

# Screening for Domestic Violence: Meeting the Challenge of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases

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**D**omestic abuse is common. It includes emotional and psychological abuse as well as physical assaults.<sup>1</sup> Children are harmed by it, even if they are not the direct victims of the physical violence.<sup>2</sup>

Because domestic abuse is so prevalent and its effects are so far-reaching, court personnel must educate themselves to understand domestic violence and determine strategies for handling cases where it is present. Even if domestic violence is present but does not seem to have a direct impact on the case at hand, one should be aware of the power and control dynamics of domestic abuse to provide effective intervention in domestic violence cases.

Screening for domestic violence is important because it can provide information that can help courts make better decisions about the cases before them. Domestic violence is a critical fact in determining the process and the outcome in a domestic relations case. Without an understanding of domestic violence in general and knowledge about whether there is domestic violence in a particular case, the decision maker could erroneously be making orders that (1) increase danger to the victim and children, including the danger of lethality,<sup>3</sup> and (2) reduce the resources available to the victim, thus increasing the likelihood that the violence and abuse will continue.<sup>4</sup> Before the court orders mediation or other alternative processes, it should look into screening for domestic violence to ensure that the process of mediation can be effective, and not coercive or revictimizing.<sup>5</sup>

## WHAT THE FACT-FINDER NEEDS TO KNOW ABOUT DOMESTIC VIOLENCE

To make good decisions in domestic relations cases, the fact-finder must know:

- A. What is domestic violence, and who are the most common victims of domestic violence?
- B. What are the risks and consequences of not knowing whether there is domestic violence in a relationship?
- C. Do all system players understand domestic violence?
- D. What are the tools available to find out whether there is domestic violence in a relationship?
- E. What can be done once the fact-finder knows that domestic violence is present in a case?

## A. WHAT IS DOMESTIC VIOLENCE AND WHO ARE THE MOST COMMON VICTIMS OF DOMESTIC VIOLENCE?

Domestic violence is a pattern of assault and coercion, often including physical, sexual, and psychological attacks, as well as economic coercion, that adults and adolescents use against their intimate partners.<sup>6</sup> The key factor characterizing domestic abuse is one partner's need to control the other.

The most recent, reliable, and comprehensive studies of violence find that:

- Women are more likely than men to be victimized by intimate partners; women are harmed more severely in those assaults; and males who are victims of assault are generally assaulted by other males.<sup>7</sup>

## Footnotes

1. See FAMILY VIOLENCE PREVENTION FUND & NATIONAL JUDICIAL INSTITUTE ON DOMESTIC VIOLENCE, ENHANCING JUDICIAL SKILLS IN DOMESTIC VIOLENCE CASES 3-12-3-15 (2001) (for more information on this program, see <http://www.endabuse.org/programs/justice>); PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 4 (2002); LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 8 (2002).
2. See LUNDY BANCROFT AND JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).
3. The most dangerous time for a victim is when she attempts to leave the relationship. See, e.g., Barbara J. Hart, *The Legal Road to Freedom* (1991) available at: <http://www.mincava.umn.edu/hart/legalro.htm>; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issues of Separation*, 90 MICH. L. REV. 1 (1991); Margo Wilson and Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE AND VICTIMS 10 (1993).
4. See Family Violence Prevention Fund, *supra* note 1.
5. Mediation can be a dangerous setting and can lead to extreme disadvantages for less powerful women, particularly when they are victims of domestic violence. See Penelope Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). See also *The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook* 4-17 (Goelman et al., eds., 1996) [hereinafter *Lawyer's Handbook*].
6. See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE DEPT., EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999).
7. See P. Tjaden and N. Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, NATIONAL INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION (1998) available at <http://www.ojp.usdoj.gov/nij>. According to National Crime Victimization Survey data from the Department of Justice, about 1 million violent crimes in 1998 (a conservative estimate) were committed against people by their current or former spouses, boyfriends, or girlfriends. These crimes were committed primarily against women. About 85% of victim-

- More than 50% of abusers will be abusive of their partners in a subsequent relationship.<sup>8</sup>
- Nearly 100% of children in violent homes hear or see the abuse.<sup>9</sup>
- False allegations of domestic violence occur infrequently, and there is in fact a significant *underreporting* of domestic violence.<sup>10</sup>
- Consequently, the great majority of cases where there is domestic violence will have female victims and male perpetrators.

The Family Violence Prevention Fund has identified five central characteristics of domestic violence:<sup>11</sup>

1. Domestic violence is learned behavior.
2. Domestic violence typically involves repetitive behavior encompassing different types of abuse.
3. The batterer—not substance abuse, the battered woman, or the relationship—causes domestic violence.
4. Danger to the battered woman and children is likely to increase at the time of separation.
5. The victim's behavior is often a way of ensuring survival.

