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# Court Review

Volume 53, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
Volume 53, Issue 1

2017

## EDITOR'S NOTE

**F**or our first issue of 2017, we're pleased to have a special issue on domestic-violence topics. The American Judges Association has been committed for decades to educating judges about domestic-violence issues, which intersect with virtually every judge's docket at least some of the time. AJA usually includes some domestic-violence educational programming in each of its annual conferences, and *Court Review* has covered the issue extensively over the years.

This year's special issue was largely put together by Colorado trial judge Julie Kunce Field, who served as special-issue editor. She recruited several leading experts to write for the issue and got Lynn Rosenthal, formerly the White House Advisor on Violence Against Women, to write an introduction to the issue (at page 10). We refer you to her introduction for an overview of each of the articles.

In addition to the articles, we also have reprinted a one-page benchcard (at page 43) on steps judges can take at injunction (or restraining order) hearings to protect the parties and make a hearing go more smoothly. Some other benchcards, including longer ones, are reviewed in a Center for Court Innovation publication, *Domestic Violence Benchbooks: A Guide to Court Intervention* (2015) (available at <https://goo.gl/SxhUAR>).

I will close this issue's Editor's Note with a grammar and style note regarding *Court Review*. Lots of style questions come up in a journal like ours. For example, we follow Harvard Bluebook style for legal citations. For grammar and usage, we generally follow the recommendations of Bryan Garner (who also edits *Black's Law Dictionary*), the author of *Garner's Dictionary of Legal Usage* (3d ed. 2011) and a contributor to *The Chicago Manual of Style*. Garner recommends hyphenating phrasal adjectives, as he explains here (<https://goo.gl/xTMIsh>) and here (<https://goo.gl/EbaJI7>).

What does that mean? Well, if we refer to a trade secret, that's a type of secret—secret is used as a noun, trade as an adjective. But if we refer to trade-secret protection, now the phrase "trade-secret" is being used as an adjective. Garner, among many others, recommends hyphenating phrasal adjectives to make it easier for the reader quickly to see the connection. For topics in this issue, that means that while we often refer to domestic violence, when we refer to domestic-violence dockets, we hyphenate "domestic-violence" because it's now being used as a phrasal adjective.

I mention this in the introduction to this issue because we have another guiding principle at *Court Review*: We greatly appreciate those who write for the judicial audience, so we try to do our best to accommodate their requests as we edit them. In this issue, that has meant that while we have hyphenated the phrasal adjectives in most of the issue, one author asked us not to hyphenate them in her article, and we agreed. So the careful reader will see some inconsistencies.—SL



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 42 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Shelley Rockwell at (757) 259-1841.

Cover photo, Mary S. Watkins ([maryswatkins@mac.com](mailto:maryswatkins@mac.com)). The cover photo is of the original Cochise County Courthouse in Tombstone, Arizona. Tombstone, of course, was the site of the famous 1881 "Gunfight at the O.K. Corral," and of the post-gunfight prosecution of Wyatt Earp, Virgil Earp, and Doc Holliday on murder charges. That story is well told by Steven Lubet in his book, *Murder in Tombstone: The Forgotten Trial of Wyatt Earp* (2006). This courthouse, built in 1882 and listed in 1972 on the National Register of Historic Places, now serves as a museum, anchoring the Tombstone Courthouse State Historic Park.

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# President's Column

## "A GOOD JUDGE"

Russell J. Otter

**F**ounded in 1959, the American Judges Association has long been "The Voice of the Judiciary®." This role has been amplified in recent times with the mission of "Making Better Judges®," which is premised on the assumption that our members are good judges already.

Electors and governments choose those whom they consider will make good judges. The AJA seeks to make good judges better.

What makes a good judge has been the subject of extensive debate and dispute over the years by numerous judges, lawyers, and other commentators. Whether a judge is elected or appointed, it matters not. Among the two foremost qualities of making good judges, I would submit, are professional excellence and judicial temperament.

In an assessment of that appropriate temperament, consideration is given to personal characteristics. According to the Ontario government's advisory committee on judicial appointments, these personal characteristics should include the following:

- an ability to listen;
- respect for the essential dignity of all persons regardless of circumstances;
- politeness and consideration for others;
- moral courage and high ethics;
- the ability to make decisions on a timely basis;
- patience;
- punctuality;
- good regular work habits;
- a reputation for integrity and fairness;
- compassion and empathy; and
- an absence of pomposity and authoritarian tendencies.

Simon Rifkin, an American lawyer, in a speech highlighted in the *New Yorker* (May 23, 1983, at page 63), said that "the courtroom, sooner or later, becomes the image of the judge. It will rise or fall to level the judge who presides over it . . . No one can doubt that to sit in the presence of a truly great judge is one of the great and moving experiences of a lifetime." From a common-law jurisdiction, Lord MacMillan, a former member of the House of Lords, once wrote that "courtesy and patience must be more difficult virtues to practice on the Bench than might be imagined seeing how many otherwise admirable judges have failed to exhibit them, yet they are essential if our courts are to enjoy public confidence." (*Law and Other Things* 218-19 (1937)).

The primary mechanism of the American Judges Association

in Making Better Judges® has always been its outstanding educational programs, which promote professional excellence. These include regular updates on leading appellate decisions such as the widely acclaimed lecturer on American constitutional law, Dean Erwin Chemerinsky, from University of California, Irvine, School of Law. On the Canadian side, our journal, *Court Review*, includes a regular update of Supreme Court of Canada decisions by Judge Wayne Gorman from Newfoundland.

Our next annual meeting is from September 11 to 15, 2017,

at the Renaissance Cleveland Hotel in Cleveland, Ohio—the home of the Rock and Roll Hall of Fame, the American League Champion Cleveland Indians, the National Basketball Association Champion Cleveland Cavaliers, and the 2016 host of the Republican National Convention. There will be fascinating and informative presentations under the theme of "Improving Access to Justice" on such topics as Courts and Technology, the Right to Counsel, Procedural Fairness, and Pretrial Justice for Juveniles. On professional ethics and conduct, there will be a special session dealing with Living Outside the Robe: How to Manage Life Beyond the Bench, and a timely presentation on the intersection between courts and the communities they serve.

Your professional duty is an ongoing obligation to become a better judge. What better way to do it than to attend an educational program put on by the American Judges Association?

To register for this or other conferences, please go to our website: <http://www.amjudges.org/conferences/>. Urge your colleagues to attend! If they are not already members of the American Judges Association, they can become first-time members with a complimentary membership for their first year. Direct them to the AJA website for that purpose and to see all the other benefits of AJA membership.

Judicial education is a vital and central requirement in Making Better Judges®. In this regard, I wish to announce that the midyear educational conference in 2018 will be April 19 to 21 in Memphis, Tennessee. The 2018 annual conference will be in Lihue, Hawaii (Island of Kauai), from September 22 to 27, 2018.

The American Judges Association is the largest independent judges' association in the United States. Your continued involvement in our educational programs and by maintaining your membership helps us maintain that position. Membership can also strengthen the judicial characteristics that resulted in your election or appointment.

Hope to see you in Cleveland.



# Recent Developments in Domestic-Violence Law in Canada, Australia, and New Zealand

Wayne K. Gorman

**W**ith the demise of the Law Reform Commission of Canada, proposals for changes to our criminal-law processes at the federal level tend to be statutory in nature. In this edition's column, I want to review some recent studies and reports in the area of domestic violence released in Canada, Australia, and New Zealand.

## CANADA

A recent call for proposals from the Public Health Agency of Canada contained an interesting review of the problem of domestic violence in Canada. The Public Health Agency of Canada is a governmental agency designed to "promote and protect the health of Canadians through leadership, partnership, innovation and action in public health."<sup>1</sup>

It issued a *Call for Proposals: Supporting the Health of Victims of Domestic Violence and Child Abuse through Community Programs*. The Agency invited "eligible organizations" to submit applications for projects that "will address gaps in current knowledge about the effective design and delivery of community-level and multi-sectoral programs that address the physical and mental health needs of victims of domestic violence and child abuse."<sup>2</sup> Though the call for proposals has been placed on hold, the material attached to the call for proposals includes a very interesting analysis of domestic violence in Canada. The fact that a national health agency would see domestic violence as a "health" issue rather than simply a criminal-law issue reflects the widespread impact of domestic violence on Canadian society.<sup>3</sup>

## THE HEALTH AGENCY'S RESEARCH CONCLUSIONS

The Public Health Agency notes that the "research evidence points to the lifelong health effects of violence":

Women abused by their partners experience high rates of injury, chronic pain, post-traumatic stress disorder, and substance use problems. Children who have been abused or who have been exposed to domestic violence need immediate attention to support their recovery and help

mitigate health problems later in life (e.g., mental health issues such as depression, anxiety, self-harm, and risk-taking behaviours).<sup>4</sup>

The Public Health Agency suggests that approximately 30% of women in Canada have reported experiencing domestic violence in their lifetimes. However, the Agency suggests that "this statistic does not represent the true proportion of victims in Canada because many do not report their abuse." In fact, "[d]ata from a Canadian self-reported survey indicated that only 24% of women who had been abused reported it to the police. Rates of domestic violence are higher for women compared to men in every age group, and Aboriginal women experience rates more than two times higher than non-Aboriginal women."<sup>5</sup>

The Health Agency summarized its findings on the "health problems" engendered by domestic violence by pointing out that it impacts both victims and their children:

Research indicates that domestic violence and child abuse cause a range of short-term and long-term health problems and can even result in death. The impacts of violence can be physical, emotional, and behavioural. For example, women who have been abused by partners suffer high rates of injury, chronic pain, post-traumatic stress disorder, and substance use problems. If a child is exposed to violence or has been abused, the effects on health can last a lifetime. Childhood abuse is associated with chronic diseases later in life such as heart disease, mental health issues such as depression, anxiety, and problematic behaviours such as self-harm and risk taking.

Research shows that the longer and more severe the abuse, the worse the health impacts. There is also evidence that suggests that children and youth who witness violence between their parents, compared to those who do not, are more likely to seek medical attention for eating disorders, sleeping and pain problems, poor mental

## Footnotes

1. *About the Agency*, PUBLIC HEALTH AGENCY OF CANADA, [http://www.phac-aspc.gc.ca/about\\_apropos/index-eng.php](http://www.phac-aspc.gc.ca/about_apropos/index-eng.php).
2. *Call for Proposals: Supporting the Health of Victims of Domestic Violence and Child Abuse through Community Programs*, PUBLIC HEALTH AGENCY OF CANADA, <http://www.phac-aspc.gc.ca/sfv-avf/proposal-proposition/index-eng.php>.

3. See also THE CHIEF PUBLIC HEALTH OFFICER'S REPORT ON THE STATE OF PUBLIC HEALTH IN CANADA 2016: A FOCUS ON FAMILY VIOLENCE IN CANADA (2016), <http://healthycanadians.gc.ca/publications/departement-ministere/state-public-health-family-violence-2016-etat-sante-publique-violence-familiale/index-eng.php>.
4. *Call for Proposals*, *supra* note 2, at Section 1.
5. *Id.* at Appendix A.

health, and substance use problems. They are more vulnerable to suicide.<sup>6</sup>

## NEW ZEALAND

The New Zealand Department of Justice and the Law Commission of New Zealand have recently released a number of reports assessing the extent of the problem of domestic violence in New Zealand.

### THE DEPARTMENT OF JUSTICE

For instance, on September 13, 2016, the Department of Justice of New Zealand announced that it had reviewed the *Domestic Violence Act 1995*. The Department of Justice announced that the changes it was proposing would include:

- getting help to those in need without them having to go to court;
- ensuring all family violence is clearly identified and risk information is properly shared;
- putting the safety of victims at the heart of bail decisions;
- creating three new offences of strangulation, coercion to marry, and assault on a family member;
- making it easier to apply for protection orders, allowing others to apply on a victim's behalf, and better providing for the rights of children under protection orders;
- providing for supervised handovers and aligning care-of-children orders to the family-violence regime;
- making evidence-gathering in family-violence cases easier for police and less traumatic for victims;
- allowing a wider range of programmes to be ordered when a protection order is imposed;
- making offending while on a protection order a specific aggravating factor in sentencing; and
- enabling the setting of codes of practice across the sector.<sup>7</sup>

### THE LAW COMMISSION OF NEW ZEALAND

On May 11, 2016, the Law Commission of New Zealand announced that it had been asked to conduct a reexamination of whether the law in respect of a victim of family violence who commits homicide can be improved. Such an examination had been recommended by the New Zealand *Family Violence Death Review Committee*.

In its Fourth Annual Report, published in 2014, the *Family Violence Death Review Committee* concluded that “New Zealand is out of step in how the criminal justice system responds to [victims of family violence] when they face homicide charges for killing their abusive partners.”<sup>8</sup> To address this, the Committee recommended that the government reexamine the

options for amending the defence of self-defence and introducing a targeted partial defence to murder.

The Law Commission of New Zealand announced that as part of this review, it would consider:

- (a) whether the test for self-defence, in section 48 of the *Crimes Act 1961*, should be modified so that it is more readily assessable to defendants charged with murder who are victims of family violence;
- (b) whether a partial defence for victims of family violence who are charged with murder is justified and, if so, in what particular circumstances; and
- (c) whether current sentencing principles properly reflect the circumstances of victims of family violence who are convicted of murder.<sup>9</sup>

### THE LAW COMMISSION'S REPORT

On May 12, 2016, the Law Commission of New Zealand released its report *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*.

The Law Commission suggests that New Zealand “has the highest reported rate of intimate partner violence in the developed world. Intimate partner homicides are all too common. Most of the time, they are committed in the context of an ongoing abusive relationship, by the person who, in the history of that relationship, has been the abuser (the ‘predominant aggressor’). However, in a small number of intimate partner homicides, it is the primary victim of the past abuse who kills the predominant aggressor.”<sup>10</sup>

The report notes that gender “is a significant risk factor for family violence victimisation and harm across all forms of family violence, and in intimate relationships women are more likely than men to experience severe physical and psychological harm. Three-quarters of all intimate partner homicides in New Zealand are committed by men, while three-quarters of the victims are women. However, where the homicide offender is the primary victim of family violence, they are overwhelmingly women.”<sup>11</sup>

The Commission made the following recommendations:

- continued education to support an improved understanding of family violence among judges, lawyers, and police;
- reforms to the *Crimes Act 1961* and *Evidence Act 2006* to improve the accessibility of self-defence to victims of family violence;
- reforms to the *Sentencing Act 2002* to promote consistent consideration of a history of family violence as a mitigating factor in sentencing; and

6. *Id.*

7. See *Safer Sooner: Strengthening Family Violence Laws*, JUSTICE.GOV.T.NZ, <http://www.justice.govt.nz/justice-sector-policy/key-initiatives/reducing-family-and-sexual-violence/safer-sooner>.

8. FAMILY VIOLENCE DEATH REVIEW COMMITTEE, FOURTH ANNUAL REPORT: JANUARY 2013 TO DECEMBER 2013, at 102 (2014), <https://www.hqsc.govt.nz/assets/FVDR/Reports/FVDR-4th-report-June-2014.pdf>.

9. *Id.* at 20.

10. LAW COMMISSION, UNDERSTANDING FAMILY VIOLENCE: REFORMING THE CRIMINAL LAW RELATING TO HOMICIDE 5-6 (2016), <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/R139%20Understanding%20Family%20Violence%20-%20Reforming%20the%20Criminal%20Law%20Relating%20to%20Homicide.pdf>.

11. *Id.* at 6.

- Ministry of Justice consideration of how the “three strikes” legislation applies to victims of family violence who commit homicide and how it could be amended to allow judges to impose a sentence other than life imprisonment in deserving cases.<sup>12</sup>

## STRANGULATION IN A DOMESTIC-VIOLENCE CONTEXT

On March 8, 2016, the Law Commission of New Zealand issued its report *Strangulation: The Case for a New Offence*, in which the Commission recommends that a specific offence of strangulation be enacted. In the introduction to its report, the Commission suggests that strangulation is “very common, particularly between intimate partners”:

In the past decade, there has been a rapid growth internationally in understanding the role played by strangulation in family violence. It is now known to be very common, particularly between intimate partners. The harm caused by strangulation ranges from struggling to breathe, to loss of consciousness, to death. The psychological impact on victims can be devastating. It is often said that, while the abuser may not be intending to kill, he is demonstrating that he can kill. It is unsurprising that strangulation is a uniquely effective form of intimidation, coercion and control.<sup>13</sup>

The Commission indicates that two key factors distinguish strangulation from most other forms of family violence:

First, it is an important risk factor for a future fatal attack by the perpetrator. Victims of family violence who have been strangled have seven times the risk of going on to be killed than those who have suffered other forms of violence but not strangulation. . . . Second, it characteristically leaves few marks or signs, sometimes even when it has been life threatening. That presents unique challenges for prosecution and contributes to the dangerousness of strangulation being underestimated and the perpetrators not being held appropriately accountable.<sup>14</sup>

## VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE

On November 11, 2015, the Law Commission of New

Zealand released its issues paper *Victims of Family Violence Who Commit Homicide*. In a description on its website, the Commission indicated that the paper:

considers the law that applies when victims of family violence kill their abusers. It identifies three main areas in which there is a risk the current criminal justice system is not adequately providing for victims of family violence who commit homicide. These areas include the operation of self-defence, how the law recognises the culpability of these defendants when self-defence is not available (given the absence of any partial defence), and persisting myths and misconceptions about family violence which mean these defendants can struggle to have their experiences understood and may receive inequitable treatment before the law.<sup>15</sup>

## AUSTRALIA

In Australia, the Sentencing Advisory Council for the State of Victoria and the Sentencing Advisory Council for the State of Tasmania have both released reports in 2015 and 2016 considering the issue of domestic violence in Australia.

## VICTORIA

On September 12, 2016, the Sentencing Advisory Council for the State of Victoria announced it had received terms of reference requesting that it provide advice for “‘swift and certain’ approaches to the sentencing of family violence offenders.”<sup>16</sup> The Sentencing Advisory Council indicated that it would “‘shortly begin preliminary consultation with key criminal justice stakeholders, in advance of the publication of a consultation paper in the last quarter of 2016.’”<sup>17</sup> At the time of the submission of this column, the consultation paper had not been issued.<sup>18</sup>

## INTERVENTION ORDERS

On August 23, 2016, Victoria’s Sentencing Advisory Council released its report *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending*. The report considered offending and reoffending for 1,898 offenders sentenced for breaching a family-violence intervention order or family-violence safety notice in Victoria in the financial year 2009-10.<sup>19</sup> The study found that those sentenced for breaching family-violence intervention orders had had a

12. *Id.* at 185-86.

13. LAW COMMISSION, STRANGULATION: THE CASE FOR A NEW OFFENCE 4 (2016), <http://www.lawcom.govt.nz/sites/default/files/project/AvailableFormats/NZLC-R138.pdf>.

14. *Id.*

15. *Victims of Family Violence Who Commit Homicide*, LAW COMMISSION, <http://www.lawcom.govt.nz/our-projects/victims-family-violence-who-commit-homicide>.

16. *Swift and Certain Approaches to Family Violence Sentencing*, SENTENCING ADVISORY COUNCIL (Sept. 12, 2016), <https://www.sentencingcouncil.vic.gov.au/news-media/news/council-receives-terms-reference-swift-and-certain-approaches-family-violence>.

17. *Id.*

18. See *Swift and Certain Approaches to Family Violence Sentencing*,

SENTENCING ADVISORY COUNCIL, <https://www.sentencingcouncil.vic.gov.au/projects/swift-and-certain-approaches-to-family-violence-sentencing>.

19. SENTENCING ADVISORY COUNCIL, CONTRAVENTION OF FAMILY VIOLENCE INTERVENTION ORDERS AND SAFETY NOTICES: PRIOR OFFENCES AND REOFFENDING, at xiii (2016), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Contravention%20of%20FVIOs%20and%20FVSNs%20Prior%20Offences%20and%20Reoffending.pdf>. Legislation allowing for spouses to apply *ex parte* for family-violence protection orders is very common in Canada. For instance, in Newfoundland and Labrador, such applications can be made pursuant to the *Family Violence Protection Act*, SNL 2005.

higher five-year reoffending rate (53%) than offenders in general (37%).<sup>20</sup> Over half of the family-violence offenders had prior convictions (58%).<sup>21</sup>

The report also examined the group's offending over an 11-year period from July 1, 2004, to June 30, 2015, inclusive. Over this period, the 1,898 offenders were sentenced for 28,749 charges, and over half were sentenced for at least one assault-related offence.<sup>22</sup> The report found that the more often an offender was sentenced for breaching an intervention order or safety notice during the study period, the more likely that offender was to also be sentenced for an assault/cause-injury offence (against anyone).<sup>23</sup> Over two-thirds (68%) of young adult (18-24) male offenders and 59% of young adult female offenders were sentenced for at least one assault-related offence in this period.<sup>24</sup>

The report concludes with the following observations:

For family violence related offences, it is crucial that the sentencing exercise is treated by courts as an opportunity to intervene, to prevent behaviour escalating, to assess and address risk, and to ensure that the sentence imposed is effective and purposeful. Where a contravention offender is fined and the fine is unpaid and/or the recipient reoffends (particularly with further violent or family violence related offending), there is a strong argument that the sentence imposed was ineffective, in that it served none of the purposes of sentencing offenders set out in the *Sentencing Act 1991* (Vic). Furthermore, it is difficult to see how the use of a fine in such cases is consistent with the purpose of the *Family Violence Protection Act 2008* (Vic) (which establishes the contravention offences): 'to maximise safety', 'reduce family violence', and 'promote the accountability' of the offender for their actions.

Where a contravention charge is accompanied by factors that indicate a heightened risk—such as a previous or co-sentenced assault—specific deterrence and community protection are particularly important. In some cases, the best long-term protection may be achieved by sentencing dispositions such as community correction orders or adjourned undertakings, which are able to couple strong deterrence measures with measures designed to facilitate the offender's rehabilitation through behaviour change programs and other treatment programs. In other cases, the incapacitation of the offender through a custodial sentence may be required. Critical to sentencing contravention offenders is ensuring that the sentence imposed is an effective vehicle for achieving its intended purposes. A clear risk of ineffective sentencing of contravention offences is that the system of intervention orders and safety notices will be undermined.<sup>25</sup>

## TASMANIA

On December 7, 2015, Tasmania's Sentencing Advisory Council released its report *Sentencing of Adult Family Violence Offenders*. The report "provides advice on the sentencing of adult family violence offenders in Tasmania and includes consideration of the range and adequacy of sentencing options and support programs available and the role of specialist family violence lists or courts in dealing with family violence matters."<sup>26</sup>

The report also notes that "family violence is a gendered crime":

This Report contributes to the now extensive debate on family violence by focusing primarily on one aspect, sentencing. Information on the prevalence of family violence and sentencing outcomes for offenders has a vital role to play in sketching the extent of the problem of family violence and the adequacy of the justice system response.

