Prevention - www.strangulationtraininginstitute.com/publications
National Stalking Resource Center - www.victimsofcrime.org/our-programs/stalking-resource-center
Empire Justice Center - www.empirejustice.org
Youth & Domestic Violence - www.breakthecycle.org
Legal Momentum - www.legalmomentum.org
American Bar Association - www.americanbar.org
US Bureau of Justice Statistics - www.bjs.gov

Risk Assessment & Safety Planning

www.dangerassessment.org
www.joinonelove.org/get-help/danger-assessment-app
www.odara.waypointcentre.ca
www.mosaicmethod.com
www.opdv.ny.gov/help/fss
www.tech2stalk.org

Resources

National Family Justice Center Alliance - www.familyjusticecenter.org/family-justice-centers
National Battered Women's Justice Project - www.bwjp.org
National Coalition Against Domestic Violence - www.ncadv.org
National Domestic Violence Hotline - www.thehotline.org
National Network to End Domestic Violence - www.nnedv.org
Rape, Abuse, and Incest National Network - www.rainn.org
National Sexual Violence Resource Center - www.nsvrc.org
National Center on Domestic and Sexual Violence - www.ncdsv.org
Workplaces Respond to Domestic & Sexual Violence - www.workplacesrespond.org
National Human Trafficking Resource Center - www.traffickingresourcecenter.org
Training Institute on Strangulation Prevention - www.strangulationtraininginstitute.com
NY Model Batterer Programs - www.nymbp.org
Prosecutors' Resource on Violence Against Women - www.aequitasresource.org
Legal Resource Center on Violence Against Women - www.lrcvaw.org
National Victim Notification Network - www.vinelink.com
NYS Coalition Against Domestic Violence - www.nyscadv.org
NYS Coalition Against Sexual Assault - www.nyscasa.org
Anti-Violence Project (LGBTQ) - www.avp.org

National Center for Lesbian Rights - www.nclrights.org

NYC Clerk Marriage Bureau - www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml

Government Agencies

NYS Courts Forms - www.nycourts.gov/forms

NYS Department of Corrections and Community Supervision Inmate Look-up - nysdoccslookup.doccs.ny.gov

NYS Department of Corrections and Community Supervision Victim Impact Unit - https://www.parole.ny.gov/victimimpact.html

NYS Office of Victim Services - www.ovs.ny.gov/victim-compensation

NYS Office for the Prevention of Domestic Violence - www.opdv.ny.gov

NYS Office of Temporary & Disability Assistance - www.otda.ny.gov

NYS OTDA Division of Child Support Enforcement - www.childsupport.ny.gov

NYS Office of Children & Family Services - www.ocfs.ny.gov

NYS Department of Health - www.nystateofhealth.ny.gov

NYC Mayor's Office to Combat Domestic Violence - www.nyc.gov/html/ocdv

NYC Department of Homeless Services - www.nyc.gov/html/dhs/html/home/home

NYC Human Resources Administration - www1.nyc.gov/site/hra/index.page

NYC Housing Authority - www1.nyc.gov/site/nycha/index.page

US Office for Victims of Crime - www.ovc.gov

US Office for Victims of Crime Training and Technical Assistance Center - www.ovcttac.gov

US Bureau of Justice Statistics - www.bjs.gov

US Depart of Justice - www.justice.gov

US Center for Disease Control - www.cdc.gov

US Department of Labor - www.dol.gov

Family Justice Centers

The Family Justice Center Model

The Family Justice Center model is the co-location of a multi-disciplinary team of professionals who work together, under one roof, to provide coordinated services to victims of family violence and their children. Some Centers also serve victims of elder abuse, human trafficking, sexual assault, and child abuse. Many communities, including those throughout New York State, use the name "Family Justice Center" though some communities select a different name to describe their Centers or similar multi-agency service delivery models. Family Justice Centers are specifically defined in federal law and refer to the co-location of staff members from multiple agencies, including government and non-government agencies, under one roof. While a Family Justice Center may house many partners, the basic partners include police officers, prosecutors, civil legal service providers, and community-based advocates. The core concept is to provide one place where victims can go to talk to an advocate, plan for their safety, interview with a police officer, meet with a prosecutor, receive medical assistance, obtain civil legal services, receive information on shelter, and get help with transportation.

The Family Justice Center approach is based on the San Diego Family Justice Center model, which opened in 2002 under the leadership of then-City Attorney Casey Gwinn. The model has been identified as a best practice in the field of domestic violence intervention and prevention service by the U.S. Department of Justice. The documented and published outcomes in the Family Justice Center model have included: reduced homicides; increased victim safety; increased autonomy and empowerment for victims; reduced fear and anxiety for victims and their children; increased efficiency and coordination among service providers; and reduced recantation and minimization by victims when wrapped in services and support. (Gwinn, Strack, 2006). As the Family Justice Center movement has evolved, models have developed in tribal, rural, suburban, and urban communities. (Gwinn, Strack, 2010)

Today, Alliance for HOPE International (www.allianceforhope.com) serves as the umbrella organization for all Family Justice Centers in the United States and abroad. The Alliance supports tribal, rural, suburban, and urban communities with developing or operating Family Justice Centers.

The Need

Each year law enforcement agencies around the world respond to alarming incidents of domestic violence. The prevalence of family violence and related sexual assault and child abuse is even more alarming when one considers that experts estimate that only 25 percent of such cases are actually reported. There are many reasons why victims often fail to report domestic violence, including love, fear, religious beliefs, threats to children, lack of money or resources, or simply not knowing that help is available.

Most criminal and civil justice systems make it difficult for victims to seek help and unintentionally wear them down. Victims are often required to travel from location to location to seek services that are scattered through a community or region. They have to tell their story over and over again to officials representing agencies, such as, law enforcement, courts, legal aid, medical, transportation, housing, social services, mental health, rehabilitation, financial assistance, and many more. The criminal justice system unintentionally makes it easy for victims to become frustrated and ultimately return to their abuser instead of seeking help. These challenges for victims and their children have made the Family Justice Center and similar multi-agency models very popular with victims and with professionals seeking to coordinate all needed services for victims.