### 1. Domestic violence is learned behavior.

Domestic violence perpetrators use domestic violence because it works: it serves to maintain power over the battered woman and to cause her to do what the batterer wants. Domestic violence is learned behavior that batterers perfect through observation, experience, reinforcement, culture, family, and community.<sup>12</sup> The batterer learns what works, and what doesn't, to cause his victim to do his will. Domestic violence perpetrators universally use the same tactics to maintain control over their victims. Those tactics are similar to the tactics used by terrorists.<sup>13</sup>

### 2. Domestic violence typically involves repetitive behavior encompassing different types of abuse.

"Battering is the pattern of intimidation, coercion, terrorism or violence, the sum of all past acts of violence and the

promises of future violence that achieves enhanced power and control for the [batterer] over [the] partner."<sup>14</sup>

The key factor characterizing domestic abuse is one partner's need to control the other. The methods of control include using economic abuse, isolation, intimidation, emotional abuse, and sexual abuse. Children become pawns that the abuser may use to continue his control over his partner's actions.<sup>15</sup> Each method of control may be enforced—and reinforced—with the use or threat of physical violence.<sup>16</sup>

### 3. The batterer—not substance abuse, the battered woman, or the relationship—causes domestic violence.

Rarely do substance abuse, genetics, stress, illness, or problems in the relationship cause domestic violence, though these conditions are often used as excuses for the violence, and they may exacerbate violent behavior.<sup>17</sup>

Batterers who blame drugs or alcohol for their violence generally are selective in their violence, thus demonstrating that the violence is *controlled*, not *out of control*. Their violence is directed against their partner, generally when there are no other witnesses (perhaps except for the children), and not against everyone who crosses his path.<sup>18</sup>

Domestic violence is a problem with the batterer, and caused by the batterer. It is not a problem with the relationship or with the battered woman, but with the batterer's belief that violence against his partner is acceptable and appropriate. Accepting his excuses—that he was drunk or high, or that she somehow "made" him hit her—reinforces his violence and control and does not help to protect the battered woman and her children.

### 4. Danger to the battered woman and children is likely to increase at the time of separation.

Many batterers believe they have the right to make and enforce rules, and many battered women routinely evaluate the rules and decide which rules they will follow depending on a variety of factors, such as the dangers presented, the available interventions, and the likelihood of punishment of the perpetrator.<sup>19</sup>

izations by intimate partners in 1998, or 876,340, were against women. Intimate partner violence made up 22% of violent crime against women between 1993 and 1998. By contrast, during this period intimate partners committed 3% of the violence against men. See CALLIE MARIE RENNISON & SARAH WELCHANS, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, INTIMATE PARTNER VIOLENCE, MAY 2000 [hereinafter "BJS Report"].

8. See Daniel Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51 (Jan. 1994).
9. See *id.*
10. See AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, VIOLENCE AND THE FAMILY 10 (1996); Jaffe et al., *supra* note 1 at 58-59.
11. See Family Violence Prevention Fund, *supra* note 1.
12. See Bancroft and Silverman, *supra* note 2, at ch. 1. See also, JEFFREY EDLESON AND RICHARD TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH 15-25 (1992).
13. See Julie Kuncie Field, *Lessons from Ground Zero*, 7 DOM. VIOL. REPT. 17 (Dec./Jan. 2002).
14. MICHIGAN JUDICIAL INSTITUTE, DOMESTIC VIOLENCE: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS Ch. 1 (2d ed. 2001); LARRY TIFFT,

BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION 19 (1993). See also Lavita Nadkarni and Barbara Zeek Shaw, *Making a Difference: Tools to Help Judges Support the Healing of Children*, COURT REVIEW, Summer 2002 at 24.

15. See Bancroft & Silverman, *supra* note 2.
16. For guidance on some of the methods of control used by abusers, the Domestic Abuse Intervention Project in Duluth, Minnesota has developed a graph to depict the dynamic and characteristics of domestic abuse: the Power and Control Wheel. The corollary is the equality wheel, which shows how power should be shared in a healthy relationship. These graphs can serve as useful guides to screening for domestic violence. See *Domestic Abuse Intervention Project*, available at <http://www.duluth-model.org/daippce.htm>.
17. See *National Judicial Institute*, *supra* note 1, at 7-55-7-58.
18. See *id.*
19. See *Lawyer's Handbook*, *supra* note 5, at Ch. 13. See also Barbara J. Hart, *Rulemaking and Enforcement, the Violent and Controlling Tactics of Men who Batter and Rule Compliance and Resistance, the Response of Battered Women*, in I AM NOT YOUR VICTIM: ANATOMY OF DOMESTIC VIOLENCE 258-263 (Sage Publications, ed. 1996).