Women and men may be both victims and perpetrators of family violence. However, there can be no doubt that family violence is a gendered crime. The Australian Bureau of Statistics' 2012 Personal Safety Survey (PSS) estimated that 16.6% of all women over the age of 18 had experienced violence from a partner or ex-partner since the age of 15 compared to 5.3% of all men. A recent report on patterns and trends in family violence reporting in Victoria shows that men consistently made up 80% of respondents in finalised protection order applications and were the perpetrator in 80% of reported family violence incidents. An examination of the data prepared for this Report shows that women constituted less than 15% of all those convicted of a family violence offence since the commencement of the Family Violence Act 2004 (Tas). This Report does not suggest that men can never be victims but it reflects the gendered reality of family violence, in most cases using gender-specific pronouns for victims and perpetrators.<sup>27</sup>

## PLEA NEGOTIATIONS

On plea negotiations in such offences, the report indicates:

Plea negotiation can have adverse consequences in the family violence context if the offences to which the offender agrees to plead guilty do not adequately reflect the seriousness of the offending conduct. This may be particularly problematic where, in cases involving multiple charges, no evidence is tendered on some charges as part of a plea negotiation. Effectively, these charges are dismissed. As a consequence, should the offender come before the court for similar offences in the future, evi-

20. *Id.* at 33.

21. *Id.* at 25.

22. *Id.* at xvi, 103.

23. *Id.* at 40.

24. *Id.* at 42.

25. *Id.* at 78.

26. SENTENCING ADVISORY COUNCIL, SENTENCING OF ADULT FAMILY VIOLENCE OFFENDERS, at ii (2015), [http://www.sentencingcouncil.tas.gov.au/\\_\\_data/assets/pdf\\_file/0018/333324/SAC\\_-\\_family\\_violence\\_report\\_-\\_corrected\\_accessible\\_version\\_for\\_web.pdf](http://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0018/333324/SAC_-_family_violence_report_-_corrected_accessible_version_for_web.pdf).

27. *Id.* at 1.



dence of the earlier violence may not be led by the Crown. This is entirely appropriate since the accused may in fact be innocent of the allegations and in any case is entitled to the benefit of the acquittal on those charges. However, there is a risk that potentially relevant relationship evidence is excluded and the court may receive a distorted picture of the extent of the history of offending. An agreement to plead to a lesser offence will also somewhat artificially diminish the severity of the record of prior offending which a sentencing officer will have before them in sentencing for subsequent offending.<sup>28</sup>

## SENTENCING

The report contains a number of “observations,” including the following on the impact of sentencing practices:

The adverse effects of the sentence on the victim should be taken into account. However, victims’ wishes should not be given undue weight. If an appropriate sentence is to be imposed that prioritises the victim’s safety but also promotes the aims of rehabilitation and family reintegration the sentencing Magistrate must be able to call on relevant background information from other agencies.

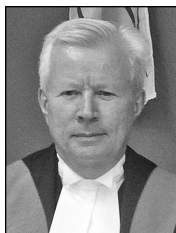
....

The imposition of sanctions alone is not bringing about a change in offender behaviour. It may be that a greater investment in rehabilitative interventions and the adoption of a more therapeutic approach to sentencing should be considered.

Consideration should be given to inserting a sentencing aggravating provision in the summary offence of common assault (s 35 POA) which applies in cases where the person assaulted was a pregnant woman.<sup>29</sup>

## CONCLUSION

These various reports from three countries with common legal systems illustrate how domestic violence is ingrained within their criminal-law systems. The reports consider various issues, but the common theme throughout is the prevalence and unceasing nature of this crime. The statistics differ, but all express a common theme of high rates of violence in intimate relationships with low reporting rates. Thus, the problem is much worse than even the startling reported statistics suggest.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to [wgorman@provincial.court.nl.ca](mailto:wgorman@provincial.court.nl.ca).

28. *Id.* at 36.

29. *Id.* at vii.

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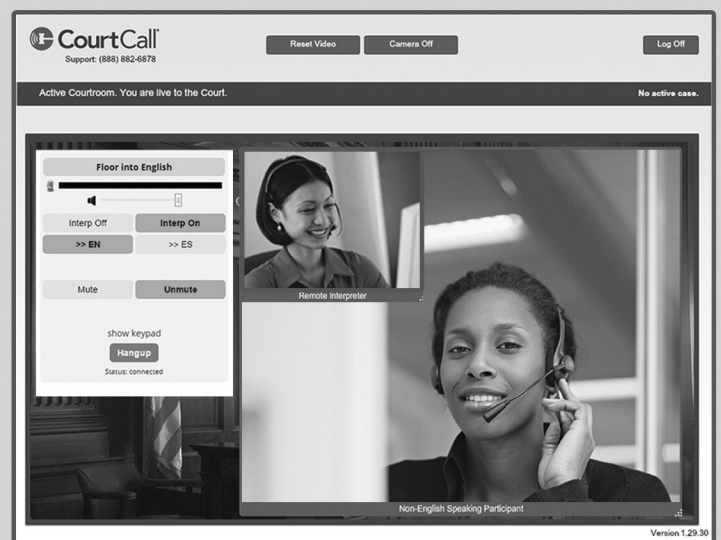
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# INTRODUCTION

Lynn Rosenthal

**M**ore than 20 years ago, I spoke at a meeting of a newly constituted task force on domestic violence in Florida. As the director of the state domestic-violence coalition, my job was to inspire local communities to take action. In those days, the principles promoted by the Violence Against Women Act (VAWA) of victim safety and offender accountability were just beginning to take hold. My presentation was pretty basic: the dynamics of domestic violence, its effects on victims, and the tactics offenders use to make victims look like they are the problem. After my talk, a family-court judge waited in the background to speak to me. When he stepped forward, he said, “I wish I had known this before. Now I understand what I have been seeing in my courtroom.” He said he could see the faces of women whose behavior he had not understood at the time. Now, he said, it all made sense.

Today, judicial training on domestic violence is much more widespread than it was 20 years ago. Most judges know that 1 in 3 women will suffer some form of abuse in their lifetimes and that this can take the form of threats, intimidation, coercion, economic control, sexual assault, and physical violence. Most know that domestic violence is about power and control and that the risk of violence is greatest when a victim is trying to separate from an abusive partner. The articles that follow describe how these dynamics play out in the courtroom and take us deeper into the complexities of domestic violence.

This collection begins, as it should, with the words of a survivor. Jane Licata is also a lawyer, and from this unique vantage point she gives us an inside view of domestic violence. She shares her painful journey through the courts, facing skeptical officials even as her batterer files motion after motion. As the court attempts to resolve Licata’s divorce without addressing the domestic violence, she and her children suffer great economic and emotional costs. From her, we understand how batterers use the courts to continue to intimidate and control their victims. Chances are, Licata’s story will stay with you long after you have turned the page.

Teresa Garvey tells us about victims’ experiences from a different perspective: when they stand accused of crimes. As a victim advocate, I have long been aware of the downward spiral victims find themselves in when they are accused of wrongdoing. Garvey describes how the effects of trauma are misunderstood by the court and exploited by batterers in family and criminal courts. She places victim behavior in the context of abuse and helps us understand how batterers turn the truth on its head. Garvey takes on the complexities of self-defense and false accusations and offers information that will help judges understand these cases.

Furthering this lens on abuse, Victoria Lutz describes the important role expert witnesses can play in helping judges and

juries understand domestic violence. She provides detailed guidance to courts in making the best use of expert testimony. Lutz provides a fresh look at battered women’s syndrome and offers helpful recommendations for experts who are serving as witnesses.

Offender accountability is a cornerstone of addressing domestic violence, but we haven’t always known what this means. Batterer intervention programs began as voluntary efforts to help men recognize their abusive behaviors and the roots of these behaviors in the systemic oppression of women. Over time, these programs became part of the legal system working to hold individual men accountable for their violence. Victim advocates have voiced skepticism about these programs, and the research on their effectiveness has yielded mixed results. Angela Gover and Tara Richards offer a new look at offender treatment with a profile of the Colorado model and the state’s standards for treatment. Today, as policymakers and activists seek new solutions to crime, the time is ripe for fresh ideas about intervention for domestic-violence offenders.

Featured on the Resource Page is an announcement about an upcoming judicial-training series offered by National Network to End Domestic Violence cyberviolence experts and judicial officers from around the country. As technological advances have triggered new ways for offenders to stalk and harass their victims, the criminal-justice system has lagged behind in its response. Experts Cindy Southworth and Erica Olsen and judicial partners are creating an important new initiative to train judges and other professionals on this growing form of abuse. From GPS tracking to social media, we are reminded that as cyberviolence continues to evolve, so must the response.

As I read these articles, I was struck by both our progress over these past two decades and the ongoing need for innovation and change. The role of the courts remains central to our continued progress, and I am grateful to these authors for contributing to this path forward.



*Lynn Rosenthal was appointed by President Obama and Vice President Biden as the first-ever White House Advisor on Violence Against Women in 2009. She served in the White House for five years and coordinated interagency efforts to reduce domestic and sexual violence. Ms. Rosenthal was the executive director of the National Network to End*

*Domestic Violence and served as the executive director of state domestic-violence coalitions in Florida and New Mexico. A social worker by training, Ms. Rosenthal has been an advocate at the local, state, and national levels for 25 years.*

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# A Survivor's Tale

Jane Massey Licata

I have been a lawyer for over 30 years and have taught law school for about half of that. Although I had some litigation experience, I was totally unprepared for the New Jersey Family Court experience I encountered when I sought a divorce and a protective order after many years in an abusive relationship. While I expected it to be a difficult experience, I did not expect to be told my testimony was not credible. The judge commented that (1) if the abuse was as bad as I claimed, I should have left long before I did, (2) I could not be considered a battered woman under New Jersey law because I was an educated, professional woman with resources, and (3) I did not have the right to protect my children. I would like to share some of that long and difficult journey through the court system and in the years following. The ramifications of some of the court's decisions and misperceptions have impacted my family in ways that I do not think the court considered or even imagined. I am going to highlight a few of the issues that led to flawed decisions and orders, all of which ultimately were undone, but at a great cost both in monetary and human terms.

Domestic violence and abuse happen at all economic and social levels. I have heard this said often, but in practice, if you are an educated professional woman, it is difficult to convince a court that you could be a victim of domestic violence. I have spoken to many women who are doctors, lawyers, and CEOs who have had very similar experiences to mine. When confronted with an allegation of abuse, the court often finds it difficult to believe that such a woman would tolerate domestic violence, cannot understand why she would stay, and even blames the woman for the problem. Blaming the victim has a number of very important ramifications. I was told I could not be considered a battered woman under New Jersey law because I had options. The court could not square my appearance and résumé with that of a victim of domestic violence. But what does a victim look like? It could be your mother or sister or daughter. I have heard a partner of a major U.S. law firm speak with tears in his eyes about how difficult it was for him to see and accept what was happening to his daughter, an accomplished attorney, until it was almost too late. My mother and sister testified in my case, but the court preferred to view this as a litigation tactic rather than to seriously consider that they feared for my life. My mother was afraid that I was going to end up being a story on the evening news, but the court could not fathom this. My former husband was also an attorney, and it was difficult for the court to accept that the man who was appearing in the courtroom could be capable of abusing his family. In fact, the court appeared to go to great pains to explain away testimony and evidence that suggested that his behavior was dangerous or ongoing. It was just not believable to the court that domestic violence could occur in our zip code.

While the county prosecutor would not get involved in the matter because a complaint for divorce had been filed, I was able to obtain a consent order, which replaced a temporary restraining order issued by the court. The consent order prevented my former husband from coming into my home or office as a result of his threats and behavior at both places. He was able to maintain his license to practice law, and the order protected me, my mother (who had come to live with me and the children), and my law partner, and it continues to this day. The court also restricted his communication to two parenting e-mails a week that were reviewed by the court when necessary. All contact was through our attorneys for many years, and there was ongoing litigation by my former husband until it ended by my filing for personal bankruptcy. The police in my town were very kind and have kept an eye on my home and office for years. I live under a domestic-violence safety plan. Yet, in its final order concerning custody, the court required that if both parents attended an event with the children present, the parents were to sit with the children in between as a buffer. As you can imagine, I was unable to attend many events without making separate, secure arrangements where I sat apart from my children to protect both them and me. Why a court would impose such a requirement was dumbfounding.

The court granted my former husband's request for joint legal custody. I was the custodial parent, but for many years every parenting decision was challenged or scrutinized. My former husband threatened to take the children from me unless he received what he wanted in terms of equitable distribution and other things. He demanded a parenting-time schedule based on a calculation where he would not be required to pay child support, although he did not respect the schedule and paid for nothing for the children. He was unwilling to pay education costs. The court did not require him to contribute anything, and it was too expensive and frightening to fight about it. Every time he wanted something, he would file a motion, legal fees would pile up, and the court would seek to find a middle ground, which did not work well when he always started from an extreme position. Eventually he litigated me into bankruptcy. This was something the family court did not see coming. However, it turned out to be a blessing because it ended his aggressive litigation tactics and brought in a very thoughtful and effective bankruptcy judge who finally brought some sanity into the situation and removed the children as pawns in a dangerous and high-stakes game that my former husband was playing. The children and I spent seven years in bankruptcy, but we survived and moved on with our lives.

In New Jersey, there is a preference for settlement. There is a so-called blue-ribbon-panel process where experienced family-law attorneys review the case and suggest an equitable settlement. We went through two such panels, and I agreed to

both panels' recommendations. My former husband would not agree to anything. This delayed the final divorce, racked up huge legal bills, and eventually frustrated the court because the case did not settle. The court did not understand that this was just another facet of the power and control aspect of domestic violence and that there was no settlement possible in such a dynamic. The more pressure the court put on us to settle, the more extreme my former husband's demands became until, eventually, there was no option but bankruptcy. Literally tens of thousands of dollars of assets were wasted on protracted and contentious litigation. When my attorney asked for the court's help in controlling the situation, she was rebuffed soundly. If the court had understood the domestic-violence dynamic, a great deal of time, expense, and hardship could have been avoided.

There has been a huge cost to my family. The children suffered terribly. There was no stability or safety at their father's house, and there were constant threats to our safety and well-being. However, if I complained to the court, I was perceived not as being a protective parent, but as seeking to undermine the relationship between the father and his children. Even though experts were brought in to evaluate and a parenting coordinator was appointed for a time, it was an impossible situation. The court-appointed coordinator resigned eventually, indicating that it was not a workable solution due to the domestic violence. After only a few years, all that remained of the court's various orders was the protective consent order. All other attempts to try and overlook the domestic-violence component and effect a traditional divorce settlement and custody arrangement imploded. However, since I was under bankruptcy protection at that point and the litigation threat was removed, I sought and received help from other sectors. I had established effective counseling for my children, their schools and coaches were involved in a protection plan, and my neighbors and co-workers joined together to form a community of love and respect to help my family heal and remain safe. Eventually we were able to establish a safety and recovery plan that the court was unable or unwilling to do.

I am writing this in the hope that if confronted with a domestic-violence situation, especially involving children, perhaps the court will stop and consider that it cannot be business as usual. Mediation does not work in a situation where there is fear for personal safety and the need to protect children. It is difficult for a victim to recount and explain the domestic violence. It is frightening to lose economic security and a way to support your family on your own, even with an education. It is difficult to lose your home and your savings and to be confronted with the threat of constant litigation. It is hard for children to tell a judge what is really going on with their parents. It is difficult for them to even understand the complexity and cruelty of the situation. Understanding that things may not be as they seem and thinking like a protective parent may prevent not only injustice, but tragedy. It is important to understand that power and control must be considered and balanced.

Many of the traditional remedies simply are not workable in a situation where one party holds all the power and control in a relationship. Using aggressive litigation tactics and seizing assets can make it very difficult for even a professional to create a safe and independent life for her family. Forcing a domestic-violence survivor to continue to suffer ongoing abuse and threats in the name of the best interests of the children is simply wrong. While the children need to figure out a way to have a relationship with both their parents throughout their lives, placing young and vulnerable children in constant conflict, uncertainty, and fear is not helpful. Assuming that the harm that has come to their mother will not necessarily be visited on the children is a very high-risk calculation. Taking time and figuring out why a parent wants and needs protection for the children, and giving some benefit of the doubt, can make a significant difference in children's lives. The informality of the family-court process can also create benefits and risks. Unlike other civil matters—and inconsistent with due process or the rules of evidence or procedure—in my case, most of the discussion with the court and presentation of information to the judge was in chambers, so it was difficult to understand or appeal the court's decisions. It is hard to prove what happens behind closed doors, and when there is misunderstanding and stereotyping about domestic violence, opportunities to fashion humane and effective remedies can be missed. It is much easier to look away from domestic violence than to engage in the situation. However, if a case does not seem to make sense, a closer look can reveal that business as usual can do great harm. I would ask that if a case gives you pause, please pause and think about whether there could be domestic violence involved. If so, seeking information and expertise could significantly impact the outcome for a family for years after the final divorce decree.



*Jane Massey Licata, J.D., Ph.D., is a partner in the biotech-patent and FDA boutique law firm of Licata & Tyrrell and also teaches patent and FDA law at Rutgers School of Law and Drexel Law School. Professor Licata writes and teaches about emerging legal and bioethical issues concerning biotechnology, including genetic privacy and nondiscrimination. Her firm concentrates in the nonprofit sector. Dr. Licata has been translating science into invention® for over two decades.*

# Context Is Everything:

## Victims Who Stand Accused

Teresa M. Garvey

Thanks to significant reforms over the past few decades, the American justice system today recognizes that intimate-partner violence is not a private wrong, but an evil that society as a whole condemns. Courts routinely issue protective orders to enhance victim safety and punish convicted batterers<sup>1</sup> with sentences commensurate with the seriousness of the harm they inflict. However, the dynamics of abuse and the pernicious effects of ongoing violence are not always recognized or taken into proper account when a victim of battering stands accused of some sort of wrongdoing, whether in criminal court or in the course of family-court proceedings.

Victims of battering are often fearful of finding themselves in court in any capacity because they have been subjected repeatedly to threats about how the batterer will “destroy” them in court. They have become convinced, based on what the batterer has told them (and perhaps based on prior negative experiences with the justice system), that no one will believe them. Victims have seen firsthand how the batterer has been able to manipulate others (police, marriage counselors or therapists, family, neighbors, clergy, and the courts) into believing the victim is to blame for whatever problems the couple or their children are experiencing.<sup>2</sup> Batterers are often skilled at presenting a calm, reasonable demeanor to responding officers, judges, or other court personnel, while victims may present as emotional or inarticulate as a result of the trauma they have experienced.<sup>3</sup>

Judges presiding over criminal or civil actions in which victims of battering stand accused of wrongdoing—as parties or as witnesses—are charged with the responsibility of making factual findings, requiring them to assess the credibility of witnesses and competing claims. They are called upon to control the litigants, to determine the admissibility of evidence, and to fashion a just result. To do justice in these cases, judges must possess a firm grasp of the dynamics of intimate-partner violence—the tactics employed by batterers in their pursuit of power and control over victims and the effects these tactics have on victims and

their children. Where victims are proven guilty of violating the law for reasons attributable to the effects of battering, courts should consider those reasons in imposing penalties that hold victims *appropriately* accountable. Most important, courts must not allow batterers to exploit the legal system as a weapon to harass, intimidate, and harm their victims.

This article will discuss some of the common scenarios judges may encounter in which victims of abuse are accused of wrongdoing in criminal court (whether the nominal defendant or not) or in family-court proceedings and will suggest actions that judges can take to ensure the justice process is not co-opted by the abuser. Arriving at a just result in these situations demands consideration of the context giving rise to the victim’s act or to the allegation of unlawful conduct. As a preliminary matter, issues of credibility—applicable in any court setting where the batterer and victim may both be called upon to testify as witnesses—must be considered.

### CREDIBILITY OF VICTIMS AND CHILDREN

Intimate-partner violence is traumatic to victims<sup>4</sup> and to their children.<sup>5</sup> Children may be witnesses to frightening violence against a parent or may be physically injured themselves as a result of intentional violence directed against them<sup>6</sup> or as a result of intervening to protect a parent being assaulted. In addition, victims and their children are frequently subjected to intimidation and manipulation before, during, and after the acts of violence.<sup>7</sup> Trauma may adversely affect the ability of these witnesses to recall and relate details of what occurred, while intimidation and manipulation often cause victims to remain with or return to the abuser, to recant or to minimize the abuse, to refuse to testify, or even to testify on behalf of the abuser. For factfinders to accurately assess credibility, they must consider the possibility that the actions of the parties and their demeanor in court may be the product of a history of violence (and accompanying trauma), intimidation, or manipulation.

### Footnotes

1. The terms “battering” and “abuse” will be used interchangeably to describe “an ongoing patterned use of intimidation, coercion, and violence as well as other tactics of control to establish and maintain a relationship of dominance over an intimate partner.” ELLEN PENCE & SHAMITA DASGUPTA, PRAXIS INTERNATIONAL, INC., RE-EXAMINING “BATTERING”: ARE ALL ACTS OF VIOLENCE AGAINST INTIMATE PARTNERS THE SAME? 5 (2006), available at [http://www.ncdsv.org/images/Praxis\\_ReexaminingBattering\\_June2006.pdf](http://www.ncdsv.org/images/Praxis_ReexaminingBattering_June2006.pdf). It is to be distinguished from acts of violence against a partner in a different context, with a different motivation.
2. LUNDY BANCROFT, JAY SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT 17-18 (2012).
3. Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers’ Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. SOC. JUST. 1053, 1066-67, 1076-

77 (2011).

4. CAROLE WARSHAW, CRIS SULLIVAN & ECHO RIVERA, NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, A SYSTEMATIC REVIEW OF TRAUMA-FOCUSED INTERVENTIONS FOR DOMESTIC VIOLENCE SURVIVORS (2013), available at [http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH\\_EBP\\_LitReview2013.pdf](http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH_EBP_LitReview2013.pdf).
5. *Children and Domestic Violence*, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/content/children-and-domestic-violence>.
6. Intimate-partner violence strongly correlates with child abuse, with batterers physically abusing the children at a rate conservatively estimated at 40%. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578, 596 (1998).
7. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 93-98.

## EFFECTS OF TRAUMA

Neuroscientists have been studying the effects of trauma on the brain, including the ways in which memories are recorded and accessed. While understanding of these processes is far from complete, studies suggest that during a traumatic event, details essential for survival are stored and later accessed far more readily than such descriptive details as the exact sequence of events or the actual words that may have been uttered.<sup>8</sup> Without a rudimentary understanding of this phenomenon, a factfinder may conclude that the witness has had a “convenient lapse of memory” about crucial details of the event. A related possibility is that a witness, pressured into believing he or she *ought* to be able to recall certain details, will confabulate—filling in details with what seems to have been likely, rather than relating events as they were experienced and recorded in the brain.<sup>9</sup> As a result, the traumatized witness’s statements to police may be inconsistent with later statements or with courtroom testimony, and accounts of events may be disorganized due to the difficulty of retrieving details and the fact that additional memories may emerge over time.<sup>10</sup> When victims or witnesses are describing an event that was traumatic for them, inconsistencies may be a product of trauma rather than an attempt to deceive.<sup>11</sup> The witness may be quite literally providing the most accurate information possible.