The Benefit

The Family Justice Center model can provide a combination of services and interventions from one location to help victims and offenders break the cycle of violence and develop healthy relationships. A collaborative effort provides more support to victims and children involved in family violence through improved case management and a more fluid exchange of information and resources. Bridging existing gaps increases a victim's access to services and resources and makes the entire process of reporting a domestic violence incident much less overwhelming for the victims and children involved.

Comprehensive evaluations of Family Justice Centers have demonstrated strong support from survivors and marked improvements in case outcomes when survivors and their children receive help in Centers. (Petrucci, 2013).

The Services and Activities

The Family Justice Center model often provides comprehensive advocacy support, safety planning, civil legal services, counseling for victims and children, links to Juvenile, Family and Criminal court, as well as access to on-site professionals providing forensic medical services, job training and placement assistance, public benefits assistance, camping and mentoring programs, and safety planning. It can also provide comprehensive prevention efforts such as outreach to young adults and underserved victims through community education. Each Center is different and is based on the needs of victims in each community and the partner agencies participating in the collaborative effort.

Family Justice Centers often specialize in addressing high-risk cases, near and non-fatal strangulation assaults, trauma-informed practices with adults and children, and long-term community engagement with survivors and their children. The Family Justice Center model has produced evidenced-based models for improving outcomes for trauma-exposed children (Gwinn, Hellman, 2014), victims of near-fatal strangulation assaults (Gwinn, Strack, 2014), and high-risk victims (Gwinn, Strack, 2014).

Judges and court systems often collaborate with local Family Justice Centers to create video-based or electronic filing processes to increase access to services for victims without requiring their personal presence in court. Family Justice Centers are also valuable resources for courts when addressing high-risk cases and cases with co-occurring child abuse and domestic violence. To learn more about such models, contact Alliance for HOPE International at www.allianceforhope.com.

Bibliography

Gwinn, C., Strack, G. (2006), *Hope for Hurting Families: Creating Family Justice Centers Across America* (Volcano Press).

Gwinn, C., Strack, G. (2010), *Dream Big: A Simple, Complicated Idea to Stop Family Violence* (Wheatmark).

Gwinn, C. (2015), *Cheering for the Children: Creating Pathways to HOPE for Children Exposed to Trauma* (Wheatmark).

Gwinn, C., Strack, G. (Ed.) (2014), *Investigation and Prosecution of Strangulation Assaults* (California District Attorneys Association).

Petrucci, C., Seibold, W. (2013), *Final Evaluation Results – California Family Justice Initiative, Phase II. Accessed* July 13, 2015 at http://issuu.com/familyjusticecenteralliance/docs/evaluation___outcomes_-_cfji_final_.

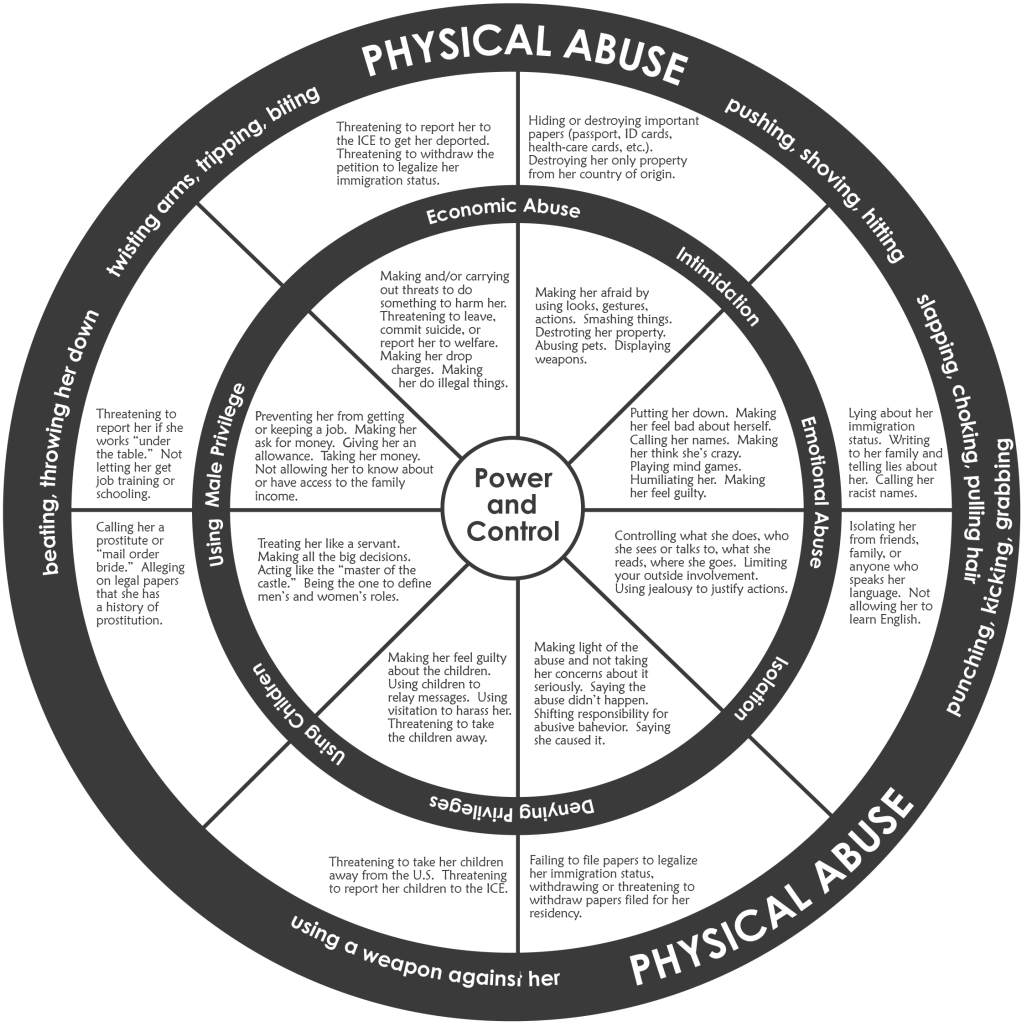
Power and Control Wheels

See www.theduluthmodel.org/training/wheels.html for detailed information on using the Power and Control Wheels to assist your client in understanding the dynamics of abuse.

