

STANDARDS *of* PRACTICE

for LAWYERS REPRESENTING

VICTIMS OF DOMESTIC VIOLENCE,

SEXUAL ASSAULT AND STALKING

in CIVIL PROTECTION ORDER CASES

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Preface

Domestic violence, sexual assault and stalking are epidemics in our society with dramatic, negative effects on individuals, families and communities. These crimes know no economic, racial, ethnic, religious, age or gender limits. Moreover, although these crimes can and do occur independently, they may also occur together, committed by the same perpetrator against the same victim. A sexual assault victim may have been stalked prior to the assault; a domestic violence victim may experience systematic rape in addition to physical and psychological abuse. Because these crimes may overlap and intersect, it is essential that lawyers providing legal assistance to victims be informed and educated about them individually and collectively.

In order to understand the dynamics of a particular domestic violence, sexual assault or stalking case, it is important to understand the broader continuum of violence in which these cases occur. By conservative estimates, 1.5 million women in the United States are assaulted by their intimate partners every year.¹ Nationally, one in three women will experience sexual violence in her lifetime,² and one in twelve women will be stalked in her lifetime.³ Although women are the victims in the majority of these crimes, men are also victims: the same studies reveal that 835,000 men are physically assaulted by an intimate partner annually in the United States, one in five sexual assault victims are male, and one

1 Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey* (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>

2 *Id.*

3 Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 169592, *Stalking in America: Findings from the National Violence Against Women Survey*, (1998), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/169592.htm>

in forty-five men is stalked in his lifetime.⁴ The need for protection from violence cannot be underestimated.

Civil protection orders for victims of domestic violence are available in every state. Though states have begun to enact statutes specifically creating civil protection orders for victims of sexual assault and stalking, only a minority of states have stalking civil protection orders and fewer still have civil protection orders available for victims of non-intimate partner sexual assault.

Civil protection orders are typically issued by state or tribal civil courts after a showing of abuse or violence or the likelihood of imminent harm. They may include a variety of provisions that vary from jurisdiction to jurisdiction requiring, *inter alia*, that the perpetrator (1) stay a certain distance from the victim, (2) not assault or otherwise abuse the victim, and (3) refrain from direct or indirect contact with the victim. Civil protection orders vary in their duration (*e.g.*, emergency, temporary or “permanent”), and in many jurisdictions may include remedies such as emergency monetary assistance, temporary child custody and support, and housing. Similarly, in every jurisdiction there is an enforcement mechanism whereby the victim may call upon law enforcement to enforce the provisions of the civil protection order when it is violated. In these ways, civil protection orders are intended to provide tangible, specific protection for victims that have experienced domestic violence, sexual assault or stalking.

Victims of domestic violence, sexual assault and stalking do not seek protection orders readily, often concerned that the court will not believe them and fearing that the abuse will continue even after the protection order is obtained. Many victims are concerned about having to face the perpetrator in court, or fear losing their privacy. In domestic violence cases, the majority of victims complain of serious physical assault, threats to kill or harm, or attempts or threats to take children. Protection orders are emergency remedies designed to provide for immediate safety. Nonetheless, victims of domestic violence, sexual assault and stalking are regularly murdered by their assailants when they

4 See *supra* notes 1, 2 and 3.

try to escape, even after the court has issued a civil protection order, demonstrating that these orders can be ineffective without enforcement and skilled, holistic advocacy.

Access to justice is essential to ensuring that victims of domestic violence, sexual assault and stalking receive the protection and remedies necessary to prevent and minimize the lifelong, devastating effects of these crimes. These Standards recognize the importance of victims' full access to the civil protection order remedies available to them. In addition, lawyers may seek further guidance from other American Bar Association Standards of Practice for use in conjunction with these Standards: *Standards for the Provision of Civil Legal Aid*, *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* and *Standards of Practice for Lawyers Representing Children in Custody Cases*.

Use of the Standards

These Standards are presented as aspirational guidelines for the operation of legal service providers, pro bono legal service providers, and individual lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases. They are based on the combined and distilled judgment of individuals with substantial experience in the area. These Standards do not create any mandatory requirements and failure to comply with a Standard should not give rise to a cause of action or a finding of a legal ethics violation, nor should it create any presumption that an individual lawyer, legal service provider, or pro bono legal service provider has breached any legal duty owed to a client or to a funding source.

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History

In October 2005, with generous funding from the Office on Violence Against Women, U.S. Department of Justice, the *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases* (“Standards of Practice” or “Standards”) project was launched. Led by the American Bar Association Commission on Domestic Violence and its partner organizations, the Washington Coalition of Sexual Assault Programs, Texas RioGrande Legal Aid and the National District Attorneys Association’s National Center for the Prosecution of Violence Against Women, the partners developed these Standards of Practice together.

The purpose of the Standards of Practice is to provide a reference tool for practicing lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases. The Standards of Practice are intended to cover a wide range of victim issues that should be considered to provide effective representation to victims of diverse backgrounds in civil protection order cases. The Standards contemplate practice in all U.S. state court jurisdictions, but are not intended to be a comprehensive resource on tribal court practice.

The goals of the Standards of Practice are: (1) to improve the quality of legal representation of victims of domestic violence, sexual assault and stalking; (2) to enable lawyers to effectively, ethically, and holistically represent victims in civil protection order cases; and (3) to raise awareness about the need for high-quality representation for victims of domestic violence, sexual assault and stalking in civil protection order cases.

A Standards of Practice Steering Committee met on May 8, 2006 in Washington, DC. The Steering Committee was comprised of 16 individuals, including practitioners, judges and others with various areas of expertise in civil protection orders. With the Steering Committee's advice, guidance and discussion, a draft of the Standards of Practice was created.

To receive substantive and structural feedback on the draft version of the Standards of Practice, the project partners designed three Working Group meetings, gathering lawyers from three geographic regions to maximize diverse input. The first Working Group meeting took place on September 18, 2006 in Chicago, IL. The second meeting took place on December 1, 2006 in Seattle, WA, and the third meeting took place on February 12, 2007 in Austin, TX.

All of the Working Group meetings were comprised of approximately 10-12 legal practitioners who handle civil protection order cases in various capacities. Through a series of facilitated discussions, dialogue among the meeting participants garnered substantive and constructive comments which informed the drafting of the Standards of Practice. Finally, the project partners submitted a completed draft of the Standards of Practice for peer review by practitioners and national subject matter experts in a series of conference calls. With this input from "front-line" practitioners and pro bono lawyers, we believe that the Standards of Practice are a helpful and practical resource for lawyers representing victims in civil protection order cases.

On August 13, 2007, the ABA House of Delegates adopted the black letter rules and the Preface of the Standards of Practice as official policy.

It is our hope that these Standards of Practice will not only be an invaluable resource to lawyers, but will also increase the quality of legal services to victims of domestic violence, sexual assault and stalking.

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I. *Purpose & Scope*

The purpose of these Standards of Practice is to provide a reference for lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases, and to encourage lawyers to provide high quality legal representation to those clients. These Standards keep the needs of the client at the center of representation and strive to build public confidence in a just and fair legal system by working to promote safety for victims of domestic violence, sexual assault and stalking, and accountability for perpetrators.

II. *Definitions*

- A. “DOMESTIC VIOLENCE”: Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim.
- B. “SEXUAL ASSAULT”: Any type of non-consensual touching or sexual penetration, however slight. Sexual assault may be perpetrated by an intimate partner (including a spouse), a non-intimate person known to the victim, or a stranger.
- C. “STALKING”: A course of conduct directed at a specific person that would cause a reasonable person to experience fear.
- D. “DATING VIOLENCE”: Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by a person who is or has been in a romantic or intimate relationship with the victim, often for the purpose of establishing and maintaining power and control over the victim.
- E. “VICTIM”: A person who has been subjected to domestic violence, sexual assault and/or stalking. Other terms used to describe a victim may include “survivor” or “client.”

- F. **“PERPETRATOR”**: A person who commits an act of domestic violence, sexual assault and/or stalking against a victim. Other terms used to describe a perpetrator may include “offender,” “batterer,” “abuser,” or “assailant.”
- G. **“CLIENT”**: Any person receiving the services of a lawyer. In these Standards, the person receiving services is a victim of domestic violence, sexual assault and/or stalking who is petitioning the court for a civil protection order, or is the person seeking the civil protection order on behalf of the victim.
- H. **“RESPONDENT”**: Any person responding to a petition for a civil protection order. In these Standards, a respondent is a person alleged to have committed an act or acts of domestic violence, sexual assault and/or stalking and against whom the civil protection order is sought. Other terms used to describe the respondent may include “defendant,” “perpetrator,” “offender,” “batterer,” “abuser” or “assailant.”
- I. **“FEDERALLY RECOGNIZED TRIBE”**: A group, band, nation or other organized group of indigenous American people, including any Alaska Native village, which is recognized by the federal government as constituting a distinct and historically continuous political entity.
- J. **“CIVIL PROTECTION ORDER”**: A civil court order, enforceable by law enforcement, intended to protect a victim and to stop the violent, dangerous and/or harassing behavior of a respondent. A civil protection order, if violated, can subject the respondent to criminal prosecution. Other terms used to describe a civil protection order may include “order for protection,” “restraining order,” or “peace order”; however, in some jurisdictions these terms may have a distinct meaning and usage, and may not be enforceable by law enforcement.
- K. **“SAFETY PLAN”**: An individualized set of strategies designed to maximize the safety of a victim who may be in danger of further harm from a perpetrator.

- L. “LETHALITY ASSESSMENT”: An assessment, typically via a screening instrument, designed to gauge the future risk of homicide to the victim by the perpetrator of domestic violence, sexual assault and/or stalking.
- M. “FULL FAITH AND CREDIT”: A constitutionally and/or legislatively mandated rule of law requiring each state, federally recognized tribe or territory to recognize and enforce some or all public acts, records, and judicial proceedings of every other state, tribe and territory. The Violence Against Women Act 2005 (VAWA) mandates that every state, recognized tribe and territory provide full faith and credit to protection orders issued by other states, tribes or territories. This includes provisions in protection orders relating to custody, visitation and support. For the purposes of full faith and credit under VAWA, a protection order is any injunction, protection order, restraining or other order issued for the protection of victims of domestic violence, sexual assault, dating violence or stalking.

