BWJP
CHANGING SYSTEMS
TRANSFORMING LIVES

PROTECTION ORDERS
NATIONAL CENTER ON PROTECTION
ORDERS AND FULL FAITH & CREDIT

The Protective Order Case

Litigation Skills in Protective Order Cases

AUTHORS: Judith Wolfner and Becki Kondkar

A practice manual for lawyers representing survivors in domestic violence protective order cases

This project was supported by Grant No. 2016-TA-AX-K052 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this document are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women

Table of Contents

Introduction

This manual provides trial practice tips for attorneys litigating protective order cases on behalf of domestic violence survivors. Despite differences in state law, these cases present similar issues and challenges for survivors, as well as the attorneys who represent them.

The manual divides the phases of case preparation into the following sections: (1) Before You File, (2) Pre-Trial Practice and Evidence Selection, (3) Case Themes and Opening Statement, (4) Direct Examination, (5) Evidence, (6) Cross Examination, (7) Impeachment, (8) Closing Argument, (9) Objections, (10) Negotiations and Settlement, and (11) Expert Witnesses. Each section incorporates broadly applicable principles of good litigation practice with fact scenarios and issues specific to protective order cases.

I. Before You File

A. OVERVIEW

Lawyers who represent domestic violence survivors in protective order cases must make a variety of strategic decisions quickly. Just as quickly, survivors must make personal and legal decisions that can have long-term consequences relating to their families, their children, their financial security, and their personal safety. In the context of a crisis, it can be difficult for clients to grapple with these issues. Lawyers can do a lot to help clients understand and navigate the decisions they need to make.

1. Deciding Whether and When to File for a Protective Order

The repetitiveness of a legal practice focused primarily on protective order cases can lull even the most experienced attorney into a "one size fits all" approach to domestic violence litigation. But these cases require careful consultation with clients for important strategic decisions at every stage of the case. Good lawyering begins before the case is filed; it requires careful client consultation on issues such as:

- Will legal action positively or negatively impact victim safety (i.e. will it be deterrent or a trigger for this particular abuser)?
- Do non-legal alternatives exist for accomplishing the survivor's goals?
- Will litigation result in an abusive parent having increased access to shared children (i.e. will the batterer initiate custody litigation in response, or begin exercising visitation not previously exercised)?

In some cases, lawyers must also determine whether the complexity of a case makes it impossible to competently litigate within expedited time frames established by statute. For example, cases that require expert testimony regarding child sexual abuse can be difficult to prepare in the time frames required for protective orders. In those circumstances, lawyers should speak frankly with their clients about immediate safety considerations, long-term litigation goals, and options for different types of proceedings.

Lawyers must also help clients understand both the benefits and the limitations of protective orders. By exploring these issues before litigation starts, clients can weigh the risks and benefits of filing, and make informed decisions about how court proceedings might affect them. Clients who engage in this process with their lawyers are more likely to feel satisfied with litigation outcomes.

2. Thinking ahead on Child Custody Issues

When child custody is at issue in a protective order case, important additional considerations apply. Before initiating litigation on behalf of a parent, the lawyer should understand how domestic violence protective order statutes and permanent custody statutes interact, and then determine how those interactions should direct strategy in any given case.

Long-term custody considerations should play a central role in developing a case strategy for survivors, even when the lawyer representing the survivor will provide representation only for the protective order case. Lawyers handling protective order cases must be thoughtful about the potential impact that temporary child custody determinations in the protective order case will have on the permanent custody case. For example, a judge may be reluctant to impose visitation restrictions on a batterer in a subsequent custody case, if the victim conceded to less restrictive access during the protective order case. Additionally, depending on the jurisdiction, findings from protective order cases may or may not be binding in future litigation. As a practical matter, however, judges are unlikely to deviate significantly from their own protective order findings during a subsequent permanent custody case. For all of these reasons and more, lawyers representing parents must carefully consider how protective order proceedings might affect a client's long-term child custody goals.

Finally, clients need information about their rights and options before they can make informed choices about what type of custodial arrangements to pursue in their cases. Sometimes survivors express a desire for custodial arrangements that appear dangerously permissive (i.e. joint custody), and sometimes they desire custodial outcomes that appear unrealistically restrictive (i.e. termination of parental rights). In these situations, lawyers should not substitute their judgment for the client's, but should instead make sure the client is well-informed about the range of realistic options available to them, and the legal meaning of various custodial outcomes (i.e. joint custody vs. sole custody).

B. INTERVIEWING YOUR CLIENT

The emergency nature of protective order cases creates challenges for the lawyer/client relationship. More often than not, clients and lawyers meet for the first time on the same day they file emergency petitions. In other words, lawyers must get clients to trust them with intensely personal stories within hours, if not minutes, of having first met them. Those stories often include facts or circumstances that clients either feel ashamed about or are afraid to share, for fear the lawyer will judge them or not want to help.

1. Facilitating Client Trust

Client trust is essential in domestic violence cases. Clients need to feel supported and not judged in order to open up about their experiences. A few things that lawyers can do during the client interview to help clients open up include the following:

- Plan enough time for the interview. If you seem distracted or rushed, it will be obvious. You are asking clients to trust you with intensely personal information and they deserve

your full attention. The more rushed you are, the more likely you are to do things that inhibit client trust - like interrupting your client's story and peppering the client with interrogation-style questions. It's hard to create the impression that you care if you don't have time to listen.

- Discuss client confidentiality early in the interview. Many survivors are distrustful of the legal system, and sometimes for good reason. Abusers can be good at convincing victims that they have "connections" with law enforcement, lawyers, and judges. Some clients will need to be reassured early and often about your duty of confidentiality, and reminded that everything they tell you is confidential.

- Don't interrupt. Let your client tell her own story at her own pace, then go back and ask follow-up questions. Save follow-up questions that might seem judgmental until later in the interview, after your client feels more comfortable.