Power and Control Wheel

DOMESTIC ABUSE INTERVENTION PROJECT
202 East Superior Street
Duluth, Minnesota 55802
218-722-2781
www.duluth-model.org

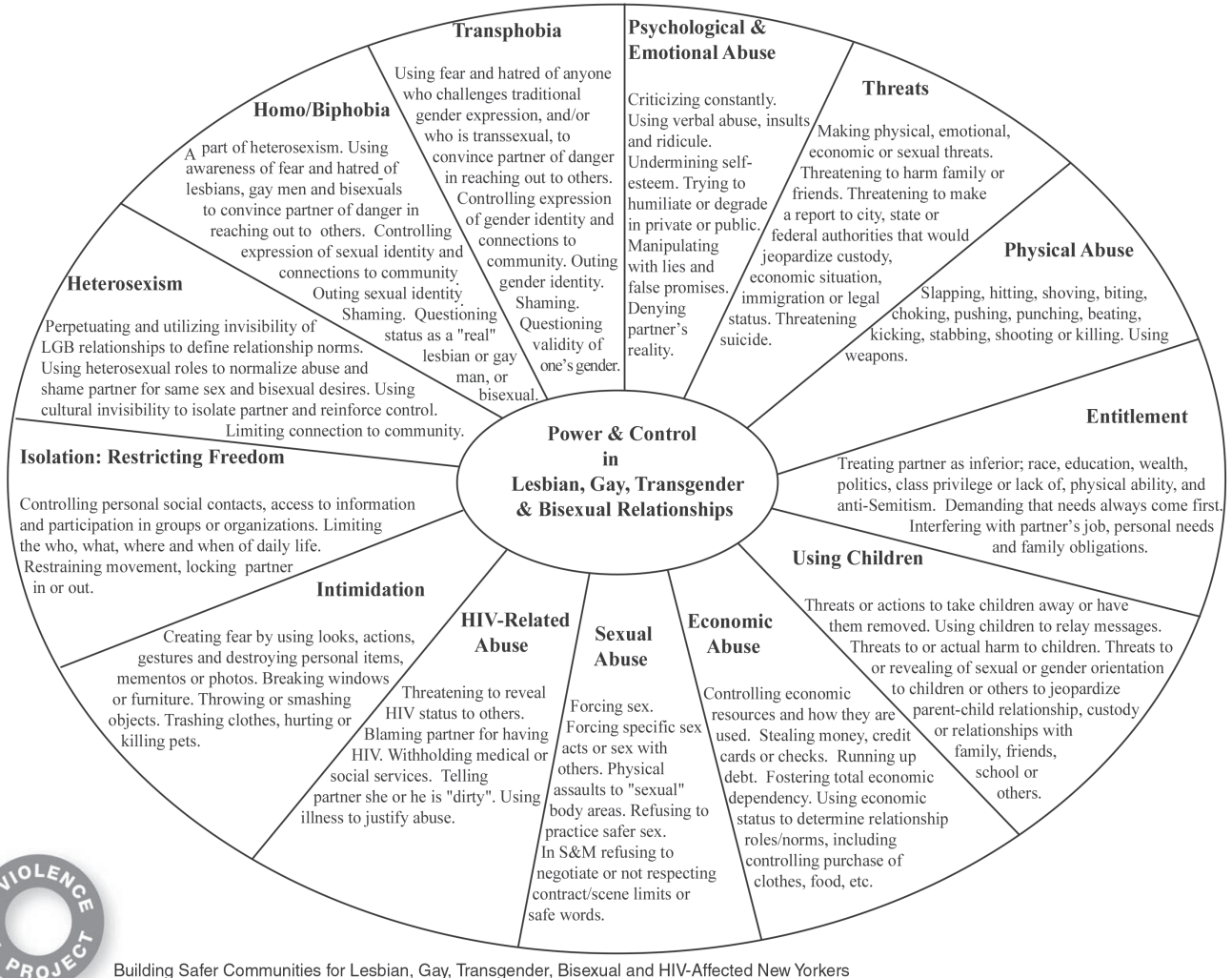
Immigrant Power and Control Wheel



Adapted from original wheel by:
Domestic Abuse Intervention Project
202 East Superior Street
Duluth, MN 55802
218.722.4134

Produced and distributed by:
NATIONAL CENTER
on Domestic and Sexual Violence
training · consulting · advocacy
4612 Shoal Creek Blvd. · Austin, Texas 78756
512.407.9020 (phone and fax) · www.ncdsv.org

LGBTQ Wheel



Building Safer Communities for Lesbian, Gay, Transgender, Bisexual and HIV-Affected New Yorkers