## EFFECTS OF BATTERING

Even where the effect of trauma on memory is not a significant factor, victim behavior in response to ongoing violence may be difficult for factfinders to understand without a grasp of the dynamics of abuse and its effects. In the absence of explanation, factfinders may question the victim’s credibility for such actions as remaining with or returning to the batterer, failing to report the abuse to the police, requesting to “drop” criminal charges or protective orders, failing to appear in court, minimizing or recanting on the stand, or testifying on behalf of the batterer.<sup>12</sup>

Courts around the country are increasingly willing to permit expert testimony to explain the dynamics of battering and its effects so the victim’s credibility can be evaluated in proper context.<sup>13</sup> Most often, this expert is not a licensed professional who has conducted a psychological examination of the victim; in fact, expert witnesses called to explain victim behavior are most often “blind” to the specific details concerning the parties, the incident at issue, or the history of the relationship.

They may be advocates or other professionals, with or without academic credentials, who have extensive training and/or experience working with victims of domestic violence.<sup>14</sup> The purpose of this type of expert testimony is not to provide a “diagnosis” or opinion whether someone has been a victim of abuse, nor to provide an improper opinion as to the veracity of a report of abuse, but rather to enlighten factfinders about the ways in which victims may be affected by the constant pressures of coercive control on the part of the batterer. These control tactics may include isolating the victim from sources of support like friends and family, depriving the victim of economic independence, threatening the victim with dire consequences if the abuse is disclosed to anyone, or threatening to take the children. In addition, victims are often affected by a sense of shame and self-blame, which may cause them to try to hide the abuse at all costs or to assume responsibility for it.

Because each victim is unique as an individual and faces unique challenges in terms of the type and magnitude of the abuse and the resources available to cope with or to escape the abuse, it is impossible to identify a single set of responses or

**When victims or witnesses are describing an event that was traumatic for them, inconsistencies may be a product of trauma rather than an attempt to deceive.**

8. See, e.g., James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME, Dec. 9, 2014, available at <http://time.com/3625414/rape-trauma-brain-memory/>; Rebecca Campbell, Transcript “The Neurobiology of Sexual Assault,” NATIONAL INSTITUTE OF JUSTICE (Dec. 3, 2012), available at <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>; Bessel van der Kolk, James Hopper & Janet Osterman, *Exploring the Nature of Traumatic Memory: Combining Clinical Knowledge with Laboratory Methods*, 4 J. AGGRESSION, MALTREATMENT & TRAUMA 9 (2001).
9. Van der Kolk, Hopper & Osterman, *supra* note 8, at 28-29.
10. Campbell, *supra* note 8.
11. *Id.*
12. JENNIFER LONG, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS 8 (2007), available at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).
13. See, e.g., *People v. Brown*, 94 P.3d 574, 583 (Cal. 2004); *State v. Borelli*, 629 A.2d 1105, 1115-16 (Conn. 1993); *Earl v. United States*, 932 A.2d 1122, 1128 (D.C. 2007); *State v. Clark*, 926 P.2d 194, 203 (Haw. 1996); *State v. Newell*, 710 N.W.2d 6, 28-29 (Iowa 2006); *People v. Christel*, 537 N.W.2d 194, 205 (Mich. 1995)

- (finding expert testimony admissible provided proper foundation laid; harmless error to admit in this case); *State v. Grecinger*, 569 N.W.2d 189, 197 (Minn. 1997); *State v. Bonamarte*, 213 P.3d 457, 461 (Mont. 2009); *State v. Searles*, 680 A.2d 612, 615 (N.H. 1996); *State v. Townsend*, 897 A.2d 316, 332 (N.J. 2006); *State v. Haines*, 860 N.E.2d 91, 97-98 (Ohio 2006); *State v. Weaver*, 648 N.W.2d 355, 365 (S.D. 2002); *State v. Laprade*, 958 A.2d 1179, 1188 (Vt. 2008); *State v. Ciskie*, 751 P.2d 1165, 1171-74 (Wash. 1988); *Dean v. State*, 194 P.3d 299, 311 (Wyo. 2008).
14. See, e.g., *Gipson v. State*, 772 S.E.2d 402, 410 (Ga. App. 2015) (shelter director qualified as expert based on bachelor’s degree, 13 years of experience as advocate, and specialized ongoing training); *State v. Newell*, 710 N.W.2d 6, 28 (Iowa 2006) (police lieutenant qualified as expert based on extensive experience and training in domestic violence); *Salinas v. State*, 426 S.W.3d 318, 323 (Tex. App. 2014), *rev’d on other grounds* by 464 S.W.3d 363 (Tex. Crim. App. 2015) (social worker qualified as expert based on training and experience). Pursuant to Fed. R. Evid. 702, an expert may be qualified by virtue of “knowledge, skill, experience, training, or education.” See also LONG, *supra* note 12, at 34-35.



**[A]rresting a victim of intimate-partner violence can have serious consequences for victim safety.**

behaviors that will exist in every case. Expert testimony, however, provides the factfinder with explanations of some of the possible reasons that may have compelled a victim of abuse to stay with or return to the abuser, to recant, to minimize the severity of an incident, or to testify on behalf

of the abuser, thereby allowing the factfinder to more accurately judge the victim's credibility.

### **BATTERER CREDIBILITY**

In contrast to victims, whose testimony may be angry, emotional, or disorganized, batterers are often highly skilled at presenting a calm and reasonable demeanor when it matters most.<sup>15</sup> Family and friends who have not witnessed acts of abuse may describe the batterer as an admirable person. Some police officers may uncritically accept batterer claims that the victim is “crazy,” based solely upon the emotional state of the parties at the time of the police response. Courts must recognize that when judging the relative credibility of partners in abusive relationships, many of the external cues normally relied on to assess credibility may be turned on their heads. The calm and reasonable-appearing party, eloquently describing the tragedy of separation from the children, may not be telling the truth; the emotional party with a bulging folder of notes, desperate to be believed, may be the one worthy of belief.<sup>16</sup> It is critical for judges to look beyond surface demeanor in judging credibility and to consider whether they may be observing the effects or tactics of battering.

### **CRIMINAL PROCEEDINGS**

#### ***Failure to Appear***

When a victim fails to appear in court pursuant to a properly served subpoena, the court may be called upon to consider whether to issue a bench warrant or a material-witness warrant to compel appearance at trial. Although a subpoena is a valid court order to appear, arresting a victim of intimate-partner

violence can have serious consequences for victim safety.<sup>17</sup> Most victims who fail to appear for trial are not simply “uncooperative”—rather, they are acting in accordance with their sense of what is the safest course of action (which often is to avoid testifying against their abuser) or in response to intimidation or manipulation on the part of the defendant. Arrest amounts to re-victimization by the criminal-justice system, effectively punishing the victim for the intended outcome of the batterer's campaign of intimidation and manipulation. The message sent to both the victim and the batterer is that calling the police is a risky proposition for the victim. A victim humiliated by an arrest or confinement may think twice about reaching out for help from the criminal-justice system in the future.

In the extraordinary case of a defendant so highly dangerous that prosecution is imperative, where there is no alternative to move forward without the victim's testimony, the court can craft its order in a way that minimizes negative consequences to the victim. For example, unless officer safety or departmental policy requires otherwise, the court can direct that no physical force or restraints be used. The court could also direct that an advocate accompany the officer serving the warrant to provide reassurance and assistance with safety planning, that the warrant be executed only while the court is in session and prepared to take the victim's testimony, and that the victim have an opportunity to make any necessary arrangements for childcare. Such considerations communicate the justice system's concern about the victim's ongoing safety.

Evidence-based prosecution<sup>18</sup> makes it possible for most criminal cases to move forward without victim testimony, just as in homicide prosecutions. Before granting a defense motion to dismiss a case because of the victim's failure to appear, it is important to consider whether sufficient evidence exists to survive a motion to dismiss at the conclusion of the State's case. The court should give serious consideration to motions seeking to admit the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing when there is evidence that the defendant's own acts of intimidation and manipulation are responsible for the victim's absence at trial.<sup>19</sup> By admitting the victim's hearsay statements when the requirements of the rule are satisfied, the court can protect the integrity of the jus-

15. Przekop, *supra* note 3, at 1066.

16. *Id.* at 1066-67, 1081-82.

17. See Erin Gaddy, *Why the Abused Should Not Become the Accused*, THE VOICE (NATIONAL DISTRICT ATTORNEYS ASSOCIATION) (2006), available at [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_1\\_no\\_8\\_2006.pdf](http://www.ndaa.org/pdf/the_voice_vol_1_no_8_2006.pdf). Two of the primary grant programs under the Violence Against Women Act to improve criminal-justice response to intimate-partner violence have identified forced testimony by victims of domestic violence against their abuser as an “activit[y] that compromise[s] victim safety and recovery.” See U.S. Department of Justice, Office on Violence Against Women, *OVW Fiscal Year 2016 STOP Formula Grant Solicitation* 5-6 (2016), available at <https://www.justice.gov/ovw/file/839466/download>; U.S. Department of Justice, Office on Violence Against Women, *OVW Fiscal Year 2016 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (also known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program)* 7-8 (2016), available at <https://www.justice.gov/ovw/file/811611/download>.

load (disapproving “[p]rocedures that would penalize victims of violence for failing to testify against their abusers or impose other sanctions on victims. Instead, procedures that provide victims with the opportunity to make an informed choice about whether to testify are encouraged”). These same considerations weigh against charging victims with perjury or false swearing as a result of recantation on the stand.

18. Evidence-based prosecution involves strategies based upon the identification, preservation, and presentation of evidence other than the victim's in-court testimony, allowing a prosecution to proceed regardless of whether, or how, the victim testifies at trial.

19. E.g., Fed. R. Evid. 804(b)(6). In states without a cognate provision in their rules of evidence, the doctrine is widely recognized as an exception to the rule against hearsay and the defendant's right of confrontation. See Timothy Moore, *Forfeiture by Wrongdoing: A Survey and an Argument for Its Place in Florida*, 9 FLA. COASTAL L. REV. 525, 532-33 (2008).

tice system by not allowing the offender to profit from wrongdoing intended to silence the victim.

### **Acts of Violence Against the Abuser**

Victims of intimate-partner violence are sometimes charged with criminal offenses against the batterer. These may be acts committed in self-defense or unlawful conduct that nevertheless is attributable, at least to some extent, to the violence inflicted by the batterer.<sup>20</sup> In addition, some victims are falsely accused by the batterer either as another form of abuse or in an effort to impugn the victim in the context of a criminal case against the batterer. Victims often more readily enter early guilty pleas than batterers, acting out of a sense of self-blame and a desire to resolve the matter as quickly as possible.<sup>21</sup>

In setting bail and conditions of pretrial release where it appears that the accused may be a victim of intimate-partner violence, courts should consider any available criminal histories of both parties, as well as the history of protective orders or other family-court proceedings and details recounted in the police reports, if possible. Incarceration of victim-defendants<sup>22</sup> whose charged offense may be attributable to the intimate-partner violence can result in loss of employment, placing victims and their children—who will likely remain in the care of the abuser—at risk of additional harm. Such victim-defendants usually do not pose a significant risk of flight or risk to the safety of the community. Counseling, drug/alcohol treatment, job training, or parenting classes, where appropriate, may be helpful conditions of pretrial release that will benefit the victim-defendant as the case moves forward.

### **Self-Defense**

While no one should be convicted (nor, ideally, charged or even arrested) for the lawful use of force in self-defense, identifying the justifiable use of force can be complex.<sup>23</sup> When a victim of intimate-partner violence is charged with a crime for acting in self-defense, the arrest and subsequent proceedings may exacerbate the existing trauma.

When there is evidence to suggest that a victim of battering reasonably believed that the use of force was necessary, a self-

defense instruction may be required.<sup>24</sup> While many courts still refer to defenses that take into account a pattern of ongoing abuse as “Battered Woman Syndrome,” that term has been largely abandoned by professionals in the field in favor of more accurate descriptions, such as “effects of battering.”<sup>25</sup>

Regardless of the viability of “Battered Woman Syndrome” as such, however, evidence of a history of violence against the victim-defendant remains highly relevant to that person’s use of force in self-defense. There may be subtle but recognizable precursors to a battering incident enabling the victim to reasonably anticipate such violence. These can include gestures, facial expressions (“the Look”), taking off a shirt or jewelry, or certain words or phrases (“You’re asking for it!”).<sup>26</sup> When acts of violence are routinely presaged by such signals, it is reasonable for the victim to anticipate the predictable outcome and to act accordingly. Victim-defendants in such cases may introduce expert testimony to explain their perception of the necessity of using force or to explain victim behavior that might cause jurors to doubt the veracity of a claim of history of victimization. As in the case of expert testimony offered by the State to explain victim behavior, expert testimony offered by the defense should not purport to opine whether a particular defendant was or was not a victim of battering, nor should it offer an opinion as to the truthfulness of the defendant’s testimony concerning a history of battering.<sup>27</sup> Rather, such testimony should allow the fact-finder to judge the victim’s honest belief in the necessity for use of physical force and the reasonableness of that perception.

### **Contextual Violence**

Even where the use of force is not legally justifiable, a history of abuse is still relevant to appropriate disposition. Use of force by someone who is continually subjected to violence, and

**Incarceration of victim-defendants whose charged offense may be attributable to the intimate-partner violence can result in loss of employment . . . .**

20. JEFFREY GREIPP, TOOLSI MEISNER & DOUGLAS MILES, AEQUITAS, INTIMATE PARTNER VIOLENCE VICTIMS CHARGED WITH CRIMES: JUSTICE AND ACCOUNTABILITY FOR VICTIMS OF BATTERING WHO USE VIOLENCE AGAINST THEIR BATTERERS 7-14 (2010), available at [http://www.aequitasresource.org/Intimate\\_Partner\\_Violence.pdf](http://www.aequitasresource.org/Intimate_Partner_Violence.pdf).

21. Martha McMahon & Ellen Pence, *Excerpt from: Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 1, 4 (2003), available at [http://dvturningpoints.com/wp-content/uploads/downloads/2011/01/MAKING\\_SOCIAL\\_CHANGE\\_2003.pdf](http://dvturningpoints.com/wp-content/uploads/downloads/2011/01/MAKING_SOCIAL_CHANGE_2003.pdf).

22. To avoid confusion, the term “victim-defendant” will be used to refer to victims of battering who are charged with criminal offenses against the batterer.

23. See GREIPP, MEISNER & MILES, *supra* note 20, at 7-14.

24. In many jurisdictions, the use of deadly force in self-defense is permitted only where the threat of harm is “imminent” and where there is no ability to retreat, which precludes the defense during quiescent periods, such as where the batterer is asleep or uncon-

scious. The imminence requirement is thoughtfully discussed in Whitley Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342 (2007). Prosecutors and courts are bound by legislative provisions regarding self-defense; however, where the legislative scheme permits, it is important to give the instruction where the evidence arguably supports the defense.

25. For a summary of many of the criticisms of Battered Woman Syndrome as a term to describe the varied effects of battering, see generally Mary Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, VAWNET, August 2009, available at [http://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_BWSCritique.pdf](http://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf); see also LONG, *supra* note 12, at 44-45.

26. GREIPP, MEISNER & MILES, *supra* note 20, at 13.

27. See, e.g., New Jersey Model Criminal Jury Charge on “Battered Woman Syndrome” as a Defense, available at <https://www.judiciary.state.nj.us/criminal/charges/bws1.pdf>. The charge permits the jury to consider expert testimony as an aid to determining the honesty (and reasonableness, in the case of self-defense) of the defendant’s belief in the necessity of the otherwise criminal act.

**Batterers often make false accusations against their victims, particularly as a form of harassment once the parties are separated . . . .**

who acts within that context,<sup>28</sup> is qualitatively different from the use of force by someone seeking to exercise power and control over a partner or by someone who is habitually violent against others. The relevant question, “Who is doing what to whom and with what impact?” suggests that the response to reactive/resistant violence should be different from the response to bat-

tering.<sup>29</sup> There is less need to deter such victim-defendants and more need to craft a disposition that holds them appropriately accountable. Where diversionary disposition is available and appropriate, diversion enables the victim-defendant to avoid the negative collateral consequences of a criminal conviction.<sup>30</sup> Those consequences can severely compromise future safety, security, and well-being by making it more difficult to secure employment, housing, child custody, and parenting time; making it possible for the batterer to threaten or take action to revoke the victim-defendant’s probation or parole; and adversely impacting the victim-defendant’s immigration status.<sup>31</sup> The court may impose diversionary conditions that promote alternatives to violence and present options that may reduce the victim-defendant’s dependence on the batterer for survival.<sup>32</sup> Such conditions may include counseling, education, and job training to increase economic security and independence, treatment for substance abuse, and parenting classes.<sup>33</sup> When diversionary disposition is not an option, a probationary sentence with similar conditions may be considered, depending on the seriousness of the offense.<sup>34</sup>

When the offense is so serious that incarceration is required, the context giving rise to the criminal act and the characteristics of the victim-defendant may still provide sufficient mitigation that a significant reduction in prison time is warranted.

**False Accusations by the Batterer**

Batterers often make false accusations against their victims, particularly as a form of harassment once the parties are separated or a protective order is in effect. Batterers may file criminal complaints for harassment, stalking, or threats; accuse the victim of child abuse or neglect; or make allegations against the victim in the course of defending the batterer’s own criminal charges. Some batterers will race to call 911 before the victim can, in an attempt to appear the true victim. Some batterers go so far as to inflict superficial injuries on themselves or create other kinds of false evidence, such as faked emails or social-media postings, in an attempt to have the victim arrested.<sup>35</sup> “Evidence” of wrongdoing on the part of a person known to be a victim of intimate-partner violence, offered by a known or accused batterer, should be viewed with a critical eye.

**Other Crimes Related to Victimization**

Batterers may coerce their victims into engaging in criminal activity on their behalf, forcing their victims to sell drugs; to hide drugs, weapons, or proceeds of criminal activity in their homes; to shoplift; or to claim ownership of contraband. In such cases, a defense of duress or coercion might be asserted. Expert testimony on the effects of battering may be critical to the fair consideration of the victim-defendant’s guilt.

More troubling are cases in which the victim of intimate-partner violence is charged with “failure to protect” the children from the batterer who shares the home or is charged with

28. A victim may, for example, instigate violence in an effort to escape or stop the battering (perhaps under circumstances or in a setting where the victim has more control of the situation) or as a form of retaliation for battering. Other victims may use violence as a result of their addiction to drugs or alcohol, which some victims turn to as a way of coping with the violence in their lives. PENCE & DASGUPTA, *supra* note 1, at 9-11, 13, 15; GREIPP, MEISNER & MILES, *supra* note 20, at 10, 14.

29. PENCE & DASGUPTA, *supra* note 1, at 15-16.

30. GREIPP, MEISNER & MILES, *supra* note 20, at 19-20.

31. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, UNDERSTANDING AND MITIGATING THE DIRECT AND COLLATERAL CONSEQUENCES OF CRIMINAL RECORDS: SELECTED INTERNET RESOURCES FOCUSING ON WOMEN/VICTIMS OF BATTERING CHARGED WITH CRIMES (2016), available at [http://www.ncdbw.org/reentry\\_resources/Mitigating%20Collateral%20Consequences%20--%20NCDBW%20Reentry%20Internet%20Listing%20-%20FINAL%20\[3-8-2016\].pdf](http://www.ncdbw.org/reentry_resources/Mitigating%20Collateral%20Consequences%20--%20NCDBW%20Reentry%20Internet%20Listing%20-%20FINAL%20[3-8-2016].pdf); GREIPP, MEISNER & MILES, *supra* note 20, at 17-18. An additional potential negative consequence for victim-defendants who are convicted of a crime is the possibility that the conviction will be used for impeachment purposes in future court proceedings, thereby undermining the victim’s ability to seek safety and justice in the future. GREIPP, MEISNER & MILES, *supra* note 20, at 17-18.

32. GREIPP, MEISNER & MILES, *supra* note 20, at 11, 15-16.

33. Typical batterers’ intervention programs, geared toward correc-

tion of violence as a tool of power and control, are inappropriate for the victim-defendant because they fail to address the actual cause of the offense. GREIPP, MEISNER & MILES, *supra* note 20, at 5, 17-18. They may also exacerbate trauma by forcing a victim of abuse to interact with batterers in a group setting.

34. The National Clearinghouse for the Defense of Battered Women has collected Internet resources that may be helpful in fashioning appropriate probationary conditions. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, WHEN VICTIMS OF BATTERING ARE ON PROBATION OR PAROLE (2015), available at [http://www.ncdbw.org/reentry\\_resources/Probation%20and%20Parole%20--%20NCDBW%20Internet%20Listing%20-%20FINAL%20\[8-20-15\].pdf](http://www.ncdbw.org/reentry_resources/Probation%20and%20Parole%20--%20NCDBW%20Internet%20Listing%20-%20FINAL%20[8-20-15].pdf).

35. The author prosecuted two unrelated intimate-partner stalking cases in which the stalker forged letters, emails, and social-media postings in an effort to “frame” the victim or the victim’s new partner by making it appear that the stalker was being victimized. One of these stalkers also falsely reported that the victim had threatened him with a gun (the victim had video proof of her alibi at the time of the alleged gun-pointing), and the other (a former police officer and then-current law student) reported an assault by mysterious strangers who appeared at his home and threatened to kill him if he didn’t surrender the marital home to the victim (police concluded after investigation that the superficial injuries, which were inconsistent with the reported assault, were self-inflicted).

abuse or neglect of those children. Appropriate accountability in these cases again demands consideration of context in which the acts or omissions occurred. The same factors that impede victims from protecting themselves often make it impossible for them to protect their children, while some acts of apparent abuse or neglect are intended to protect the children from even greater harm.<sup>36</sup>

### **Jury Instructions**

Although police and prosecutors have the initial responsibility to investigate and make the correct charging decisions as well as to make reasonable plea offers that take into account the victim-defendant's personal circumstances—decisions guided by principles of justice as well as the letter of the law<sup>37</sup>—many of these cases ultimately rest in the hands of a jury. Correct jury instructions are crucial in every criminal case. Where the defendant is a victim of intimate-partner violence, it is especially important that juries have a fair opportunity to determine whether any of the statutorily recognized defenses may apply to justify, excuse, or mitigate the offense. Model or pattern jury instructions should be carefully reviewed and the language adjusted or supplemented where necessary to ensure that the charge explains the permissible use of expert testimony or evidence regarding the history of abuse and how the evidence may apply to the elements of the charged offense and any defenses raised.

When the verdict is “guilty,” the court has final responsibility to impose a just sentence. Careful weighing of mitigating factors may permit the court to impose a sentence that holds the perpetrator *appropriately* accountable for criminal conduct. Being a victim of abuse gives no one *carte blanche* to disregard the law. Nevertheless, it is important to consider the abuse when it has directly contributed to the violation of law and to impose a sentence that addresses those factors and is commensurate with the defendant's blameworthiness.