- Give clear, consistent, and unambiguous refutation to self-blame, minimization, and shame. When a client says, "I know how stupid it makes me seem that I stayed with him after that," don't ignore it. Instead, say something reassuring like "Anyone can find themselves in this situation. It doesn't happen overnight, and it's not always easy to figure out what to do." If a client makes excuses for her abuser's behavior, point it out. "I hear you making excuses for him. Lots of people drink too much, but they don't abuse other people. He has no right to hit you even if he's been drinking. He actually has two problems – an alcohol problem and an abuse problem." Sometimes, clients feel the need to refute accusations that abusers have used to justify the abuse. If a client says, "I promise you I've never cheated on him," you should respond by telling her that there's no excuse for abuse: "The truth is, it doesn't matter whether you ever cheated. I believe you when you say you didn't, but I don't care either way. He can't abuse you or hit you for any reason."

- Avoid judgment and judgmental language. Sometimes you will have to ask questions that can be perceived as judgmental. Even if you are feeling judgmental about something, be thoughtful and neutral about how you ask questions. Instead of saying, "Why would you slap him in the face if you were afraid of him?," ask, "I want to understand more about what you were thinking and feeling when this happened. Tell me more about what was going on and what he was doing when you slapped him in the face… Have you ever done that before? What was different this time?" The way you ask the question dictates the way she communicates her story moving forward. By asking questions the wrong way, you can distort your client's narrative into one that focuses more on whether she can justify her own behavior than on what the abuser did to her.

- Try not to ask leading questions. Leading questions can make some clients think there is a "right" answer. Or they might lead a client to skip parts of their story. In either case, leading questions can cause you to miss important information. The best way to avoid leading questions during a client interview is to ask, "Tell me about…" or "What

happened next?" Instead of asking, "Is that when you called police?," ask, "Then what happened?," or "Tell me about what was happening right before you called the police."

- Pay attention to signals you might send to your client through body language and follow-up questions. If you start scribbling notes for the first time just as your client tells you that she was drinking on the night of the incident, you have signaled something to her. If you quiz her about why she went to her abuser's house - before she can tell her story fully in her own words - you have signaled something to her. Stay tuned in to these issues.

- Show empathy. Expressions of empathy and kindness go a long way with clients. Don't always just move on to the next topic. Pause occasionally and take the time to let the client know you are hearing her. It can be as simple as saying, "I know this must be hard to talk about," or "I'm so sorry that he did this to you. You don't deserve to be treated this way."

- Ask the client what she wants. Too often, lawyers assume they know what clients want. Don't assume – ask. After you explain what a protective order can do and the process for getting one, ask the client whether it sounds like something that might help her situation.

- Leave time for questions. Clients really value not just being talked at, but listened to. Make sure that you leave time for clients to ask questions about the things you have told them and the advice you have given. The client's questions will often help you identify what the client's priorities and needs are. For example, a client who asks a lot of questions about custody may be signaling that custody is her top concern.

2. Getting the Whole Story

No client is perfect, but many clients worry they should be. Many will be reluctant to tell lawyers negative personal and private information. But your job is to be prepared for the tactics and accusations abusers will use in court. To be prepared, you need your clients to be open about what might come up in litigation.

Introduce the issue by explaining first why you are asking the questions:

> "Part of my job in court will be to deal with the things that your husband might say to make you look bad in court. I want to figure out what those things will be. Let's start by talking about what you think your husband will say about you in court – whether or not it's true."

Start with open-ended questions:

- What negative things do you think your partner will say about you in court?
- Has he ever threatened to bring up something bad or embarrassing?
- Is there anything in particular you are afraid he will bring up to try to make you look bad?

- After asking open-ended questions, get specific:

    - Have you ever sent your partner text messages or emails that he will bring to court to make you look bad? What kinds of messages?
    - Has your partner ever called the police on you?
    - Have you ever had criminal charges filed against you?
    - Have you ever used a weapon on your abuser?
    - Have you ever had a protective order issued or filed against you?
    - Have you ever had your children removed from your care by child protective services?
    - Has your partner ever reported you to child protective services?
    - Will your partner say that you have drug or alcohol problems? (wait until later to try to figure out whether it's true.)
    - Are you on any medication for any kind of mental health issues? Anxiety? Depression? Have you ever been given a mental health diagnoses?
    - Have you ever been hospitalized for any mental health issues?
    - Will he say that you have tried to commit suicide or threatened suicide?

- <u>Now get the scoop.</u> Once you have an idea about what the abuser might bring up, ask follow up questions to determine whether the allegations are true or false, and what evidence or witnesses the abuser might bring to court to support his claims.

    - Of all the things you think he might say about you, are any of them true? Which ones?
    - What evidence or witnesses will he bring to court to prove those things?
    - Who do you think your partner will bring to court to testify? What will they say?

II. Pre-Trial Practice and Evidence Selection

A. OVERVIEW

In most jurisdictions, protective order hearings happen so quickly that formal pre-trial discovery is rarely available, and lawyers have limited opportunity to conduct important investigation. To prepare for court, lawyers must anticipate and plan for a variety of scenarios that cannot be fully narrowed in advance. But thorough preparation, even in this setting, makes it possible to avoid a true "trial by surprise" scenario in the courtroom.

B. EVIDENCE GATHERING AND SELECTION

In protective order cases, lawyers must conduct quick, focused investigations, and also decide quickly whether to edit evidence and testimony that detracts from the client's "core story."

1. Deciding Which Incidents to Prove

Don't try to prove everything and every incident. Domestic violence cases are much more compelling if you are selective about your evidence. Plan to prove only a limited number of incidents, and choose your best evidence. In general, a good case plan should include proving the most compelling incidents that tell the client's "core story." In most cases, that will include:

- The two most recent incidents of abuse
- Two or three of the worst incidents of abuse (in addition to the most recent)
- The general nature and frequency of abuse
- Incidents resulting in serious bodily injury or medical attention
- Incidents involving the use of weapons
- Threats to kill
- Stalking behavior and/or obsession with monitoring or controlling daily activities

Consider other special issues in evidence selection. Some categories of evidence require special assessment and consideration when considering what to prove at trial.