According to Barbara Hart, the four rules invariably most important to batterers are:

1. You cannot leave this relationship unless I am through with you.
2. You may not tell anyone about my violence or coercive controls.
3. I am entitled to your obedience, service, affection, loyalty, fidelity, and undivided attention.
4. I get to decide which of the other rules are critical.<sup>20</sup>

Notably, leaving the home or the relationship breaks all of the universal rules of batterers. So, far from guaranteeing safety, when the battered woman attempts to leave, the violence against her and the children is likely to increase. To the batterer, leaving or attempting to leave can represent his ultimate loss of control over his victim and can lead to lethal violence.<sup>21</sup>

### **5. The victim's behavior is often a way of ensuring survival.**

The conduct of domestic violence victims may sometimes seem “counterintuitive”—the victim fails to leave the situation, even though it may objectively appear to be intolerable. Her failure to leave doesn't necessarily indicate a lack of desire to do so, but rather that she is afraid, doesn't have resources, fears that he will become lethal if she leaves, or for some other reasons, leaving is not a viable option.<sup>22</sup>

The fact that the battered woman did not call the police or other agencies does not mean that she and the children were not assaulted and terrorized. Only about one in ten women victimized by a violent intimate sought professional medical treatment.<sup>23</sup> Domestic violence perpetrators can be charming.<sup>24</sup> Battered women may fear that the perpetrator will be believed and that they will not. Because of concern that they will not be believed when compared to the batterer and his smooth-talking version of events, or because of intimidation, embarrassment, or other reasons, many battered women do not seek help from police or other agencies. “The most common reasons given by victims for not contacting the police were that they considered the incident a private or personal matter, they feared retaliation, or they felt the police would not be able to do anything about the incident.”<sup>25</sup>

### **B. WHAT ARE THE RISKS AND CONSEQUENCES OF NOT KNOWING WHETHER THERE IS DOMESTIC VIOLENCE IN A RELATIONSHIP?**

The consequences of not knowing whether there is domestic violence in a relationship could be severe. There is a risk of death for battered women, the children, or the abuser.<sup>26</sup> Even short of death, not knowing about domestic violence in a relationship that comes before the court can lead to a lack of safety for adult and child victims, and allow children to continue to be exposed to abuse.

The court may unwittingly allow its processes to become another method for more abuse, and allow the power imbalance and manipulation to continue. Rather than the court making the rules, the abuser continues to make the rules and the court and other players become manipulated and under the batterer's control. Unfortunately, when distracted by the batterer's manipulations and his attempts to focus blame on the victim, it can be easy for the court to lose focus on safety, on the interests of the children, and on the needs of the adult victim. Ultimately, the victim might be blamed for abuse, and the consequences to children, and the abuser may not be held accountable for his conduct. Not knowing whether there is domestic violence in a relationship can ultimately limit the court's ability to provide necessary resources and autonomy for battered woman, which can mean that returning to the batterer is the only option available to her.

One way to think about this is to recognize that domestic violence relationships are necessarily different than a relationship where domestic violence is not a factor. Generally speaking, the expectations that the public and courts have of healthy, intimate relationships are that there will be equality and mutual respect between intimate partners, that conflict will be mutual, that power is relatively equal, and that both parents are concerned primarily about the well-being of the children.

Relationships in which there is domestic violence are markedly different than those expectations. In a domestic violence relationship, there is an extreme power imbalance; the abuser's concern is not for the children, but rather for himself, and maintaining control.<sup>27</sup> The conflict between the parties is not mutual conflict between equals, but abuse of one party by another.<sup>28</sup>

Relationships with domestic violence can actually appear to outsiders to be healthy relationships that meet our expectations of equality, mutual respect, and primary concern for the chil-

20. For more information about rulemaking, see Barbara J. Hart, *supra* note 19.

21. See, e.g., Barbara J. Hart, *The Legal Road to Freedom* (1991) available at <http://www.mincava.umn.edu/hart/legalro.htm>; Martha Mahoney, *Legal Images of Battered Women: Redefining the Issues of Separation*, 90 MICH. L. REV. 1 (1991); Margo Wilson and Martin Daly, *supra* note 3, at 10.