Risk Assessment Resources

Family Court Judicial Guide to Domestic Violence Risk Factors

New York State Unified Court System

FAMILY COURT JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

RISK FACTOR	WHAT TO LOOK FOR	LEGAL CONTEXT
Context of Violence	• Was this the **first time** that something like this happened? • If not, what happened before? How long ago? • What was the **worst or most serious thing** that happened? • Medical treatment needed? • Has the **physical violence increased** in frequency or severity over the past year? • Is there a recent **loss of employment**? • Is there a history of **substance abuse or mental health** concerns?	Use of some illegal drugs; increased severity/ frequency of violence; unemployment increases lethality and recidivism. Medical costs can be allocated FCA §828(4) and §842(h); batterer's program can be required, and may include substance abuse programs under §842(g).
Criminal and Family Court History	• **Criminal and Family Court check**, OP registry, sex offender registry • Pending or prior **Orders of Protection** • Pending order of **Support**	Prior OPs/crim history can be a risk factor for re-offending. FCA §814 provides for communication between Crim and Fam. Ct.; §822(6) OP inquiry required; prior orders and violations are relevant FCA §821-1(6); §FCA 827.
Relationship Status	• When did the relationship begin? When did it end? • Where does each party live? Did they live together, if so when? • Are they **recently separated**?	Separation within the past year increases risk of lethality and recidivism. FCA §828 authorizes temporary child support; FCA §842 and RPL §227-c authorize lease termination.
Firearms/ Weapons	• Does respondent have **access to a firearm or weapon**? • Is there a firearm or weapon in the home? • Has the respondent ever used or **threatened to use a weapon** against the petitioner?	Respondent access to firearm and use or threatened use of lethal weapon increases lethality risk. FCA §842-a and18 U.S.C. 922(g)(8,9) include firearms restrictions.
Strangulation	• Has respondent ever **attempted to strangle** or choke the petitioner?	Strangulation increases lethality. Obstruction of breathing PL §121.11/12/13.
Threats to Kill	• Has respondent ever **threatened to or tried to kill** the petitioner?	Disorderly Conduct, Harassment and Aggravated Harassment PL §240.20/25/26/30/31.
Sexual Violence	• Has respondent **forced the petitioner to have sex**?	PL Art 130 Sex Offenses.
Controlling Behavior	• Does respondent **try to control** most or all of petitioner's daily activities? • Is respondent **constantly or violently jealous**? • Who has **access to bank accounts**, the car, etc.?	Violent jealousy and stalking behaviors are lethality factors and may constitute Stalking PL §120.45-60.
Stalking	• Does the respondent **repeatedly call, text, or email** the petitioner? • **Send unwanted gifts** or other items to the petitioner? • **Monitor petitioner's phone calls**, computer use, or social media? • **Use technology**, like hidden cameras or global positioning systems (GPS), to track the petitioner? • **Drive by or hang out** at the petitioner's home, school, or work? • **Follow or show up** wherever the petitioner is?	Stalking increases risk of lethality. Stalking PL §120.45-60.
Petitioner's Belief	• Does the petitioner **believe that the respondent will re-assault or attempt to kill** the petitioner?	Petitioner's belief of harm is a lethality factor FCA §821(1).
Children	• Has there been **direct physical abuse? Threats to harm** children? Child **sexual abuse**? • Were **children present** during the incident? • Have the **children witnessed violence** between the parties? • Is the respondent the **biological** parent of the child(ren)?	Having a child who is not the respondent's increases lethality and recidivism. Assault during pregnancy increases risk of lethality. Children present increases risk of recidivism. FCA §842(b)(c) and following: court may limit custody or access on OP; court may include child as a protected party on OP, Annie C. v. Marcellus W., 278 AD2d 177 (1st Dept 2000).
Safety Planning	• **Are there safety measures in place**? Petitioner service referral? • Is the petitioner eligible for an attorney?	FCA §821-a requires court to inform both parties of right to attorney; §154-c(2) and §844 covers modification.

This Guide is to assist Family Court judges in identifying domestic violence risk factors and to offer legal remedies or specific conditions that may be appropriate that respond to the correlating risk. This Guide may also be valuable in assisting courts in crafting temporary and final custody, parental access and visitation orders in cases involving domestic violence. The Guide is not exhaustive, is not meant to be a substitute for the court's discretion in determining the credibility of the allegations and weight of each factor, and is not meant to be filled out, scored in any way, or placed in any court file.

HOW TO USE – FAMILY COURT JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

GENERAL INSTRUCTIONS

- Provide both parties with notice of right to retain counsel and, if indigent, to assigned counsel under FCA 262(a)(ii) and 821-a(3)(a) and Jud L 35
- Provide the responding party with an opportunity to be heard as to any risk factors identified
- If ex parte application for a Temporary Order of Protection involves exclusion from the home, the case should be scheduled with a short return date
- **EXPLAIN THE TERMS AND CONDITIONS OF THE TEMPORARY ORDER OF PROTECTION TO ALL PARTIES, WITH THE ASSISTANCE OF AN INTERPRETER WHERE LIMITED ENGLISH PROFICIENCY OR HEARING IMPAIRMENT IS AN ISSUE**

Limitations of eliciting safety or risk information from petitioners in open court
- **Safety concerns or trauma** can affect the petitioner's ability to provide accurate information in open court
- **Soliciting information from petitioners** in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the petitioner

At Initial Hearing under §828:
- **This tool can assist in determining the terms and conditions** on the temporary order, whether to issue a warrant, how quickly to calendar the return hearing, and whether temporary support should be ordered

At Dispositional Hearings §833:
- **This tool can assist in determining type and length of order**, whether aggravating circumstances apply and which conditions are appropriate, including firearms surrender, support, children on the order, and/or program mandates

Requests for Modifications §154-c(2) and §844; Violation Hearings §846:
- **This tool can assist in modification of type and length of order**, and which conditions are appropriate, including firearms surrender, support, children on the order, and/or program mandates; or adding terms and conditions after a violation hearing

Provide petitioners information on risk assessment factors and the option of consulting with confidential advocates
- Information and access to advocates improves petitioner safety and the quality of petitioners' risk assessments and, as a result, the court's own risk assessments

Cultural factors may impact litigants' understanding of this tool
- Information and access to language services should be made available to litigants to ensure their understanding of the risk factors and the petition
- Some of the terms on this tool may need to be explained in more detail

Note that this list of risk factors is not exclusive
- The listed factors are the ones **most commonly present when the risk of serious harm or death exists**
- Additional factors exist which assist in prediction of re-assault
- Petitioners may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports

Remember that the level and type of risk can change over time
- **The most dangerous time is during or after the period when the petitioner:**
  - **is separating or has separated from the respondent**
  - **has disclosed or is attempting to disclose the abuse to others**

  Risk factors may be used to tailor supervision strategies and oversight.

This Guide is an educational tool used to contextualize certain behaviors within the NY State Penal Code. It may also be valuable in assisting courts in making custody-related determinations in cases involving domestic violence.

REMEMBER TO EXPLAIN THE TERMS AND CONDITIONS OF THE TEMPORARY ORDER TO THE PETITIONER.