III. Ethical Duties of All Lawyers Representing Domestic Violence, Sexual Assault or Stalking Victims

Lawyers are bound by their jurisdiction’s ethics rules in all matters. In order to most effectively discharge their ethical obligations, lawyers representing victims of domestic violence, sexual assault and stalking should comply with the standards of practice identified here.

A. COMPETENT KNOWLEDGE OF LAW

1. KNOWLEDGE OF CIVIL PROTECTION ORDER LAW

Before representing a client in a civil protection order case, the lawyer should have competent knowledge of the civil protection order laws in the relevant jurisdiction(s).

COMMENTARY

Competent knowledge means, at a minimum, basic litigation skills, an understanding of the burden of proof, knowledge of the requirements to obtain a protection order and remedies available to victims under the statutes of their particular jurisdiction.

All jurisdictions in the U.S. allow for civil protection orders for victims of domestic violence, while only a minority of jurisdictions allows civil protection orders specifically for non-intimate partner sexual assault and stalking victims. These orders can have various application or eligibility requirements, and may provide different forms of relief to different affected parties.

Domestic Violence

Every jurisdiction has relationship requirements that must be met in order for a victim to be eligible for a domestic violence civil protection order. In most jurisdictions, a victim must be married or formerly married to, be living with or have lived with be related by blood to, or have a child with the perpetrator. The victim need not be separated from the perpetrator to qualify. However, the relationship requirement varies by jurisdiction and some allow other relationships to qualify. For example, some jurisdictions allow for protection orders for teens or for those in non-sexual dating relationships. In some tribal jurisdictions broader relationship requirements may exist.

Anti-harassment protection orders may also be used to protect victims who do not meet the eligibility requirements for domestic violence protection orders, such as elders who are abused by non-family members, clients with disabilities who are abused by personal care attendants, or teens who are victimized by someone with whom they do not have an intimate or sexual relationship.

Not only is domestic violence physical, sexual, economic or emotional abuse, it is also the infliction of fear of imminent harm to a person. The threat of imminent harm is measured from the perspective of the victim. Perpetrators often threaten to take minor children away from victims, and victims are often told that they will never see their children again if they pursue legal action against the perpetrator. It is important for the lawyer to make clients aware of their rights and the best interest standards regarding child custody, visitation and child support in their jurisdiction. The lawyer should also be aware of remedies to seek when a child has been abducted and is in immediate harm by being with the perpetrator (*i.e.*, how to obtain a writ of attachment for the immediate return of the minor child and language to include in the final protection order to prevent parental abduction).

When a domestic violence civil protection order is issued by a court, the order may include specific remedies. In every jurisdiction, the court may order the respondent to have no contact with the victim. Many jurisdictions allow provisions for temporary child custody and child support, possession of the home, and other economic remedies. Some jurisdictions may order the immediate return of children through writs of attachment. The lawyer is responsible for knowing what types of civil protection orders are available in the jurisdiction, what remedies are available under each type of order, and what provisions are subject to criminal sanctions.

Sexual Assault

The vast majority of reported rape victims are assaulted by a known perpetrator. Many times perpetrators premeditate sexual violence, masking it in acceptable social behavior such as alcohol consumption. Similarly many perpetrators of sexual violence employ instrumental violence, *i.e.*, only the amount of violence necessary to

subdue the victim. Victim consent and credibility are often key issues to address in civil protection order cases. It is important for the lawyer to understand how rape myths will play into the case and how to represent a sexual assault victim most effectively.

The lawyer should be aware of any statutes or case law in the jurisdiction that might afford clients specific remedies based on their status as a victim. For example, a client who is a victim of domestic violence, sexual assault and stalking may have as many as four or five different types of civil protection orders available in some jurisdictions. Other civil remedies may also exist, including pursuing an action against the perpetrator and/or against a third party whose failure to reasonably fulfill some legal duty was a substantial contributing factor in the commission of the sexual assault, or pursuing a victim's compensation application and award. The lawyer should discuss the desired outcome with clients to determine which offense best qualifies them for what they are seeking from the protection order process.

The lawyer should also be aware of the applicability of rape shield evidentiary rules in civil cases in the jurisdiction. Rape shield rules govern the admissibility of a victim's or witness's extraneous sexual behavior as well as his or her predisposition to certain behavior. In addition, the lawyer should be prepared to litigate motions *in limine* to prevent the introduction of irrelevant "bad acts" of the victim, such as the victim's use of drugs or alcohol.

Many victims of sexual assault may be deeply concerned about their privacy and how taking legal action against the perpetrator may affect their privacy interests. The lawyer should be aware of the client's privacy concerns and how they may affect case strategy. Similarly the lawyer should be aware that a client's privacy concerns may change throughout the course of representation, and

thus it is important for the lawyer to communicate often with the client about privacy.

In sexual assault cases, no relationship between the parties is required in order to be eligible for a civil protection order. Most jurisdictions do not have specific civil protection order statutes for victims of non-intimate partner sexual assault and often civil anti-harassment order statutes or injunction statutes may be used.

Stalking

Stalking is a crime that is often misunderstood, minimized or missed entirely. As with sexual assault, the vast majority of victims are stalked by someone they know. In fact, a large percentage of stalking cases involve a perpetrator who is either a current or former intimate partner. It makes sense that there is a significant connection among the crimes of stalking, domestic violence and sexual assault. A large percentage of victims who are stalked by a current or former intimate partner were also previously physically and/or sexually assaulted by that partner.

In stalking cases, no relationship between the parties is required in order to be eligible for a civil protection order. However, there may be a requirement that the victim make a report to law enforcement or that the victim be able to show a pattern of conduct. As in sexual assault cases, civil anti-harassment order statutes or injunction statutes may be used to protect victims because most jurisdictions do not have specific civil protection order statutes for victims of stalking.

Stalking is a crime under the laws of all 50 states, the District of Columbia, and the federal government. Yet, stalking is vastly underreported and under-investigated by the criminal justice system. Civil lawyers working with stalking victims should, therefore, be aware of the criminal stalking laws in their jurisdiction and the resources

available to assist victims in accessing and navigating the criminal systems.

Additionally, civil lawyers should think about creative ways to assist stalking victims using the civil legal and social service systems in their communities. A majority of stalking victims take some type of self-protective measures to keep themselves safe from their offenders. Civil lawyers can help these victims by informing them about available protection orders, as well as housing and employment laws that may assist the victim (such as the ability to break a lease agreement or maintain employment status). Civil lawyers should also be mindful of the privacy concerns of stalking victims and vigilantly protect all client information.

Dating Violence

Many victims of domestic violence, sexual assault and stalking are not married to, or do not have a child in common with or live with the perpetrator of the violence. Victims may be in dating relationships when experiencing abuse, sexual assault or stalking from their dating partner.

In many states, dating violence victims are eligible for civil protection orders if the court is able to determine that a dating relationship exists. Several factors are examined to determine the existence of a dating relationship: the length of the relationship, the type of interaction between the abuser and the victim, and the frequency of the interaction. Several states define a dating relationship as “intimate” or “romantic,” while others explicitly require a sexual relationship between the parties to qualify as a dating relationship. When the statute does not allow for dating violence relationships to qualify for a civil protection order, or the relationship does not meet the statutory definition of a “dating relationship,” civil anti-harassment order statutes or injunction statutes should be considered.

Civil lawyers should be aware of the remedies available to dating victims of violence in their jurisdictions and counsel the client accordingly.

Mutual Orders

The lawyer should be aware of the dangers of mutual protection orders. A mutual order is an order issued against both parties (*i.e.* both the client and the respondent) on the basis of only one petition. Because mutual orders are issued *sua sponte*, without a petition by the respondent and a finding that the respondent is entitled to protection, some jurisdictions prohibit mutual orders, pursuant to statute. Mutual orders are generally discouraged because they often serve to further embolden the perpetrator to abuse and discourage the victim from seeking legal assistance. Mutual orders lack a finding of the predominant aggressor, and frequently lead to unfair mutual arrest in any future incident of abuse.

Lawyers should also be aware that according to the federal Violence Against Women Act (VAWA), mutual orders are not entitled to full faith and credit in other jurisdictions, and the lawyer should counsel the client accordingly. If the lawyer discovers that there is a mutual order in place, the lawyer needs to identify who the original petitioner is. If the original petition was filed by the perpetrator, the lawyer should counsel the client to file an independent petition to avoid the mutual protection order problem. The lawyer should have a solid understanding of the dynamics of power and control in order to effectively counsel clients about the risks of agreeing to mutual orders.

However, “criss-cross” civil protection orders, in which each party petitions for and receives a separate civil protection order against the other, do receive full faith and credit in other jurisdictions. Often times a criss-cross or counter-petition is filed by a respondent as a form of retaliation or intimidation toward a victim

of domestic violence. Lawyers should be alert to any fraudulent, frivolous or vexatious counter-petitions and prepared to defend against the issuance of criss-cross orders. Though mutual orders and criss-cross orders are technically different, the effect of the orders and potential danger that may result to the victim due to these orders may be the same. The lawyer should carefully distinguish and explain the consequences of mutual orders and criss-cross orders to the client.

In addition, federal law mandates that for state and tribal governments and courts to receive certain types of federal funding, the programs must meet statutory requirements regarding their arrest policies. Among the different requirements, the program must certify that their laws, official policies or practices prohibit the issuance of mutual protection orders except where both parties have filed petitions and the court makes findings of fact that both parties acted primarily as aggressors and that neither party acted primarily in self-defense. Therefore, lawyers should be aware that a court's issuance of a mutual protection order without the filing of two separate petitions may be a federal law violation and should seek appropriate recourse, if necessary.

Federal Firearms Prohibitions

Lawyers should be cognizant of the federal and state firearms prohibitions and their effect on protection orders. Persons subject to a state court-issued civil protection order that meets the federal statutory definition are generally prohibited from possessing any firearm or ammunition that affects commerce (*i.e.*, shipping or transporting any firearms in interstate or foreign commerce, or receiving any such firearm or ammunition). A violation of this prohibition while the protection order remains in effect is a federal offense punishable by up to ten years imprisonment.