22. See Susan McGee, *Why Some Battered Women Sometimes Stay: Information for Professionals*, available at <http://www.comnet.org/dvp>. See also Michigan Judicial Institute, *supra* note 14; Nadkarni and Shaw, *supra* note 14.

23. BJS report, *supra* note 7.

24. See Bancroft and Silverman, *supra* note 2, at 15-16.

25. See BJS report, *supra* note 7.

26. Commonly identified lethality factors include a prior history of violence, obsessive possessiveness and morbid jealousy, threats to kill, a perception by the abuser that he has been betrayed. Additional risk factors include specific threats to harm or abduct the children or an extended fantasy of murder/suicide of the family. See Jaffe et al., *supra* note 1, at 48 (citing Robin Hassler et al., *Lethality Assessments as Integral Parts of Providing Full Faith and Credit Guarantees*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (2001) available at <http://www.vaw.umn.edu/FFC/chapter9.html>).

27. See Bancroft and Silverman, *supra* note 2.

28. See Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCIL. CTS. REV. 273 (July 1999).

dren. Only by understanding the various tactics and manifestations of domestic violence, and knowing what to do in a case where there is domestic violence, can courts provide necessary relief to the victims.

These expectations about relationships become what judges and other professionals expect to see of parties in court. Because we expect equal power, when there are conflicts, our belief is that the conflicts are the fault of both parties, and that the parties should have equal ability to resolve conflicts without outside intervention.<sup>29</sup> Given that premise, when a party appears to be unwilling or unable to resolve a conflict with their intimate partner, they may be seen as obstructionist. Safety is not a primary concern, because each party is assumed to be equally able to walk away from the conflict. The belief may be that if there was violence, it was a one-time event that will be resolved by separation. Even in cases in which the parties are in conflict or disagree about other issues, the overriding assumption is that they are each concerned with the welfare of the children above all.

Domestic violence cases present differently than judges' and other professionals' expectations of how parties in a domestic relations case should act. Because domestic violence is not conflict between equals, but rather abuse based on unequal power and control, the assumption that the parties are equally able to resolve the conflict does not apply in a case where there is domestic violence. Although the expectation is that a parent in a family law case should be cooperative with the other party in facilitating parenting arrangements, an abused party may have good reasons—primarily safety for herself and her children—for not cooperating in parenting time arrangements, even when ordered by the court.<sup>30</sup> The expectation is that both parents should and will put their own interests aside in favor of the welfare of the children. The abuser's interest is not in the welfare of the children, but in maintaining his power over them and his victim. Unlike the situation where there is no domestic violence, safety must be a primary concern; separation can exacerbate the danger, rather than eliminate the conflict.

The disparity between the expectations for how a family law case should be resolved and the reality of a case involving domestic violence can lead courts to make the wrong decisions about what should happen in a case.<sup>31</sup> For example, if there is domestic violence in a case and the court requires that a parent facilitate parenting time with the abuser, that can put the children and the abused parent in danger if the abused parent follows the court's order. If the abused parent puts safety as the primary consideration and refuses to follow the court's order to facilitate the children's relationship with the abuser, then she could be punished by the court for acting contrary to its expectation, and she could then lose her children to the abuser.<sup>32</sup>

In order to make the best decisions for battered women and

children who are exposed to domestic violence, the court must understand domestic violence and recognize that the processing and decisions in a case involving domestic violence must necessarily be different than the processing of and decisions in a case not involving domestic violence. For example, the goals of joint decision making, getting along, compromise, meeting to work out problems, and sharing responsibility for the failure of the marriage or subsequent problems do not work in a case marked by the power and control dynamics of domestic violence.

Asking the parties to work out their own parenting time schedule and details would be comparable to asking a former hostage to return to his captors alone, without any weapons or back-up support, to negotiate the surrender of weapons and the release of other hostages or goods. The hostage takers have all the guns, power, and ability to control the outcome to their design. Similarly, the battered woman and her children have no relative power without legislative and court assistance to design a custody or parenting time plan that can help them stay safe. The court is in the best position to help the battered woman equalize the power between her and her batterer and to ensure that she has the resources necessary to remain free from her former partner's violence and control.

#### **C. DO ALL SYSTEM PLAYERS UNDERSTAND DOMESTIC VIOLENCE?**

Courts necessarily rely on a number of professionals to provide them with information or assistance in a given case. For example, in a domestic relations case, those professionals might include a custody evaluator, guardian ad litem, a therapist, or a mediator or facilitator, among others. In a criminal case, probation officers, pretrial services personnel, and other law enforcement personnel may provide information or do background screening for the court system. In any kind of case, the attorneys for the parties also are charged with being officers of the court and providing accurate information to the court, albeit from the perspective of an advocate for a party. The information that the court receives from those professionals may be inaccurate or incomplete if domestic violence is a factor in the case, and the professionals don't screen for, or understand, domestic violence. Bad information can lead the court to make decisions that are based on false assumptions or an incorrect understanding of the situation, and those decisions can in fact be harmful to the abused party and the children.