Stalking. Abusers often stalk and terrorize victims by exploiting the personal knowledge they have about victims' daily routines. Yet many domestic violence attorneys have been trained or admonished by courts to focus only on incidents of physical injury or assault, and to ignore stalking behaviors that suggest high risk of lethality. Testimony of physical abuse, when presented in isolation, often fails to capture the anxiety and fear induced by abusers who also stalk and monitor

their victims. Sometimes, a simple question such as "how has this affected your daily life?" can elicit incredibly powerful testimony about the ways that a victim has changed her work schedule, telephone number, driving routes, and daily routine in order to stay safe. While it is important not to detract from compelling evidence of physical abuse, stalking behavior is often key evidence that contextualizes the level of fear our clients feel.

Sexual Assault. Don't avoid it. Instead, help clients make informed decisions about whether and how to raise it. Sometimes lawyers sense a client's discomfort with disclosing sexual abuse, and forgo questions that would help them to understand the extent and nature of that trauma. Be careful to balance a client's privacy concerns with the need to be fully prepared for trial. For some clients, sexual abuse is the primary victimization, and it is essential that lawyers present evidence about it. In other cases, there will be substantial evidence of other types of serious abuse, and clients may decide not to testify about sexual abuse for a variety of legitimate reasons, including privacy concerns and litigation strategy. The lawyer and the client should decide together about the extent and nature of testimony regarding sexual abuse, and should talk openly about the client's concerns for privacy.

As a final note, survivors often use ambiguous language that minimizes sexual abuse, especially if committed by a spouse. Ask follow up questions to make sure you understand. Lawyers sometimes get stumped over whether to use the word "rape" when a client does not feel comfortable doing so. Vivid testimony about an incident is more important than labels. Do not push clients to use language they are uncomfortable with, and let the evidence speak for itself.

Strangulation. Incidents involving strangulation should generally be considered among the more serious abuse you should present testimony about. Yet clients seldom use the word "strangle" to describe having been strangled. Make sure you understand what happened, and elicit a narrative that clearly establishes strangulation. When drafting pleadings or speaking in court about strangulation, do not use inaccurate terminology such as "choking."

Also keep in mind that most strangulation will not include visible signs of strangulation. Present other testimony and evidence regarding the strangulation, including inability to breathe, "seeing stars," loss of consciousness, voice changes, shortness of breath, difficulty swallowing, nausea or vomiting, dizziness, or urination while unconscious. These symptoms sometimes appear in medical records or 911 calls, and can corroborate the survivor's testimony about the incident, even if she did not report the incident as a strangulation.

Injuries. A skilled lawyer should have basic competence in evaluating offensive and defensive wounds. Some evidence that lawyers might miss includes injury or bruising to the back of a victim's hands or arms (indicating a protective posture), injuries in "private" areas that victims are

reluctant to show, or injuries that a victim hasn't seen because they are on her backside (indicating the victim was curled in fetal position). On the other hand, abusers are generally very effective at presenting their own injuries and are eager to do so. A common example is bite marks. If an abuser has bite marks on his chest, it suggests the victim was being restrained in a "bear hug" or straddled. A bite mark on his arm suggests the victim was in a choke hold. Scratches on an abuser's face or neck suggest the victim was being strangled. A good lawyer should take advantage of the abuser's eagerness to display these types of injuries, and should turn the testimony to the client's advantage during cross-examination and closing.

2. Identifying Witnesses

Once your client decides to proceed with a protective order, you must quickly determine what, if any, witness testimony you will present in addition to your client's testimony. Competent lawyering demands that, even within this shortened time frame, you prepare each witness for court by running through the direct, preparing them for cross examination, and explaining the process of objections.

In addition to testimony from the client, other witnesses used to prove the violence often include:

- Children
- Police
- Neighbors
- Family
- Friends
- Co-workers

Child Witnesses. Few issues generate more controversy in family court than child witnesses. In domestic violence cases, children are often the only witnesses who can corroborate a victim's testimony about abuse in the home. Many judges believe strongly that children should not testify because the experience of testifying, and especially testifying against a parent, will be traumatic. But in some cases, the child's testimony is essential for securing orders of protection that will prevent future harm. If the child's testimony is more likely to make the primary parent and the child safer in the future, it is probably a necessary part of your case.

When considering whether to call a child to testify, keep in mind that children, like all people, are complicated. They can exhibit a wide range of responses to their experiences of abuse or trauma, including alignment with the safe parent, or alignment with the dangerous parent. Clients are often good at accurately predicting how their own children will respond to questioning, and can help lawyers prepare. For example, in a case where a son has intervened to protect his mother from abuse, the mother might accurately predict that the son will testify truthfully about an incident, but will minimize the abuse and say that he wants to live with his father. In these circumstances, the attorney might call an expert to testify that the child's alignment with the father is a red-flag that

suggests he normalizes the abusive behaviors modeled by his father, and is at risk of adopting similar behaviors.

If you do need to call a child to testify, it is usually a good idea to minimize your preparation of and/or contact with the child. Judges often try to determine how much children have been influenced by parents or lawyers, and too much contact could lead a judge to give the child's testimony less weight. Try to conduct an interview of the child that closely mirrors the questions you would ask in court. That way, the interview itself can be part of the child's preparation for court. When asking children questions, try to be open ended with who, what, when, where, and "tell me about" questions.

Also, kids will sometimes be reluctant to volunteer negative information about a parent with whom they are closely aligned. Make sure that you have asked the right questions so that you are not surprised in court. After you ask questions to determine what the child saw or heard, ask more general follow up questions to determine whether there are any landmines or pitfalls. For example, depending on the child's age, you may want to ask:

- Has anyone besides me talked to you about testifying in court? What did he/she say?
- How do you feel about telling the judge what you saw and heard?
- Is there anything that either a judge or another lawyer might ask you that would make you say something that you don't want to talk about in court?
- Is there anything that you are worried might come up in court?
- How will you feel if you see your dad in court?

Finally, sometimes the opposing party or the judge will want a child to be questioned informally or "off the record," or the judge will place impermissible restrictions on the manner or substance of the child's testimony. Prepare to object. Many states have case law about the types of restrictions judges can permissibly place on child testimony. Make sure you know the law, and that you preserve your record for appeal regarding your right to present witnesses. To facilitate the child's comfort, you can propose that testimony be taken in judge's chambers, but should insist that the court reporter be present. And don't forget that for younger children, it is important to establish their competence to testify, which is often done through questions to establish that the child understands the difference between the truth and a lie.