A state court-issued protection order meets the federal definition if one of the following terms are met: 1) the respondent received actual notice and had an opportunity to participate; 2) the petitioner is an intimate partner of the respondent (*i.e.*, a spouse, a former spouse, has a child with, or cohabitates or has cohabitated); 3) the order restrains respondent from harassing, stalking or threatening the intimate partner, child of the respondent, or child of the respondent's intimate partner, or the order restrains respondent from engaging in conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child; or 4) the order includes a finding that the respondent is a credible threat to the safety of the intimate partner or child, or the order explicitly prohibits use of physical force against the intimate partner or child that would reasonably be expected to cause physical injury.

When interviewing and counseling clients, lawyers should explain these firearm prohibitions to their clients and ask about potential firearm possession by the perpetrators. Lawyers should tailor case strategy based on the existence of firearms, including working with the prosecutor's office to prosecute the perpetrator, keeping the safety of all parties as the foremost concern.

Inter-jurisdictional Issues

Lawyers should be familiar with state and federal laws governing interstate custody and domestic violence cases, which may involve protection order, relocation, custody, jurisdictional and parental kidnapping laws. These laws fit together in complex ways, allowing lawyers to answer critical questions such as the following: May a client flee for safety to another state with her children without being charged criminally? May a client file for custody in a refuge state? May a court issue a custody provision within a protection order? Lawyers who understand the

relevant laws can assist client so that they do not lose custody of their children, jeopardize their safety, or serve time in jail for attempting to escape from abuse.

2. KNOWLEDGE OF RELATED LEGAL ISSUES

The lawyer should screen for related legal issues arising from the incidence of domestic violence, sexual assault or stalking. If the lawyer is not competent or available to represent the client in related matters, the lawyer has a duty to refer the client to competent counsel.

COMMENTARY

Clients who are seeking civil protection orders often have a myriad of legal and non-legal issues that intersect with their civil protection order matters, such as housing, education, employment, privacy and privilege, child protective, child custody, emancipation, criminal justice or immigration issues. The lawyer has a duty to be competent in these areas of the law, or a duty to appropriately refer the case if training is not feasible. This is particularly true for clients with immigration law concerns as well as cases in criminal court, as these areas of law are highly specialized and have serious long-term consequences for the client. For example, admissions in one legal context will often compromise relief in another area, *i.e.*, an affidavit in a civil protection case can provide powerful impeachment evidence for a criminal trial. Therefore, the lawyer must be competent in the intersecting area of law or appropriately refer the client.

Many state domestic violence and sexual assault coalitions or local bar associations offer training in civil protection order law and other related areas of law, specific to the needs of victims of domestic violence, sexual assault and stalking. Prior to representing clients, the lawyer should identify community resources and referrals, and associate with suitable mentors to supplement the lawyer's knowledge.

Clients with Disabilities

Clients with disabilities (including age-related disabilities) often depend substantially on other people in matters ranging from economic support to help getting dressed. In domestic violence cases, clients with disabilities may have particular concerns about leaving an abusive partner because of their fear of institutionalization and/or the fear of losing custody of their children. The lawyer should be prepared to argue why the client's disability should not be used as the basis for denying the client custody of the children. The lawyer should also be prepared to develop a plan for attendant care, transportation, medical treatment, food, housing and financial aid in order to permit a client with disabilities to remain independent of the perpetrator.

People with cognitive disabilities tend to experience much higher rates of sexual victimization than people who do not have a disability. Increased dependence on caregivers, social isolation and institutions that fail to adequately supervise and perform criminal background checks on other clients, staff, and volunteers all contribute to the high rates of sexual abuse. In discussing sexual abuse with a client, the lawyer should be aware that the client may have a different understanding of what is considered sex, and how and when it is considered abusive.

A disabled person might suffer abuse specific to his/her disability that does not fit neatly under the definition of abuse in most states' protection order statutes. For example, leaving someone unattended without readily available food or water for extended periods of time, moving phones or assistive devices out of reach, taking pictures of the victim performing sexual acts, placing furniture to obstruct the victim's path, denying medication or overdosing are all sufficient to constitute abuse.

Clients with Limited English Proficiency / Use of Interpreters

If the lawyer is using an interpreter to communicate with the client, the lawyer should know how to work effectively with interpreters and be aware that it may take longer than English-speaking communications. Similarly, the lawyer should be aware of whether the interpreter is in any way acquainted with the client or the client's family, and have procedures in place to respond to situations where interpreters and clients are from the same small ethnic community, as this could affect the client's ability to communicate openly and effectively.

Economic Concerns

A victim of domestic violence, sexual assault and/or stalking who is low income or who is prevented from accessing shared resources may struggle with economic issues related to the violence. Economic stability is tantamount to client safety in many cases. For example, clients may need to move quickly for safety or because the violence occurred in the home and they can no longer bear to reside there. Clients may experience harassing behavior at work or have excessive absences due to physical and/or psychological injury, which may be creating job insecurity. Clients may have a new or continuing need for public benefits such as food stamps, Temporary Assistance for Needy Families and Medicaid. The lawyer should have a general understanding of the myriad ways a client can lose economic support and stability because it is fundamental to effective representation and meaningful, appropriate referrals.

Elder Abuse

Elder abuse is the physical, sexual, emotional or financial abuse, or neglect or abandonment, of an older person by a family member, friend, fiduciary or caregiver. Elder abuse includes domestic violence and sexual violence in

later life, and may be committed by a current or former spouse or intimate partner, as well as by adult children, grandchildren, other family members, a “friend,” or a non-relative caregiver or fiduciary. Issues related to an older person’s legal capacity and right to autonomy add to the complexity of dealing with older abused persons in many cases. In addition, older persons may be reluctant to disclose abuse, especially sexual assault, because of embarrassment or shame, or legitimate fears of retaliation, disbelief or institutionalization.

The lawyer should consider the wide range of civil legal remedies that may be available to the older client. Lawsuits to recover money or property, restraining orders or injunctions, or actions for damages all may be appropriate responses to elder abuse. In addition, the perpetrator should be removed from the setting and alternative care should be secured, if the perpetrator was the client’s primary caregiver. The lawyer should be familiar with state laws governing reporting of elder abuse, particularly if the state requires mandatory reporting by lawyers.

Older victims are often accompanied by others when they visit a lawyer’s office. The lawyer must be clear as to who is the client and then make that information known to everyone involved. If the client is the elderly person, the lawyer must meet with the client separately in order to preserve confidentiality and to ensure that the client is not subjected to undue influence.

The lawyer should strive to achieve remedies that place the fewest restrictions on the client’s independence and autonomy. Guardianship or conservatorship of the client or placement in a nursing home or other facility is sometimes necessary, but is certainly not the only means of terminating the abuse, and should be considered only as a last resort.

Immigrant Clients

When meeting an immigrant client for the first time, the lawyer's primary concern should be whether the client qualifies for a civil protection order, and not the client's immigration status. Immigration status has no bearing on a client's eligibility for a civil protection order. Other services and relief may also be available. The lawyer should have a ready list of referrals of service providers that can handle the immigration issues of the client within the service area.

VAWA now provides immigrant victims of domestic violence with access to some form of immigration relief. However, many immigrant victims are unaware of these remedies. Perpetrators use this fact to solidify their power and control and inhibit the immigrant victim's ability to successfully escape violence. In addition, immigrant victims may have justified concerns about the safety of family in their home country, a fear of parental abduction of the children by the perpetrator or other acts of retaliation by the respondent. Many immigrant clients are reluctant to obtain a final protection order against the respondent for fear that it will result in the respondent's deportation and a loss of financial support. A violation of a civil protection order may be a deportable offense. Similarly, many immigrant clients are reluctant to obtain a civil protection order against their employer or coworker for sexual assault, sexual harassment or stalking due to a fear of job loss, which may in turn, result in a loss of housing or even loss of legal status. The lawyer should be aware of any specific remedies for victims of sexual assault or stalking that may exist for immigrant clients and refer them to appropriate resources as necessary.

Lesbian, Gay, Bisexual and Transgender (LGBT) Relationships

Most LGBT victims of abuse, assault or stalking (and especially men and transgendered individuals) do not have the same access to support services, including legal services, as heterosexual victims. Even when LGBT victims are provided services, they may experience severe homophobia.

In several states, victims of domestic violence in same-sex relationships are explicitly excluded from access to civil protection orders. Legal complexities can arise in same-sex domestic violence cases when the relationship between the victim and the perpetrator is not legally acknowledged. Some examples include difficulties with child custody, excluding the respondent from the home, or allocating property.

Homophobia is a major barrier to LGBT victims of sexual assault. Lawyers should be aware that often LGBT victims are reluctant to discuss sexual assault, since LGBT sex is often perceived as deviant and/or criminal. LGBT victims may also be reluctant to disclose childhood sexual abuse due to fear of a homophobic reaction (*e.g.*, “you’re LGBT because you were sexually abused”). Also, homophobic assumptions about LGBT adults working with youth (*e.g.*, that they are pedophiles, or are “recruiting”) further serve to discourage LGBT victims from disclosing sexual assault. Homophobia is also a barrier in same-sex stalking cases where there is not a pre-existing relationship between the stalker and the victim.

It is not uncommon for police officers (and judges) to disregard or downplay same-sex domestic violence, sexual assault or stalking. Lawyers should be specifically aware of the danger of the issuance of mutual civil protection orders if the victim and perpetrator are the same sex, because of the

minimization that clients may experience when they seek to enforce the order. Enforcement of civil protection orders issued to LGBT individuals may be unreliable because of institutionalized prejudices towards LGBT people by law enforcement and the courts.

LGBT clients are sometimes sensitive to any public disclosure of their relationships because employment and other positions may be jeopardized. The lawyer must remember that there may not be a mechanism for confidentiality in court proceedings and police intervention. In some cases it may be safer for a victim to seek shelter and remain anonymous. As with all cases, victims should decide the best option for themselves, in consultation with the lawyer.

Mental Health

A client's mental health can have a bearing on effective representation. While many victims of domestic violence, sexual assault or stalking experience no significant or chronic mental health issues, some may be coping with pre-existing mental health issues in addition to the experience of violence, while others may develop problems as a result of being victimized. Typical ailments may include depression, increased anxiety, disassociation, sleep or eating disorders, drug and alcohol dependence and/or post-traumatic stress disorder (PTSD). The lawyer should always inform the client of relevant mental health services if the client seems to be suffering with mental health issues, while being careful to safeguard the client's privacy and protect against the possibility of impeachment. If the victim does have a mental health issue and is receiving treatment, the lawyer should consult with the mental health professional to determine how the client's condition, medication and treatment may affect strategy in the case.