### **FAMILY-COURT PROCEEDINGS**

Family-court proceedings—for protective orders, divorce, child support, custody/parenting time, or any combination thereof—present a wealth of opportunities for the batterer to continue the abuse of the victim through misuse of the judicial system.<sup>38</sup> It is well known that the time of separation from the abuser is the most dangerous for victims of intimate-partner

violence. There is an increased risk of homicide, and non-lethal violence often escalates as the batterer sees the ability to control the victim slipping away.<sup>39</sup> Batterers may file cross-complaints for protective orders, seek sole custody or unsupervised parenting time with the children (often claiming that the victim has “alienated” them from the abusive parent<sup>40</sup>), obstruct the fair division of marital property, resist paying child support or alimony, and file mountains of meritless motions for the sake of continuing to harass the victim.<sup>41</sup>

To the extent that the batterer is able to compel the victim to come back to court over and over, the justice system serves as a powerful weapon in the abuser's arsenal. For victims who have already been subjected to trauma and to the abuser's coercive control of their lives, receiving a summons to answer a complaint or being served with a motion reopens old wounds, causes distress and anxiety, and exacts monetary harm in the form of legal fees and lost time from work.<sup>42</sup> The legal challenges mounted by abusers target victims' greatest vulnerabilities—their ability to properly protect, parent, and provide for their children.<sup>43</sup>

Victims seek protective orders to regain a measure of peace and security in their lives. With an order in place, court proceedings may offer the only opportunity for the batterer legally to have direct contact with the victim. Victims who divorce the abuser hope that the decree will bring an end to the abusive relationship. But divorce from an abuser simply moves the arena from the victim's house to the courthouse, as the abuser files repetitive motions to amend support orders, challenge the victim's lifestyle, or seek changes in custody/parenting-time determinations.<sup>44</sup> Once again, the batterer is in a position of power, and the victim has been placed on the defensive.<sup>45</sup> The ongoing litigation also exacts a financial toll on victims.<sup>46</sup>

Although family courts routinely grant orders of protection to victims of intimate-partner violence, the dynamics of abuse

**To the extent that the batterer is able to compel the victim to come back to court over and over, the justice system serves as a powerful weapon in the abuser's arsenal.**

36. Evan Stark, *A Failure to Protect: Unravelling “The Battered Mother's Dilemma,”* 27 W. ST. U. L. REV. 29, 56, 105 (2000).

37. GREIP, MEISNER & MILES, *supra* note 20, at 16.

38. Przekop, *supra* note 3, at 1059-60.

39. Ruth Fleury et al., *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363 (2000); Przekop, *supra* note 3, at 1076.

40. “Parental alienation syndrome” posits that parents, particularly mothers, “alienate” the affections of children from the other parent in custody disputes. It has been severely criticized as an unfounded theory that overvalues the child's ongoing relationship with an abusive parent while undervaluing the child's safety, effectively punishing the non-abusive parent for acting in a supportive

fashion to protect children from the abusive parent. See BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 168-73; Joan Meier, *A Historical Perspective on Parental Alienation Syndrome and Parental Alienation*, 6 J. CHILD CUSTODY 232, 248-49 (2009); Joan Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 219, 229-34 (2010).

41. Przekop, *supra* note 3, at 1069-72.

42. *Id.* at 1070-71.

43. *Id.*

44. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 154-68; Przekop, *supra* note 3, at 1069-72.

45. Przekop, *supra* note 3, at 1081-82.

46. *Id.* at 1082-83

**While the use of third parties to transport the children . . . reduces the opportunities for abuse . . . , courts should avoid designating friends or family of the abuser . . .**

are not always sufficiently considered in parallel or subsequent proceedings.<sup>47</sup> Child custody and parenting time is a frequent source of ongoing litigation. Some courts view the abuse as something that affects only the victimized parent, failing to recognize the need to protect the children when the abuser continues to assert power and control over the other parent.<sup>48</sup> Even when children are not physically harmed, they often are used as pawns in the batterer's campaign against

the victim, and some courts are too quick to apportion blame equally between the parents, as if the victim is equally to blame for the ongoing tensions in the family.<sup>49</sup> When the batterer has unrestricted, unsupervised parenting time, the children may be abused themselves<sup>50</sup> or be used as a means of manipulating or spying on the victim.<sup>51</sup> Such acts not only harm the children directly but undermine the victim's effectiveness as a parent.<sup>52</sup> Some children—especially boys—ally with the abuser, becoming surrogate abusers in the home.<sup>53</sup>

Moreover, the exchange of the children in connection with parenting time can be yet another opportunity for in-person contact with the victim, facilitating further in-person harassment.<sup>54</sup> While the use of third parties to transport the children or to supervise the exchange reduces the opportunities for abuse or intimidation in that setting, courts should avoid designating friends or family of the abuser to serve in that role.

Many jurisdictions have recognized the ongoing danger to victims and their children by legislating a rebuttable presumption against sole or joint legal or physical custody for batterers

who have abused the other parent.<sup>55</sup> Where there is no such presumption by law, however, courts should weigh heavily any history of domestic violence. The focus should be on the well-being of the children rather than the “right” of an abusive parent to unrestricted parenting time. Not only are the children at risk for abuse and manipulation by an abusive parent, the children are harmed when the victimized parent is in a continual state of anxiety, stress, and fear and when that parent must continually battle for sufficient financial support to create a stable home for them.<sup>56</sup> Children rarely thrive in such an environment.

Another abusive tactic is to file groundless charges of parental misconduct against the victim for petty disagreements about the children's activities or supposedly harmful lifestyle choices by the custodial parent. Batterers may complain about matters such as the children's bedtimes, vacation plans, after-school activities, or eating habits. The other parent's work or school schedule, childcare arrangements, and especially dating or a new relationship are criticized as harmful to the children.<sup>57</sup> This is, essentially, an attempt to continue the pattern of control over the victim and the children that was exercised during the relationship and should be recognized as such.

Obviously, batterers, like anyone else, have a right of access to the courts for redress of grievances and conflict resolution. Family courts should, however, consider the motive when a litigant with a history of abuse becomes a “frequent filer.” Most jurisdictions have rules permitting sanctions against litigants who abuse the legal process by filing frivolous motions or those intended solely to harass the other party.<sup>58</sup> Motions can be screened for potentially meritorious claims and denied on the papers when patently frivolous. Sanctions can be imposed, with the victim reimbursed by the batterer for any financial loss occasioned by having to appear in court. Most important, courts should avoid allowing the batterer to exploit the judicial process as a weapon against the victim.<sup>59</sup> Assigning all cases involving the same parties to the same judge will enable that

47. Joan Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 657, 662-63 (2003).

48. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 189-98. Two recent tragedies involving fathers with a history of domestic violence who killed or attempted to kill their children as an apparent means of harming their mothers have been reported in the news. A New Jersey man jumped with his two toddler children from a bridge after a dispute with his wife in which he threatened to harm the children. Christie Duffey, *NJ Dad Who Jumped from Overpass with 2 Sons Had History of Domestic Violence*, WPIX-TV, Oct. 25, 2016, available at <http://pix11.com/2016/10/25/nj-dad-who-jumped-from-overpass-with-2-sons-had-history-of-domestic-violence/>. A Missouri man murdered his two young children after abducting them while subject to an outstanding warrant for domestic violence. Joe Sutton & Madison Park, *Man Kills Two Sons, Himself, Police Say*, CNN, Nov. 6, 2016, available at <http://www.cnn.com/2016/11/06/us/father-kills-sons-amber-alert/>.

49. Przekop, *supra* note 3, at 1076-77; Meier, *supra* note 47, at 692-700. Poor parenting on the part of the non-abusive parent, when not attributable to the battering, can appropriately be considered without treating it as equivalent to the malign effects of battering on the welfare of the children and without blaming the victim for

the abuser's conduct. Przekop, *supra* note 3, at 1077.

50. See generally Appel & Holden, *supra* note 6.

51. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 92-96; Przekop, *supra* note 3, at 1065-66.

52. BANCROFT, SILVERMAN & RITCHIE, *supra* note 2, at 38-39, 72-80, 204-05.

53. *Id.* at 38-39, 91-92, 238-50.

54. Przekop, *supra* note 3, at 1071-72.

55. See, e.g., National Council of Juvenile and Family Court Judges, Model Code on Domestic and Family Violence § 401 (1994). Statutory rebuttable presumptions existed in 24 states as of 2013. *Rebuttable Presumption States*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2013), available at <http://www.ncjfcj.org/sites/default/files/chart-rebuttable-presumption.pdf>.

56. Przekop, *supra* note 3, at 1071.

57. *Id.* at 1068-70.

58. *Id.* at 1088-89.

59. An excellent resource for family-court judges is *A Judicial Guide to Child Safety in Custody Cases*, published by the National Council of Juvenile and Family Court Judges in 2008 and available at [http://www.ncjfcj.org/sites/default/files/judicial%20guide\\_0\\_0.pdf](http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf). The Guide details the actions judges can take to protect families where domestic violence and abusive litigation are factors.

judge to become familiar with the parties and the pattern of claims, making it easier to identify meritless claims intended solely to harass the other party.

## CONCLUSION

When victims of battering are accused of wrongdoing, judges must be careful to view the evidence in context, through the proper lens, and ensure that juries are educated and empowered to do the same. By factoring into their decisions the realities of abusive relationships—the dynamics of abuse, batterer tactics, and effects on victims—judges can prevent batterers from co-opting the justice system for their own ends. These efforts will bring our courts closer to the ideal of a truly fair and just forum that protects victims and their children, allows them to heal, and holds abusers accountable for their actions.



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# Domestic Violence Expert Witness Testimony:

## A Guide for the Judiciary

Victoria L. Lutz

### WHY AN EXPERT IS NEEDED

A woman is battered in the United States every nine seconds.<sup>1</sup> Between 25% and 31% of American women will be physically or sexually assaulted by an intimate partner at some point during their lives<sup>2</sup>—an estimated 1.3 million women annually.<sup>3</sup> Intimate partner homicides make up 40% to 50% of all murders of women in the United States.<sup>4</sup> Every day in the United States, more than three women are killed by their abusers.<sup>5</sup> The statistics from Canada are similarly astounding. “Half of all women in Canada have experienced at least one incident of physical or sexual violence since the age of 16.”<sup>6</sup>

These facts are difficult to believe and even more difficult to fathom. How can it be that a woman is in more danger from her life partner than from strangers on the street? How does the good, kind juror who has never witnessed an abuser slap or even browbeat his wife accept that the same man, who is calm and

non-violent at work, can hit his wife with a bat and leave her bleeding on the side of a highway? How does the self-made working single mother of three on the jury evaluate the testimony of the wealthy victim who testifies that her paramour has been sexually assaulting her for years but that she still loves him?

So much about domestic violence is counterintuitive. Myths and misunderstandings cloud the vision of even those intent on seeing the issues clearly. For these reasons, domestic violence experts can be valuable resources in cases involving intimate partner violence.<sup>7</sup>

### ADMISSIBILITY OF DOMESTIC VIOLENCE EXPERT TESTIMONY

Courts in all 50 states and the District of Columbia as well as the Supreme Court of Canada have admitted domestic violence expert testimony for at least the past 20 years.<sup>8</sup> In my

In adapting *A Guide to Domestic Violence Expert Testimony in Colorado*, 45 COLO. LAW. 63, Nov. 2016, my goals are: (1) to promote in the judiciary a deeper understanding and possibly an expanded acceptance of the validity and usefulness of domestic violence expert testimony and (2) to share information from the original guide, which I wrote for attorneys and experts, so that there would be a common appreciation among all relevant parties about the “who, what, why, when, where, and how” of domestic violence expert testimony. I have not attempted to canvas North American statutes and caselaw but have offered Colorado statutes and precedent (which follow the Federal Rules of Evidence to a large degree) and a sampling of other legal authorities as representative sources. I would like to thank The Honorable Julie K. Field, Colorado Eighth Judicial District; The Honorable Evelyn Frazee, Supreme Court, Rochester, New York; and Judge Janice Rosa, Buffalo Family Court Chief Judge (ret’d), for their wise council and generous assistance in helping me to draft this article in a manner that would be useful to the bench.

### Footnotes

1. Alanna Vaglanos, *30 Shocking Domestic Violence Statistics That Remind Us It's an Epidemic*, HUFFINGTON POST, October 23, 2014, [http://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics\\_n\\_5959776.html](http://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html).
2. Bea Hanson, *Interventions for Batterers*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 419, 438 (Albert R. Roberts ed., 2002) (citing a 1999 study by six named researchers).
3. PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), available at [www.ncjrs.gov/pdffiles1/nij/183781.pdf](http://www.ncjrs.gov/pdffiles1/nij/183781.pdf); PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), available at [www.ncjrs.gov/pdffiles1/nij/181867.pdf](http://www.ncjrs.gov/pdffiles1/nij/181867.pdf).
4. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 15 (partially revised March 11, 2014),

available at [www.ncjrs.gov/pdffiles1/jr000250e.pdf](http://www.ncjrs.gov/pdffiles1/jr000250e.pdf) (a lengthy NIJ study by Jacquelyn C. Campbell and 11 other authors of Campbell's Danger Assessment Tool).

5. Soraya Chemaly, *50 Facts About Domestic Violence*, THE HUFFINGTON POST, November 30, 2012, [www.huffingtonpost.com/soraya-chemaly/50-actual-facts-about-dom\\_b\\_2193904.html](http://www.huffingtonpost.com/soraya-chemaly/50-actual-facts-about-dom_b_2193904.html).
6. See *The Facts About Violence Against Women*, CANADIAN WOMEN'S FOUNDATION, <http://www.canadianwomen.org/facts-about-violence>.
7. The instant article focuses on the most frequently used domestic violence experts in Colorado and elsewhere: those who do not meet with clients and do not testify as mental health professionals who provide opinions on a victim's medical or therapeutic diagnosis.
8. NATIONAL INSTITUTE OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, at ii (1996), available at <https://www.ncjrs.gov/pdffiles/batter.pdf> [hereinafter NIJ REPORT]. For examples of 15 state statutes that allow domestic violence expert testimony, see National Clearinghouse for the Defense of Battered Women, *Expert Testimony—Battering and Its Effects: Statutes*, in THE ANNOTATED BIBLIOGRAPHY, November 11, 2016 (on file with the author). See also Teresa M. Garvey & Stephanie Ritter, *Pennsylvania's New Victim Behavior Expert Witness Testimony Statute Upheld: Commonwealth v. Olivo*, STRATEGIES IN BRIEF, June 2016, <http://www.aequitasresource.org/Pennsylvania-New-Victim-Behavior-Expert-Testimony-Statute-Upheld-Commonwealth-v.-Olivo-SIB25.pdf>; LAWYER'S MANUAL ON DOMESTIC VIOLENCE, REPRESENTING THE VICTIM 102, 124 (Mary Rothwell Davis, Dorchon A. Leidholdt & Charlotte A. Watson, eds., 6th ed. 2015), <https://www.nycourts.gov/ip/womeninthecourts/pdfs/DV-Lawyers-Manual-Book.pdf>; Nancy K. D. Lemon, *A Transformative Process: Working as a Domestic Violence Expert Witness*, 24 BERKELEY J. GENDER L. & JUST. 208 (2013), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1280&context=bglj>. A leading Supreme Court of Canada case accepting use of battered woman syndrome is *R. v. Lavalee*, 1 S.C.R. 852 (1990).

home state, Colorado, appellate courts have approved this type of testimony since 1999.<sup>9</sup> Yet the foundations for admitting domestic violence expert testimony, the parameters of its use at trial, the qualifications necessary to become an expert, and even the accepted nomenclature for this type of testimony are often decided on a case-by-case or court-by-court basis. This article addresses these topics and includes best-practice considerations and suggestions.

## THE VALUE OF DOMESTIC VIOLENCE TESTIMONY TO EDUCATE THE TRIERS OF FACT AND DISPEL MYTHS

Over half the states in the U.S. now mandate domestic violence training for judicial officers.<sup>10</sup> Attorneys and jurors often do not come into the courtroom as well educated about intimate partner violence as judges. And even an educated judiciary will not be as up-to-date concerning the dynamics of domestic violence as an expert.<sup>11</sup>

It is a mistake to assume that, because jurors nowadays may have heard about or read about domestic violence, they do not need an education about intimate partner violence. Often what little knowledge jurors possess about domestic violence comes from Twitter, Facebook, movies, and television.<sup>12</sup> Many jurors have been lucky enough to have never been personally impacted by domestic violence. Moreover, to the extent that prospective jurors have in some way experienced domestic violence, they are likely to be challenged and

often are not empaneled.

Because the triers of fact in a domestic violence case frequently will benefit from hearing an expert deconstruct stereotypes, dispel myths, and explain battering and its effects, attorneys whose clients are touched by this type of violence would be wise to contact a qualified domestic violence expert to talk through issues and possible retention.<sup>13</sup>

The attorney, after selecting and retaining the expert, “must work with the expert to prepare the case for trial.”<sup>14</sup> To prepare an effective and persuasive presentation of expert testimony, the attorney should supply the expert with all information the expert will need to prepare to testify and explain what the court will require before and during the proceedings. The attorney and the expert should work together to educate each other and prepare for trial.<sup>15</sup> “Expert testimony which is both helpful and persuasive to the fact-finder . . . does not happen by itself; it takes long hours of careful preparation.”<sup>16</sup> If domestic violence is an important element in the case, counsel who proceeds without consulting an expert in the field proceeds at a decided disadvantage.

**Attorneys and jurors often do not come into the courtroom as well educated about intimate partner violence as judges.**

9. *People v. Lafferty*, 9 P3d 1132, 1135 (Colo. App. 1999); *People v. Johnson*, 74 P3d 349, 353 (Colo. App. 2002) (“The reliability of the principles underlying the battered woman opinion evidence is well recognized.”). See *People v. Shreck*, 22 P3d 68 (Colo. 2001) (clarifying Colorado’s criteria for the admission of expert witness testimony generally); see also Colo. R. Evid. 702 (enumerating statutory prerequisites for admission of expert testimony); Colo. R. Evid. 403 (authorizing a court to exclude relevant evidence if, for example, its probative value is substantially outweighed by the danger of unfair prejudice); see generally Fed. R. Evid. 702 and 403.
10. See National Council of Juvenile and Family Court Judges, *Mandatory Domestic Violence Training for Judges* (2013), <http://www.ncjfcj.org/sites/default/files/chart-mandatory-dv-training-for-judges.pdf>.
11. Consider evolving research documenting an increase in litigation abuse, its effects, and ways that the justice system can mitigate this type of domestic terrorism, for example: David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. SOC. JUST. 429 (2015).
12. “A significant percentage of people have serious misconceptions about sexual assault, domestic violence and intimate partner sexual abuse.” *Module VIII: Jury Selection*, INTIMATE PARTNER SEXUAL ABUSE, ADJUDICATING THIS HIDDEN DIMENSION OF DOMESTIC VIOLENCE CASES 14, [www.njep-ipsacourse.org/JurySelection/Key-Points-JurySelection.php](http://www.njep-ipsacourse.org/JurySelection/Key-Points-JurySelection.php). See also Bonnie E. Carlson & Alissa Politz Worden, *Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey*, 20 J. INTERPERSONAL VIOLENCE 1197, 1206 (2005), available at [www.ncbi.nlm.nih.gov/pubmed/16162487](http://www.ncbi.nlm.nih.gov/pubmed/16162487) (“Most [of 1,200 phone call] respondents think about the causes of violence in the context of individual problems, relationships, and families, not as a problem with roots in our society or culture. Few believe that women are the cause of their own

abuse; one fourth still believe that some women want to be abused, and most believe that women can end abusive relationships.”); Myrna S. Raeder, *The Better Way: The Role of Batterers’ Profiles and Expert ‘Social Framework’ Background in Cases Implicating Domestic Violence*, 68 UNIV. COLO. L. REV. 147, 182-83 (1997); Charles Patrick Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myths*, 2 J. FAMILY VIOLENCE 257 (1987), available at [link.springer.com/article/10.1007%2FBF00976543](http://link.springer.com/article/10.1007%2FBF00976543).

13. The purpose of such a conversation should include weighing the pros and cons of offering any expert testimony at all. A litigating attorney who is well versed in the dynamics of domestic violence may choose to forgo offering expert testimony and simply handle domestic violence education via witness testimony, in voir dire, in summation, and, as appropriate, throughout a trial or hearing. Another option is for the attorney to employ an expert as a pretrial consultant or as one who may be present throughout case preparation and court proceedings but have no role as a potential witness. Regardless of whether expert testimony is to be offered in a civil or criminal case, the expert, as witness, consultant, or both, will be of most use to the court when contacted by the attorney at the outset of the proceedings and consulted regularly throughout the matter. The expert can provide assistance, for example, in fleshing out the theory of the case, pursuing new avenues of investigation and new witnesses, verifying foundational grounds for the expert’s testimony, offering voir dire questions, and assisting with lines of inquiry for witnesses.
14. See James H. Seckinger, *Presenting Expert Testimony*, 15 AM. J. TRIAL ADVOCACY 215, 251 (1991), available at [scholarship.law.nd.edu/law\\_faculty\\_scholarship/12](http://scholarship.law.nd.edu/law_faculty_scholarship/12).
15. *Id.* at 251-53.
16. *Id.* at 253.