These factors were compiled based on the work of Minnesota's Gender Fairness Implementation Committee; 2009, Identifying Risk Worksheet created by Probation Officer James E. Henderson Jr. of the 15th District Court in Ann Arbor MI. This project was supported by subgrant No. VW10562640 and subgrant no.VW12562642 awarded pursuant to a S.T.O.P. Violence Against Women Formula Grant Program administered by DCJS, the New York State administering office. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women. This guide was developed by the Unified Court System with the assistance of the Center for Court Innovation. June 2015

Matrimonial Court Guide to Domestic Violence Risk Factors

MATRIMONIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

RISK FACTOR	• WHAT TO LOOK FOR IN ALLEGATIONS OR TESTIMONY	RELEVANCE/ LEGAL CONTEXT
Context of Violence	• Was this the first time that something like this is being alleged? If not, what happened before? How long ago? When was the first incident? • What was the **worst or most serious** thing that happened? Has the physical violence **increased in frequency** or severity over the past year? Medical treatment needed? • Is there a recent loss of employment? • Is there a history of substance abuse or mental health concerns?	Use of some illegal drugs (cocaine and derivatives, meth. amphetamines); increased severity and frequency of violence; and unemployment increase lethality and recidivism. DRL § 240 and DRL § 252.
Criminal and Family Court History	• Pending or prior **Orders for Protection** • Pending order of **Support**	The existence of prior OPs and criminal history is an indicator for repeat offending. Check Criminal and Family Court, OP registry and SORA. DRL § 240 1(A-1).
Relationship Status	• When did the relationship begin? What is the date of the marriage? • Where does each party live? Did they live together, if so when? • Are they **recently separated**? Is one party requesting exclusive occupancy? • Is economic relief being requested?	Separation within the past year increases lethality and recidivism. Mitzner v. Mitzner, 228 A.D.2d 483, 643 N.Y.S.2d 674 (2nd Dept., 1996); Formato v. Formato, 173 A.D.2d 274, 569 N.Y.S.2d 665 (1st Dept., 1991).
Firearms/ Weapons	• Does responding party have **access to a firearm or weapon or a license**? • Is there a firearm or weapon in the home? What types? How many? • Has the responding party used or threatened to use a weapon against the moving party?	Responding party access to firearm and use or threatened use of lethal weapon increases lethality. DRL § 240 (3) (h); DRL § 252 (a).
Strangulation	• Has the responding party ever attempted to strangle or choke the moving party?	Strangulation increases lethality. Obstruction of breathing. PL § 121.11/12/13. **
Threats to Kill/Suicide	• Has responding party ever threatened to or tried to kill the moving party? • Has responding party ever threatened or attempted suicide?	Threat or attempt to kill/suicide increases lethality. Harassment and Aggravated Harassment PL § 240.20/25/30/30(1). **
Sexual Violence	• Has responding party forced the moving party to have sex?	Responding party forcing moving party to have sex is a lethality factor. Sexual misconduct, PL § 130.20/52/55/60. **
Controlling Behavior	• Does responding party try to control most or all of moving party's daily activities? • Is the responding party constantly or violently **jealous**? • Does the responding party **follow or spy** on moving party, leave threatening notes or messages, destroy personal property or make unwanted calls? • Does one party control the finances/marital assets? • Does the responding party denigrate the moving party's parenting?	Violent jealousy and stalking behaviors are lethality factors and constitute Stalking PL § 120.45-60. ** Controlling behaviors limit moving party's access to resources. Abusive party may use children to control non-abusive parent.
Stalking	• Does the responding party **repeatedly call**, text, or email the moving party? • Send unwanted gifts or other items? • Monitor moving party's phone calls, computer use, or social media? • **Use technology,** like internet, hidden cameras or global positioning systems (GPS), to track the moving party? • Drive by or hang out at the moving party's home, school, or work? Follow or show up wherever the moving party is?	Stalking increases risk of lethality. Stalking PL § 120.45-60. **
Petitioner Belief	• Does the moving party believe that the responding party will re-assault or attempt to kill the moving party?	Moving party belief of harm is a lethality factor. DRL § 240.3c, PL § 812(b). **
Children	• What is the biological relationship of the responding party and children? • Were children present during the incident? • Have the children witnessed violence by a party? • Has there been direct physical or sexual abuse of the children? **Threats to harm children? Physical or sexual abuse of the children and threats to harm children are not risk factors but can indicate means by which a party can be controlled.**	Having a child who is not the responding party's biological child increases lethality and recidivism. Assault during pregnancy increases risk of lethality. Children present increases risk of recidivism.
Safety Planning	• Are there safety measures in place? Moving party service referral? Is the moving party eligible for an attorney?	DRL § 240 (3) (f) authorizes lease termination.

HOW TO USE–
THE JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

This Guide is to assist Supreme Court judges in identifying domestic violence risk factors and to offer legal remedies that respond to the correlating risk. This tool should not be used to determine whether there is a legal basis to issue an order of protection.

Both DRL § 240 and § 252 have provisions concerning issuance of Orders of Protection in matrimonial cases. DRL § 240 concerns the issues of custody and child support in matrimonial actions and under DRL § 240(3) the issuance of orders or protection. DRL § 252 provides for the issuance of Orders of Protection (OP) or Temporary OPs in Supreme Court. Initial applications or modifications can be entertained in both the Supreme and Family Courts. Applications for OPs or TOPs must be in writing in the form of an Order to Show Cause or Notice of Motion (see DRL § 252(4)(8)). Ex parte relief is available with an Order to Show Cause. The Court rule (22 NYCRR 202.7[f]) that governs notice on applications for temporary relief specifically provides that the rule does not apply to Orders to Show Cause or motions requesting an Order of Protection under DRL § 240—unless otherwise ordered by the Court.

Initial Order to Show Cause: This tool can assist in determining the terms and conditions on the temporary order, whether to issue a TOP, a warrant for arrest (depending on the severity of the abuse claimed, i.e., visible signs of abuse, types of abuse alleged, etc.), how quickly to calendar the return hearing, and whether temporary support should be ordered.

Pendente Lite Application: This tool can assist in determining the type and length of an order, whether aggravating circumstances apply and which conditions are appropriate, including firearms surrender, support, or children on the order.