Military Concerns

Victims of domestic violence or sexual assault who are associated with the military have the option of “restricted reporting,” which allows a victim to confidentially disclose the details of an assault to certain individuals within the military community and receive medical treatment and counseling, without triggering the official investigative process. Under these circumstances, the victim’s report and any details provided to the individuals identified above will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under the Restricted Reporting Directive. However, lawyers must check local law and practice to ensure that the facts and injuries in the case do not trigger state mandatory reporting laws.

Lawyers should be aware, however, that if clients do not elect to make a restricted report, current Department of Defense policy requires all members of the military community, including personnel on active duty, their family members, civilian employees, and contractors, to report known or suspected crimes to their commanding officer, including known or suspected incidents of domestic violence or sexual assault. The lawyer must be aware that if they advise a client to make an unrestricted report of an incident of domestic violence or sexual assault to military personnel, such personnel will initiate an investigation that will involve contacting the alleged perpetrator and any witnesses, such as medical staff, military police or other officers. If a client wants to speak to someone confidentially about options for services/interventions, the lawyer may make a referral to civilian, community-based domestic violence programs or rape crisis centers.

Under the Armed Forces Domestic Security Act, military commanders are required to take all reasonable measures to ensure that a civilian protection order preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person is given full force and effect on a military installation. However, it excludes a support or child custody order issued pursuant to state divorce and child custody laws except to the extent that such an order is entitled to full faith and credit under other federal law. The lawyer should contact the installation's legal office to register any civil protection order pertaining to a person in the military, whether that person is on active duty, a civilian employee, contractor, or a family member of these.

A military protection order is issued by a commanding officer to an active duty service member to both protect a victim of domestic violence or sexual assault, and to regulate the behavior of the offending service member. A military protection order may be oral rather than in writing, although written orders are preferred. Because a military protection order is issued by a commanding officer, it becomes invalid if the service member is reassigned to another command. Furthermore, civilian law enforcement agencies and civilian courts cannot enforce military protection orders because they do not meet the due process requirements under the full faith and credit provisions of VAWA. However, civilians can notify military law enforcement that a violation has occurred and in many cooperative agreements between local law enforcement and military installations, offenders are to be held until military police arrive or taken and turned over to the military police by civilians.

It is important to note that a military service member is always subject to the Uniform Code of Military Justice (UCMJ). Hence, if a service member violates a military protection order, command can be notified of the

violation and take action because the person violated a direct order and engaged in conduct unbecoming, both of which are prohibited under the UCMJ.

Finally, a service member may request temporary suspension of civil judicial and administrative proceedings (such as those regarding protection orders) pursuant to the Service Members Civil Relief Act, when the service member's ability to participate in those proceedings is materially affected by their military duty. However, if the commander is aware that the subject of the proceedings is the protection of another person from violence or harassment, the commander is unlikely to concur with the request. The lawyer should take steps to ensure that the commander is apprised of the nature of the proceedings.

Minor Victims

Many minor victims of domestic violence, sexual assault or stalking may not meet the age or relationship requirements of their state's protection order statutes, and must resort to more cumbersome procedures in order to obtain civil protection orders. For example, many states prohibit unemancipated minors from bringing actions for protection on their own behalf. In these jurisdictions, an adult must bring the action on the minor's behalf or the court must appoint a lawyer or guardian *ad litem* to represent the minor's interests. Anti-harassment protection orders may also be used to protect minor victims who do not meet the relationship requirements for domestic violence protection orders. However these orders may have age limits that impede access to the courts for minors as well.

Additional challenges in obtaining protection through the civil and criminal courts may arise for minors who are being abused by other minors. For example, if a minor seeks a sexual assault protection order against another minor, not only does the petitioning minor likely

need an adult or guardian to file on her behalf, in order to effect service, the minor respondent and his parents must be served in order to facilitate proper service. Then relief must be tailored to the unique needs of minors, who often are not in control of their own schedules, do not have access to transportation, and are engaged in full-time mandatory education. This is of particular concern when the victim and the perpetrator attend the same public school and may have classes together.

Lawyers must be familiar with the child abuse and neglect laws of the jurisdiction, as well as juvenile delinquency statutes and the Indian Child Welfare Act. In sexual assault cases, lawyers must also be familiar with statutory rape laws, the age of consent for minors to engage in consensual sexual relations and what the local prosecutors' policy is with regard to minors engaging in consensual sexual relations. Similarly these issues will likely impact whether a minor can successfully petition for a civil order of protection given the criminal analysis of whether a crime has occurred or if the minor has exposed herself to possible criminal sanctions for engaging in illegal activity prior to the assault, such as alcohol consumption.

Lastly, lawyers working with minors must be careful to distinguish the minor client from the caregiver who may accompany them, and be aware of mandated reporting requirements in their jurisdiction.

Native American Victims

American Indian and Alaska Native women are victimized at a much higher rate than any other group of women in the United States. When the perpetrator is non-Native, particular jurisdictional challenges arise. When deciding whether to secure a protection order in state or tribal court when both appear to have jurisdiction, the ability to enforce the protection order should be considered. The tribal court may have limited

subject matter jurisdiction, or limited court dates. See Section IV.C.8.

Because tribes are sovereign entities, their governments will vary in their statutory and judicial responses to domestic violence, sexual assault and stalking. Lawyers serving Native victims must be aware of which tribe is involved, either because the victim is a member or because the offense took place in Indian Country, and then review the applicable code provisions that will affect your client. In addition, seeking redress in a tribal court may afford the victim a means of justice that differs both judicially and culturally from a state or federal system. Prior to moving forward with representation, it is imperative that the laws of the involved tribe be consulted, the jurisdictional status be reviewed and the client consulted regarding her desire to seek redress in the community which may, or may not, afford a more holistic, or traditional response to the offense. Finally, ensure that you are respecting tribal sovereignty by affording full faith and credit to all forms and orders of the court, regardless of whether they are handwritten or contain provisions that may be outside the scope of your usual practice.

Substance Abuse Issues

Some victims of physical, sexual and psychological abuse may attempt to numb their physical and emotional pain by using drugs and/or alcohol. Other victims are coerced into drug use by their abusive partners. Whatever the initial motivator, a client's drug use or addiction provides the perpetrator with another weapon to undermine the client's credibility.

Clients who use drugs and alcohol may not be believed or taken seriously by others when they report abuse. They also may be unable to access certain emergency services such as shelters, many of which have a "sober-first" policy. The use of chemicals can compromise cognitive

functioning and motor coordination, leaving clients less able to identify cues or indicators when violence escalates, inhibiting their ability to defend against a physical assault, to make and use a safety plan, or to present well in court. If you suspect your client may be dealing with substance abuse issues, it is imperative that you inform the client of the relevant treatment resources.

B. COMPETENT KNOWLEDGE OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING

Before representing a client in a civil protection order case, the lawyer should have competent knowledge of the dynamics of domestic violence, sexual assault and/or stalking.

In particular, the lawyer should understand the potential risk of escalated violence due to litigation, and how the experience of domestic violence, sexual assault and/or stalking may affect the client-lawyer relationship, including the process of establishing rapport with and gathering information, evidence and case direction from the client.

COMMENTARY

Competent knowledge means, at a minimum, an accurate understanding of the dynamics of domestic violence, sexual assault and/or stalking, in addition to understanding the statutes that protect victims against these types of violence.

The lawyer should be aware of the issues a particular client may face and be able to counsel the client about the pros and cons of obtaining a civil protection order. For example, for domestic violence victims, often the risk of violence increases significantly when a victim attempts to leave the batterer. Therefore, the lawyer should discuss with the client different strategies for getting protection, which may include not immediately obtaining a civil protection order if obtaining an order will compromise safety. Additionally, sometimes being served with a petition for a civil protection order prompts

respondents to file a retaliatory cross-petition. The lawyer should be prepared to discuss this possibility with the client, and prepare the client for defending against a cross-petition. In sexual assault cases, many victims are very concerned about maintaining their privacy. Civil protection order actions may result in family, friends, employers and other institutions learning compromising details about a victim's sexual or personal history. Lawyers should be mindful that such disclosures can have very harmful consequences to a victim's social and economic life. Protecting the victim's privacy is integral to protecting her safety, and therefore privacy concerns will inform case strategy. In stalking cases, victims may not even know the perpetrator and may have limited ability to assess risks. Factors such as these, and others, will have an effect on the development of the case and the feasibility of certain remedies.

The lawyer must also be knowledgeable about the dynamics of violence in order to craft appropriate and effective orders for relief. For example, final protection orders which prohibit contact "except to discuss the children" or prohibit weapons "except for hunting" are seldom useful to the client and are extremely difficult to enforce, due to their vagueness. Similarly, sexual assault protection orders which allow the perpetrator to continue to attend class with the victim may be useless in helping the victim remain in school.

Some clients who have experienced domestic violence, sexual assault or stalking may require a heightened level of patience and assurance from the lawyer before they will be willing to disclose essential information. The additional client interview time this may require is well worth the investment, as it will likely result in more thorough, accurate and efficient trial preparation.

The lawyer must understand the dynamics of power and control in abusive relationships in order to understand that it is common for victims of domestic violence to return to the perpetrators, even after multiple separations. Often

victims will leave numerous times before finding the social, economic, and emotional resources to remain independent of their abusers. The lawyer should remain nonjudgmental toward clients who reunite with their perpetrators, and should assure clients that should they decide to leave in the future, resources will be available to help them.

C. CULTURALLY COMPETENT REPRESENTATION

The lawyer should be aware of the culture of the client and of how violence is understood within that culture.

In particular, the lawyer should understand how the culture of the client may affect client-lawyer communication and trust, identification and presentation of evidence, and remedy selection.

COMMENTARY

Cross cultural communication is an essential component of effective legal representation in domestic violence, sexual assault and stalking cases. Lawyers who develop what is often referred to as “cultural competence” will be able to enhance rapport with clients, gather more information, investigate cases thoroughly, develop more meaningful strategies for resolving problems, counsel clients appropriately, negotiate comprehensive agreements and conduct trials in a more effective manner.