#### **D. WHAT ARE THE TOOLS AVAILABLE TO FIND OUT WHETHER THERE IS DOMESTIC VIOLENCE IN A RELATIONSHIP?**

Screening for domestic violence is critical to determining what are appropriate court and system responses in the case.

29. *See id.*

30. *See* Joan Zorza, *Friendly Parent Provisions in Custody Determinations*, 26 CLEARINGHOUSE REV. 8 (Dec. 1992).

31. *See* Dalton, *supra* note 28.

32. *See* Jaffe et al., *supra* note 1, at 89-90 (summarizing research that "approximately 70% of contested custody cases [in the United States] that involve a history of domestic violence result in an

award of sole or joint custody to the abuser," citing Jane Aiken and Jane Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 43-62 (2000). A recent revision of Professors Aiken and Murphy's article appears in this issue of COURT REVIEW. *See* Jane H. Aiken and Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, COURT REVIEW, Summer 2002, at 12



Given the prevalence and high risk of harm in cases where domestic abuse is a factor, it is essential that court personnel screen for domestic violence in every case that involves family members or intimate partners. What follows are a number of different screening questions that can help the questioner determine whether domestic violence has occurred in a case. After determining that domestic violence has occurred in a case, the court or other relevant professional must evaluate the actions that it can take to provide safety and autonomy for the abused party and the children, based on an understanding of domestic violence and the use of power and control tactics by the abuser.

## 1. Screening considerations

### a. Demeanor and conduct of the parties

As with any case, it is essential that the investigator develop a rapport with the parties and understand that revelations about painful issues may not occur fully or immediately. Compassion, patience, empathy, and active listening skills are critical and will be essential to obtaining necessary information in these cases. An awareness that batterers can appear charming and calm, while the victim may be fearful and agitated, can help court personnel as they assess the domestic violence in the case. Batterers are, by their nature, manipulators.<sup>33</sup> The cautious court investigator or judge will be able to assess the truth by listening carefully to what is said, and by looking for signs of power and control in the parties' statements or demeanor.

Also, the screener should understand the context of domestic violence: perpetrators make rules that the victim must follow,<sup>34</sup> while certain behavior or words of the perpetrator may be threatening or harmful to the victim even though they may seem harmless or even kind to outsiders. A key screening device therefore is to understand what the batterer's actions or words mean to the victim. By asking: "What does that behavior mean to you?" the court can understand the conduct of the batterer, and use that information to interrupt the batterer's rulemaking, and therefore help keep the battered woman and her children safe.

### b. Demeanor of the questioner

A review of judicial behavior in domestic violence cases in Massachusetts found that judicial demeanor was critical to the process and the outcome of these cases.<sup>35</sup> Helpful judicial responses include:

- Prioritizing women's safety.
- Making the court hospitable to abused women.
- Supportive judicial demeanor by listening to abused women and asking questions.
- Connecting women with resources.
- Taking the violence seriously.
- Focusing on the needs of children.

- Imposing sanctions on violent people.
- Addressing the economic aspects of battering.<sup>36</sup>

When screening for domestic violence, the demeanor of the questioner is critical to getting good information and creating safe and final outcomes.

The screening tools outlined below give some examples of questions that the investigator can adapt to suit her or his style and practices. Some keys to remember in gathering this information are:

- The investigator should not be judgmental when asking the screening questions.
- The questions should be phrased in the investigator's own words. If a written questionnaire is used, it should be supplemented with questions in a face-to-face interview.
- The questions should be introduced with a nonthreatening opening, such as, "Because abuse and violence are so common in intimate relationships, I ask about it routinely."
- The information related to domestic violence should be asked about in every case where intimate partners or family members are involved.
- Both parties may minimize the abuse or not identify it as "domestic violence."
- The more specific the questions, the more likely it is that the information elicited will be accurate. Asking, "Has there been domestic violence in your relationship?" will not provide accurate or enough information to determine whether domestic violence has in fact occurred, or whether precautions are necessary to protect the parties and the court personnel from harm.