Other Hearings or Disposition: This tool can assist in modification of the type and length of an order, conditions -- firearms surrender, support, children on the order, program mandates; or adding terms and conditions after a violation hearing. Supreme Court orders can extend until the youngest child is 18.

Limitations of eliciting safety or risk information from petitioners in open court:

- Safety concerns or trauma can affect the petitioner's ability to provide accurate information in open court.
- Soliciting information from petitioners in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the petitioner.

Provide moving parties information on risk factors and the option of consulting with confidential advocates

- Information and access to advocates improves litigant safety and the quality of the moving party's risk assessments and, as a result, the court's own assessment of risk.

Cultural factors may impact litigants' understanding

- Information and access to language services should be made available to litigants to ensure their understanding of the risk factors and the petition.
- Some of the terms on this tool may need to be explained in more detail.

Note that this list of risk factors is not exclusive

- The listed factors are the ones most commonly present when the risk of serious harm or death exists.
- Additional factors exist which assist in prediction of re-assault.
- Moving parties may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports.

Remember that the level and type of risk can change over time

- The most dangerous time period is the days to months after the responding party discovers that the moving party
  - might attempt to separate or terminate the relationship.
  - has disclosed or is attempting to disclose the abuse to others, especially violent behavior.

This is an educational tool used to contextualize certain behaviors within the NY State Penal Code.

These factors draw on the following evidence based risk and lethality assessment tools: Danger Assessment and DVSI-R.

** Penal Law statutes are for reference. DRL § 240 and § 252 govern judicial decisions in matrimonial proceedings.**

This project was supported by subgrant no. VW13562643 and subgrant no. VW14562644 awarded pursuant to a S.T.O.P. Violence Against Women Formula Grant Program administered by DCJS, the New York State administering office. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.

January 2015

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Pooja Asnani is a staff attorney at Sanctuary for Families' Center for Battered Women's Legal Services Immigration Intervention Project where she represents survivors of domestic violence, sex trafficking, and other forms of gender-based violence in their immigration matters. Her previous experience includes serving as Chadbourne & Parke Fellow at The Door's Legal Services Center, where her work focused on representing immigrant youth in immigration and family courts, and as a litigation associate at Chadbourne & Parke LLP.

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Christina Brandt-Young is a senior staff attorney at Disability Rights Advocates where she fights for the civil rights of persons with disabilities. Previously, she served as a senior staff attorney at Legal Momentum and as a staff attorney at New York Legal Assistance Group where she won a unanimous reversal in the Appellate Division, First Department in a custody case on behalf of an abused mother and her child.

Melissa A. Brennan is the Deputy Director at Sanctuary for Families' Anti-Trafficking Initiative, where her work focuses on the immigration legal needs of survivors of sex trafficking, domestic violence, and other forms of gender-based violence. She founded Sanctuary's Queens Trafficking Intervention Pro Bono Project, which provides free immigration legal services to foreign-born defendants in the Queens Trafficking Intervention Court. She previously served as a program associate at the Center on Immigration and Justice at the Vera Institute of Justice. Prior to that, she was a legal fellow and consultant with the United Nations Interagency Project on Human Trafficking in Bangkok.

B.J. Cling is a clinical psychologist and a lawyer specializing in the effects of violence against women and children. She has both a clinical and a forensic private practice in New York City and teaches at John Jay College of Criminal Justice in the areas of psychology and law, and family violence. She conducts psychological evaluations of victims of domestic violence in complex custody evaluations, and has particular expertise in trauma. She has written extensively about sexual violence against women and children. She serves on the Ethics Board of the New York State Psychological Association and is a founding member of the interdisciplinary Mental Health Professionals on Domestic Violence.

Elizabeth Cronin is the Director of the New York State Office of Victim Services. She previously served as the Director of Legal Affairs for the U.S. Court of Appeals for the Second Circuit. She was also an adjunct professor in the Criminal Justice and Sociology Department at Pace University, where she taught domestic violence and child abuse, ethics and criminal justice. She was a Deputy Bureau Chief of the Domestic Violence and Child Abuse Bureau at the Westchester District Attorneys' Office, from 1986 until she left for the Court of Appeals in 2000.

Mary Rothwell Davis, an attorney in New York City, served as project attorney with the National Judicial Education Program of Legal Momentum in creating a web-based distance-learning program for judges on Intimate Partner Sexual Abuse. She has also served as appellate counsel to Sanctuary for Families' Center for Battered Women's Legal Services. She was formerly the first court attorney for the State's Integrated Domestic Violence Court in Bronx County and served as law clerk to Chief Judge Judith S. Kaye, following a long tenure at the Legal Aid Society's Criminal Appeals Bureau and Parole Revocation Defense Unit. She is chair of the New York State IOLA Fund.

Hon. Betty Weinberg Ellerin is the chair of the New York State Judicial Committee on Women in the Courts and has been a member of the Committee almost since its inception in 1986. Currently she is senior counsel in the Litigation and Trial Practice Group of Alston & Bird. Before joining Alston & Bird, she served for more than 20 years as a Justice of the Appellate Division, First Department. She was the first woman appointed to that bench, and she served as its first woman Presiding Justice. She was also the first woman appointed as Deputy Chief Administrative Judge for New York City Courts, where she was responsible for the operation of all trial courts within the City. Prior to her tenure on the bench, she served as Law Clerk to various state Supreme Court justices.

She is also a founding member of numerous New York and national professional organizations. She is currently vice chair of the New York State Advisory Committee on Judicial Ethics and vice chair of the Character Committee of the Appellate Division, First Department. She has served as president of the National Association of Women Judges and was a founding member and is a current board member of the Women's Bar Association of the State of New York. Upon her retirement from the bench, she was appointed to assist in acclimating new judges to the bench and to help design training programs for new judges. She also is currently a Trustee Associate of New York University, and, in addition to other bar association leadership roles, she is a past chair of the New York State Bar Associations Committee on Courts of Appellate Jurisdiction. She is the recipient of innumerable awards from local and national bar associations including the American Bar Association's Margaret Brent Women of Achievement Award.