The lawyer is more likely to be aware of cross cultural differences when representing a client who was born in another country or a client who does not speak English as a first language. However, cross cultural communication extends beyond differences in ethnicity and language and encompasses differences among individuals based on a variety of factors including race, religion, education, socioeconomic status, gender, sexual orientation and age. In addition, there are tremendous differences within cultural groups. Individuals who may be identified as Latino or Asian, for example, hail from a host of countries which

have their own unique histories, languages/dialects, foods, religions and customs.

Cultural differences exist in the ways in which survivors of domestic violence, sexual assault and stalking react to the violence they experience; interact with police, lawyers and judges; describe events which have transpired; communicate needs and goals; and make decisions about how best to address the situation. While lawyers need to develop cultural awareness, it is important not to reinforce stereotypes in the process. In order to enhance cross cultural communication, lawyers should (1) refrain from making assumptions about a client based on the client's cultural affiliation(s); and (2) refrain from generalizing based on the lawyer's own experience. Instead, the lawyer must learn about the individual client's values, experiences and priorities through sensitive questioning and perhaps more importantly, through careful listening and attention to verbal and nonverbal cues.

EXAMPLES:

Culturally competent practice for lawyers representing victims of domestic violence, sexual assault and stalking include (but are not limited to) the following:

- Listening attentively to clients, using reflective listening and empathetic responses
- Asking clients about their views or perceptions of events and interactions, spending significant time gathering information
- Not assuming all people from a particular cultural group are the same or share the same values and priorities; learning about clients' beliefs and priorities through discussion with them; asking clients how they define themselves culturally
- Being aware of the lawyer's own cultural beliefs, values, customs and biases

- Identifying areas in which the lawyer and the client share similarities, and using these areas of commonality to build rapport with the client
- Becoming educated about other countries, cultures, and customs
- Explaining how the U.S. legal system works using simple, straightforward language (orally and in writing)
- Being careful in the use of humor
- Before making negative judgments about a client, determining whether there may be cultural explanations for the client's behavior or decision
- Developing creative, flexible solutions which respect a client's priorities and cultural beliefs
- For non-citizen clients, consulting with an immigration lawyer about the possible immigration ramifications of actions taken in a domestic violence, sexual assault or stalking case
- Developing methods for using interpreters effectively

D. EFFECTIVE CLIENT COMMUNICATION

1. COMMUNICATION WITH CLIENTS

The lawyer should always personally consult with the client prior to representation and prior to court proceedings for a private and meaningful exchange of case-related information.

COMMENTARY

Victims of domestic violence, sexual assault and stalking are a unique client population because their legal concerns are often embedded in very personal, private matters. Effective representation requires that the lawyer earn the trust of a client who has experienced betrayal and/or abuse. It is not uncommon for clients to withhold

crucial information from lawyers out of self-doubt, shame, fear of disapproval or disloyalty.

Traumatized clients may have difficulty processing or remembering new or technical information. It is important for the lawyer to take adequate time to communicate effectively with the client, to learn all the relevant facts of the case, and also to ensure that the client has a complete understanding of the legal process, remedies, and consequences. The lawyer should listen reflectively with minimal interruption, avoid the use of jargon, be prepared to repeat information, and allow time for the client to absorb and consider her options.

In cases where this is simply not possible, the lawyer should work closely with an advocate who can take the necessary time to communicate effectively with the client, and who can serve as a client-lawyer liaison throughout the case. However, the lawyer must be cautious if the client is located in a jurisdiction with no advocate-client privilege, and make sure all parties are aware of that fact.

2. PHYSICAL ACCESS TO DIRECT LEGAL REPRESENTATION

All clients should have comparable access to the lawyer. When working with clients with physical and/or mental disabilities, the lawyer is obligated to ensure that the appropriate accommodations are in place.

COMMENTARY

The Americans with Disabilities Act (ADA) requires, among other things, that the lawyer's office and the courtroom be free of architectural and communication (*e.g.*, signs, alarms) barriers, and that auxiliary aids or services be provided when they are necessary to ensure effective communication (*e.g.*, using a TTY or relay service for clients who are Deaf or hard of hearing; reading documents to a client if providing it in Braille is too expensive). Also, service and companion animals

must be permitted in facilities unless the animals pose a direct threat to the health or safety of others. The lawyer should remember that the ADA prohibits charging persons with disabilities to cover the costs of needed accommodations.

In addition to ADA requirements, it is good practice to be aware of the effects of any medications the client may be taking, or of any cognitive impairments or psychological diagnoses the client may have, both to facilitate client communication and to better prepare for the civil protection order hearing.

The ADA describes the legal minimum for providing services to people with disabilities. Lawyers are encouraged to go beyond these minimum guidelines to provide the most accessible services possible. Appropriate accommodation will enhance representation by facilitating effective client-lawyer communication.

3. INTERPRETERS AND OTHER LANGUAGE RESOURCES

When the client is not proficient in English or is Deaf or hard of hearing, the lawyer should ensure a neutral, professional, qualified interpreter is available for all client meetings and court proceedings.

COMMENTARY

The lawyer should ensure that competent and unbiased interpreter(s) are available at each client-lawyer meeting and court proceeding, as appropriate. In no case should the lawyer allow the client's child or other family member to interpret. If a professional or certified interpreter is not available, the lawyer should seek out community resources, such as language departments of local universities, listserves, and referral sources to find an interpreter who is neutral and competent. If such an

interpreter is not available, the lawyer should seek out other resources, such as the AT&T language line or relay service, to ensure that the client can fully participate in all proceedings.

If a client is working with a bilingual advocate from a community-based domestic violence or sexual assault program, it is not appropriate to use the advocate as an interpreter. The advocate's role is to advocate on behalf of the client, not to act as an interpreter.

If the client is Deaf or hard of hearing and from another country, the lawyer should be aware that he or she may use a different form of sign language (*i.e.*, not American Sign Language). The lawyer should establish the best and safest way to communicate with the client throughout the case if a qualified interpreter is not available, either by email, text telephone device, video relay or through the use of multiple interpreters, to minimize and avoid perpetrator manipulation of these devices.

The lawyer should also be aware that some language communities are very small and that the client must be comfortable with the interpreter chosen and satisfied that there are no potential conflicts of interest.

Title VI of the Civil Rights Act (prohibiting discrimination on the basis of national origin) and the Americans with Disabilities Act both describe the legal minimums for providing language access to clients. Lawyers are encouraged to go beyond these minimum guidelines to provide the most accessible services possible. Appropriate accommodation will enhance representation by facilitating effective client-lawyer communication.

4. CONFIDENTIALITY AND THIRD PARTY PRIVILEGE ISSUES

The lawyer should inform the client that ordinarily, communication exchanged between the lawyer and client is protected by the attorney-client privilege. The lawyer should advise the client about the applicable rules and laws regarding confidentiality of communications with third parties (e.g. advocates, interpreters, counselors, personal care attendants, legal guardians, support persons) and any effect of these parties' presence on attorney-client privilege.

COMMENTARY

The lawyer should be aware that the scope of different types of privilege varies by jurisdiction. Privilege concerns should be addressed first with the client and, if the client consents, then discussed in the presence of the client and the third party.

In addition to attorney-client privilege, many states also have domestic violence or sexual assault advocate-victim privilege statutes. It is important for lawyers to know what privilege statutes exist in their state between third parties and the client in order to appropriately address any privacy or confidentiality breaches that may arise from working collaboratively.

Finally, the lawyer should be cautious about including third parties who may be mandated to report suspected child or vulnerable adult abuse to authorities.

If the client consents to the release of information to a third party, the consent should specify exactly what information may be released, that the release is time-limited, and it should be in writing.

E. CLIENT SAFETY

1. LETHALITY ASSESSMENT AND SAFETY PLANNING

The lawyer should ensure that comprehensive lethality assessment and safety planning occur with the client.

COMMENTARY

Lethality assessment and safety planning should occur with the client throughout the case. In most instances, clients will be best situated to assess their own safety and lethality risks, and the lawyer should defer to their concerns. In some cases, clients will minimize their risk as a means of coping, in which case the lawyer should nevertheless ensure that the client is provided with responsible information about safety planning. As an added consideration, discussing safety and lethality risks with the client can often reveal valuable evidence for the case. The lawyer should research the current practice in lethality assessment to determine how best to assess the perpetrator's lethality. However, if the lawyer is not familiar or comfortable with threat assessment or safety planning, he or she should consult with and connect the victim with someone who is—an advocate or trained law enforcement.

Safety planning is intended to limit the risks of violence, regardless of the victim's relationship with the perpetrator. A safety plan is not static but is dynamic and unique to each client. The lawyer should consider how the safety plan fits in with the broader case strategy.

In domestic violence cases, safety planning does not necessarily require that the client leave the abusive relationship; in fact, in many cases leaving will increase the risk. A domestic violence safety plan may include (but is not limited to): methods for limiting harm during a violent incident; keeping children safe from abuse; preserving assets; minimizing opportunities for abuse at court, at home, at work, online, or at school; planning

before leaving an abusive relationship; and enforcing a protection order. If the client has made the lawyer aware that the respondent is in possession of weapons, the lawyer should take the necessary steps to ensure that the respondent will have to go through a metal detector or other security screening prior to any hearings, depositions, etc.

In sexual assault or stalking cases, safety planning may include helping clients to identify what they need to feel safe – at work, at home, at school, and in transit. Other measures that can be taken include having the victim change routines, relocating and informing friends and family of the stalking. The lawyer should be familiar with the various models of effective safety planning that exist. If a lawyer is not competent in safety planning, an advocate should assist.

Clients should conduct on-going lethality assessment and safety planning as the case moves forward. The lawyer should often check in with the client about her safety plan and encourage the client to work with community-based advocates to help facilitate this process. When appropriate, the lawyer should make a safety plan for himself or herself and staff.

The lawyer should always discuss with the client the safest way to conduct the client-lawyer relationship. For example, it may not be wise for the lawyer to call the client at home, leave messages, send mail or be seen publicly with the client. The lawyer should notify the client in advance of legal developments, *e.g.*, when the perpetrator will be served so the client can adapt the safety plan.