3. Identifying and Gathering Evidence

a. Use discovery whenever possible. In most jurisdictions, it is not common practice to conduct formal discovery in protective order cases, even though it may be possible within the time frames allowed. In others, there may be insufficient time to conduct written discovery, but sufficient time to give reasonable notice of a deposition. Lawyers should take advantage opportunities to conduct formal discovery in advance of a protective order hearing. Discovery is valuable not just because it helps you prepare for the defendant's version of events, but also because it helps you find evidence to prove a batterer's income and ability to pay support. When a defendant fails to respond to formal discovery requests, it creates the

opportunity for a continuance that includes maintaining the TRO in place while you compel discovery.

Once you know your discovery options, make a case plan that establishes what you need to prove, and whether the sources of proof can be obtained through either informal discovery (any investigation you can do on your own), or formal discovery (interrogatories, requests for production, requests to admit, and depositions). In some cases, it may be necessary to request a continuance to conduct discovery (particularly in cases involving cross-petitions).

b. **Evidence of abuse.** In domestic violence cases, the most frequent sources of evidence to corroborate abuse include:

- Photographs of injuries or property damage
- Phone records
- Emails/text messages
- Clothing
- Police reports
- 911 tapes
- Medical records

For discussion about how to offer and introduce this evidence, see Chapter V. "Evidence."

c. Evidence to support ancillary claims. Finally, consider the other types of evidence you will need to support ancillary claims such as child custody, child and spousal support, and/or housing needs. That evidence might include:

- Pay stubs and/or tax records for each party
- Bills and other proof of household expenses
- Evidence that establishes best interest/primary caregiver history (see next section below, "Planning for Contested Child Custody")

C. PLANNING FOR CONTESTED CHILD CUSTODY

1. Overview

The tasks of gathering evidence and identifying witnesses will differ in protective order cases that involve contested child custody. Depending on the legal standard, many protective order plaintiffs will need to put on a truncated "best interest" case for custody. When custody is hotly contested, some judges eye protective order petitions with undue suspicion, believing that litigants have requested them for the purpose of obtaining quick custody orders, or to gain an advantage in custody litigation. Even more, many judges still believe that so long as the child has not been been physically abused, the domestic violence has little relevance to custody.

For these reasons, lawyers and judges routinely propose and impose custody orders that require victim to make trade-offs between their personal safety and safe custodial arrangements. One of the most important jobs a lawyer can do in a protective order case is help clients avoid that trade-off if there is a way to do so.

2. Making a Case for Custody

a. First, be strategic about when and how to introduce issues of custody. Even though custody and visitation issues are often intertwined with the abuse at issue, and even though custody fears can be a legitimate reason to pursue orders of protection, lawyers need to be strategic about when and how to introduce custody issues to the court. Whenever possible, start your case presentation with a sharp focus on the domestic violence, and then turn to custody issues after having established the abuser's dangerousness. For example, you might decide not to have your client testify about abusive incidents in chronological order – instead, save testimony about incidents that occurred during custody exchanges (or are related to custody disputes) until after your client has testified about other serious abuse. In other words, first establish the abuser's dangerousness. If the custody issues are so tied to the abuse that they cannot be separated at all, you may need to develop a case theme that says just that – it's a case about an abuser whose current weapon of choice is his children.

b. Second, be clear about the applicable legal standard. In some jurisdictions, a "best interest" test may not explicitly apply in a protective order proceeding. Instead, a different legal standard may trigger a custodial presumption in favor of the abused parent. Make sure you are familiar with the legal standard that applies within the context of a protective order case and plan accordingly.

   If a "best interest" test does not apply, be careful what evidence you introduce. Abusers generally like to focus on "best interests" in protective order cases because it distracts the court's attention away from fact-finding on abuse. It also opens the door for abusers to raise negative issues about the victim that are not relevant to a determination on abuse (for example, an unrelated criminal conviction or a history of depression). If you can object to the abuser's introduction of best interest evidence, you should. The fact that a father shows up to all of his son's soccer games should not be factored into a factual determination on the abuse. Try to avoid conflating the issues if you can.

   Once you've requested custody, your protective order case now has two parts – the case is no longer about showing only the abuser's bad acts, it is also about showing why your client is a good and/or preferable parent. Do not rely entirely on the defendant's bad acts to establish your client's right to custody.

c. Third, prepare your client to think ahead on child custody. Your client must be very clear about what custodial arrangement she will ask for in court. Never wait until the day of court to talk to your client about what she wants. Once she's in court, there is

too much pressure and anxiety to think clearly about the issue. To figure out what your client wants, you must do more than ask. Clients need information about their choices. Talk to clients about the options, and the likelihood of getting them. For example, some clients believe that mothers are always awarded custody, and other clients believe that they can only be awarded custody if the abuser agrees. Many clients will not have considered supervised visitation, or will not have thought about the dangers associated with family members supervising instead of professionals. Finally, you should also give clients a sense of how long they may have to "live with" their choice. Choosing an overly permissive arrangement for the abuser's visitation now may make it impossible to pull back on visitation later.

Clients need to think ahead on child custody issues in other important ways as well. Protective order hearings require that domestic violence survivors focus intensely on the abuser's worst behavior. Leading up to the hearing, it can be difficult for clients to switch gears and put on positive evidence of their own parenting. Encourage your clients to think about positive custody themes before you practice direct. One way of doing this is to give your client "homework" – ask her to make a list that describes what is special about her relationship with her children, what she wants for her children, and what makes her a good mom and the best parent for her children. Her answers on direct will be much more thoughtful and informative if she has taken the time to think through these positive parenting issues in advance.

d. Fourth, prepare for the abuser's use of best interest factors. Anticipate how the abuser may use best interest factors against your client. Many problems that abusers characterize as parenting deficits will be attributable to the abuse. If your client has less education or work history, it's often because of family sacrifices demanded of her by the abuser. If she has lost jobs time and time again, it's often because of the abuser's controlling or harassing behavior. If she has bounced around to different houses, that too, is often the result of financial insecurity created by the abuse and/or the defendant's failure to pay support. Would your client have been evicted for non-payment of rent if the abusive parent had been paying support? The abused parent may have discipline problems with the children because of the ways the abuser has undermined her parental authority. Or she may have mental health issues brought on by the abuse, such as anxiety and depression. Ask the court to weigh those effects of abuse against the abuser, not the victim.