**[M]any myths and misunderstandings exist that can alter how the trier of fact perceives testimony concerning acts of coercive control . . . .**

**EVOLUTION OF THE DYNAMICS OF DOMESTIC VIOLENCE IN THE COURTROOM**

Until about 50 years ago, what happened between intimate partners behind closed doors was considered a private matter. This dangerous attitude gradually has yielded to empirical reality.<sup>17</sup> In 1964, the first battered women's shelter in the United States opened its doors.<sup>18</sup> In the 1970s, social workers, psychologists, healthcare workers, and all man-

ner of professional caregivers and researchers began identifying, analyzing, and addressing what has since been labeled the "public health epidemic" of domestic violence.<sup>19</sup>

In 1979, psychologist Lenore Walker introduced the "battered woman syndrome" theory to describe the impact of domestic violence that she witnessed in the battered women she studied.<sup>20</sup> She used the "cycle of violence" concept to show how the domestic violence relationship evolved.<sup>21</sup> She adapted and advanced the concept of "learned helplessness" to explain why battered women in her study found it difficult to safely escape abusers.<sup>22</sup>

Nearly 40 years of research have confirmed that "battered woman syndrome" was just the beginning of our understanding of domestic violence (or "intimate partner violence," as it is frequently called).<sup>23</sup> We now know that battered woman syndrome, which is sometimes described as a subset of post-traumatic stress disorder, affects only some battered women.<sup>24</sup> The "cycle of violence" may reflect the initial but not necessarily the long-term experiences of many battered women, while "learned helplessness" is a term that has conjured much misinterpretation and taken decades to clarify.<sup>25</sup>

Often the legal system uses battered woman syndrome as a shorthand for explaining the dynamics of a battering relationship.<sup>26</sup> However, one of the shortcomings of using the term "battered woman syndrome" is that it simultaneously fails to encompass the batterer's grab bag of controlling behaviors and the victim's variety of responses to those behaviors. Decades of research and experience have resulted in conceptualizing "battering and its effects"<sup>27</sup> and "social framework evidence"<sup>28</sup> as better paradigms than any syndrome to explain intimate partner violence and abuse.<sup>29</sup>

Regardless of the words that are used to label or describe domestic violence, many myths and misunderstandings exist that can alter how the trier of fact perceives testimony concerning acts of coercive control, battering behaviors, and responses to intimate partner violence. A domestic violence

17. See Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Toward a New Understanding*, 19 FORDHAM URB. L.J. 567, 567-72 (1992) (describing the history of violence against women).
18. JILL DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN 12 (1998).
19. Melissa Jeltsen, *Joe Biden: Domestic Violence Is a 'Public Health Epidemic'*, THE HUFFINGTON POST, March 20, 2015, [http://www.huffingtonpost.com/2015/03/20/biden-domestic-violence-epidemic\\_n\\_6911820.html](http://www.huffingtonpost.com/2015/03/20/biden-domestic-violence-epidemic_n_6911820.html).
20. See LENORE E. WALKER, THE BATTERED WOMAN 42-70 (1979); see also LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (3d ed. 2013, originally published 1984).
21. *Id.* See also WALKER 2013, *supra* note 20, at 98-102 for the history of Walker's cycle of violence and more recent research.
22. WALKER 2013, *supra* note 20. For the history and Walker's updated analysis of learned helplessness in the context of domestic violence, see pages 69-84. The original term "learned helplessness" evolved as psychologist Martin Seligman's theory to explain the results of experiments in which dogs were subjected to electric shocks at random intervals and, over time, did not act aggressively to avoid those shocks, even when escape routes were possible. See MARTIN SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH 21-24 (1975).
23. "Domestic violence" is a process whereby a dating partner, intimate partner, spouse, or ex-partner uses emotional, psychological, physical, sexual, or economic abuse to exert power and control over the other person. Domestic violence is also called intimate-partner violence. Regardless of which term is used, it is characterized by a malevolent course of coercive control where one person dominates the other through intimidation, isolation, violence, and other abuse. Both definitions are useful; the second helps clarify how the key motivating element of the abuse—control—is orchestrated. Domestic violence is similarly described by SUSAN

- SCHECHTER & JEFFREY L. EDLESON, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999). For Colorado's statutory definitions, see CRS § 18-6-800.3(1) (criminal) and CRS § 13-14-101 (2) (domestic relations). See generally EVAN STARK, COERCIVE CONTROL (2007). Throughout this article, as in much of the literature on point, "domestic violence," "intimate partner violence," and "battering" are used interchangeably.
24. Prevalence studies of battered women have found rates of post-traumatic stress disorder ranging from 31% to 84%. NIJ REPORT, *supra* note 8, at 19.
25. *Id.* at 6-7, 18. Battered women are not *per se* helpless; in fact, many are savvy survivors who have jobs and income of their own and a level of independence that belies an overbroad categorization of their behavior as "learned helplessness." See generally Kathleen J. Ferrara & Noël Bridget Busch-Armendariz, *The Use of Expert Testimony in Intimate Partner Violence*, VAWnet, Aug. 2009, [http://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_ExpertTestimony.pdf](http://vawnet.org/sites/default/files/materials/files/2016-09/AR_ExpertTestimony.pdf).
26. NIJ REPORT, *supra* note 8, at i-ii.
27. "With respect to validity, a review of the research literature concluded that expert testimony on battering and its effects can be supported by an extensive body of scientific and clinical knowledge about the dynamics of domestic violence and traumatic stress reactions." NIJ REPORT, *supra* note 8, at ii.
28. *Id.* at 21. Social framework evidence derives from social science research that provides a social and psychological context in which the trier of fact can understand and evaluate claims about the ultimate fact. See also Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 32 LAW & CONTEMP. PROBS. 133 (1989), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1874&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1874&context=faculty_scholarship).
29. NIJ REPORT, *supra* note 8, at 20-21.

expert witness is best suited to explain battering and its effects and can identify and dispel common misunderstandings. Conversely, without the assistance of an expert, the fact-finder might misconstrue abusive acts to be benign, myths to be reality, and a victim's responses to be unreasonable.

## GENERIC DOMESTIC VIOLENCE AND "MYTH-BUSTING" INFORMATION

On direct examination, short questions and clear answers should be used to educate the jury about domestic violence and the misconceptions that many people harbor concerning battering and its effects. While no list of substantive topics is exhaustive, the following are common direct examination areas of inquiry in domestic violence cases:<sup>30</sup>

- state who retained the expert and what the fee is;
- state whether the expert knows or met with any witnesses;
- describe what the expert has done to prepare for this trial;
- define domestic violence;<sup>31</sup>
- define intimate partner violence;<sup>32</sup>
- provide statistics that highlight the impact of domestic violence on American society (see sidebar entitled "Domestic Violence by the Numbers");
- explain why domestic violence is called a "process";

- define battered woman syndrome;<sup>33</sup>
- define battering and its effects;<sup>34</sup>
- define social framework evidence;<sup>35</sup>
- explain common myths or misconceptions many people have about domestic violence (see sidebar entitled "Misconceptions about Domestic Violence");
- explain why batterers abuse;<sup>36</sup>
- explain what the research states about how batterers generally act;
- explain how victims generally act;<sup>37</sup>
- explain how the "process" of domestic violence starts and proceeds by using a visual of the cycle of violence, explaining the concept's origin, value, and limitations for use;<sup>38</sup>
- describe methods abusers employ to control their victims (e.g., by using the Power and Control Wheel after explaining its origin and highlighting relevant sections of quadrants as pre-arranged with counsel);<sup>39</sup>

**On direct examination, short questions and clear answers should be used to educate the jury about domestic violence and the misconceptions that many people harbor . . . .**

30. The author has testified in numerous domestic relations and criminal cases, and the listed "bulleted" questions have always been held admissible. Sample transcripts are on file with the author.

31. See SCHECHTER & EDELSON, *supra* note 23.

32. *Id.*

33. NIJ REPORT, *supra* note 8. See *United States v. Johnson*, 956 F.2d 894, 899 (9th Cir. 1992) (*rev'd* on grounds unrelated to battered woman syndrome, *United States v. Martinez-Martinez*, 369 F.3d 1076 (9th Cir. 2004)). Current clinical and technical knowledge about the dynamics of domestic violence suggests augmenting and updating past research via the analysis of battering and its effects on the victim as well as the role played by social framework evidence.

34. Explaining the way batterers abuse their victims and the effects that the battering produces can help in parsing and understanding the myriad large and small types of coercive control batterers exert, along with battered women's responses, behaviors, and thought processes.

35. Developing an understanding of the victim's social framework requires an exploration of options and limitations placed on her from sources beyond the batterer. The social framework may include shelters, the justice system, a personal support network, as well as a victim's upbringing, education, economic stability, mental and physical health, religious and cultural tradition, and so on. These framework elements can help or hinder a domestic violence victim and, therefore, are relevant in determining why she does what she does, which can sometimes seem incongruous. The expert is able to connect the social framework dots and provide research-validated theories that explain victim behaviors as rational responses to otherwise irrational situations.

36. There is no consistent clinical agreement about why men batter. Many studies suggest that learned behavior is a common factor and that they do it because they can and because it provides them the sense of control that they seek. See WALKER 2013, *supra* note

20, at 114; see generally LUNDY BANCROFT, *WHY DOES HE DO THAT?* 38 (2002).

37. "Battered women do not fit a singular profile." Cheryl A. Terrance et al., *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 944 (2012) (citing Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993)).

38. A "cycle of violence" visual is useful in explaining how violent relationships often begin. See *The Cycle of Violence*, BUILDING FUTURES FREE FROM HOMELESSNESS AND FAMILY VIOLENCE, [www.bfvc.org/pdf/Cycle%20of%20Violence.pdf](http://www.bfvc.org/pdf/Cycle%20of%20Violence.pdf). Almost always there is a pleasant courtship phase. Usually what follows is a "tension-building phase" when little insults, put-downs, and psychological abuse create a sense in the victim that she is walking on eggshells. The next phase is the "acute incident of battering" phase, when a push, a slap, or some other type of more seriously abusive behavior punctuates the tension and sends a clear message of domination to the victim. After this first episode, the batterer often tries to make amends, to "make-up" and calm things down; this is sometimes called "the honeymoon phase." Time passes, and the cycle may repeat itself. After any number of cycles, the honeymoon phase may flatten into simply a "lull in the hostilities." For many women in domestic violence shelters, their lives before their entry had become less cyclical than flat-lined realities of ongoing anxiety, abuse, and violence.

39. The Power and Control Wheel gives examples of typical batterer manipulation and abuse within the "spokes." The "hub" around which they are all connected is the batterer's goal of power and control. Keeping all the pieces in play is the "rim" of sexual and physical violence. See *Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROJECT, [www.theduluthmodel.org/training/wheels.html](http://www.theduluthmodel.org/training/wheels.html).

## DOMESTIC VIOLENCE BY THE NUMBERS

**3.3 million:** Estimated number of children in the United States each year who witness violence against their mother or female caretaker by a family member.

**40-60:** Percentage of men who abuse women who also abuse children.

**1 in 5:** Number of teenage girls who said they have been in a relationship where the boyfriend threatened violence or self-harm if a breakup was to occur.

**90-95:** Percentage of domestic violence victims who are women.

**175,000:** Number of workdays American employees miss each year due to domestic violence.

**40-70:** Percentage of female murder victims in the United States who were killed by their husbands or boyfriends, often within an ongoing abusive relationship.

Source: These statistics were accessed from domesticshelters.org, at [www.domesticshelters.org/domestic-violence-articles-information/faq/domestic-violence-statistics#.VO0Jha\\_mqUk](http://www.domesticshelters.org/domestic-violence-articles-information/faq/domestic-violence-statistics#.VO0Jha_mqUk)

- define intermittent reinforcement;<sup>40</sup>
- define learned helplessness;<sup>41</sup>
- explain the Stockholm Syndrome (or the Hostage Syndrome);<sup>42</sup>
- explain the significance of an escalation in or change in the type of abuse;
- explain the term “lethality assessment”;<sup>43</sup>
- explain what fatality review boards are;
- name commonly accepted high-risk or lethality factors;<sup>44</sup>
- address why a battered woman doesn’t leave.<sup>45</sup>

## EXPLANATIONS THAT ARE PARTICULAR TO THE CASE AT BAR

In addition to testifying about myths and general domestic violence information, experts can help fact-finders understand certain dynamics of domestic violence that are particular to a given case by explaining:

- why a victim of domestic violence might tell law enforcement or healthcare professionals how she received the fresh bruise on her cheek and then later refuse to testify;<sup>46</sup>
- why she may recant what she said at the time of the abuse;<sup>47</sup>
- why she may change or minimize what she said at the time of the abuse;<sup>48</sup>
- why she might blame herself for provoking whatever violence occurred;

40. Intermittent reinforcement occurs when there is repeated unpredictable positive and negative reinforcement of behaviors, which then erodes a victim’s self-confidence, encourages traumatic bonding, and fosters her inability to predict the outcome of her actions. See generally Hanson, *supra* note 2.

41. The battered woman can become so worn down by the abuse and by its nature of intermittent reinforcement that she can no longer perceive—she has learned that she is helpless to perceive—that her actions will have a particular outcome. These women can be helpless to perceive safe alternatives. See WALKER, *supra* note 20. Alternatively, the battered woman’s passivity may be an actual coping mechanism that minimizes her risk, which suggests she is not helpless regardless of how she may appear. See Mary Ann Dutton, *Update of the “Battered Woman Syndrome” Critique*, VAWNET, Aug. 2009, [http://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_BWSCritique.pdf](http://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf).

42. See STARK, *supra* note 23, at 335-36. The Stockholm Syndrome refers to the type of bonding that occurred in Sweden when a bank was robbed and the hostages that were taken, after being with their captors for several days, all sympathized with the captors’ cause and did not want them to be punished. See also BESSEL VAN DER KOLK, *THE BODY KEEPS SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 135 (2014) (“Hostages have put up bail for their captors, expressed a wish to marry them, or had sexual relations with them; victims of domestic violence often cover up for their abusers.”).

43. Lethality assessment is a means by which domestic violence victims and the systems that try to end domestic violence look to the past to enhance awareness of the potential for future dangerousness. The goal of lethality assessment is to document and explain high-risk factors that have been co-extensive with an increased probability of serious or lethal domestic violence. See Neil Websdale, *Lethality Assessment Tools: A Critical Analysis*, VAWNET, Feb.

2000, <http://community.iaclea.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d5e56abb-ef1a-4d25-95d3-e749e0fd428d>.

44. See *id.* These include: (1) recent escalation or change in type of domestic violence; (2) prior history of domestic violence, especially choking or strangulation; (3) leaving a violent relationship; (4) obsessive-possessiveness; (5) prior police involvement; (6) threats to kill; (7) access to/use of weapons (especially guns); (8) significant substance abuse; (9) batterer’s acute perception of betrayal; (10) prior criminal history of the batterer; (11) mental illness of the batterer; (12) batterer’s suicidal ideation; (13) the victim’s perception. See also Jacquelyn C. Campbell, *Danger Assessment* (2003), [www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf](http://www.dangerassessment.org/uploads/pdf/DAEnglish2010.pdf); Janet A. Johnson et al., *Death by Intimacy: Risk Factors for Domestic Violence*, 20 PACE L. REV. 263 (2000).

45. See Sarah M. Buel, *Fifty Obstacles to Leaving*, a.k.a., *Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19. A dozen categories under which many others fall are: fear, love, children, finances, traumatic bonding, culture, religion, embarrassment, low self-esteem, isolation, medical dependency, and “crazy-making” by the batterer (a term used to describe the batterer’s attempts to confuse the victim by offering contradictory statements to make her think she is losing her mind and must simply depend on him and do what he tells her to do). “Separation assault” is so common that the term has been coined to highlight how dangerous the act of leaving can be. Separation assault is the attack on a victim’s body and volition by which the batterer seeks to prevent her from leaving, retaliate and punish her for the separation, and/or force her to return. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991).

46. See *People v. Wallin*, 167 P.3d 183, 188 (Colo. App. 2007).

47. *Id.*; *Lafferty*, 9 P.3d at 1134-36.

48. *Wallin*, 167 P.3d at 188; *Johnson*, 74 P.3d at 353.

- why she might not want to involve the police or government systems;
- how sexual violence affects an intimate partner (as opposed to a stranger);
- why she may not recognize sexual assault by her husband as a crime or a problem, or even something she will agree to talk about;<sup>49</sup>
- the meaning of otherwise seemingly benign comments, looks, or actions by the batterer that, when explained in context, are subtle but real threats to the victim;
- the role of the victim's financial and economic dependence on her abuser;
- how the threat of removal of the victim's children can control her behavior;
- the effects of immigration concerns;
- the limitations created by a victim's ethnicity, religion, culture, and language;
- the victim's reactions to the batterer threatening or attempting suicide if the victim leaves;
- case-focused lethality factors and the meaning of changes in abuse patterns;
- the impact of real or implied threats against, or violence toward, the victim's children, extended family, or pets;
- why a domestic violence victim might sense that her batterer intends to seriously injure or kill her even before he takes any action;
- why a battered woman defendant charged with killing her abuser might say it was all her fault, even if she acted in self-defense;
- how a domestic violence victim might experience duress from her abuser that she is helpless to resist.

#### **TYPES OF CASES WHERE DOMESTIC VIOLENCE TESTIMONY CAN BE HELPFUL**

This section does not attempt to present an exhaustive list of the myriad types of situations in which a domestic violence expert might be used. The list of possible uses of an expert is as endless as the list of ways by which an abuser can attempt to harm a victim.

This section canvasses some of the most common uses of a qualified domestic violence expert, whether as a witness at trial or a non-witness trial consultant. Some cases can include one domestic violence expert, while others might employ both a case-specific expert—for example to testify about a post-traumatic stress diagnosis of a client—and a general domestic violence expert to explain myths about domestic violence that could taint the fact-finder's view of the facts.

#### **DOMESTIC RELATIONS AND CIVIL CASES**

It is not uncommon for marital disputes to include allega-

tions of mistreatment, sometimes encompassing the children. A domestic violence expert may be called on to testify at proceedings for protection orders, temporary orders, permanent orders, allocation of parental responsibilities, and in all manner of domestic relations cases.

Experts can describe approaches adults sometimes employ to protect children, approaches that may not at first blush seem protective in nature. If, for example, a mother yells harshly at her young son for misbehaving and sends him to bed without dinner, it may be to avoid what the mother knows from experience the father will do if left to his own devices: whip the boy with a belt. An expert could also explain the impact of emotional abuse, the “silent treatment,” requiring the child to beg for money for the abused parent, using the child as a “mole” to continue to exert power and control over a divorced spouse, and how the abuse of a parent impacts the psyche of a child.

Expert witnesses also testify in tort actions, contract cases, clemency actions, and at different types of civil hearings, such as administrative, immigration, and student disciplinary proceedings.

#### **CRIMINAL CASES**

Use of domestic violence expert witnesses in the prosecution of batterers and in the defense of battered women is no longer novel.

In the prosecution context, domestic violence experts testify in cases involving murder, assault, and all forms of violent behavior, kidnapping of the victim or children, theft, stalking, and criminal mischief, when the objective is to harass or harm the victim.<sup>50</sup> For example, in a case where a batterer charged with murdering his partner tries to blame the victim, the expert offering general testimony could explain battering and its effects to help the jury understand the victim's behavior leading up to the homicide.

An expert can explain evidence of battering that could inform a plea offer; suggest reasons for a victim's ambivalent behavior so that the prosecution could argue for appropriate bail in a domestic violence case that fortuitously resulted in no injuries; or help the fact-finder evaluate a victim's refusal to testify if such a victim is isolated, disabled, and dependent on her batterer for medical assistance.

Probably the most frequent use of expert witnesses by the defense is where the battered woman has fought back and injured or killed her abuser and asserts self-defense.<sup>51</sup> The

**This section  
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49. In 1988, Colorado enacted legislation barring the use of a “marital defense” in sexual assault cases (unless otherwise specified in the elements of an offense). See CRS § 18-3-409.

50. See, e.g., *People v. Ruibal*, 2015 COA 55 (*cert. granted* as to the testimony of the forensic pathologist); see also *People v. Lafferty*, 9 P.3d 1132; *People v. Johnson*, 74 P.3d 349.

51. See *People v. Yaklich*, 833 P.2d 758, 761 (Colo. App. 1991)

(approving in general battered woman expert evidence of the “cycle of violence” and “how a battering relationship generates different perspectives of danger, imminence, and necessary force” in support of a defense theory of self-defense, but holding, in this murder-for-hire case, that self-defense was not an available option to the defendant).

**An expert in a field of specialized knowledge like domestic violence . . . has an obligation to stay current in the field.**

“sleeping victim” homicide is one variety of such cases.<sup>52</sup> The domestic violence expert can be used to explain how a history of battering and certain types of threatening behaviors can announce to a victim that deadly physical force is imminent. Other defense uses include an explanation of the impact of a batterer’s duress on

a domestic violence victim and why a victim may commit a crime because she has been coerced to do so by her batterer.<sup>53</sup>

A domestic violence expert also can be useful in submitting sentencing memoranda and parole letters.

**CREDENTIALS/QUALIFICATIONS THAT THE COURT SHOULD LOOK FOR, AND LAYING THE PROPER FOUNDATION FOR DOMESTIC VIOLENCE EXPERT TESTIMONY**

Regardless of whether the domestic violence expert witness is providing expert testimony as a profession, as a part-time job, or only infrequently, education about domestic violence to courts, attorneys, jurors, and others should be the expert’s passionate pursuit—and the expert’s experience and knowledge should demonstrate that passion. An expert in a field of specialized knowledge like domestic violence, which encompasses behavioral, legal, medical, cultural, sociological, psychological, and other dynamics, has an obligation to stay current in the field. At its core, specialized knowledge presupposes ongoing critical reevaluation.<sup>54</sup>

There is no college degree or any education required by the courts to be qualified as a domestic violence expert, and there is no formal ethical code for domestic violence expert witnesses as there is for attorneys. But expertise in any endeavor requires both ongoing training and specialized familiarity with the topic. If domestic violence experts do not possess relevant and cur-

rently valid intimate partner violence information, their credibility suffers, as does the testimony and assistance that they provide. For example, in-service trainings and advocacy with hundreds of rural Colorado clients may equip a shelter advocate to testify about general domestic violence myths but may not prepare this expert to testify about the unusual cultural aspects of the sexual abuse of a monolingual Vietnamese wife.

The legal criteria that a court uses to decide whether to endorse experts is arguably different from the criteria that domestic violence experts should require of themselves before taking the stand and opining on intimate partner violence.<sup>55</sup> While years of victim advocacy may prove adequate for qualification, keeping abreast of advances in the field of intimate-partner-violence research should be part of the tool kit every domestic violence expert brings into the courtroom.<sup>56</sup>

**WHO IS QUALIFIED TO BE A DOMESTIC VIOLENCE EXPERT?**

Rule 702 of the Colorado Rules of Evidence states that, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”<sup>57</sup> It is the job of the qualified domestic violence expert witness to provide specialized knowledge useful in assisting the trier of fact to dispel misconceptions about intimate partner violence and to assist the trier of fact to understand the evidence and determine facts at issue.

A domestic violence expert may be, for example, an advocate at a domestic violence shelter, a mental healthcare provider, a domestic violence educator, or an attorney who has specialized knowledge in this field.<sup>58</sup> There is no requirement for any type of degree, license, or certification process. Rather, the sole standard that the expert must meet is that he or she has “scientific, technical or other specialized knowledge” that will “assist the trier of fact.”<sup>59</sup>

52. See *id.* at 762 for cases illustrating the divergence in how courts have resolved whether self-defense is available to battered women defendants who have killed their abusers during a lull in the violence.

53. Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much*, 22 BERKELEY J. GENDER L. & JUST. 2 (2013).

54. See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

55. See Andrew W. Jurs, *The Gatekeeper’s Toolbox: A Survey on Judicial Handling of Expert-Reliability Motions*, 51 CT. REV. 8 (2014) (indicating that, since *Daubert*, in many cases reliability standards had tightened). In Colorado, for a domestic violence advocate to claim a confidential relationship with domestic violence clients, the advocate must satisfy a statutory requirement to undergo 15 hours of domestic violence training. CRS § 13-90-107. Many advocates all over the United States, however, benefit from regular exposure to inter- and intra-agency domestic violence trainings as well as intimate partner violence state and local conferences.

56. As a pragmatic matter, experts will find their trial experience more satisfying and less subject to a crushing cross-examination if they are prepared to answer questions, for example, about “parental alienation syndrome” or “situational couple violence” or any of

the other developments in relevant social science literature that touch on or deal directly with intimate partner violence. This heightened level of readiness to testify is partly the function of the expert’s responsibility to seek out continuing domestic violence education and training and partly the function of quality witness preparation by the examining attorney. For a discussion of parental alienation syndrome and domestic violence, see, e.g., LUNDY BANCROFT ET AL., *THE BATTERER AS PARENT* 134-37 (2002), and *Parental Alienation Syndrome: Debunked, Disproven, and Dangerous Theory*, PARENTS UNITED FOR CHANGE, [parentsunitedforchange.com/uploads/Parental\\_Alienation\\_Syndrome.pdf](http://parentsunitedforchange.com/uploads/Parental_Alienation_Syndrome.pdf) (citing multiple sources through 2013). Two recommended sources for learning about situational couple violence are: MICHAEL JOHNSON, *A TYPOLOGY OF DOMESTIC VIOLENCE* (2008), and Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?* 12 J. CHILD CUSTODY 4 (2015).

57. Colo. R. Evid. 702.

58. See, e.g., *Huntoon v. TCI Cablevision of Colorado*, 969 P.2d 681 (Colo. 1998), for examples of Colorado’s broad approach to admission of expert witness testimony.