2. SENSITIVITY TO EFFECTS OF TRAUMA

Lawyers should be sensitive to the effects of trauma in their clients, and aware of the effects of vicarious trauma on themselves and their staff.

COMMENTARY

While many victims of domestic violence, sexual assault and stalking will display no signs of trauma at all, lawyers must be prepared to accommodate the effects of trauma in their clients. Some clients may present as excessively hostile or difficult or, in contrast, be surprisingly flat in their affect. Aggressive or emotional over-reactions and emotional numbness (sometimes with accompanying high-risk behaviors) are normal responses to both one-time and ongoing assaults and should not be taken as indicators of instability or lack of credibility of the client. It is also common for trauma victims either to remember their abuse with vivid detail or to block it out entirely. Other victims may remember certain incidents or moments of assault vividly, but not others, and may not remember the incidents or moments in sequential order.

Additionally, vicarious trauma is a well-recognized phenomenon among helping professionals, and involves symptoms and behaviors similar to those exhibited by persons directly exposed to traumatic situations. Because working with victims of domestic violence, sexual assault and stalking involves stressful issues and situations, lawyers should be aware of the possibility of the effects of vicarious trauma on themselves and their staff.

The lawyer should have access to counseling and other support referrals so that the client or others can be referred if necessary.

F. SCOPE OF REPRESENTATION

1. CLIENT-CENTERED REPRESENTATION

The lawyer should advise the client about legal options and consequences, but must ultimately defer to the client regarding legal decisions.

COMMENTARY

As with all litigation, the right to decide what action to take in a case ultimately belongs to the client. In all cases, the lawyer must avoid dictating a course of action to the client. Often, victims of domestic violence, sexual assault or stalking seriously question their judgment and blame themselves for the assault. Clients may look to the lawyer to make decisions for them because the violence may have damaged their self-confidence and self-reliance. Because a client's ability to make decisions about the case may be compromised, the lawyer should be prepared to clearly articulate the choices available to the client and the risks and benefits associated with each.

The lawyer should remind clients that the case is theirs and that they are able to make her own decisions (including firing the lawyer). In some cases a client will make decisions that the lawyer believes are unsafe or unwise, but voicing disapproval is rarely helpful or responsible. The lawyer must ensure that the client is educated and informed about legal options and choices, and the likely consequences of those choices. Once this information has been conveyed, the lawyer must respect the client's autonomy.

2. LEGAL CAPACITY AND DUTY OF LOYALTY

The lawyer should determine whether the potential client has the legal capacity to enter into and/or sustain the client-lawyer relationship pursuant to the rules of the jurisdiction, and communicate this to the client. Once the client-lawyer relationship is established, the lawyer must refrain from divulging case-related information gained in interviewing or representing the client to unauthorized third parties.

COMMENTARY

All lawyers have the duties of loyalty and confidentiality, but these duties are heightened in cases where the lawyer may represent teen, elderly or disabled victims of domestic violence, sexual assault or stalking. In these cases, the potential client may have limited legal capacity, and may also be accompanied by a third-party caregiver. In some cases, the third-party caregiver may actually be the abuser. The lawyer must consult the rules of the jurisdiction to determine whether the client-lawyer relationship can be formed, and continue to assess whether it can be sustained.

The lawyer must refrain from sharing information with or taking direction from third parties claiming to represent the interests of the client, such as parents, adult children, or other caregivers, without the client's express and informed consent.

3. SCOPE OF REPRESENTATION,
CASE CLOSING AND WITHDRAWAL

The lawyer should be clear about his or her role in the client's legal matters, including communicating to the client the limits of the lawyer's role and the anticipated time the lawyer will fulfill that role.

COMMENTARY

The lawyer must communicate the limits of his/her representation clearly from the outset of representation. A written retainer agreement, even in cases where legal services are free, is always recommended. If the lawyer will represent the client only for the civil protection order (or for an even more limited purpose), or if the lawyer must withdraw for any reason, the lawyer should nevertheless make the client aware of the client's ability to pursue, appeal, enforce, modify or renew the

protection order regardless of whether the lawyer will be able to assist. Referrals to other legal and non-legal service providers should be made available to the client. The client should be advised of the statute of limitations for any pending legal claims.

4. COORDINATION WITH ALLIED PROFESSIONALS; HOLISTIC REPRESENTATION

The lawyer should refer the client to suitable non-legal professionals for support, advocacy and treatment when necessary and seek to holistically represent the client.

COMMENTARY

Failure to coordinate with other professionals may lead to undue stress and frustration for both the lawyer and the client, resulting in impaired representation.

Advocates

Community-based advocates at domestic violence or rape crisis centers can play a critical role in working with the lawyer and client to provide support services to the client. Advocates can assist victims with many tasks, including safety planning and preparing for economic independence.

If the client is receiving counseling services from a domestic violence program or rape crisis center, the lawyer should be aware that it is not the advocate's role to share such information. It is also not the advocate's job to provide the client with auxiliary services such as transportation to and from lawyer meetings or court, or to provide translation/interpreter services.

Counselors and/or Therapists

Clients may struggle to cope with the effects of domestic violence, sexual assault or stalking in their lives. A referral to mental health care and/or substance abuse treatment, when appropriate, will often improve the client's coping skills and facilitate the client-lawyer relationship by offering the client an appropriate venue for healing. Lawyers should be aware of appropriate and well-regarded counseling services specifically for victims of domestic violence, sexual assault or stalking.

The lawyer must also be prepared to address the potential for discovery and/or impeachment, breach of privacy or confidentiality, and the effect on collateral litigation (e.g. custody litigation) when a client receives treatment or counseling services.

Clergy or Other Faith-Based Advocates

Clients who are members of a faith community may find support and counsel from religious leaders who are well-versed in domestic violence, sexual assault and/or stalking. Lawyers should be aware, however, that clergy who are not well-informed may offer dangerous advice to clients. Lawyers should be familiar with well-trained faith leaders for client referral.

Tribal Elders, Healers or Other Traditional Practitioners

Native survivors may have a myriad of services open to them in their communities. Lawyers who practice in Indian Country may be aware of culturally specific opportunities for victim healing. Be prepared, however, to graciously accept that the community may not discuss these options with non-Native lawyers, or even members of other Native communities.

IV. Procedures

A. OFFICE INTAKE PROCEDURES

Intake for victims of domestic violence, sexual assault and/or stalking should be conducted by personnel trained to work sensitively with this client population. Intake should include, at a minimum, a conflict check, a safety assessment, and identification of any accommodations required by the client.

COMMENTARY

Intake procedures will vary by service provider; for example, a solo practice will likely have a different intake procedure than a large urban legal services office, which may have a different intake process from a shelter-based lawyer. However, these basic principles should apply to any practice.

The lawyer should strive to minimize the number of times the client is asked to repeat the facts of her case, and should understand that the intake and interview process may be re-traumatizing for the client. Enough time should be allocated for the intake and initial interview to allow the client to approach the subject at her own pace. The lawyer should be prepared for the possibility that the client will not reveal crucial details in the initial interview, and that more disclosure may come over time. The lawyer and any other intake personnel should also be prepared to respond without judgment or shock to details that the client may reveal.

EXAMPLES:

Appropriate intake questions for victims of domestic violence, sexual assault and stalking may include questions about medical treatment, police reports, other court orders, criminal history, access to weapons, physical evidence, photographs, privacy concerns, excited utterances, other incidents of violence or stalking behaviors, involvement of child or adult protective services, economic resources, collateral consequences of violence, immigration status and safety.

B. BASIC PROCEDURAL OBLIGATIONS OF THE LAWYER

- 1. The lawyer should obtain an interpreter if necessary, advise the client regarding confidentiality of communication, and establish the limits of the lawyer's role.**

COMMENTARY

See the discussion at III.D and III.F.

- 2. The lawyer should create and maintain a trusting relationship with the client.**

COMMENTARY

Trust with the client may be built over time. If the client shows hesitation or reluctance in answering questions, the lawyer should not construe this to mean that the client is not being honest or is unwilling to cooperate. All communication with the client should be conducted in a respectful, non-judgmental manner.

- 3. The lawyer should strive to document every aspect of the case as it progresses, taking written notes of client interviews, witness interviews and other case developments, and collecting other relevant written documentation in the file.**
- 4. The lawyer should interview and counsel the client about the client's goals and desires, review the file and any other information that the client has provided, and help the client determine whether obtaining a civil protection order is the best remedy.**

COMMENTARY

The lawyer should listen carefully to the client's statements and expressed desires, and ensure that the client has realistic expectations given the facts of the case. After the initial intake has been completed, the lawyer should ask any follow up questions necessary to assess the situation as thoroughly and completely as possible.

EXAMPLES:

Some examples of possible legal and safety-related questions to ask in deciding to obtain or refrain from seeking a protection order may include: 1) Will it increase the victim's safety?; 2) Will it trigger other legal developments?; 3) Will it give a state continuing exclusive jurisdiction over custody when she wants to move?

5. **The lawyer should advise the client about the civil court system, the proceedings at hand and the lawyer's responsibilities. Additionally, the lawyer should understand the basic criminal procedure for a misdemeanor and felony domestic violence, sexual assault or stalking case so as to inform the client how each case is different if they are occurring simultaneously. If relevant, the lawyer should also understand the basic procedures of child and/or adult protective services so as to inform the client about what to expect if she has a case pending with either agency.**

COMMENTARY

The lawyer must explain clearly to the client the legal issues and procedures so that the client knows what to expect at the hearing. This includes preparing the client to see the respondent at court and safety planning accordingly. This can be a deterrent for many clients and may affect their decision to seek a civil protection order. The lawyer should ensure that the client understands the general layout of the courtroom, the role of the bailiffs or marshals and where the respondent and any other parties will be.

When explaining legal matters, the lawyer should clearly explain the procedures and processes in lay terms, and take necessary steps to ensure that the client has understood the substance of their meeting. The client may not understand legal terminology, especially if the client is suffering the effects of trauma, if the

client's first language is not English or if the client is hard of hearing or has a cognitive disability. Identify any necessary safety precautions and plan accordingly.