Another "best interest" factor that some abusers invoke is the "friendly parent" factor. When victims seek reasonable and appropriate custodial restrictions on abusers, they are often met with claims that they are "unfriendly" parents who have "poisoned" or "alienated" a child against the abuser. In essence, it's a claim that your client is vindictive. When making these claims, the abusive parent asserts that a child dislikes or fears him - not because of the child's experiences with that parent - but because of the other parent's vindictiveness. Some tips for heading off these claims include the following: 1) have your client testify on direct about any efforts she made to facilitate a relationship before seeking restrictions; 2) prepare your client to talk

very specifically about why the restrictions she seeks are reasonable and necessary for the child's well-being; 3) make sure your client spends enough time before trial thinking about and practicing her testimony regarding the children and the ways the abuse has affected them.

"Alienation" claims tend to arise in protracted custody litigation, but need to be cut off quickly at the protective order stage if possible. The fact that a child is fearful or resentful of an abusive parent should not be surprising. Connect the child's feelings to his or her experiences with the abusive parent – that connection is more logical than the claim of alienation. If the abuser has financial resources and brings an expert to testify, you will need opposing expert testimony to challenge the testimony and establish that "parental alienation syndrome" is discredited junk science. "Alienation" cases can be tricky, and the litigation strategies they require are beyond the scope of this manual.

e. Fifth, use the evidence that best supports your case. Regardless of the legal standard that applies, protective order cases involving contested child custody should include the following evidence:

Evidence regarding the child's exposure to domestic violence:

- Testimony from your client and/or the child showing that the child was present and observed or heard abuse or threats
- Testimony that the child intervened on behalf of the abused parent
- 911 tapes or other evidence that the child sought help
- Evidence that the abuser called the abused parent derogatory or gendered names in front of the child or children
- Evidence that any of the children are repeating the abusive behavior they've seen or are acting out (gendered name calling of the abused parent, acting out physically with siblings, etc.)
- Evidence regarding counseling or mental health treatment for the children necessitated by the violence
- Expert testimony about the adverse consequences and risks for children exposed to violence, and gendered violence in particular
- Evidence that the child or children are experiencing physical symptoms associated with exposure to trauma, such as asthma, immunological difficulties, or trouble concentrating at school.

Evidence that the child has been abused or threatened. If the child or children have also been abused, it can be dangerous not to raise the issue in a protective order proceeding. When an abuser seeks more custodial access in the future, courts will be especially skeptical of child abuse claims that could have been raised in prior proceedings.

Evidence that the abuser is using the children to punish your client. Evidence of this behavior tends to be cumulative. During the relationship there may have been threats to take the children or get

custody of the children; the abuser may be using custody claims or litigation to perpetuate the abuse after separation; the abuser may be using custody or visitation exchanges to harass or assault your client; the abuser may be sending harassing communications under the guise of child-related concerns. Sometimes emails and texts will be a good source of proof of this behavior.

Evidence of the primary caretaker/prior caregiving history/status quo. The general rule for child custody is that judges like to do the thing that is least disruptive to the child. For this reason, survivors of domestic violence (who are usually the primary caregivers to their children) have a strong argument that the least disruptive thing for the children – to maintain the status quo – is also the safest child custody determination. Status quo/caregiving history evidence can include any of the following:

- Testimony or evidence showing who does the daily work of parenting – homework, scheduling, transportation, meals, bedtime, etc.
- Medical records showing who coordinates the child's medical needs
- School records or testimony from school teachers or counselors about parental involvement in the child's schooling

In many cases involving contested custody, the abuser seeks a custodial arrangement that bears no resemblance to the prior caregiving history in the family. In other words, he never did the work of childcare, but now wants more custodial time because it's a way to punish his partner for leaving. When this happens, abusers will often be vulnerable on cross examination. At the same time an abuser paints himself as "father of the year," he often can't answer basic questions that a primary caregiver would know. For example, they often can't identify who the child's teacher was last year, the name of a primary care physician, the diagnosis or medication for the child, or the child's best friend. Talk to your client about this. Your client will likely know whether and what questions the abuser can and can't answer about the child.

The prior history of caregiving raises another issue in domestic violence cases. While some abusers are strict disciplinarians who over-discipline or abuse the children, others are overly permissive with their children in ways that are designed to manipulate the children and undermine the abused parent. In those cases, it's important to confront the "fun dad" issue. You may need to make a clear differentiation between the hard work of parenting that your client does, and the easy task of entertaining that the abuser does. Having no rules and no set bedtime might be fun, but it's not a recipe for healthy, thriving children.

f. Have a plan to "humanize" the children. Particularly in custody cases where the children don't testify, it can be important to remind the judge that the children are real people who will be affected by the outcome of the proceeding. Make sure that when you plan your case, you include information that accomplishes just that. For example, you might introduce a photo of the children on direct, so that when your client talks about them, the judge has an image of the children in her mind. You could also have your client testify about the children's schooling, their unique personalities, and the things they like to do.

g. Write an order that minimizes the possibility of future conflict. Nothing in a protective order can generate the potential for future legal disputes more than a child custody provision. Before you go to court, prepare an order that addresses all identifiable sources of dispute regarding custody. Some of the issues to consider when planning your orders include:

- Is contact allowed regarding child-related emergencies?
- Is contact allowed about non-emergency child-related issues?
- If contact is allowed at all, what form of contact is permissible?
- Will the parties use a court monitored program for communication?
- Will visitation be supervised or unsupervised? Does your community have a supervised visitation center? What are its hours of operation? Will it be supervised by some other professional? Who pays the costs of that? Is it even possible to create safe and meaningful supervision by a non-professional? (supervision by the abuser's friends or family is likely to be meaningless, and supervision by the victim's friends or family is likely to be dangerous). Are there dangers associated with family members supervising? Has the client considered those dangers? Does the supervisor have any specific obligations? What are those obligations?
- Other than during visitation, is the non-custodial parent authorized to contact the child, and if so, on what phone, how, and when?
- Will the prohibitions in the order affect the parents' attendance at sport events, extra-curricular or school activities? If so, do you need to address that? Will extra-curricular activities or appointments fall on visitation days, and if so, is the visiting parent obliged to take them?
- For unsupervised visitation, where will visitation exchanges occur? Is there a safe supervised exchange program in your community? If not, is a police station available? Where will your client feel safe doing exchanges, if at all? At what time will the exchange take place? Who is allowed to be at the exchange? Are there any rules about the exchanges (i.e. no one gets out of the car)?
- Are there any prohibitions about where visitations take place or who can be there?
- Are there any substance abuse issues that need to be addressed, such as a prohibition on the consumption of alcohol during visitation?
- Does the abuser's work schedule mean that the child will be cared for by someone else during his custodial time? If so, does this issue require any restrictions? Should you include a right of first refusal?

These are just a few of the many issues that end up causing conflict down the road if they are not addressed in the order.

D. UNDERSTANDING THE ROLE THAT VICTIM AND PERPETRATOR STEREOTYPES WILL PLAY IN YOUR CASE

1. Victim Stereotypes

For every domestic violence case, victim and perpetrator stereotypes will come into play. Effective case planning includes preparation for a variety of predictable defenses that batterers use against their victims, most of which play upon gendered stereotypes that include some version of either (1) the lying/vindictive/scorned woman, (2) the hysterical, exaggerating woman, (3) the provocateur, or (4) the cheating manipulator. Your client is likely to know which of these the batterer will use. Do not underestimate the effectiveness of these powerful cultural archetypes.

In addition to the gendered stereotypes that batterers frequently exploit, commonly held beliefs about "real victims" of domestic violence also present challenges in protective order cases. For example, although anger is the prevailing emotional response to abuse, judges often believe that "real victims" are never angry. Instead, they expect victims to present as fearful and passive, and to behave consistently with notions of "learned helplessness." When victims present as angry or resistant to their abusers, they are readily cast as mutually violent perpetrators, or "high conflict" litigants. This tendency to cast victims as mutually violent varies with racial and socio-economic differences, happens often to victims in same-sex relationships, and creates challenges for some clients more than others.

Common Victim Myths and Stereotypes

- Weak
- Masochistic
- Crazy
- Hysterical and exaggerating
- Lying and vindictive
- Mutually violent
- Provocateur
- The "virtuous victim"

2. Perpetrator Stereotypes

Lawyers must also prepare for the role that stereotypes about batterers will play in their case. The relative economic privilege and professional status of batterers often dictates which stereotypes about victims and batterers are most likely to resonate in any given case. The commonly held belief that domestic violence is primarily committed by people of lower socio-economic status can make it hard for victims whose perpetrators have financial resources and professional credentials. Additionally, batterers benefit from the tendency to conflate domestic violence with "anger management" problems. Although most batterers effectively manage their anger by directing it to one safe target (the victim), judges often expect them to be volatile and angry in court. If an abuser instead seems calm and in control, the behavior is seen as incongruous with the victim's reports of

abuse. Similarly, a judge who wrongly assumes that domestic violence is associated with mental illness may believe that a "normal" psychological test result, or the absence of an identifiable pathology, is probative on the issue of whether someone has committed acts of domestic violence.

Common Batterer Myths and Stereotypes

- Stereotypes about the socio-economic status of abusers
- DV is caused by alcohol or drug abuse
- DV is an "anger management" problem
- DV is associated with mental illness
- DV has nothing to do with being a good parent

3. Controlling for stereotypes in your case

It will often be readily apparent which of these stereotypes and myths will play out in each case. Don't simply ignore it and hope for the best. If your client is likely to be cast as an angry, mutually aggressive "provocateur," start dealing with that in your opening. Create a framework for the court to interpret her behavior as brave and strong, not mutually aggressive. Instead of apologizing for it or trying to minimize your client's anger, address it. Anger is a normal, healthy response to abuse. Fear and anger are not mutually exclusive emotions. Say so. Similarly, if your client will be cast as a hysterical exaggerator, plan for that. In that case, your job will be to show that your client's fear is proportionate to the threat - lay the groundwork for that in opening as well.

Once you have a plan to address the stereotype/s that may or will be imposed on your client, communicate with her. Before practicing direct examination, talk to her about the "traps" the defendant will try to set. Warn her that they will try to cast her as angry and vindictive. She needs to know that if she shows anger in court, it will play into the abuser's strategy. Prepare your client to be smart and thoughtful about these issues when testifying.

Finally, don't forget to plan for perpetrator stereotypes as well. Will this abuser present as a cool, calm, "upstanding citizen" because of his socio-economic status? Maybe the case calls for a theme that focuses on how deliberate and calculating the defendant is - not just about the image he portrays to the outside world, but also about his reign over the home. Your clients will be very good sources of information about how abusers will behave in court.

III. Case Themes and Opening Statement

A. OVERVIEW

Whether you practice in a large or small jurisdiction, most courts will have a busy protective order docket. Judges frequently open a hearing by telling counsel to "call your first witness," thereby discouraging opening statement. Resist the temptation to begin your case in chief without an opening statement. Simply stand up and give a 30-second opening that tells the judge your theme and your core story. In almost all cases, the court will require that your opening be very brief, and you will have to plan to make an extremely succinct opening statement.

A quick and effective opening statement will do three things: 1) communicate your case theme, 2) take the bite out of "bad facts," and 3) convey compelling facts without overstating your case.

B. THE CASE THEME

1. Get to the "core" story.

A primary purpose of opening statement is to introduce the case theme. Establishing a compelling theme, or "core story," is vital to the effective presentation of your client's case. Your theme is first presented in opening statement, is emphasized at every stage of the case, and then reiterated again in closing argument. In some cases, it is possible to begin laying the groundwork for your theme in your first pleading.