Nicole Fidler is the Pro Bono Supervising Attorney at Sanctuary for Families Center for Battered Women's Legal Services. She previously served as a litigation associate at Millbank, Tweed, Hadley & McCloy where as a pro bono attorney, she won an order of protection and full custody for a client from Bangladesh who had suffered years of abuse by her husband, who violently forced her and the couple's four-year old daughter out of their home in Bangladesh, and separated her from their eight-year old son, concealing the son's whereabouts.

Lisa Fischel-Wolovick has been a practicing attorney for over twenty years, specializing in matrimonial and family law. Her practice also includes guardianship matters, and advanced directives. In addition to her legal background, she also has a Master's in Social Work degree. As a certified mediator since 1996, she has assisted clients in resolving custody, child support and other financial concerns through negotiation. She has taught at Fordham University's Graduate School of Social Service and Albany

Law School's Clinical Legal Studies Program. Prior to entering private practice she was supervising attorney at MFY Legal Services and Sanctuary for Families.

Rose Garrity is the Board President of the National Coalition Against Domestic Violence and retired founding Executive Director of A New Hope Center in Tioga County, New York. She is a co-founder of the NY Model for Batterer Programs, and developed one of the earliest domestic violence coordinated community response networks in New York while developing the batterer program work. She oversaw the development of the first pet rescue project related to domestic violence project in the northeast. She is a well-known writer and trainer on various aspects of domestic violence and sexual assault as well as economic justice, anti-racism, classism, and other oppressions. She has received numerous awards for her work. She also served on several other boards, including the NYS Coalition Against Domestic Violence and the NYS Coalition Against Sexual Assault.

Virginia Goggin is Director of Legal Services at the New York City Anti-Violence Project which works to empower lesbian, gay, bisexual, transgender, queer, and HIV-affected communities and allies to end all forms of violence through organizing and education, and supports survivors through counselling and advocacy. She previously served as a staff attorney in the LGBT Law Project in the Matrimonial & Family Law Unit at the New York Legal Assistance Group.

Jill Laurie Goodman (ret.) served as Counsel to the New York State Judicial Committee on Women in the Courts and co-chair of the Lawyers Committee Against Domestic Violence. She served as an editor of the third, fourth, and fifth editions of the *Lawyer's Manual on Domestic Violence* and as an editor of the *Lawyer's Manual on Human Trafficking*.

Amy Hozer is a senior staff attorney in the Matrimonial & Family Law Unit and consults on family law matters for Legal Health. Prior to joining NY Legal Assistance Group, she provided legal services to families affected by terminal illness at The Family Center in New York City. She represents litigants in matrimonial, custody, visitation and family offense cases, and supervises law students. She also provides family law representation for patients, and legal training for physicians of various New York City medical clinics and hospitals. Before moving to New York, she was an associate attorney at the Consumer Law Center in Connecticut. She is an active member of the Lawyers Committee Against Domestic Violence and co-chairs the Manhattan Family Court Domestic Violence Working Group of that Committee. She is also a member of the Children and the Law Committee at the New York City Bar Association.

Josephine Lea Iselin (ret.) pursued a diverse practice, working as an associate at Skadden Arps, a partner at Lankenau, Kovner & Bickford, and as counsel at Morris & McVeigh. She handled groundbreaking cases representing individuals of modest means against major financial institutions, winning the largest punitive damages granted an individual for commercial injury. As attorney emeritus at Sanctuary's Center for Battered Women's Legal Services, she continued the pro bono work that has been a life-long commitment and conducted in-depth research on the Hague Convention.

Jelena Kolic is a staff attorney at Disability Rights Advocates. She has also worked at Legal Momentum and as a fellow on the Immigration Intervention Project at Sanctuary for Families. There she worked on international jurisdiction for custody matters involving domestic violence victims, and on procuring immigration remedies for the agency's domestic violence and human trafficking victims.

Hon. Mary Anne Lehmann (ret.) served as Binghamton City Court judge and acting Broome County Court judge. Judge Lehmann founded the Domestic Violence Part of the Binghamton City Court, and is the author of *Domestic Violence Cases, Orders of Protection and Firearms*, utilized statewide to train judges about their responsibilities in this area. She has lectured extensively to judicial audiences across New York State on domestic violence and other topics.

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Betty Levinson retired as a partner in Gulielmetti Levinson, P.C. Her four decades of law practice include counseling and litigation in divorce, custody, support, paternity, and adoption matters in traditional and non-traditional families, with special expertise in protecting the rights of battered women. She represented Hedda Nussbaum, securing a landmark ruling on tolling of the statute of limitations as a result of the psychic damage inflicted on her client by Joel Steinberg in *Nussbaum v Steinberg*, 269 AD2d 192 (1st Dep't 2000).

Hon. Jonathan Lippman is Chief Judge of the State of New York and Chief Judge of the Court of Appeals. His career in the court system spans four decades. He rose to Chief Administrative Judge and has served as Chief Judge since 2009. He lectures frequently in New York and around the country on access to justice and judicial branch leadership and innovation. He has published many articles and essays on these and other topics and received numerous awards and honors, including the William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts and the Cyrus R. Vance Tribute of the Fund for Modern Courts.

Robert M. Maccarone is a Deputy Commissioner at the NYS Division of Criminal Justice Services, where he serves as the Director of Probation and Correctional Alternatives, and as a Special Advisor to the Governor. He also serves as the Chair of the NYS Probation Commission. His responsibilities include the general oversight, funding and regulation of New York State's local probation departments, Alternatives to Incarceration Programs, and County Re-entry Task Forces. In addition, he oversees the operation and regulation of New York State's Ignition Interlock Program, which was implemented with the passage of "Leandra's Law" in 2009. Mr. Maccarone serves as the Commissioner and Compact Administrator for New York State's participation in the Interstate Compact for Adult Offender Supervision, with oversight responsibility for the interstate transfer of probationers and parolees. In this capacity, he also serves as the Chair of the NYS Council for the Interstate Compact for Adult Offender Supervision. Prior to his state appointment, he served as a Deputy Bureau Chief in the Westchester County District Attorney's Office. Earlier, he served as Deputy Commissioner of the Westchester County Department of Correction and Director of Criminal Justice Services for Westchester County.