6. **The lawyer should inform the client of all relevant available remedies and make sure the client understands the legal implications of not seeking the civil protection order (*i.e.*, whether the civil protection order will be dismissed with or without prejudice, etc.). The lawyer should assist the client with a plan for self-sufficiency and seek economic remedies, where permitted, through the legal process.**

COMMENTARY

Clients who are victims of domestic violence, sexual assault or stalking are likely to have justified doubts about the advisability of proceeding with a civil protection order. Many clients will withdraw from the case prior to hearing and some will return at a later time to continue legal action. The lawyer should be prepared to advise the client about the consequences of withdrawal for the legal case and its effect (if any) on the ability to bring a similar case in the future.

Often, the primary relief sought by the client is for the respondent to stay away from the victim and cease all further contact. In most jurisdictions the court will specify the distance, relevant places and types of contact the respondent is restrained from engaging in. In domestic violence cases, some jurisdictions allow a wide range of additional relief such as: child custody, visitation and exchange, child support, spousal support, and possession of the residence or other property. In domestic violence, sexual assault and stalking cases, additional remedies may include: damages or monetary reimbursement, forfeiture of firearms, relocation costs, emergency assistance and a catch-all provision which can be utilized to ask for a wide range of remedies that the

victim may need. While not an exhaustive list, the lawyer should carefully consider all of these potential remedies since the civil protection order hearing may be the only time the client enters the courtroom and has these remedies available. The lawyer may ask for many other forms of relief by creatively using the catch-all provision, if available.

C. PRE-HEARING RESPONSIBILITIES

1. **The lawyer should interview the client to identify case theory, strategy and evidence; engage in appropriate discovery when permitted and defend against inappropriate discovery requests; and gather and investigate evidence as appropriate.**

COMMENTARY

The lawyer should carefully think through the logistics of obtaining the necessary evidence. For example, the lawyer should obtain the crime lab report from the forensic exam, torn clothing, pictures and any law enforcement investigative reports if made. Similarly the lawyer should determine with the client which personal or household items the client wants or needs from the house if she is not currently staying there. The lawyer should be familiar with the process for obtaining 911 tapes, police reports, medical reports and in domestic violence cases, evidence of the respondent's income.

Other sources of potential evidence include (but are not limited to): police reports, crime lab reports, forensic examinations, medical records, voice mail messages or other correspondence, relevant documents from previous court cases involving the client and/or the respondent and drug or alcohol abuse screens of the client or respondent.

- 2. The lawyer should identify potential related legal issues and consequences for the client, such as inter-jurisdictional enforcement of the order, effect of the order on current or future immigration status, intersection of the civil proceeding with criminal prosecution, and crime victim rights.**

COMMENTARY

The lawyer should always be aware that any evidence used for the civil protection order hearing may also be used in future family, criminal, immigration or other litigation. For example, an affidavit used in a civil protection hearing can be used to impeach the victim in a criminal trial or to harm credibility in a school disciplinary proceeding.

The lawyer should also carefully consider potential legal consequences, depending on the client's situation and specific concerns. For example, if the client is considering relocating to another jurisdiction to protect herself or her children, the lawyer should be able to advise the client about full faith and credit, jurisdictional requirements for permanent custody orders and what steps to take in order to avoid parental abduction claims.

Similarly, if the client does not want her employer to know about the stalking or assault because she wants to protect her privacy as much as possible, but clearly wants a protection order, the lawyer should consider how this may affect the client in her workplace.

- 3. The lawyer should timely file all pleadings, motions, briefs and responses; identify, subpoena and prepare witnesses, including potential expert witnesses; prepare the cross-examination of respondent, including the gathering of respondent's written admissions, criminal history and police reports involving both parties; research applicable legal issues; and advance legal arguments.**

COMMENTARY

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the client, including, if necessary, amendments of her *pro se* filings and responses to pleadings of other parties, to ensure that appropriate issues are properly before the court and to expedite the court's consideration of issues important to the client's interests.

The lawyer should strive to obtain the best evidence possible. Often, there may not be any direct witnesses to the violence other than the client, and she may be hesitant to testify. Therefore, when formulating strategies for gathering evidence, the lawyer must be creative and choose witnesses the court is most likely to find credible: for example, neutral parties such as the children's teacher, neighbors, or the gas station attendant or store clerk who saw the client immediately after the assault. The lawyer should think creatively about other witnesses and other evidence that may corroborate any part of the client's case, including coordinating with the prosecutor's office to develop evidence.

The lawyer should consider whether using an expert witness would be beneficial to the client's case in order to provide the court with more information regarding specific topics such as the dynamics of domestic violence, sexual assault or stalking, lethality assessment, custody evaluations, the effects of trauma, immigration issues or other unique concerns.

To ensure that witnesses are ready for trial, the lawyer should ask them questions about the worst possible thing that the respondent may say about them, regardless of whether it would be true. Witnesses should be thoroughly prepared for cross-examination. Additionally, the lawyer should ensure that witnesses are familiar with the dress code when going to court, being specific about what is appropriate and what is not. The

lawyer should explain about general procedures of the court and what they can expect.

Again, the lawyer should always be aware that any evidence used for the civil protection order hearing may also be used in future family, criminal, immigration or other litigation.

4. **If there are children involved and the law of the jurisdiction permits it, the lawyer should discuss with the client her wishes regarding temporary custody and visitation, keeping in mind jurisdictional issues. The lawyer should carefully consider the pros and cons of having the children offer witness testimony, in light of current law and scholarship on childhood development.**

COMMENTARY

When the lawyer discusses issues related to temporary child custody and visitation with the client, the lawyer should advise the client on the pros and cons of her particular choices. While the ultimate decision to make decisions about custody and visitation lie with the client, the lawyer should candidly inform the client about whether the client's wishes are the best course of action to take for overall success of the case.

5. **If the client has privacy concerns, the lawyer should consider how protecting her privacy will affect the case progression and continue to discuss the issue with the client.**

COMMENTARY

Regardless of whether a client announces her privacy concerns, lawyers should assume that privacy concerns exist for every sexual assault victim. These concerns should be considered at every step in the process. The lawyer should ask clients specific questions about how they want their privacy protected. To address these concerns, the lawyer should consider the use of pseudonyms or initials in court documents, redaction

of home/school addresses, limiting witnesses, sealing of court records, and holding the hearing in closed or private chambers.

If the respondent subpoenas the client's records, the lawyer must be prepared to address privacy concerns with the court.

- 6. If the respondent is unrepresented by counsel, the lawyer should consider how this may affect his or her ability to negotiate, conduct the hearing, protect the client during cross-examination, and keep the lawyer and the client safe in the courthouse.**

COMMENTARY

When the respondent is unrepresented, the lawyer should make an effort to keep all communications in writing for clarity and to create a record. The lawyer should also seek to require the respondent to submit his cross examination of the victim to the court in writing, for recital by the court, in order to minimize the opportunity for harassment or intimidation of the victim.

- 7. The lawyer should prepare a specific, enforceable proposed order that both protects the client and holds the respondent accountable.**

COMMENTARY

The victim's lawyer should draft the proposed order whenever permitted because of the importance of securing specific, enforceable relief. If the court will not accept the proposed order, the lawyer should nevertheless advocate in closing for inclusion of its provisions in the court's order. Alternatively, many courts utilize a standardized form order. Usage of the form may prevent omission of important requirements and facilitate enforcement. The lawyer should first ensure that the forms are entirely consistent with the civil protection order statute. If the lawyer chooses to

use the standardized form, the lawyer should fill out the form using specific language to ensure that the order is enforceable and tailored to meet the needs of the victim.

For example, if children are involved, the order should explicitly articulate the day, time and location for visitation or exchange, include timed windows for exchanges and consequences for a failure to appear, or designate a named supervisor for supervised visitation. If the parties work together, the order should be specific about how the distance will be maintained between the parties and how and through whom any work-related communication is to occur. Other proposals can include ordering the respondent to make credit card and mortgage payments, or ordering police stand-by to obtain the client's belongings. In addition, in sexual assault and stalking cases, if the victim and the perpetrator attend the same school, the order should specify that the respondent may not attend the same classes or reside in the same dormitory or residence as the client.

The lawyer should seek to ensure that the order includes information relevant to enforcement such as jurisdictional basis, penalties for violation, weapons prohibitions, and contact information for the court. The lawyer should also be aware of any other orders issued in the same jurisdiction or other jurisdictions (including school-based orders) and their content and seek to avoid the issuance of competing and/or conflicting orders.

The lawyer must also remember that the proposed order should state what the client wants or needs, not what the lawyer thinks is appropriate. For example, some victims of domestic violence, sexual assault or stalking may want to have contact with the respondent, such as continuing to work with or co-parent with the respondent, and want the order simply to prohibit the respondent from assaulting or harassing them or from being violent or threatening towards them.

Batterers Intervention Programs; Counseling

If the respondent is ordered to attend a batterer's intervention program, the lawyer should ensure that the program is a certified program that is designed to address the unique needs of this perpetrator population. The lawyer should be well-informed about these programs and be prepared with the name, address and telephone number of the specific program the lawyer and client want included in the order.

Any program requiring the parties to communicate or spend time together (including mediation, marriage counseling or joint parenting classes) is dangerous and ill-advised. Additionally, anger management programs typically are not appropriate for perpetrators of domestic violence, sexual assault or stalking, because they fail to adequately address the seriousness of the violence, and they can minimize the dynamics of power and control at the root of these behaviors.

8. **The lawyer should be cognizant of the client's rights in other forums such as immigration, tribal or criminal justice, and when appropriate, the lawyer should coordinate with those systems.**

COMMENTARY**Criminal Law Issues**

If appropriate, the lawyer should work with prosecutors to achieve victim safety and offender accountability. This includes asking the prosecutor to drop the prosecution when appropriate, understanding that the ultimate decision to prosecute lies within the prosecutor's discretion.

When working with the prosecutor, the lawyer must be aware of the conflicts that may arise when a criminal case against the respondent or the petitioner occurs simultaneously with the civil protection order hearing. For example, the lawyer should be aware of the potential

for clients' testimony or other evidence during protection order hearings to be used against them in a criminal trial where they are the complaining witness, and vice versa. In addition, the lawyer should be aware of any issues that arise from the intersection of the client's statutory and/or constitutional crime victim rights and the civil proceeding and/or other administrative hearings such as an immigration hearing, making sure no inadvertent waiver of privilege or privacy occurs.