The theme is your 15-second sound bite that describes your case. Themes should encapsulate the most crucial facts of your case and create a framework for your client's narrative. It must capture the essence of your client's experience. Your theme must be supported by the evidence so that it rings true to the judge when you argue it again in closing. For example, in this opening, the theme addresses the defendant's motivation to assault his wife: he feels entitled to hurt her and does not believe there will be consequences for his behavior.

> Your Honor, this case is about a husband who feels entitled to abuse and terrify his wife to get what he wants. You'll hear testimony that on January 1, Mr. Smith wanted dinner, and he wanted his wife to serve it to him. When she didn't do it fast enough, he punished her. He punched her in the face, dragged her across the room, and kicked her as she lay on the ground. This is the third protective order proceeding that Ms. Smith has brought against her husband during their 10 years of marriage, and Mr. Smith still hasn't gotten the message. The evidence will show that Mr. Smith has been given more than enough chances to change but that he either can't or won't. Ms. Smith needs a protective order from this court in order to live safely in her home.

Themes can be about your client, the abuser, or the abuse. The list below includes other common themes in protective order cases. Notice how these themes are connected to facts that frequently arise in domestic violence cases:

- A woman who wants to feel safe in her own home
- A husband who thinks he owns his wife (he controls and monitors her daily activities)
- A husband who has thrown away chance after chance (victim has repeatedly returned to the abuser)
- A mother who is defending her personal dignity and physical safety (she has used physical violence of some kind in self-defense or retaliation)
- A husband who promised to make his wife pay if she ever left him (he is retaliating with legal action, depriving her of resources, or escalating his abuse)
- A boyfriend who won't take no for an answer (he refuses to accept that the relationship is over, refuses to let victim move on, stalking)
- A husband who accepts no responsibility for his actions (he blames the victim, denies, minimizes, and has an excuse for everything)
- An incident that is just the tip of the iceberg (the past abuse is much more serious than current incident)
- A threat to kill - made even once - is a bell that can't be unrung (her fear may seem disproportionate to the history of abuse)

Every case presents an opportunity for a unique and compelling case theme. Think about what draws you to the case, and what makes you want to help. Examples of other sentiments to capture in case themes include:

- <u>the victim</u> - perseverance through adversity, standing up against abuse, exhausting all options;
- <u>the abuser</u> - preying on the vulnerable, incapable of change, obsessed and volatile, escalating and unpredictable.

2. Develop a compelling message.

Rule 1: Make your theme logical, provable, and compelling. Your case theme is the lens through which the judge will filter the evidence in your case. It will be effective only if it is logical and provable given the facts the judge will hear. In other words, it must be believable. For example, if your client is the family's primary breadwinner and has a strong, willful personality, a theme that portrays her as dependent and vulnerable will backfire. It will not be logical; it will not be believable. You will not be able to give the judge the evidence she expects to hear.

Your case theme should also be compelling. Themes are not compelling if they are too "trite." A trite theme is one that is over-used or invokes too much "DV lingo," such as, "The defendant is obsessed with power and control." If you want your theme to be compelling, it needs to make the listener want to hear more and to right the wrong. A theme is not compelling if it sounds like you use

it in every domestic violence case. Consider this example, and think about whether it makes the listener want to hear more:

> On October 3, 2015, Mary Smith did the thing her husband thought she would never do. After 27 years of marriage, she walked out the door, closed it behind her, and didn't look back. She said enough is enough – John Smith will never lay hands on me again.

Also, never overstate your case with your theme. Domestic violence cases sometimes call for strong words – berate, belittle, humiliate, terrorize, stalk, brutalize. Use the most compelling and descriptive words available, but resist the temptation to use words that overstate your case. Again, if you tell the judge what to expect, you need to be able to deliver.

Rule 2: Keep it simple. A compelling theme will have a concise message that is not watered down by unnecessary information or facts.

Rule 3: Support your case AND respond to the other side. Your client almost always knows what the batterer will say about her, and how he will present in court when on his best behavior. Consider whether you can incorporate the information in a way that supports your case theme.

> Example 1: Your client says her abuser is very charismatic, and will come to court appearing like "father of the year."
>
> > Theme: Jekyl-Hyde: This case is about a man who shows one face to the outside world, and another face to his family behind closed doors.
>
> Example 2: The abuser will say your client is hysterical and crazy and is medicated for anxiety and depression.
>
> > Theme: The toll of abuse: Today the Court will hear about the toll a decade of Mr. Smith's abuse has taken on Mary Smith – about how Ms. Smith wants to live free from his abuse and the emotional turmoil it creates.

When possible, co-opt "bad facts" in the earliest stages of litigation. A "bad fact" can sometimes be incorporated into a case theme in a way that actually bolsters your client's case.

For example:

> Bad fact 1: The abuser has visible injuries.
>
> > Theme: This case is about a wife who was forced to defend herself against a brutal attack by her husband.

Bad fact 2: Victim's instability in employment and housing

> Theme: This case is about a husband who wants to make good on his promise that if Ms. Smith ever left him, she would have nothing.

3. Thread the theme through every part of your case.

Ideally, you lay the groundwork for your case theme in the first pleading, and then set the stage in opening. During opening, the theme should include a few key words or phrases that you will later repeat in closing:

> "This case is about a man who shows one face to the outside world, and another face at home, behind closed doors…"

The direct and cross examination should then build upon your theme by including facts and points that will help you drive it home in closing. In closing, drive the theme home through repetition of the key words or phrases you used in opening:

> "Mr. Smith has shown the court one face here today…"

Then, "connect the dots" with the evidence presented:

> "It is difficult to imagine that the man who testified in Court today is the same man on the cell phone video recorded in Ms. Smith's home on January 1st. Everyone but Ms. Smith is surprised. The man in that video is the man Ms. Smith has been married to for fifteen years – it's the man he becomes behind the closed doors of his home."