## 2. Tools to identify domestic violence: screening questions

### a. Identifying lethality risks

Lethality increases at the time of separation. There are a number of lethality assessment tools and checklists that can help a fact-finder determine whether a domestic violence perpetrator may become deadly. Although no one can predict with absolute certainty which domestic violence offenders will become lethal, some warning signs include:<sup>37</sup>

- Suicidal or homicidal ideation, threats, or attempts.
- Escalation (or sudden decrease) in frequency and severity of violent episodes.
- Access to weapons or threats to use weapons.
- Prior criminal behavior or injunctions.
- Depression or substance abuse.
- Obsession or preoccupation with victim.
- Stalking behaviors.
- The victim believes he will become lethal.

33. See Bancroft and Silverman, *supra* note 2.

34. See Hart, *supra* note 3.

35. See JAMES PTAČEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999).

36. See *id.* at 176.

37. One example of a screening tool used to identify high-risk behaviors or history that would identify someone who needs further assessment before sentencing on a domestic violence offense was

developed by the Colorado State Court Administrator's Office and directed for use by the Division of Probation Services of the Colorado state courts. The Colorado Domestic Violence Screening Instrument (DVSII) asks about such things as prior court involvement on domestic violence and non-domestic violence cases, recent separations, and employment history. A copy of the DVSII is on file with the author.

## **b. Identifying cases with prior court involvement**

One of the most apparent means of discovering information about domestic violence history in a relationship is to determine whether there has been prior court involvement by either party. Court personnel should be cautioned, however, that the lack of prior court or police involvement does not necessarily mean that there is no domestic violence between the parties or that reports of current domestic violence are not truthful.<sup>38</sup> Court personnel should also be aware that victims may be arrested and charged with domestic violence when they were defending themselves against the primary aggressor.<sup>39</sup> Therefore, any screening must be mindful of these issues and with awareness of the myths about domestic violence victims and perpetrators.

Some questions that can help determine whether there has been prior court involvement might include:

- Are there now, or have there ever been any criminal charges brought against either party? If so, in what court? What was the outcome?
- Has any other court ever issued an order involving either party? If so, what court? What did the order provide?
- Has either party ever been arrested? If so, when? Where?
- Is there a personal protection order issued involving either party? If so, what court issued it?
- Has any other court ever issued an order for custody, support, or parenting time regarding any of the parties' children?

## **c. Other screening tools**

### **1. AMA screening guidelines**

The American Medical Association has developed diagnostic and treatment guidelines for cases of domestic abuse.<sup>40</sup> Those guidelines suggest that doctors ask their patients questions included in the following list. Those questions are easily adapted to the court investigation setting:

- Are you in a relationship in which you have been physically hurt or threatened by your partner?
- Are you in a relationship in which you felt you were treated badly? In what ways?
- Has your partner ever destroyed things that you cared about?
- Has your partner ever threatened or abused your children?
- Has your partner ever forced you to have sex when you didn't want to? Does he ever force you to engage in sex that makes you feel uncomfortable?
- We all fight at home. What happens when you and your partner fight or disagree?
- Do you ever feel afraid of your partner?
- Has your partner ever prevented you from leaving the house, seeing friends, getting a job, or continuing your education?

- Does your partner use drugs/alcohol? How does he act when he is drinking or on drugs? Is he ever physically or verbally abusive?
- Do you have guns in your house? Has your partner ever threatened to use them when he was angry?

### **2. ABA screening suggestions**

The ABA Commission on Domestic Violence has developed a lawyer's handbook, which gives practical, useful information about domestic violence for lawyers and judges.<sup>41</sup> Many of the ABA's proposed questions are similar to the AMA's. Some additional screening questions outlined in the ABA's publication that may be adaptable to investigations include:

- Do you ever do anything differently because of the consequences of a fight?
- Has your partner ever put his hands on you against your will, or forced you to do something you didn't want to do?
- Does your partner criticize you or your children often?
- Has your partner ever tried to keep you from getting medical help? Kept you from sleeping at night?
- Has your partner ever hurt your pets or destroyed your things? Does your partner throw or break things during arguments?
- Is it hard for you to have relationships with friends or relatives because your partner disapproves of, argues with, or criticizes them?
- Does your partner make it hard for you to keep a job or go to school?
- Does your partner withhold money from you? Do you know what your family's assets are? If you wanted to find out, or to find any important documents like birth certificates, passports, bank books, house deed, would your partner make it difficult for you to do so?