59. Colo. R. Evid. 702.

The Colorado Supreme Court in *People v. Shreck*<sup>60</sup> provided the following criteria for courts to use in applying the Rule 702 standard: “(1) the scientific principles at issue are reasonably reliable, (2) the witness is qualified to opine on such principles, and (3) the testimony will be useful to the jury.”<sup>61</sup> Additionally, the probative value may not be outweighed by the danger of unfair prejudice or the other trial concerns of Rule 403.<sup>62</sup> “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>63</sup>

“An abuse of discretion does not occur [in determining the admissibility of expert testimony] unless the trial court’s ruling is manifestly arbitrary, unreasonable, or unfair.”<sup>64</sup> The court is given broad discretion in determining who meets this standard and must make its findings on the record.<sup>65</sup>

#### WHAT TOPIC AREAS MUST THE EXPERT BE ABLE TO ADDRESS?

In preparing to testify, the domestic violence expert and retaining counsel should discuss discovery rules and decide how their communications will be handled. Requirements for discovery are statutory; for example, if a domestic violence expert is retained by the prosecution, the prosecuting attorney must make available to the defense “any reports or statements of experts made in connection with the particular case.”<sup>66</sup>

To benefit most from the attorney/expert relationship, counsel should seek the assistance of the domestic violence expert in creating a detailed set of questions and answers (Q&A) that the expert and the attorney determine are relevant to domestic violence generally and to the issues in their case specifically. Some questions (e.g., concerning necessary expert witness qualifications and definitions of critical domestic violence terms) will be standard because they apply to most, if not all, domestic violence cases. Other questions obviously need to be targeted to address the facts of a particular case. Usually, experts provide their qualifications at the beginning of their testimony.

#### PEDIGREE AND ENDORSEMENT DETAILS

As part of standard trial preparation, the attorney and expert should carefully lay out, topic by topic and question by question, how the expert’s domestic violence pedigree and endorsement references will be presented. Once a legal foundation of the reason for the need for expert testimony is estab-

lished for the court (e.g., to explain why a battered woman stays with a partner who abuses her), Colorado courts are generally receptive to domestic violence expert evidence and will consider the qualifications of the proposed expert.<sup>67</sup>

Based on anecdotal data, it seems that courts give great weight to experiential expertise, especially expertise gained from years of working with battered women. Problems, however, can arise if an expert has only minimal training. Such an expert becomes susceptible to undermining cross-examination into his or her limited knowledge of state-of-the-art interpersonal violence social science advances.

Library shelves contain hundreds of domestic violence books and treatises, and the Internet is filled with constantly evolving research about intimate partner violence. Therefore, an “expert” who, for example, relies on an outdated 1979 book as a source<sup>68</sup> should no more be deemed a domestic violence expert than a physician who relies on a 1979 book as a primary source of information. Updating and keeping current are hallmarks of reliable expertise in any field.

Similarly, an attorney who hires an expert with excellent educational credentials but who has never assisted domestic violence victims may find that this expert is unable to “tell it like it is” and simply parrots information found in books. Counsel may also encounter problems in qualifying such an “ivory tower” expert.

Every domestic violence expert’s initial courtroom challenge is to prove his or her unique expertise to the fact-finder judge or jury. By the time the expert has finished explaining his or her qualifications to the jury, the jury should feel comfortable suspending popular preconceptions and allowing this expert to lead the way to a new understanding of what battering really means.

Jurors who are impressed by the expert’s experience and training are more likely to be impressed by the expert’s testimony. While this may sound obvious, it is worth mentioning

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60. *Shreck*, 22 P.3d at 69.

61. *Id.* See also *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007) (“Admissible testimony must be grounded in ‘the methods and procedures of science rather than subjective belief or unsupported speculation.’”) (citing *Gallegos v. Swift & Co.*, 237 F.R.D. 633, 639 (D. Colo. 2006)).

62. See *Shreck*, 22 P.3d at 79; *Masters v. People*, 58 P.3d 979, 989 (Colo. 2002) (no single test can be applied to the multitude of potential areas of expert testimony).

63. Colo. R. Evid. 403.

64. *Wallin*, 167 P.3d at 187 (quoting *Johnson*, 74 P.3d at 352).

65. *People v. Williams*, 790 P.2d 796 (Colo. 1990); *Estate of Ford v. Eicher*, 250 P.3d 262, 266 (Colo. 2011).

66. See Colo. R. Crim. P. 16 (1)(A)(I & III). Relevant defense discovery requirements are outlined in Colo. R. Crim. P. 16 (1)(e)(2)(c). Civil discovery concerning general domestic violence experts is governed by Colo. R. Crim. P. 26 (a)(2).

67. See, e.g., *Lafferty*, 9 P.3d at 1134-36; *Johnson*, 74 P.3d at 353.

68. This occurred in an unreported felony case in Colorado in 2015. The expert’s source was Walker’s 1979 book, *The Battered Woman*, *supra* note 20, which was cited without reference to changes in Walker’s updated books, the last being *The Battered Woman Syndrome*, *supra* note 20. The proposed expert was qualified by the court over the defense attorney’s objection. (Source information is on file with the author.)

**[T]he attorney should pay attention to anything unusual in the expert's background and especially what qualifications are closely related to the issues in the case.**

because, in many cases, counsel will stipulate to the admission of an expert. This is a mistake. Especially in a jury trial, it is unwise to waive any part of qualifying the domestic violence expert witness. Such a waiver squanders the expert's clear path to grabbing the attention and, more important, to earning the support of jurors who *want* to be impressed and enlightened.

If the court urges the examining counsel to accept opposing counsel's stipulation on

qualifications, the examining counsel might urge the court to include in the stipulation not only qualifications but also credibility. While such a stipulation may not be agreed to, it focuses the court on why qualifications are critical for the trier of fact to hear. If respect for the court indicates it is wise to stipulate to the expert's qualifications, on summation the examining attorney benefits by being able to argue that even opposing counsel accepted the qualifications of the expert.<sup>69</sup> In such a case, if the court halts qualification questioning, experts should be prepared to insert their relevant qualifications, as appropriate, during their substantive testimony.

Before any court proceeding, when preparing qualifying questions for the expert, the attorney should pay attention to anything unusual in the expert's background and especially what qualifications are closely related to the issues in the case.

In broad brush strokes, these endorsement categories include but are not limited to:

- name, business address, and field of expertise;
- current and past employment information, dates, and responsibilities;
- number of victims assisted by the witness;
- number of victims assisted by staff that the witness has supervised;
- formal education, especially as related to domestic violence;
- trainings and conferences attended;
- relevant courses taught by the expert;
- professional licenses, certifications, and affiliations;
- familiarity with the body of domestic violence literature;
- how the witness's testimony draws from scholarly research and client assistance;
- previous expert testimony;
- personal research on domestic violence, battered woman syndrome, battering and its effects, and social framework evidence;
- whether the testimony the witness will be providing is accepted as reliable by the domestic violence research community.

When the witness has testified to his or her credentials and expertise, the attorney will tender the witness as a domestic violence expert. The expert should not be offered as a "battered woman syndrome expert" (unless the expert is a psychologist, mental health expert, or medical professional whose credentials support the provision of a medical diagnosis and the evidence being offered is framed as mental health evidence of, e.g., post-traumatic stress disorder). This expert should, however, be able to explain that battered woman syndrome is not a diagnosis but rather a constellation of emotional, psychological, and physical responses to domestic violence. Once formally accepted as an expert by the court, the expert can begin the substantive part of the testimony.

For attorneys looking to question a potential expert during voir dire, the aforementioned list may also be helpful.

## FOUNDATIONS FOR ADMISSIBILITY

In some cases, an oral motion or simply an endorsement together with a curriculum vitae is sufficient, but in most cases where a domestic violence expert is offered, a foundation must be proffered via written motion to the court within the statutory time frame, and endorsement of a specific expert must be requested.<sup>70</sup> The motion should set forth the foundational areas the expert will testify about (e.g., the cycle of violence, recantation, minimization, common indicia of domestic violence, why domestic violence victims do not leave, lethality indicators, or the effects of domestic violence on children). The motion should also include case law and statutory support, the experiential and educational bases for qualifying the expert, and the expert's accompanying curriculum vitae.

## SUMMARY OF THE TESTIMONY OR OFFER OF PROOF

In a criminal matter, the prosecutor often will seek a list of the expert's sources and sometimes a Summary of the Testimony (unless, as in some places in metro Denver, the court allows the prosecutor's Notice of Expert Endorsement to obviate the need for a Summary). The defense generally requires a Summary of the Testimony from the domestic violence expert.

In domestic and civil cases, the expert is required to submit a written Report or an Offer of Proof. The Report or Offer of Proof is submitted to the court, and, in certain proceedings or jurisdictions (e.g., in Larimer County, Colorado, domestic relations temporary orders), a court may simply ask the domestic violence expert witness under oath if he or she agrees with what is contained in the Report or Offer of Proof. If so, that affirmation under oath will take the place of most direct examination questioning, and the opposing counsel may cross-examine the witness based on what is in the document.

The attorney who retains the expert, whether a prosecutor, defense attorney, domestic attorney, or civil attorney, should request a list of cases on which the expert has been retained to consult or testify, as well as contact information for the attorneys who have hired the expert. As part of discovery, this list should be exchanged along with the Summary of the Evidence,

69. See Seckinger, *supra* note 14.

70. See, e.g., Colo. R. Crim. P. 16; Colo. R. Crim. P. 26 (a)(2)(a-c);

Colo. R. Crim. P. 1973 § 16-5-203, as amended; Colo. R. Evid. 702.

Report, or Offer of Proof; the expert's curriculum vitae; a list of sources the expert is relying on in the case at bar; and any other materials prepared by the expert for the case.

## HOW DOMESTIC VIOLENCE EXPERT TESTIMONY IS CLASSIFIED: "GENERAL" AND "CASE-SPECIFIC" TESTIMONY

Expert testimony in domestic violence cases is often classified as either "general" or "case specific"; both types are permitted by CRE 702.<sup>71</sup> There are two main substantive differences between general and case-specific testimony: Experts hired to provide "general" testimony do not meet complaining witnesses, defendants, parties, or witnesses and do not provide diagnoses; experts who provide "case-specific" testimony meet with clients and sometimes witnesses and are permitted to provide diagnostic testimony.<sup>72</sup>

The case-specific expert has broad latitude to offer professional opinions, while carefully framed hypotheticals or "behavior-based" questions can be used to maximize the testimony of the general domestic violence expert in either civil or criminal cases. Testimony that addresses an ultimate issue is not automatically objectionable in a civil case,<sup>73</sup> but in criminal cases the expert must avoid offering an opinion on the mental state of the defendant or on an element of the crime charged or of a defense.<sup>74</sup>

## GENERAL TESTIMONY

The purpose of general expert testimony, which is the type the prosecution in Colorado offers most frequently, is to educate the jury about the general dynamics of domestic violence (e.g., the "power and control" concept) and common misconceptions that can cloud the truth (e.g., if domestic violence were truly severe and ongoing, a person would leave the relationship). The prosecution's preference for general testimony is aimed partly at thwarting a possible perception by the jury that most domestic violence experts—who often have a background of experience in battered women's shelters—favor women. This concern is based on the fact that most domestic violence prosecutions have female complainants and male defendants, and many domestic violence expert witnesses are females who testify primarily (or only) for the prosecution.<sup>75</sup>

If the experts have not spoken with witnesses, the experts can be viewed as providing accepted social science information only, not commentary on anything specific to the case that the jurors are deciding. Additionally, prosecutors sometimes

## MISCONCEPTIONS ABOUT DOMESTIC VIOLENCE

**Myth:** Batterers must be mentally ill.

**Fact:** "There is general agreement that men who batter do not have severe mental disorders."<sup>1</sup> "Their *value system* is unhealthy, not their psychology."<sup>2</sup>

**Myth:** It is safer for a battered woman to leave the abuser than to stay with him.

**Fact:** This can be a time of heightened risk; between 50% and 75% of battered women who are killed by their abusers are killed at the point of separation or after they have left.<sup>3</sup>

**Myth:** It can't have been as bad as she said it was because she wouldn't have stayed.

**Fact:** "Studies show that women seldom overestimate danger, but they DO underestimate."<sup>4</sup>

**Myth:** Substance abuse—alcohol or drug abuse—causes domestic violence.

**Fact:** Many addicts do not abuse, and many batterers do not drink or use drugs. While extreme addiction or a sudden change in substance abuse may signal a higher risk of lethal violence, this co-occurrence is not the root cause of the abuse.<sup>5</sup>

**Myth:** Women who stay with batterers are masochistic.

**Fact:** Research suggests that victims of domestic violence, like victims of other crimes such as car thefts, do not share a pathology of masochism.<sup>6</sup>

**Myth:** Women batter men just as much as men batter women.

**Fact:** This is false.<sup>7</sup> In fact, 95% of domestic violence is reported by women who are abused by their male partner. "Wives were about half of all spouses in 2002 but 81% of all persons killed by their spouse."<sup>8</sup> The analysis of this myth allows the expert to explain that validated studies over the past 40 years have consistently found that, even though most men are not abusers, 85% to 97% of batterers are male, and the vast majority of their victims are female.<sup>9</sup> This is not to say that a man cannot be a victim of domestic violence, only that it is not common, and male victims are often victims of male partners.

1. Daniel G. Saunders, *Batterers, Personality Characteristics of*, ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE 69-71 (2008), available at <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/90026/Saunders%20DG%202008%20-%20Personality%20Characteristics%20of%20Batterers%20Encycl%20IPV%20.pdf?sequence=117>. See generally RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* (1988) (reporting that mental illness accounts for only 10% of abusive incidents).

2. LUNDY BANCROFT, *WHY DOES HE DO THAT?* 38 (2002).

3. Jana Kasperkevic, *Private Violence*, THE GUARDIAN, October 20, 2014, available at [www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice](http://www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice).

4. Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 670 (2009), available at [file:///C:/Users/Robert/Downloads/The\\_Danger\\_Assessment\\_Validation\\_of\\_a\\_Lethality\\_Ri.pdf](file:///C:/Users/Robert/Downloads/The_Danger_Assessment_Validation_of_a_Lethality_Ri.pdf).

5. "Substance abuse, like mental illness, does not cause partner abuse but can increase the risk of violence." BANCROFT, *supra* note 2, at 103.

6. V.A. Moss, *Battered Women and the Myth of Masochism*, 29 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERV. 18 (1991).

7. See LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* (3d ed. 2013).

8. UNITED STATES DEPARTMENT OF JUSTICE, *FAMILY VIOLENCE STATISTICS 18* (2005), <https://www.bjs.gov/content/pub/pdf/fvs03.pdf>.

9. See, e.g., *Understanding Domestic Violence Abusers*, NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <http://www.opdv.ny.gov/professionals/abusers/genderandipv.html#dvandgender> (noting that "[a]bout 97% of abusers are men who have a female partner").

71. NIJ REPORT, *supra* note 8, at 38. See Anna Farber Conrad, *The Use of Victim Advocates and Expert Witnesses in Battered Women Cases*, COLO. LAW., Dec. 2001.

72. Cindene Pezzell, *Testifying as an Expert Witness: Understanding the Role of Experts and Different Legal Arenas*, NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN (webinar May 1, 2013), [http://ncdbw.org/experts\\_recordings.htm](http://ncdbw.org/experts_recordings.htm).

73. Colo. R. Evid. 704(a).

74. Colo. R. Evid. 704(b).

75. Experts who only testify for the prosecution open the door to cross-examination questions about their prosecutorial bias and professional objectivity.



**One of the shortcomings of testifying blind is that the expert cannot put the pieces of the specific puzzle together . . . .**

believe that expert testimony that has no basis in the facts of the case is less likely to trigger appellate issues because there is little risk that the witness will inappropriately express an opinion about whether the complainant is a victim of domestic violence, whether any part of her testimony is true, or whether an element of the crime has been established

by the expert's testimony.<sup>76</sup>

The common denominator of the "blind," "skeletal," and "document review" prosecution approaches is that the expert providing general testimony does not meet with the complainant or any witness.

### **BLIND TESTIMONY**

Blind testimony is a way to address concerns about bias. It is the narrowest presentation of testimony in which experts testify "blind," meaning they are told nothing about the facts of the case. Experts who testify blind usually do not review any case documents or other materials. The belief that a fact-finder will find a blind expert more unbiased than one who knows about the facts of the case is understandable but may not always be accurate. An effective way to minimize bias concerns is to select a domestic violence expert who testifies for both men and women, as well as for the prosecution and the defense.

### **THE SKELETAL APPROACH**

"Skeletal" information explaining why the expert is needed is part of the foundational details of a Notice of Endorsement. Conversations with Colorado prosecutors from different parts of the state indicate that domestic violence experts who provide general testimony are often given at least this "skeletal" understanding of the case's potential trial issues (e.g., recantation, minimization, language or immigration concerns, reasons for delayed reporting, role of alcohol or drugs, and why a victim of serious physical injury would testify for the abuser). These experts do not know the facts of the case, but they are not blind to the principal issues.

This type of general testimony can better prepare the expert to address the issues the defense has already learned about, while avoiding discovery and appellate worries about the expert vouching for the complaining witness. Because the defense and prosecution are privy to the issues, it makes little sense that the expert, hired to provide specialized knowledge, be blind to those issues.

### **DOCUMENT REVIEW**

Many prosecutors prefer that their domestic violence expert has knowledge of the relevant facts of the case and thus enable the expert to perform a document review of specific portions of the case file. The belief is that the expert who is blind to the

facts will not be as helpful as the expert who can see the issues clearly and in context.

A few examples highlight how document review by the expert can be useful to the trier of fact. What may appear to the layperson as normal behavior may be recognized by the expert as part of a pattern of coercive control. In the movie *Sleeping with the Enemy*,<sup>77</sup> for example, the husband compulsively required the towels be straightened. By itself, this behavior meant little; in the context of other evidence of manipulation and control, this fastidiousness became part of establishing the obsessive-possessive pattern of domestic violence that was the theme of the film.<sup>78</sup>

Alternatively, violence between intimates at first blush can look like domestic violence, but it might be motivated by goals other than power and control. The gambler husband who kills his wife may or may not simply want to inherit her estate, and the elderly woman who kills her ailing husband may or may not be a victim of caregiver fatigue rather than a perpetrator of domestic violence. One of the shortcomings of testifying blind is that the expert cannot put the pieces of the specific puzzle together if the expert cannot see them.

If, for example, an expert is to testify in a recanting-victim case where the victim does not speak English and came recently from a foreign country, it may be that domestic violence is not a crime in that country or, conversely, that domestic violence has a longer history of criminalization in the country of her origin than in the United States. In the former scenario, the expert would be able to say that a victim who grows up in a patriarchal society that devalues women is likely to be submissive and reluctant to "disobey" her husband; in the latter scenario, culture may have little or nothing to do with why a victim would recant.

In the case of a victim from a patriarchal society, the prosecutor can ask the expert if, for example, a specific behavior such as keeping silent about abuse is a type of behavior the expert has learned about or sees as consistent with the behavior of a battered woman from a repressive society. If the expert has had no previous experience with this category of victim, the expert will have the opportunity to research this point before trial. If the expert learns that a victim from this society who claimed domestic violence would have been jailed or killed by her family members for reporting abuse, this information is helpful to the jury in understanding why such a victim might keep silent.

The blind expert (or even the expert who has been given only skeletal information about the issues) would not know the victim's nationality and culture, might not be able to address these points on direct examination, and would likely be attacked on cross-examination by a defense attorney who had more information on the victim's background than the expert.

While in one case, the expert offering general domestic violence testimony may be able to testify competently without knowledge of the issues or the facts, in another case, the expert may need context and a clear understanding of the issues. The needs of each case should dictate the approach to be taken. In

76. Farber Conrad, *supra* note 71.

77. *SLEEPING WITH THE ENEMY* (Twentieth Century Fox 1990).

78. *Id.*

all cases, the expert should be afforded sufficient details from which to form an educated view of how social framework evidence can impact the issues.

### AN ADDITIONAL APPROACH

An expanded form of general testimony is often used by the defense in criminal cases and by attorneys in domestic relations and other civil cases. Here, the domestic violence expert, who is not in the healthcare profession and does not meet with any potential witness in the case, reviews much if not all of the attorney's file (that is not privileged or work product) and is thus able to discern which statements, acts, omissions, background data, cultural norms, family attitudes, religious constraints, financial pressures, and other social framework details are relevant to an analysis of battering and its effects in the case. The usefulness of the expert is increased proportionately with the expert's specialized knowledge of how the facts and circumstances relate to the dynamics of domestic violence.

With some exceptions for the case-specific expert who is providing a diagnosis, the domestic violence expert may not express an opinion as to whether a witness is being truthful.<sup>79</sup> The expert may not usurp the province of the trier of fact.

### CASE-SPECIFIC TESTIMONY

Classic case-specific testimony is offered by domestic violence experts who are qualified to render medical diagnoses. These experts are employed in domestic relations and criminal cases, often to evaluate a victim's possible post-traumatic stress disorder or other mental issues.

With case-specific testimony, the expert meets the victim, reads the file, sometimes becomes familiar with other parties to the proceeding, submits a report, and can render a medical opinion.<sup>80</sup> Healthcare professionals, psychologists, and psychiatrists provide this type of examination and testimony.

### THREE CASES, THREE VERDICTS

*Case #1:* The complainant, a tattooed 19-year-old goth, went to the police because her 25-year-old gang-member boyfriend had raped her the week before. He had been controlling and verbally abusive, but this sexual assault was the first time he had physically harmed her. At trial, the victim minimized the attack and framed it as rough sex, even though forensics and her initial statement supported a claim of rape.

How was the jury to decide what factors to consider in evaluating such minimization behavior, and how could the prosecution address a misconception that this situation was not intimate partner violence because there was not a pattern of violence? Finally, the prosecution had to dispel any misconception that rape is something strangers do, not intimate partners.

The prosecutor used a domestic violence expert to explain

to the jury that recantation, denial, and minimization of intimate partner violence are statistically validated victim behaviors in more than four-fifths of domestic violence prosecutions. The expert also explained that physical violence, such as sexual violence, can flow from emotional and psychological abuse and that rape is much more common between intimates or acquaintances than strangers.

The jury acquitted the defendant.<sup>81</sup>

*Case #2:* The defendant took the knife off the kitchen counter and stabbed her unarmed boyfriend once in the chest. As she ran to her neighbor's house to get help, her boyfriend died. She was charged with murder, and the matter was presented to the grand jury for indictment. Several witnesses testified that the deceased had beaten the defendant many times in the past; that there was a protection order against him and that the defendant had twice unsuccessfully called the police to come and arrest him; and that the defendant still bore the scars on her neck where he had tried to choke her during his recent sexual demands. The defendant had given a full confession, which the prosecutor shared with the grand jury.

But if the deceased had really been so violent for so long, how could anyone believe that this defendant would have stayed with him? If the defendant's description of her abuse was fabricated, then she must have killed the deceased in cold blood. Many jurors would have to wonder why a severely battered woman stays with her batterer.

The defendant did not appear before the grand jury. A domestic violence expert witness testified that batterers sometimes telegraph what they are going to do, and victims then may recognize an increased level of immediate dangerousness. If a batterer has attempted to choke a victim before as part of a sex act and clues her that this is what he wants to do again, she might sense what is coming. (In this case, the deceased would tell the defendant to go get into her "black teddy" when he wanted to engage in asphyxiation sex.) If she has had no success warding him off during an attack, if she has been nearly killed during the last attack, if she has had no luck with a non-responsive justice system, she could believe she must be proactive or risk imminent rape and worse.