Clients must also understand that they do not have a confidential relationship with the prosecutor or advocates working in the prosecutor's office, and that the prosecutor is not the client's lawyer and does not represent the client's individual interests. The lawyer should make sure that clients understand the difference between a criminal and civil order, the differences in the relief each of these orders may provide, and most importantly, the duration and renewability of the orders.

The lawyer should be familiar with state and federal kidnapping or custodial interference statutes, and be prepared to discuss these provisions with the client if either party has crossed state lines or concealed the children. When both a criminal and civil case is pending, the lawyer should be aware that the judge may inform the respondent of his or her Fifth Amendment rights before testifying in the civil protection order hearing, and may not allow cross examination of the respondent. The court may also set over the civil case, pending resolution of the criminal matters.

Issues in Indian Country

When representing a Native American victim who lives or works in Indian Country, lawyers should, as a preliminary matter, ensure that they are licensed to practice in the tribal courts. Domestic violence codes may be more expansive in Indian Country (e.g. "family"

may be more loosely defined) and therefore afford greater protections for the client.

The lawyer should also become familiar with the provisions of the Indian Child Welfare Act and the state and tribal implementations of the law, as it may be relevant to custody determinations subsequent to incidents of domestic violence, sexual assault or stalking.

The lawyer should be aware of the jurisdictional and choice of law considerations that may arise when a victim is Native, and consult with a tribal law expert if needed. For example, the lawyer must determine whether the relevant tribe can exercise civil jurisdiction over a non-Native respondent. When considering civil remedies, the lawyer should be aware that VAWA gives tribes the authority to punish non-Indians by civil contempt or exclusion from tribal lands. However, not all tribes may have civil contempt statutes or exclusion provisions which apply to non-Indians.

In criminal matters, if the community or reservation where the victim lives or works is subject to Public Law 280, the state and the tribe may have concurrent jurisdiction. If the perpetrator is non-Native the tribe will not have jurisdiction. If the perpetrator is Native, the tribe will have jurisdiction. Even if the offender is non-Native and the tribe does not have jurisdiction to prosecute, tribal law enforcement does have the authority to hold the perpetrator until state or federal authorities are available. In addition, the ability of the tribe to sentence Native offenders is limited. When the offense is a major crime, however, the federal government will also have jurisdiction, and the sentencing ability will be significantly greater.

Finally, even though VAWA ensures full faith and credit for protection orders, there are still some county and tribal law enforcement agents that do not honor protection orders issued by other jurisdictions. Since this is such a critical safety issue, knowledge of local practice is important.

Immigration Law issues

The lawyer should also be aware of immigration implications for the client in getting involved with a criminal case against the respondent. The issues to consider include whether or not the victim and/or the respondent are documented or undocumented, or whether the respondent is sponsoring the victim in an immigration case. The lawyer should consult with an immigration lawyer or refer the client to an immigration expert if necessary.

- 9. The lawyer should become familiar with the practices of the judge or hearing officer on the case, as well as any local procedural rules or standing orders, and plan for safety at court.**

COMMENTARY

If needed, the lawyer should seek out community resources and/or mentors to learn about particular judges and local practices to effectively represent the client.

The lawyer should be familiar with local procedural rules regarding protection orders, for example: the sequence of what must happen between the issuance of an emergency protection order and the final protection order, appeal times, how to confirm service prior to the final protection order hearing, etc.

D. HEARINGS

The lawyer should participate actively in all court proceedings on issues within the scope of the lawyer's representation of the client.

1. The lawyer should prepare for and attend all hearings with the client, using creativity and skill in presenting the evidence. Specifically, the lawyer should prepare and make all appropriate motions, responses and evidentiary objections; prepare, present and cross-examine witnesses and exhibits; and seek every appropriate remedy the client is entitled to under the law, subject to the client's direction.
2. The lawyer should make/protect a record for appeal, ensuring that the court makes specific findings on the record, if possible.

COMMENTARY

The lawyer should always seek to have proceedings recorded, according to the rule of the jurisdiction. The lawyer should make sure that all the required elements are proven and that all objections and proffers are recorded. Off-the-record and in-chambers conferences should be avoided. If unavoidable, the lawyer should summarize what transpired for the record and ensure judge's ruling is recorded, including any denials. Finally, the lawyer should ensure that the court makes specific findings on the record and/or issues a statement of decision.

3. The lawyer should seek to ensure that the courtroom is safe for the client and the lawyer, including preparing for litigating against a *pro se* respondent.

COMMENTARY

The lawyer should always be familiar with courtroom security procedures and make use of the availability of court marshals and bailiffs. In some jurisdictions,

this may require calling ahead to ensure that adequate personnel or screening equipment will be available. At no time should the client be left alone while in the courthouse; it is advisable to ask a support person, community-based advocate or paralegal to accompany the client during times when the lawyer must attend to other matters. Additionally, if the client has children, arrangements should be made to ensure that they are not left unattended at the courthouse. Finally, the lawyer should request that the client be allowed to leave the courthouse first and that the respondent be ordered to remain in the courtroom for a period of time adequate to ensure that the respondent will not be able to follow and/or lie in wait for the client. If necessary, clients should also request a security escort to their car or other mode of transportation after the hearing.

Lawyers should consider asking the court to clear the courtroom or to be put last on the docket when they anticipate detailed and/or difficult testimony about abuse, sexual violence or child sexual abuse.

4. **The lawyer should consider a negotiated settlement only when it is in the best interest of the client, keeping in mind the danger of mutual orders and the importance of legal findings for inter-jurisdictional enforcement.**

E. POST-HEARING RESPONSIBILITIES

Ethical representation does not end with the hearing. At a minimum, the lawyer should ensure that the client understands the outcome of the proceedings, discuss implementation and any alternative legal options, and, when the client-lawyer relationship has ended, clearly communicate that fact to the former client.

1. **The lawyer should seek to ensure that the order is clear and accurate and that the client understands all provisions of the order, including its expiration date (if any) and the requirements for renewal or extension.**

The lawyer should also advise the client about how to modify the order and the availability of civil and criminal contempt proceedings.

COMMENTARY

The lawyer should ensure the client has a valid enforceable order and that the client understands all of the language of the order, and how it is likely to be enforced. The lawyer should take any additional action required to ensure or facilitate enforcement, for example: registration with a statewide database; providing a copy to the local sheriff for service; contacting appropriate authorities to set up wage assignments for child support; setting up bank accounts or other mechanisms for receiving economic relief.

The lawyer should note the expiration date of the order and, if it is safe to do so, send a reminder to the client when appropriate. The lawyer should analyze the case for other causes of action and discuss with the client the possibility of pursuing other needed civil actions. If the respondent was ordered to attend any particular program or treatment, the lawyer should request a review hearing from which the client is exempted to ensure that the respondent is complying with the order. In addition, the lethality of a respondent may increase after the hearing. The lawyer should, therefore ensure that the client has a sufficient safety plan even after a civil protection order has been obtained.

The lawyer should also, if the client desires, engage the legal process to ensure proper enforcement of a civil protection order when it has been violated. The lawyer should counsel the client about full faith and credit and enforceability of protection orders in other jurisdictions, should the client choose to go to a different jurisdiction. In some cases, the client may wish to reconcile with the respondent but keep other provisions of the civil protection order in place. In

such cases, the lawyer should seek a modification of the order, refer the client to competent counsel, or advise the client how to proceed *pro se*.

The lawyer should advise the client about enforcement or contempt procedures. The lawyer should be aware of the differences between civil and criminal contempt and discuss with the client which forum is the best option. The lawyer should explain to the client that if the respondent is found in criminal contempt for violating a civil protection order, double jeopardy will prevent a subsequent criminal prosecution for the same act.

However, if there has been a prosecution of the perpetrator in a tribal court for criminal contempt or a crime for the same acts, it is possible that action could also be brought in state court. Since the tribal government is a sovereign nation, federal double jeopardy protection generally does not apply. A few states (such as Alaska, Minnesota, Colorado, New York and possibly others) have state laws granting double jeopardy protection that exceed federal constitutional protection. They do not observe the “dual sovereigns” exception and may arguably extend double jeopardy protection to situations where the individual has been brought forward on charges before tribal and state courts for the same act.

2. **The lawyer should ensure that the order is served on the respondent and that the client is prepared to respond safely and effectively to violations by the respondent.**

COMMENTARY

After the hearing, the lawyer should advise the client that a violation of the protection order, depending on the law in the jurisdiction, may be a crime and that if the protection order is violated, the client can call the police and report the nature of the violation. The lawyer should know how local law enforcement typically

responds if there is a violation and inform the client. The lawyer should prepare the client to document all incidents of violation and counsel the client on steps to take if the police fail to enforce the protection order. The lawyer should check in with the client about continued safety planning.

The lawyer should counsel the client to keep a copy of the protection order available at all times. The client should be advised to distribute copies of the protection order (with pictures of the respondent, if possible) where the client feels it is safe to do so, including home, school, work and child care providers. The lawyer should advise the client about the risks and benefits of notifying others about the violence or threat of violence, including potential adverse employment consequences. The lawyer should tell the client that no court order is self-enforcing and that the client is an active part of the enforcement process. The client should be reminded of the protection order's expiration date and the steps to take to renew, if necessary. With the client, the lawyer should set up a safety plan to obtain the order in jurisdictions where the order is not produced immediately by the court.

- 3. If the hearing does not result in the issuance of a safe and effective protection order, the lawyer should discuss with the client the process for appeal, rehearing and/or modification.**

COMMENTARY

When faced with an adverse decision from the court, the lawyer should counsel the client on the likelihood of success on appeal. The lawyer and client should also consider how the respondent may react to an appeal, the implications of a loss on a pending or future custody case, if applicable, and any increased safety or privacy concerns that may arise if the case is appealed. Where it is the rule

of the jurisdiction, clients should also be warned that they may be responsible for the opposing party's legal fees if the appeal is unsuccessful.

4. **The lawyer should always communicate with the client about case closing procedures, including withdrawal, and implications.**

COMMENTARY

The lawyer should, in writing, inform clients of their rights and what to expect from the lawyer in the future. For example, if the scope of the lawyer's representation was limited to obtaining the protection order, and the lawyer will not handle possible enforcement issues that may arise in the future, the lawyer should make sure that the client understands these parameters.



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