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Stephanie Nilva is the founder and Executive Director of Day One, an organization that partners with New York City youth to end dating abuse and domestic violence through community education, legal advocacy, supportive services and leadership development. As an attorney, she practiced family and matrimonial law, specializing in domestic abuse.

Amanda Norejko is the Director of the Economic Justice/ Matrimonial Project and was a Victoria J. Mastrobuono Economic Justice Fellow at the Center for Battered Women's Legal Services at Sanctuary for Families. She represents domestic violence and trafficking survivors in family law and matrimonial matters and engages in legislative and policy advocacy aimed at combating violence against women and promoting women's economic empowerment on the local, state, national, and international level. She serves as a senior policy advisor and U.N. representative for the international NGO Coalition Against Trafficking in Women. She is co-chair of the Judiciary Committee and the Domestic Violence Committee of the New York Women's Bar Association, and active in the New York City Bar Association's Matrimonial Committee, the New York State Coalition Against Domestic Violence, the Bronx County Bar Association's Matrimonial and Family Law Committee, and serves as co-chair of the Domestic Violence Committee of the Women's Bar Association of the State of New York. She has been an active participant in the New York State Anti-Trafficking Coalition, the Maintenance Standards Coalition, and the Lawyers Committee Against Domestic Violence, which awarded her with the In the Trenches Award in 2014.

Hon. Janice Rosa (ret.) was a justice of the Supreme Court for the New York State Eighth Judicial District and served as the supervising judge of the Family Courts in the District. She also served as the District's supervising judge for matrimonial matters. She is the former project judge for the Integrated Domestic Violence Courts (IDV) for the Eighth Judicial District, directed to introduce IDV Courts in the Western New York area. She serves as trustee of the Board of the National Council of Juvenile and Family Court Judges and is a member of the Fourth Department (NYS) Attorney for the Children Advisory Committee. She is also co-chair of the Matrimonial Operations subcommittee charged with recommending enhanced practices and processes for divorce cases in New York. Prior to her election to the Supreme Court bench, Judge Rosa was a member of the Erie County Family Court Bench involved with Buffalo's Model Court with a dedicated abuse and neglect docket. Her activities included county and state-wide collaborative work on dependency matters and judicial leadership. Before taking the Bench, she had an eighteen-year practice concentrating in family law, divorce, and child custody matters.

Hon. Emily Ruben is a judge of the New York City Family Court. She has served as Attorney-in-Charge of the Brooklyn Neighborhood Office of the Legal Aid Society. She served as a member and previous co-chair of the Lawyers Committee Against Domestic Violence. She serves as a member of the New York State Unified Court System's Matrimonial Practice Advisory Committee and chaired the Custody, Visitation, Order of Protection subcommittee of the New York City Family Court Advisory

Committee. She is a member of the New York State Judicial Committee on Women in the Courts. She began her legal career as law clerk to the Hon. Elliott Wilk. Her chapter on matrimonial practice was authored before her appointment to the bench in June 2015.

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Lynn Hecht Schafran, Senior Vice President at Legal Momentum, has a long and distinguished career, breaking ground on a broad range of issues affecting women. She has been Director of Legal Momentum's National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) since 1981. She also serves as a senior staff attorney, litigating and writing in the areas of rape, domestic violence, the intersection of sexual assault and domestic violence, and gender bias in the courts.

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Barbara Weiner is a staff attorney with the Empire Justice Center. Her areas of practice include immigration law, particularly assistance to immigrant victims of domestic violence, and public benefits law, with a focus on the eligibility of immigrants for federal and state public benefit programs. She also serves as legal counsel in the capital region for the local Office of New Americans (ONA) Opportunity where she oversees the work of the local ONA Opportunity Center, which provides assistance to immigrants with filing applications for citizenship. She represents young people seeking deferred action status under the Deferred Action for Childhood Arrivals (DACA) program.

Jill M. Zuccardy is a family law attorney and consultant with more than twenty years of practice in the area of family law including impact litigation on behalf of victims. While employed as the Director of the Child Protection Project at Sanctuary for Families Center for Battered Women's Legal Services, she served as trial and appellate co-counsel in *Nicholson v Williams*, the federal class action lawsuit that successfully challenged New York City's practices in child welfare cases involving domestic violence.

Lawyer's Manual on Domestic Violence

Representing the Victim, 6th Edition

Edited by

Mary Rothwell Davis, Dorchen A. Leidholdt and Charlotte A. Watson

With each edition, the *Lawyer's Manual* has provided guidance on increasing numbers of topics from leading experts, and this new edition continues to add to this indispensable resource. It is, without a doubt, a powerful tool for those on the front lines and in the trenches to bring justice and safety to victims and accountability for perpetrators. There is valuable information across these pages for judges, prosecutors, law enforcement, government agencies, service providers, treatment professionals, community groups, and others who seek to protect victims and uphold the law.

Hon. Jonathan Lippman
Chief Judge of the State of New York

This 6th Edition of the *Lawyer's Manual on Domestic Violence* marks the twentieth year since publication of the first *Manual* in 1995 when the New York State legislature set in motion what soon became a sea change in how New York law addressed domestic violence. It has been ten years since publication of the last edition of the *Lawyer's Manual on Domestic Violence* and during that time the law in this area has continued to evolve at a rapid pace. Our goal is to engender an understanding of the dimensions of domestic violence and the history that has brought us to where we are today. We hope this book will provide the wisdom and the technical information to help guide those called upon to respond within the legal system.

Hon. Betty Weinberg Ellerin
Presiding Justice, Appellate Division, First Department (Ret.)
Chair, New York State Judicial Committee on Women in the Courts

This guide is an amazing compendium of spot-on critical information. Everyone doing this work should read it, not just victim/survivor attorneys!

William M. Schaefer, Jr.
VAWA/Victim Services Unit Manager
Office of Program Development and Funding
New York State Division of Criminal Justice Services

A version of this manual in PDF form is available through the links at:
www.nycourts.gov/ip/womeninthecourts/publications.shtml and
www.probono.net/ny/family/library.cfm