The grand jury returned no true bill, and the case against the defendant was dismissed.<sup>82</sup>

**The prosecutor used a domestic violence expert to explain . . . that recantation, denial, and minimization . . . are statistically validated victim behaviors in more than four-fifths of . . . prosecutions.**

79. See *Lafferty*, 9 P3d at 1135 (an expert may not give opinion testimony about whether the victim is telling the truth on a specific occasion or vouch for the victim's credibility).

80. NIJ REPORT, *supra* note 8, at 21 ("Case-specific testimony, or conclusions about a particular battered woman, requires a face-to-face evaluation of the battered woman."). Concerning discovery in domestic relations cases that include mental health witnesses, see,

e.g., CPLR 16.2(e)(3).

81. Information about this 2013 Colorado case is on file with the author.

82. See Victoria Lutz & Cara M. Bonomolo, *The Battered Woman, Self-Defense, and the Grand Jury: Why the Jury Refused to Indict*, TRIAL, August 1996.

**Case #3:** A mother of four was charged with murder for running over and killing her husband. The facts of the incident were not in dispute. Directly before the homicide, the deceased, sitting next to the defendant as she drove, had been punching and slapping her face. He got out of the passenger's side of the car, walked around to the driver's side window, and started to punch her face again. Witnesses testified to this string of events and called 911 but did not intervene. Then he taunted the defendant, saying that she did not have the guts to hit him. As he faced her and began to walk toward their house, the defendant briefly accelerated, hitting and killing her husband. Her children testified to the father's decades-long abuse of their mother.

How could the jury decide if this was premeditated murder or whether someone in the defendant's situation, with her history of long-term and ongoing abuse, would see her husband's acts as a continuing course of conduct requiring an exercise of self-defense to avoid continuation of the beating as they entered their home?

An expert gave evidence about the impact of decades of battering, belittling, threats, and economic and psychological abuse on the behavior of a person in the defendant's situation and how this type of situation is similar to that of a hostage in the split second when the hostage has to choose fight or flight—and flight has never worked before.

The jury acquitted the defendant of murder and convicted her of criminally negligent homicide, which carried a much lower sentence.<sup>83</sup>

I was the attorney of record or the expert witness in the three cases above. I am sure that, in each case, the jury heard domestic violence myths debunked and incongruous information made understandable. I am sure that the verdicts were more justly rendered because of that information.

## CONCLUSION

This article has been an attempt to place the judiciary, attorneys, and experts on the same page to facilitate a communion of process and practice in using domestic violence experts. Domestic violence continues to be a plague on our communities. As judges balance impartiality, due process considerations, victims' rights, and the awareness that domestic violence can be a morass of contradictory signals, there is every reason to view domestic violence expert testimony as a boon to clarity and fairness in the courtroom.



*For most of her 38-year legal career, Vicki Lutz has worked to end sexual and domestic violence. Currently, she provides domestic violence expert counsel and testimony in civil and criminal cases throughout Colorado and performs annual grant review for the Department of Justice's Office on Violence Against Women. She is admitted to the Colorado and New York bars*

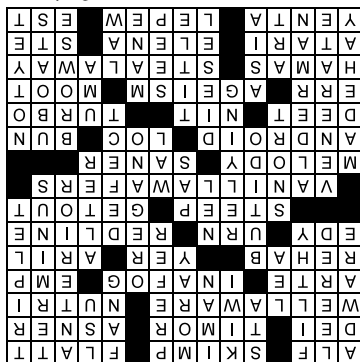
*and has been endorsed and qualified as an expert witness in many federal and state courts.*

*From 2004 to 2012, Ms. Lutz was the executive director of Colorado's Crossroads Safehouse, and during the decade prior to 2004 she held the same title at New York's Pace Women's Justice Center. She has been a law professor and has handled civil and criminal cases ranging from harassment to homicide. In addition to training thousands on gender violence issues in America, Canada, and Africa, she has authored more than 17 books or articles. She was on the faculty of the National Institute for Trial Advocacy (NITA) for six years and is the recipient of many honors. Under a 2012-2014 Colorado University grant, she was a statewide consultant for domestic violence programs, and, since 2016, she has taught "Interpersonal Violence Law and Public Policy" in CU's School of Public Affairs Master Program.*

83. Information about this 2015 Colorado case is on file with the author.

## Answers to Crossword

from page 42



The Resource Page continued from page 44.



## WEBSITES OF INTEREST

Several organizations maintain websites with useful resources on domestic violence. Here are some of the best:

**American Bar Association Commission on Domestic and Sexual Violence**  
<https://goo.gl/cciGwk>

**Building Futures with Women and Children**  
<https://goo.gl/OQUQ9E>

**Center for Court Innovation**

<http://courtinnovation.org>

**Domestic Abuse Intervention Programs (the home of the Duluth Model)**  
<http://theduluthmodel.org>

**National Center for State Courts**

<https://goo.gl/qhwZ9f>

**National Council of Juvenile and Family Court Judges**

<https://goo.gl/HEJgdv>

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# A Review of State Standards for Batterer Intervention Treatment Programs and the Colorado Model

Angela Gover & Tara Richards

**M**any states aiming to improve domestic-violence-offender treatment have passed legislative standards for Batterer Intervention Treatment (BIT). This article reviews existing literature in relation to state standards for BIT in general and Colorado's unique model for BIT specifically. In addition, existing research focused on the Colorado model's adherence to evidence-based practices and principles is discussed, and ongoing research that examines the relationship between the novel elements of the Colorado model and BIT completion and recidivism is explained.

## STATE STANDARDS FOR DOMESTIC-VIOLENCE-OFFENDER TREATMENT

There were few legal remedies available to victims of domestic violence before the 1970s.<sup>1</sup> Until that time, law-enforcement culture actively discouraged officers from inserting the law into private family matters.<sup>2</sup> In fact, law-enforcement training manuals explicitly indicated that arrest should be used as a last resort in cases of domestic violence.<sup>3</sup> Police officers' responses to domestic disputes often took the form of crisis mediation and encouragement to use informal resources, such as the extended family or the church. However, the 1980s saw a proliferation of mandatory arrest laws for domestic violence, which resulted in a corresponding surge in the arrest of "domestic-violence offenders" ("DV offenders") and the addition of these offenders to judicial dockets. Given the complicated nature of domestic violence (e.g., complexities around offender/victim cohabitation and co-parenting, hesitance in victim cooperation, desire to preserve the family unit), judges, in general, were reluctant to sentence these offenders to jail; instead, courts began to seek avenues for rehabilitation

through newly developed Batterer Intervention Treatment programs.<sup>4</sup> Although BIT programs were initially developed in the image of other types of treatment programs such as those focused on substance-abuse or mental-health problems,<sup>5</sup> it was realized that the treatment of domestic violence required a unique approach that recognized the complicated dynamics involved in domestic violence.

Today, the vast majority of convicted domestic-violence offenders are sentenced to complete BIT programs, with estimates indicating that upwards of 2.5 million American men attend BIT programs annually.<sup>6</sup> Given the increase in offenders attending BIT programs, the majority of U.S. states and the District of Columbia have adopted some form of official written standards to regulate BIT-program practices.<sup>7</sup> The purpose of establishing standards for BIT practices was to promote uniform modalities across programs and to prevent the use of strategies deemed harmful or controversial in cases of domestic violence, such as couples counseling or anger management.<sup>8</sup>

State standards often stipulate the minimum length of time offenders must attend a BIT program: statutes typically indicate that treatment must be "a minimum of XX weeks." For example, in most states, standards specify that BIT programs must be at least 24-26 weeks in length.<sup>9</sup> However, the minimum length of treatment varies widely, from 16 weeks in Alabama to 52 weeks in California. Furthermore, it has become common in nearly all states for judges to order offenders to the maximum number of weeks in treatment.<sup>10</sup> Thus, BIT programs have inherently become part of a "time-driven model" where all DV offenders in a state receive the same "one size fits all" treatment.

## Footnotes

1. Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, WIS. L. REV. 914 (1967).
2. JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE, PROMISES AND LIMITS*, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT (1996).
3. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *TRAINING KEY 16: HANDLING DISTURBANCE CALLS* (1967).
4. Ellen Pence, *Batterer Programs: Shifting from Community Collusion to Community Confrontation*, in *VIOLENCE AGAINST WOMEN: CLASSIC PAPERS* 388 (Raquel Kennedy Bergen, Jeffrey L. Edelson & Claire M. Renzetti eds., 1989).
5. *Id.*
6. Ashley L. Boal & Eric S. Mankowski, *Barriers to Compliance with Oregon Batterer Intervention Program Standards*, 29 *VIOLENCE & VICTIMS* 607 (2014).
7. Roland D. Maiuro & Jane A. Eberle, *State Standards for Domestic Violence Perpetrator Treatment: Current Status, Trends, and Recommendations*, 23 *VIOLENCE & VICTIMS* 133 (2008).
8. Michele Bograd & Fernando Mederos, *Battering and Couples Therapy: Universal Screening and Selection of Treatment Modality*, 25 *J. MARITAL & FAM. THERAPY* 291 (1999); Robert A. Geffner & Alan Rosenbaum, *Domestic Violence Offenders*, 5 *J. AGGRESSION, MALTREATMENT & TRAUMA* 1 (2001).
9. Juliet B. Austin & Juergen Dankwort, *Standards for Batterer Programs: A Review and Analysis*, 14 *J. INT'L VIOLENCE* 152 (1999).
10. Domestic Violence Offender Treatment Programs, compiled by the Arizona Supreme Court and the National Council of Juvenile and Family Court Judges (2015) (on file with authors).

Further, while nearly all states with BIT standards have delegated the oversight responsibility for BIT programming to a government agency, these bodies vary tremendously from state to state. For example, according to the Oregon statute, the Attorney General established a Batterer Intervention Program Advisory Board that developed, and now oversees, the state BIT standards. In Georgia, the Commission on Family Violence and the Department of Corrections crafted the standards, which are administered by the Georgia Department of Corrections. And in Alabama, the state standards are the responsibility of “a coalition of agency members.” States without standards or enforceable statutes to regulate BIT-program operations include Arkansas, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, and Wisconsin.

### COLORADO STANDARDS & MODEL OF DOMESTIC-VIOLENCE-OFFENDER TREATMENT

In Colorado, BIT has been mandated for domestic-violence offenders since 1987.<sup>11</sup> And in 2000, the Colorado Legislature created the Domestic Violence Offender Management Board (DVOMB),<sup>12</sup> with its oversight agency being the Department of Public Safety’s Division of Criminal Justice, to implement and oversee Colorado’s Standards.<sup>13</sup> Colorado’s Standards mandate the process for approving treatment providers’ eligibility to provide DV treatment, establish policies for oversight of providers delivering court-ordered treatment, and specify the acceptable modalities of treatment delivery and implementation, among other requirements.

One of the reasons Colorado maintains a reputation as one of the most progressive states in the U.S. with respect to domestic-violence policy<sup>14</sup> stems from its differentiated, non-time-driven approach to offender treatment. As previously mentioned, many states apply the *same* time-frame requirement for treatment to *all* DV offenders despite the accumulating evidence showing that DV offenders are a heterogeneous group of people with a correspondingly diverse set of treat-

ment needs.<sup>15</sup> Further, empirical research suggests that when the intensity of treatment corresponds to offender risk for offenses in general, there is a greater possibility for reductions in recidivism.<sup>16</sup> Accordingly, the Colorado revised Standards recognize that treatment should vary by offenders’ treatment needs and that needs can change during the treatment process, depending on the offender’s progress.

**[T]he Colorado revised Standards recognize that treatment should vary by offenders’ treatment needs . . . .**

Until 2010, Colorado’s Standards indicated that BIT-program participants must complete “up to 36 weeks of treatment” and were routinely sentenced by judges to this maximum allowable time in treatment.<sup>17</sup> However, when Colorado’s DVOMB revised Colorado’s Standards in 2010, changes included the introduction and statewide implementation of an empirically based risk assessment, the Domestic Violence Risk and Needs Assessment (DVRNA). The DVRNA informs decisions regarding each offender’s BIT-program experience, including setting standards and milestones that offenders must reach that go beyond length of treatment, effectively ending the previous 36-week time-driven model. The implementation of the DVRNA in Colorado has drastically changed the administration of domestic-violence-offender treatment for offenders statewide.

### DOMESTIC-VIOLENCE RISK AND NEEDS ASSESSMENT

The DVOMB used five risk-assessment instruments in its design of the DVRNA: the Level of Supervision Inventory (LSI VII),<sup>18</sup> the Spousal Assault Risk Assessment Guide (2nd edition),<sup>19</sup> the Domestic Violence Screening Instrument (DVSI),<sup>20</sup> the Ontario Domestic Assault Risk Assessment (ODARA),<sup>21</sup> and the Danger Assessment Scale.<sup>22</sup> Fourteen empirically based static and dynamic risk-factor domains are included in

11. See Colo. Rev. Stats. § 18-6-803.

12. The DVOMB comprises 19 multidisciplinary members with seven appointing authorities: the Department of Corrections, the Department of Human Services, the Department of Regulatory Agencies, the Department of Public Safety, the Colorado District Attorneys Council, the Chief Justice, and the Colorado State Public Defender.

13. Colorado-specific standards are denoted with capitalization.

14. Angela R. Gover, *New Directions for Domestic Violence Offender Treatment Standards: Colorado’s Innovative Approach to Differentiated Treatment*, 2 PARTNER ABUSE 95 (2011).

15. Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 4 PUB. HEALTH REP. 409 (2006); Tara N. Richards et al., *A Longitudinal Examination of Offending and Specialization Among a Sample of Massachusetts Domestic Violence Offenders*, 28 J. INTERPERSONAL VIOLENCE 643 (2012); Tara N. Richards et al., *Survival Time and Predictors of Domestic and Non-domestic Violence Recidivism Among Domestic Violence Offenders: A Ten-Year Follow-Up*, 29 VIOLENCE & VICTIMS 1 (2014).

16. COLORADO DOMESTIC VIOLENCE OFFENDER MANAGEMENT BOARD,

STANDARDS FOR TREATMENT WITH COURT ORDERED DOMESTIC VIOLENCE OFFENDERS (2010).

17. ANGELA R. GOVER, TARA RICHARDS & ELIZABETH A. TOMSICH, *COLORADO’S INNOVATIVE RESPONSE TO DOMESTIC VIOLENCE OFFENDER TREATMENT: CURRENT ACHIEVEMENTS AND RECOMMENDATIONS FOR THE FUTURE 1* (2015).

18. DON A. ANDREWS & JAMES BONTA, *THE LEVEL OF SERVICE INVENTORY—REVISED* (1995).

19. Randall P. Kropp & Stephen D. Hart, *The Spousal Assault Risk Assessment (SARA) Guide: Reliability and Validity in Adult Male Offenders*, 24 LAW & HUM. BEHAV. 101 (2000).

20. Kirk R. Williams & Amy Barry Houghton, *Assessing the Risk of Domestic Violence Reoffending: A Validation Study*, 28 LAW & HUM. BEHAV. 437 (2004).

21. Zoe N. Hilton, Grant T. Harris, Marnie E. Rice, Ruth E. Houghton & Angela W. Eke, *An In-depth Actuarial Assessment for Wife Assault Recidivism: The Domestic Violence Risk Appraisal Guide*, 32 LAW & HUM. BEHAV. 150 (2008).

22. Jacquelyn C. Campbell, Daniel W. Webster & Nancy Glass, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653 (2008).

**[T]he model allows for adjustment to a higher or lower level of treatment as offenders' needs change.**

the DVRNA.<sup>23</sup> Overall, the risk factors are most commonly associated with domestic-violence mortality, domestic-violence re-offense, and general criminal recidivism. Of these, eight are dynamic (i.e., subject to change) and seven are static (i.e., not subject to change).

With a range of 0-14, offenders are assigned one point for each risk-factor domain present. Offenders are then placed in one of three treatment-intensity levels, based on their total score: A (low intensity), B (moderate intensity), or C (high intensity) (see Figure 1). However, offenders presenting with any one of six\* risk-factor domains deemed most critical are automatically placed in Level B or C, notwithstanding their total score on the DVRNA.

Because eight of the fourteen DVRNA risk factors are

dynamic, treatment providers are able to continually assess and amend offenders' treatment plans through the course of treatment. Treatment-plan reviews account for additional risk factors that may emerge after the initial intake evaluation, therefore requiring an increase in treatment-level intensity. Likewise, offenders who exhibit progress in their treatment and a lowering of their risk factors may benefit from a corresponding decrease in treatment-level intensity. Thus, while some offenders' treatment levels remain the same, the model allows for adjustment to a higher or lower level of treatment as offenders' needs change.

## MULTIDISCIPLINARY TREATMENT TEAMS

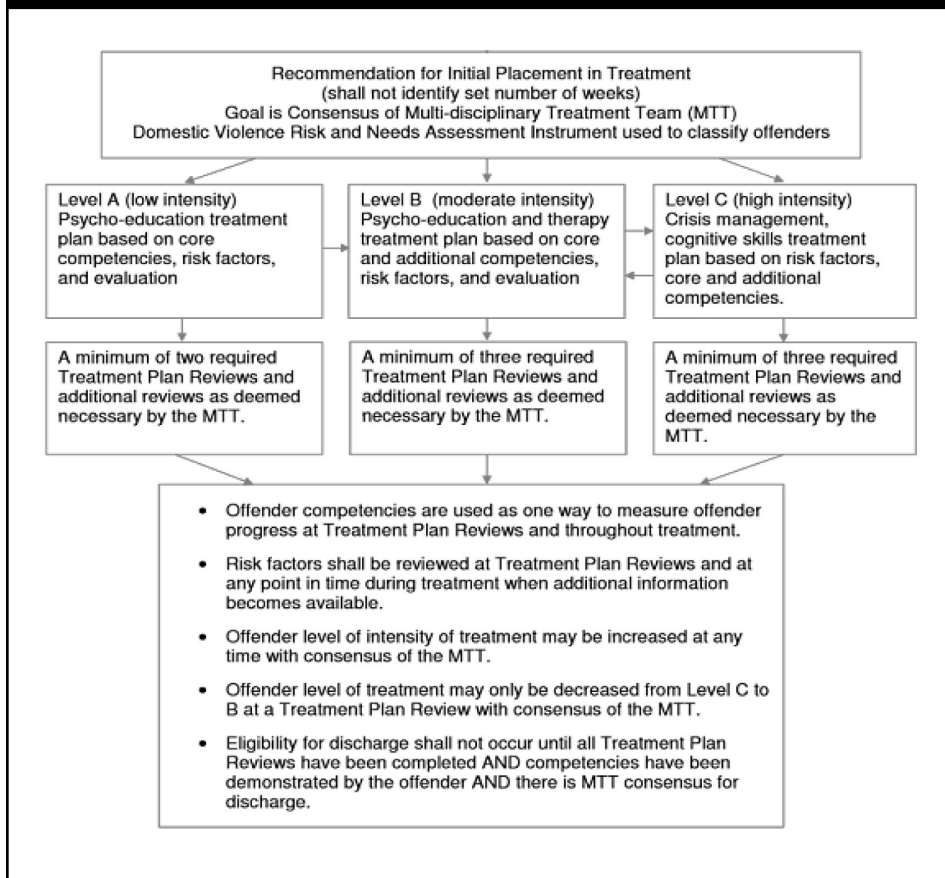
The Colorado treatment model also utilizes collaborative "Multidisciplinary Treatment Teams" (MTTs) to determine and maintain appropriate treatment levels for offenders. As outlined in Colorado's Standards, the MTT consists of a treatment provider, a victim advocate, and a probation officer. These professionals work in partnership through

the treatment process to make decisions concerning the appropriate treatment level for each offender and to evaluate ongoing treatment progress. Each member of the MTT has an equal voice in the decision-making process, as noted in the Standards: "While there is acknowledgment that there is a supervising agent for the court, the intent and goal are to work collaboratively."<sup>24</sup> MTTs are required to reach a consensus in determining the offender's risk levels at intake, making any changes in risk levels as a result of periodic treatment-plan reviews and discharging the offender at the completion of treatment. The sharing of professional expertise between MTT members provides a valuable element to effective treatment management. Members of the MTT also work to ensure that victim privacy is prioritized and respected throughout the treatment process.

## TREATMENT PLANS AND CORE COMPETENCIES

Colorado's Standards mandate that offenders attain certain core competencies, as established by the DVRNA, to demonstrate progress in reaching the goals outlined in their individualized

**Figure 1: Overview of Treatment-Intensity Levels for Domestic-Violence Treatment in Colorado**



23. The 14 risk-factor domains in the DVRNA are: (1) prior domestic-violence-related incidents\*; (2) drug/alcohol abuse\*; (3) mental-health issues\*; (4) use and/or threatened use of weapons in current or past offenses or access to firearms\*; (5) suicidal/homicidal ideation\*; (6) criminal history (non-domestic-violence related)\*; (7) obsession with the victim; (8) safety concerns; (9)

violence toward family members, including child abuse; (10) attitudes that condone or support partner assault; (11) prior completed domestic-violence-offender treatment; (12) involvement with people who have pro-criminal influence; (13) separated from victim within last six months; and (14) being unemployed.

24. COLORADO DVOMB, *supra* note 16.

treatment plans. Eighteen core competencies are included in Colorado's treatment Standards.<sup>25</sup> Primary competencies include a commitment by the offender to eliminate abusive behaviors, a commitment to eliminate all other forms of violent behaviors, and acceptance of complete responsibility for their full history of committing abuse. Individualized treatment plans may require the offender to attain additional competencies as indicated by their individual risk factors and treatment needs, as determined by their DVRNA and the MTT at intake and during periodic treatment-plan reviews.

Achievement of the core competencies is theorized by the DVOMB to be a significant factor in reducing recidivism. To complete treatment, all offenders must exhibit a clear understanding of the competencies to their personal treatment provider, who documents the progress for the MTT. Once offenders demonstrate that they have attained all the required competencies and conditions included in their treatment plan as well as fulfilled all terms of their offender contract, they receive a discharge status of treatment completion under the Standards.

#### EXISTING RESEARCH: IMPLEMENTING COLORADO'S STATE STANDARDS

In cooperation with Colorado's DVOMB, Gover, Richards, and colleagues have collaborated on several empirical studies pertaining to Colorado's domestic-violence-offender treatment.<sup>26</sup> Their ongoing research has focused on a range of topics regarding the implementation of state-mandated domestic-violence-offender-treatment standards. Specifically, they have examined the perceptions and experiences of MTT members' (i.e., treatment providers, probation officers, and victim advocates) decision-making processes for domestic-violence-offender treatment and the challenges members have experienced with the implementation of Colorado's Standards, as well as the specific role of "treatment victim advocates" on MTTs.