### **3. Other screening aids**

Larry Rute, then with Kansas Legal Services, proposed the following screening questions for mediators, which could be adapted for use by other court professionals:

- Are you fearful of the other person for any reason?
- Are you afraid you will be harmed?
- Have you ever been threatened?
- Have you ever been harmed?
- Have you had to call the police for protection?
- Have you ever stayed in a shelter?
- Are you afraid to answer these questions?
- Are you afraid to be in the same room with the other party?
- How can I tell when he/she is angry?
- How can I tell if you are angry, frightened, or upset?
- Can you ask for a break if you are feeling uncomfortable?<sup>42</sup>

To screen for violence from a different perspective, some

38. See, e.g., K. Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUSTON L. REV. 30 (1998).

39. See Casey G. Gwinn and Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U.L. REV. 297 (Spring 1993). See also Arleen Erland, *Study of Women Arrested for Domestic Violence*, (unpublished paper, on file with the author).

40. See Kathleen Waits, *Critical Issues: Battered Women and Family*

*Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027 (Spring 1995).

41. See *Lawyer's Handbook*, *supra* note 5, at 2-1-2-11.

42. See Presentation at a Continuing Legal Education for Kansas mediators at Washburn Law School, Topeka, Kansas, August 8, 1997.

sample questions developed by the Alternatives for Domestic Aggression program in Ann Arbor, Michigan,<sup>43</sup> include:

- Was there violence in your family (of origin)?
- During conflict do you often threaten someone, break things, punch walls, slam doors, ignore her, or leave?
- Do you have mood swings, where one moment you feel loving and affectionate, and the next moment angry and threatening?
- Have you ever shoved, grabbed, hit, slapped, or choked your partner, or any past partners?
- Do you find it difficult to talk to your partner about your feelings, your hopes, your fears?
- Do you tend to blame others for your behavior, especially your partner?
- Are you a very jealous person?
- Do you try to control how your partner thinks, dresses, who she sees, how she spends her time, how she spends her money?
- Do you try to discourage her from seeing her friends or family?
- Do you get angry or resentful when she is successful in a job or hobby?
- Do your conversations quickly escalate into threats of separation or divorce?
- Do you ever threaten to hurt her, yourself, or others, if she talks about leaving you?
- Do you do or say things that are designed to make her feel “crazy” or “stupid”?
- Do you blame alcohol, drugs, stress, or other life events for your behavior?
- Do you feel guilty after aggressive behavior and strive for your partner’s forgiveness?
- Do you think that you could never live without her, yet other times want her out?
- Do you use sex, money, or other favors as a way to “make up” after conflict?
- Is your partner afraid of you sometimes?

## **E. WHAT CAN BE DONE ONCE THE FACT-FINDER KNOWS THAT DOMESTIC VIOLENCE IS A FACTOR IN A CASE?**

### **1. Develop protocols**

According to the National Council of Juvenile and Family Court Judges, communities that are concerned about domestic violence “are asked to confront a new and compelling set of facts: (1) adult domestic violence and child maltreatment often occur together and (2) new responses are required of *everyone*, if violence within families is to stop.”<sup>44</sup>

43. See *Alternatives to Domestic Aggression Assessment* available at <http://csswashtenaw.org/ada/services/index.html>.

44. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE DEPT., EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 9 (1999).

45. See Jaffe et al., *supra* note 1, at 75.

46. See *id.* at 75 (Besides the power imbalance between the parties in a domestic violence case, another “reason why domestic violence cases may be exempted from mediation is that mediators may not be able to obtain accurate information if one of the parties is so

The protocols that courts and court personnel may develop will depend upon the nature of the information sought, the circumstances of the parties, and the individual court’s caseload and resources, among other factors. At minimum, courts should develop procedures that will ensure that the court environment is a safe one for disclosure and that court personnel and other system players become as educated as possible about domestic violence. Local guidelines should address such topics as training of court personnel on domestic violence; points in the proceedings when the parties will be given a specific opportunity to talk about violence in their relationship; procedures for promoting safety and confidentiality; and when and what referrals will be made.

Mediation, and other processes that are based on a presumption of equal power, should allow for a victim to opt out without negative consequence to that party.<sup>45</sup> If mediation is undertaken, the mediation session should be done in a way that enhances safety and allows a victim to provide information to the mediator about the violence in a confidential, safe setting.<sup>46</sup> The process should also allow a victim to bring a support person into the mediation session if she desires, even if the other party does not. Any agreements discussed in mediation must be subject to attorney review and court approval and should be viewed from the perspective of safety and autonomy for the abused party. The victim should not be pressured into making an agreement, and the lack of agreement through mediation should not be viewed as obstructionist if there is domestic violence.

### **2. Recognize what can be solved through court processes**

Courts have tremendous power to stop a batterer from continuing his power and control over the victim. The most effective interventions are those that hold the safety of battered women and their children paramount and that provide for consistent, swift, and sure consequences for battering behaviors.