To examine MTT members' experiences with the implementation of the Standards, Richards et al. contacted all members by email to participate in an online SurveyMonkey® survey that asked questions about their perceptions of the level of implementation of the Standards in domestic-violence treatment.<sup>27</sup> Results indicated that 87% of treatment providers surveyed reported that the 2010 *Revised Domestic Violence Standards* had been fully implemented into their treatment pro-

gram. Comparatively, 46% of probation officers and 54% of victim advocates surveyed reported that the Standards had been fully implemented.<sup>28</sup> Further, 94% of treatment providers, 69% of probation officers, and 85% of victim advocates surveyed agreed that all offenders in their program are assessed with the DVRNA before beginning treatment.

Further, Gover et al. analyzed a sample of 3,311 domestic-violence offenders who entered treatment after the new differentiated treatment model had been implemented in Colorado (between 2010 and 2012) to assess treatment-intensity levels at intake and at discharge and movement in treatment-intensity level over the course of an offender's treatment process.<sup>29</sup> Among offenders in the sample, 10% were assigned to level A, 43% were assigned to level B, and 47% were assigned to level C at intake. Findings demonstrated movement across intensity levels during treatment, with the majority of offenders discharged from level B (53%), while 37% and 10% were discharged from level C and level A, respectively. Results further demonstrated high consistency among level A and level B offenders over the course of treatment, such that few offenders assessed at treatment-intensity level A or level B at intake were reassessed as needing more intensive treatment at discharge: 7% and 3%, respectively (i.e., few offenders were assessed as becoming more risky over the course of treatment). Comparatively, 25% of offenders placed in treatment-intensity level C at intake had been reduced to treatment-intensity level B at discharge—indicating a reduction in risk factors over the course of treatment. Notably, in a departure from the Standards, 2% of offenders initially placed in treatment-intensity levels B or C were reduced to level A at their final assessment.

Richards et al. also reported interview data from MTT members, which revealed that there was a need for additional training regarding the Standards for criminal-justice-system personnel such as judges, law-enforcement officers, district attorneys, and other relevant practitioners.<sup>30</sup> Overall, interview responses suggested the need for a better understanding of

**[I]nterview data . . . revealed that there was a need for additional training regarding the Standards for criminal-justice-system personnel . . . .**

25. Core competencies include: (A) commitment to the elimination of abusive behavior; (B) demonstration of change by working on the comprehensive personal-change plan; (C) completion of the personal-change plan; (D) development of empathy; (E) acceptance of full responsibility for the offense and abusive history; (F) identification of and progressive reduction of a pattern of power and control behavior, beliefs, and attitudes of entitlement; (G) offender accountability; (H) acceptance that one's behavior should and does have consequences; (I) participation and cooperation in treatment; (J) ability to define types of domestic violence; (K) understanding, identification, and management of one's personal pattern of violence; (L) understanding of intergenerational effects of violence; (M) understanding and use of appropriate communication skills; (N) understanding and use of "time-outs"; (O) recognition of financial abuse and management of

financial responsibility; (P) elimination of all forms of violence and abuse; (Q) prohibition of purchasing, possessing, and using firearms or ammunition; and (R) the identification and challenge of cognitive distortions that play a role in the offender's violence.

26. Gover et al., *supra* note 17; Tara N. Richards & Angela R. Gover, *Domestic Violence Offender Treatment and Multidisciplinary Treatment Teams: The Role of "Treatment" Victim Advocates*, INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY (2016); Tara N. Richards et al., *The Implementation of State Mandated Standards for Batterer Intervention Programs: The Colorado Experience*, VIOLENCE & VICTIMS (forthcoming 2017).

27. Richards et al., *supra* note 26.

28. *Id.*

29. Gover et al., *supra* note 17.

30. Richards et al., *supra* note 26.



**[A] majority of Colorado judges have embraced the idea of a differential, non-time-driven treatment model.**

Colorado's approach to domestic-violence-offender treatment and the empirical basis for such an approach among members of the criminal-justice community in Colorado overall, and particularly among judges. In terms of training for judges, at a minimum, the DVOMB and interviewed staff identified the need for adding such training modules

to preexisting annual judicial trainings. For example, the DVOMB staff and board members are currently in discussions to provide training at the next annual judicial conference.

At the same time, there is overwhelming agreement among stakeholders that a majority of Colorado judges have embraced the idea of a differential, non-time-driven treatment model. However, there is still the occasional case where a judge imposes a sentence, or condition(s) of probation, that runs counter to what the Standards require. The most common example of this is when a judge orders couples counseling, which the DVOMB has prohibited for numerous reasons (most of which relate to issues of victim safety) or when a judge orders an offender to a specified number of weeks in treatment, which does not comport with the use of the DVRNA. Since the purview of the Standards includes Colorado domestic-violence treatment providers, not the court, it is important that judges receive training specific to the Standards, dynamics of domestic violence, and victim issues inherent to abusive relationships, to support accurate implementation of the Standards at all levels of the criminal-justice system.

**NEW, ONGOING RESEARCH: THE RELATIONSHIP BETWEEN OFFENDER RISK, TREATMENT CONTENT, AND OFFENDER OUTCOMES**

Currently, Gover and Richards are in the process of completing an in-depth examination of domestic-violence-offender treatment in Colorado in an attempt to identify best practices for DV treatment in the state. Specifically, this research assesses linkages between an offender's DVRNA risk score, DV-treatment content and offender competencies, and DV-treatment outcome and recidivism. At present, Gover and Richards have conducted in-depth interviews with randomly selected treatment providers about their treatment philosophy and approaches to achieving treatment competencies with clients. Treatment content information (e.g., materials used during group or individual sessions, homework, etc.) has also been collected from providers and coded regarding relevance to the competencies outlined in the Standards. "Enrollment" of clients currently receiving domestic-violence-offender treatment with the sampled providers is also in progress.

Next steps will include the collection of information from domestic-violence-offender treatment files regarding an offender's DVRNA risk score at intake and at their last treat-

ment-plan review, information from the Spousal Assault Risk Assessment (SARA), information regarding the offender's dose of treatment (including their number of group and individual sessions and the treatment content and modalities to which they were exposed); information regarding their treatment outcome (i.e., administrative discharge, successful discharge, and unsuccessful discharge) at discharge date will also be collected. In addition to treatment information, Gover and Richards will also obtain recidivism data for offenders at 12 and 18 months from the State Court Administrator's Office.

Data will be examined to determine the relationship between exposure to different DV-treatment content and treatment outcomes (offender recidivism at 12 and 18 months and successful treatment completion vs. unsuccessful discharge). It is hypothesized that providers using social-learning or cognitive-behavioral-therapy models and program content that adheres to the offender competencies outlined in the Standards will be associated with offenders with greater rates of successful treatment discharge and lower rates of recidivism. Also, it is hypothesized that treatment providers who use other treatment modalities and programs including treatment content that is not associated with the competencies will have lower rates of successful treatment completion due to drop out and higher recidivism rates among offenders.

The present study is aligned with the notion that intervention programs must be studied through rigorous research and proven empirically effective (i.e., *evidence-based practices* (EBPs)). Important topics of study for EBP research in correctional settings are "Principles of Effective Intervention" (PEIs), including acknowledgment of the target population's risk, need, and responsivity, and programs' treatment and fidelity to the model.<sup>31</sup> Research has been conducted on the use of EBPs and PEIs in many aspects of correctional programming; however, there are fewer research studies focusing specifically on EBPs and PEIs in domestic-violence-offender treatment.

Colorado's Standards for DV treatment include some of the aforementioned PEIs. For example, the "risk" principle is included in the Standards through a differentiated, non-time-driven methodology where the DVRNA is used to differentiate high-risk and low-risk offenders and offenders are placed in a corresponding treatment-intensity level.<sup>32</sup> In addition, the "need" principle is included through the application of 19 competencies that offenders are required to master before successful completion of treatment, while the "responsivity" principle is reflected in the use of individual treatment plans and goals shaped by a particular offender's risk factors, competencies, and criminogenic needs (i.e., relevant background factors relating to criminality).

At the same time, the principles of "treatment" and "fidelity" have yet to be fully integrated into Colorado's DV-treatment Standards. For example, specific treatment content remains unknown except to individual providers and the offenders they treat. Studies have shown that social-learning and cognitive-behavioral approaches are most effective to DV-

31. Dana L. Radatz & Emily M. Wright, *Integrating the Principles of Effective Intervention into Batterer Intervention Programming: The Case for Moving Toward More Evidence-Based Programming*, 17

TRAUMA, VIOLENCE & ABUSE 72 (2015).

32. GOVER ET AL., *supra* note 17.

offender treatment;<sup>33</sup> as such, these approaches should be connected to the 19 competencies required in Colorado's Standards. Further, the principle of "fidelity" requires that "implementation and adherence to PEIs, process evaluations, and outcome evaluations" be evaluated regularly.<sup>34</sup>

The current research aims to fill the gap in knowledge regarding treatment and fidelity to Colorado's model for domestic-violence-offender treatment. Gover and Richards intend for results to lead to the development of a portfolio of best practices for domestic-violence-treatment-program content in Colorado. These best practices will be directly linked to the competencies outlined in the Standards. Modalities currently in use that are not linked to competencies will be identified as well. Additionally, quantitative models testing the relationship between different treatment models and offender outcomes will allow for recommendations regarding "what works" to engage offenders in treatment (*i.e.*, what is associated with completion) and which modalities predict lower rates of recidivism.

### CONTINUED EVOLUTION OF THE COLORADO MODEL

As designed, Colorado's differentiated treatment model is a unique approach to domestic violence that prioritizes offender behavior change, offender containment, and victim safety, and where treatment decisions involve a collaborative process among a three-member multidisciplinary team. The model also recognizes that the historical time-driven approach (*i.e.*, a standardized 36 weeks of treatment) is not inherently appropriate for all offenders, but instead, that treatment plans should align with an offender's risks and needs as determined by an empirically based risk assessment. Further, the Colorado model includes offender reassessment during treatment, and offenders are discharged according to their achievement of core competencies and treatment-plan completion, not simply the number of weeks they are in attendance.

Taken together, the Colorado model is quite progressive in its reliance on several principles of effective intervention—risk, need, and responsivity; however, less attention has been paid to the principles of treatment and fidelity. Indeed, the limited existing evidence suggests that there is room for improvement regarding the implementation of the model and, specifically, fidelity to "the model on paper," in practice.<sup>35</sup> However, these issues are not isolated to domestic-violence treatment in Colorado. Although state legislative standards for domestic-violence-intervention programs have been adopted nearly universally across the U.S., the extent to which such standards have been implemented—and whether they actually achieve the intended goal of affecting programs' policies and practices—is almost universally unknown.<sup>36</sup> And the extent to which these standards are effective in reducing domestic-violence recidivism is also unclear.

However, in Colorado, the legislature mandates that the DVOMB confirm the success of DV-offender treatment by

directing the assessment of the Colorado Standards for DV treatment. The DVOMB is responsible for integrating the results of assessments into the Standards to improve best practices. Additionally, the Standards mandate the DVOMB to stay up to date on existing and emerging studies and literature to modify and improve the Standards according to new breakthroughs in understanding.<sup>37</sup> Finally, the DVOMB supports the facilitation of best practices through the reapproval process of treatment providers on a biannual basis. Given that this infrastructure is facilitative to conducting research and integrating empirical findings into the Standards, Colorado is a prime location for the development and proliferation of best practices for domestic-violence treatment.



Angela R. Gover is Professor of Criminology and Criminal Justice in the School of Public Affairs at the University of Colorado Denver. She conducts research in the areas of interpersonal violence, gender and crime, and victimization. Currently her interests specifically focus on the criminal-justice system's response to domestic-violence offenders once they have been convicted and the system's response in terms of treatment. She has published over 100 journal articles and book chapters in outlets such as *Violence Against Women*, *Journal of Interpersonal Violence*, and *Violence and Victims*. Dr. Gover is currently co-conducting a statewide examination of domestic-violence-offender treatment in Colorado in collaboration with the Domestic Violence Offender Management Board.



Tara N. Richards is an Assistant Professor in the School of Criminal Justice at the University of Baltimore. Her primary areas of research include intimate-partner violence, sexual assault, and the role of gender in criminal-justice-system processes. She is currently co-leading statewide evaluations of batterer intervention programs in Maryland and Colorado. Her recent empirical work is featured in *Violence Against Women*, *Child Abuse & Neglect*, and *Violence and Victims*, and she is the co-editor of the book *Sexual Victimization: Then and Now*.

33. Radatz & Wright, *supra* note 31.

34. *Id.*

35. GOVER ET AL., *supra* note 17

36. Boal & Mankowski, *supra* note 6; Richards et al., *supra* note 26.

37. COLORADO DVOMB, *supra* note 16, at 2-2.

## LEGAL FINDINGS by Judge Victor Fleming

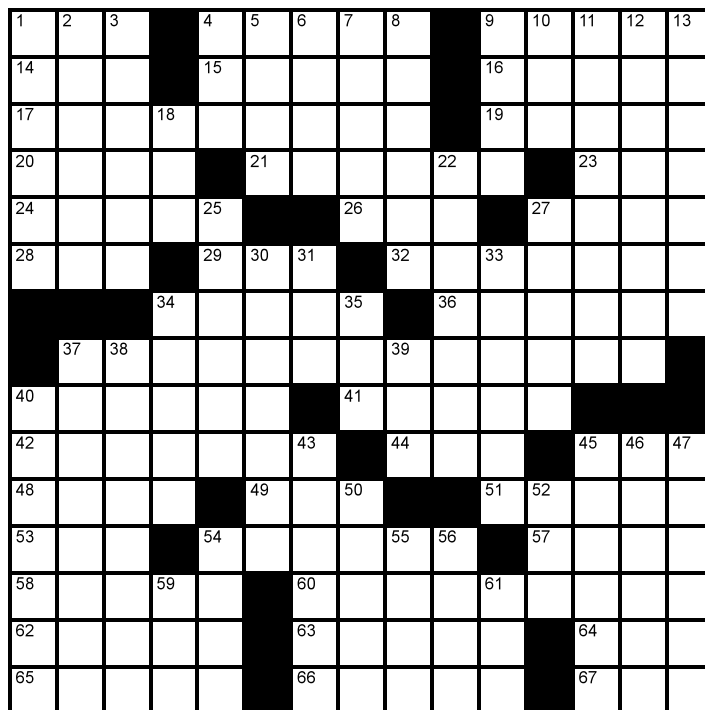
### Across

- 1 1980s TV alien  
4 Spend sparingly  
9 Earl Scruggs and Lester \_\_\_\_  
(bluegrass duo who played Carnegie Hall in 1962 and 1964)  
14 Agnus \_\_\_\_  
15 Indonesian island  
16 "Lou Grant" star Ed  
17 With full knowledge  
19 \_\_\_\_-Grain (cereal brand)  
20 Museo displays  
21 Mentally spaced out  
23 Japanese monarch (abbr.)  
24 Back-to-health process, for short  
26 "\_\_\_\_ out!" (call at the plate)  
27 Nutmeg covering  
28 Big name in ice cream  
29 Java brewer  
32 Hockey rink divider  
34 Brew, as tea  
36 "Hit the road!"  
37 Banana pudding add-ins, often  
40 It may be hummed  
41 Not as touched  
42 Robot that looks human  
44 \_\_\_\_ cit.  
45 Coiled hairdo  
48 Insect repellent ingredient  
49 Critic's pick?  
51 Prefix with jet or prop  
53 Hit the wrong button, say  
54 Discrimination of a sort  
57 \_\_\_\_ court

- 58 Group whose name is Arabic for "zeal"  
60 Depart furtively  
62 Arcade game maker  
63 Justice Kagan  
64 \_\_\_\_-Croix, Que.  
65 Gossipmonger  
66 Pepe \_\_\_\_ (cartoon skunk)  
67 Ballpark fig.

### Down

- 1 Invasive computer programs  
2 Looked like a wolf?  
3 \_\_\_\_ rich  
4 RR stop  
5 New Zealand bird  
6 One-named supermodel  
7 Conger relative  
8 Lean toward  
9 Canine tooth  
10 Tigers of the SEC  
11 ACL part  
12 End  
13 One of a matching three  
18 \_\_\_\_ & Perrins (sauce brand)  
22 Pizza spice  
25 Reply to "Why don't you like me?"  
27 Take up, e.g.  
30 Counting (on)  
31 "\_\_\_\_ blu, dipinto di ..." ("Volare" lyric)  
33 It may be latent  
34 Bullpen sound  
35 Family men  
37 Regard as sacred



- 38 Council member  
39 \_\_\_\_-Mart  
40 Capitalized on something  
43 Fuel for semis  
45 Look casually  
46 WW2 fleet  
47 "Soon, maybe ..."  
50 Duke or Earl  
52 Thurman of "Be Cool"  
54 Babylon's continent  
55 Flow gradually  
56 Locks in a barn?  
59 "... an \_\_\_\_, not a science!"  
61 "Finding" in this puzzle's three longest answers

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 34.

## Court Review Author Submission Guidelines

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

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**Essays:** Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews:** Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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## STEPS TO INCREASE SAFETY DURING INJUNCTION HEARINGS FROM THE WISCONSIN BENCHCARD ON SAFETY ISSUES AT INJUNCTION

<b>BEFORE . . .</b>	<ul style="list-style-type: none"> <li>• Consider a specialized entrance for petitioners which respondents cannot access;</li> <li>• Provide security check points for all parties including weapons screening;</li> <li>• Consider a security escort for petitioner to and from courtroom. If not possible in all cases, provide in cases of highest threat as identified by petitioner and/or advocate;</li> <li>• Have court security present before hearing to interrupt any contact between petitioner and respondent. Remind all parties contact is a violation of the law;</li> <li>• Keep parties separate before each hearing, preferably in different locations;</li> <li>• Notify security as to expectations for behavior and when to make an arrest for violation of the temporary restraining order, and make sure all parties are aware;</li> <li>• Allow the petitioner to have someone accompany him or her for support; and</li> <li>• Provide information to petitioner and/or advocate at time of issuance of the temporary restraining order as to what security measures are possible and how to obtain them in your county.</li> </ul>
<b>DURING . . .</b>	<ul style="list-style-type: none"> <li>• Provide seating arrangements to keep petitioner and respondent separated in the courtroom. For example, have court security between parties during the hearing;</li> <li>• Seat petitioner and respondent such that respondent cannot make any eye contact with petitioner to minimize being stared at or intimidated by the respondent;</li> <li>• Take control of courtroom behavior. Stop tactics such as asking irrelevant questions on cross, interrupting petitioner during testimony, accusing petitioner of behaviors irrelevant to hearing, begging petitioner to return to respondent or their child(ren), asking if petitioner still loves respondent, or revealing petitioner's private information;</li> <li>• Do not allow respondent to ask for petitioner's address or allow petitioner to provide;</li> <li>• Educate petitioner to look at the judge or court commissioner while testifying; and</li> <li>• Impress upon the parties that there are legal penalties for violation of the temporary restraining order or injunction, whether those violations happen within the court or outside of the courtroom.</li> </ul>
<b>AFTER . . .</b>	<ul style="list-style-type: none"> <li>• Stagger departures, with victim leaving first. Escort victim to vehicle in high-risk cases;</li> <li>• Have respondent, their family, and friends wait at least 15 minutes after hearing; and</li> <li>• Monitor respondent while he/she is waiting; inform respondent when he/she can leave.</li> </ul>

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# The Resource Page: Focus on Domestic Violence



**American Judges Association,  
Effective Adjudication of Domestic-  
Abuse Cases (a Web-Based Training  
Program for Judges)**  
<http://education.amjudges.org>

The American Judges Association has a comprehensive, web-based training program for judges regarding the handling of domestic-violence cases. The program includes presentations by leading experts in the area, with separate modules on the dynamics of domestic violence, civil-protection orders, child-custody cases, evidentiary issues, and sentencing.



Each module has clearly identified learning objectives, video scenarios and presentations, interactive exercises to check comprehension of key points, and resources to explore for further information. There are courtroom-based scenarios, dynamic panel discussions, and additional interactive content. Short of attending an intensive, three- to five-day training program, nothing like this has ever been put together. *And it's totally free to you and your colleagues.*

**Cyberviolence Training Opportunity  
from the National Network to End  
Domestic Violence Safety Project**  
<http://www.nnedv.org>

The National Network to End Domestic Violence, in partnership with the National Council of Family and Juvenile Court Judges and others, has announced a three-year Cyberviolence Court Training Initiative. The goal of the initiative is to develop a model training curriculum to enhance the judicial response to cyberviolence.

With the great increase in adult usage of the Internet, that use now extends to carrying out domestic violence. Research by the National Network to End Domestic Violence showed that 97% of victim-service providers had clients whose abusers used technology to stalk, harass, and control their victims. Many survivors are hesitant to report these crimes out of fear that they won't be believed, that the crime will be minimized, or that it could be difficult to prove. This initiative will try to increase awareness among judges, court staff, and law enforcement about how technology is used in this way.

Collectively, the National Network to End Domestic Violence and the National Council of Family and Juvenile Court Judges have provided comprehensive domestic-violence training for more than 20 years. Their new initiative on cyberviolence will create a series of training programs and materials that will be available at no cost to judges and court personnel. Materials will be available in an online toolkit and through trainings that will be held around the country and online. More information about the trainings will be made available on the National Network to End Domestic Violence website ([www.nnedv.org](http://www.nnedv.org)) and at [www.tech-safety.org](http://www.tech-safety.org).



## ARTICLES OF INTEREST

### PRIOR COURT REVIEW ARTICLES

Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, CT. REV., Summer 2002, at 12 (available at <https://goo.gl/7pWqUS>).

Lundy Bancroft, *The Parenting of Men Who Batter*, CT. REV., Summer 2002, at 44 (available at <https://goo.gl/11855B>).

Julie Kunce Field, *Screening for Domestic Violence: Meeting the Challenge of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases*, CT. REV., Summer 2002, at 4 (available at <https://goo.gl/swwQ3x>).

Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, CT. REV., Fall 1998, at 23 (available at <https://goo.gl/HFO6Xv>).

Randal B. Fritzler & Lenore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, CT. REV., Spring 2000, at 28 (available at <https://goo.gl/xV7KmK>).

Merrilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, CT. REV., Spring 1998, at 12 (available at <https://goo.gl/9wXdgF>).

John Monahan & Laurens Walker, *A Judges' Guide to Using Social Science*, 43 CT. REV. 156 (2007) (available at <https://goo.gl/aZEfIK>).

Lavita Nadkarni & Barbara Zeek Shaw, *Making a Difference: Tools to Help Judges Support the Healing of Children Exposed to Domestic Violence*, CT. REV., Summer 2002, at 24 (available at <https://goo.gl/OdCrRS>).

Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, CT. REV., Spring 2000, at 40 (available at <https://goo.gl/wbGDpG>).

### OTHER ARTICLES

Laurie Baughman, *The Face of Justice: The Judge's Role in Ending Domestic Violence*, 53 JUDGES' J. 1 (2014) (available at <https://goo.gl/sDpyeU>).

Joan S. Meier, *Johnson's Differentiation Theory: Is It Really Empirically Supported?* 12 J. CHILD CUSTODY 4 (2015) (available at <https://goo.gl/auNV2c>).

Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AMER. U. J. GENDER, SOC. POLY & LAW 657 (2003) (available at <https://goo.gl/YKZwgJ>).

Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty*, *Les Presses de l'Université du Québec* (2012) (available at <https://goo.gl/bG73jk>).

*The Resource Page continues on page 34.*