Courts can promote safety for battered women by issuing protection orders; contrary to popular opinion that they are “just a piece of paper,” protection orders have been found to be effective, particularly when the court and law enforcement systems enforce them.<sup>47</sup> Courts can also promote safety by taking away the batterer’s rule-making power, and making and enforcing rules against the batterer. Rules need review, enforcement, and consequences for noncompliance. In order to be effective against an abuser, a court’s rules and orders need to be reviewed, enforced, and provide for clear and swift consequences for noncompliance.

Some courts use regular review hearings, in criminal cases

afraid of the other party that she (or he) cannot speak freely to the mediator.”). For a checklist of recommendations on mediation when there is domestic violence, see Family Violence Prevention Fund, *supra* note 1, at 4-4-4-5.

47. See Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS’N 589 (Aug. 7, 2002); Kit Kinports and Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. OF WOMEN & L. 163 (1993).

and family law cases, to monitor the conduct of an abuser and to ensure that the abuser knows that the court is paying attention.<sup>48</sup>

### **3. Safety of the children and the battered partner should always be the primary concern**

In custody and parenting time cases, child and victim safety follows when one recognizes that battering a partner is *per se* bad parenting. It is not in a child's best interest to be ordered to live with a batterer, or to visit a batterer without clear and effective safeguards for the child's safety.<sup>49</sup> In addition, research shows that batterers are difficult to change—many batter in subsequent relationships, so the presence of a new partner for the batterer may not be a safety valve for the children.<sup>50</sup> When making any order in a domestic violence case, the court should actively ask itself whether it is doing everything that it can to keep the children and the non-abusive parent safe and alive.

### **4. Don't hold women to impossible standards of parenting, and recognize their efforts to stay safe.**

Put the blame for the battering where it belongs—on the perpetrator.<sup>51</sup>

### **5. Draft all orders with safety as the primary consideration.**

"Father's rights" or "parent's rights" should always be secondary to safety.<sup>52</sup>

### **6. Recognize that keeping the mother safe can translate into keeping the children safe.**

As one means of ensuring that the mother is safe, the court, as part of its decision-making process, can inquire whether a woman has a safety plan.<sup>53</sup> Courts should also order temporary custody or possession of the children as part of temporary restraining orders to ensure that children are safe, and make supervised parenting time (supervised by a non-related third party) the first choice until the perpetrator actually demonstrates that he is fit to have the children unsupervised.<sup>54</sup>

### **7. Orders must be clear, specific, and detailed as to the definite terms of the order, and should include built-in consequences for noncompliance.**

There should be no room for ambiguity or negotiation. Orders should be vigorously enforced and perpetrators held accountable.<sup>55</sup>

### **CONCLUSION**

The processing of a family law case where there is no domestic violence is necessarily different than that of a case where there is domestic violence. What would appear to be reasonable and helpful in a case without domestic violence can actually be harmful and even deadly in a case where domestic violence has occurred. Once a court or a professional identifies that domestic violence is a factor, then the court must shift its usual way of thinking about, and processing, a family law case. Without that paradigm shift, the court may be creating greater problems than it solves in the families that come before it.



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48. See Family Violence Prevention Fund, *supra* note 1, at 7-59 (Gondolf's findings demonstrate that court review dramatically increases compliance and lowers recidivism among batterers. The full report by Mr. Gondolf is available from the Mid-Atlantic Addiction Training Institute, phone number 724-357-4405.).

49. See Julie Kunce Field, *Visits in Cases Marked by Violence: Judicial Actions That Can Help Keep Children and Victims Safe*, 35 COURT REVIEW, Fall 1998, at 23, 31.

50. See D. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 53 (Jan. 1994); Bancroft and Silverman, *supra* note 2.

51. See Susan G.S. McGee, *Why Some Battered Women Sometimes Stay*, INFORMATION FOR PROFESSIONALS, available at <http://comnet.org/dvp/dvp-prof.html>. See also G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89 (Spring 1999).

52. See National Council of Juvenile and Family Court Judges, *Final Report of the Child Custody and Visitation Focus Group*, available at

<http://www.vaw.umn.edu/FinalDocuments/custodyfin.htm>.

53. See *id.* The court or other personnel who report to the court should not ask for specific details of the safety plan. If the details of a safety plan are revealed, the safety plan itself can be compromised and becomes less effective as a means of keeping the battered woman safe.

54. See Field, *supra* note 49; Nadkarni and Shaw, *supra* note 3; Jaffe, et al., *supra* note 1; Family Violence Prevention Fund, *supra* note 48.

55. See Field, *supra* note 49; *Lawyer's Handbook*, *supra* note 5, at 13-3.