One of the biggest challenges in using a case theme effectively is to keep it singular and consistent in each part of your case. Trying to make too many points can lead to multiple themes arising in different parts of the case. Compare and contrast your opening and closing to make sure they reinforce the same theme, and review your direct and cross to make sure they also support it.

4. Communicate your theme to your client.

Communicating your case theme to your client serves two important purposes. First, a client who knows the case theme is more likely to stay focused on the right issues in court, and less likely to stray from her "core story" during direct examination. Sharing the case theme with the client also helps confirm that you "got it right" - that you have captured a theme that will ring true in court.

Second, clients are often moved by the experience of hearing their stories in the compelling framework of a case theme. When you get it right and find the essence of a client's story, the client knows she has been heard and that her lawyer empathizes with her experience.

C. THE OPENING STATEMENT

1. Pick a theme and stick to it.

Domestic violence cases sometimes involve so many compelling facts and narratives that it can be difficult to choose one simply stated theme. But peppering multiple themes throughout the case can detract from your strongest message. Your opening statement is where you first commit to a simply stated theme. When stated for the first time in opening, your theme should include words or phrases that will bear repeating in the other parts of your case.

2. Combine your case theme with specific facts of abuse.

Be sure to quickly show that your case theme is both provable and logical by connecting it to your most compelling facts. The following example shows how to piece together a short, quick opening:

> Step 1: Introduce the theme
>
> Your Honor, Mr. Smith simply cannot take "no" for an answer.
>
> Step 2: Connect to facts immediately to show that your theme is provable and logical.
>
> Since the parties broke up last March, he has called her 30-40 times a day, even after Ms. Jones has repeatedly told him not to contact her. He has followed her to work and to her friends' homes on 8 different occasions. Most recently, he sat outside her apartment from 2 - 6 AM on watching her front door.
>
> Step 3: Wrap it up quickly.
>
> His stalking behavior is escalating. Ms. Jones is afraid and anxious and she needs the court's help to get him to stop.

Be very selective - use only the most compelling and provable facts in opening, and stay focused on your client's core story.

3. Be vivid and concise.

A good opening statement should trigger the listener's imagination, and should evoke a visual image. Be direct and short, but include enough detail to paint a picture of the abusive incident. It is more persuasive to give a powerful vivid description of one incident, than to list a bunch of incidents. Compare and contrast the following examples:

Example 1: During their five-year relationship, Ms. Smith has been hit, punched, kicked, and dragged by Mr. Smith.

Example 2: On October 1, Mr. Smith became enraged after Ms. Smith said she was leaving him. She fled the house and ran for help, but Mr. Smith was faster. He chased her down, tackled her to the ground, and dragged her back home - face down across a gravel road.

The second example makes the abuse and the abuser seem much more real and frightening because it triggers a visual image in the listener's mind. A list can be useful, but should not be used as a substitute for vivid descriptions of specific incidents. (You could, however, follow example 2 with the list in example 1.)

Finally, to trigger the listener's imagination you must avoid passive descriptions of abuse that describe only "what happened" to your client. Instead, say what the abuser did. For example, instead of "she was pushed to the ground," say, "he pushed her to the ground."

4. Take the "bite" out of bad facts.

Opening statement sometimes presents the opportunity to frame "bad facts" in a more favorable light. By confronting bad facts in opening, you can take the power out of the defendant's presentation of them, and avoid the perception that you tried to obscure or contort the real facts of your case.

Example:

Your Honor, what started as a simple argument between the parties turned into an explosion of violence and anger by the Defendant that resulted in tragic injuries to Ms. Smith. After the Defendant called my client a "bitch," she slapped him in the face. He responded – not in kind, and certainly not in any kind of self-defense – but completely out of proportion. He pounded her in the face so hard that he fractured her orbital socket, resulting in a trip to the hospital and 12 stitches.

This opening creates important context and framework for viewing the behavior of each party, and maintains the victim's credibility by dealing with a "bad fact."

5. Be smart about repetition.

In bench trials, repetition is both your friend and your enemy. Your opening should include key thematic words or phrases that can be woven into other parts of your case. At the same time, be careful about boring a judge by making the same statements or descriptions in every part of your case. Sometimes, your opening and closing will be delivered within the same 30-minute window. The two should sound connected but different.

6. Avoid legal argument, but address any tricky legal issues in the case.

When necessary, address any tricky legal issues raised by the facts described.

For example, in the case described above, you may need to frame your evidence by putting the court on notice about how the legal standard is different when both parties request a protective order.

> …… Under state law, the Court may issue mutual protective orders only in cases where each party presents a significant risk of future harm to the other. So today, the Court will hear evidence showing that only Ms. Smith is in danger of future harm, and only Mr. Smith presents a continuing risk.

7. Deliver your opening statement persuasively.

A persuasive opening statement will be both concise and carefully paced for maximum clarity and emphasis. Plan for strategic pauses that allow important information to "sink in," and try not to rush even though the court may, in fact, be rushing you. If you have kept your opening concise by eliminating non-essential points and facts, you should have time to deliver it.

8. Avoid common mistakes.

- Don't waste memorable introductory moments on trivial introductions or issues.Avoid a rote recitation or list of facts.
- Avoid giving a list of witness summaries.
- Don't overstate your case.
- Stay focused on the key, most compelling facts.
- Don't be argumentative.
- Use active, rather than passive descriptions what the abuser did.

IV. Direct Examination

A. OVERVIEW

A compelling direct examination is the foundation of a successful trial. Although it is rarely given the attention that cross-examination receives in trial advocacy training, a weak direct examination will lose your case much more quickly than a weak cross-examination. In domestic violence cases, direct examination sometimes makes up your entire case-in-chief, and the importance of conducting it skillfully cannot be overstated. In order to conduct a strong direct examination of a client, especially one still suffering the effects of abuse, lawyers must diligently prepare.

An effective direct examination in a protective order case will do all of the following:

- Support your case theme with facts and details
- Evoke vivid and compelling imagery of your client's experience
- Minimize the impact of stereotypes and strategies typically employed against victims in family court
- Establish the necessary factual basis for your legal claims.

B. STRUCTURING YOUR DIRECT EXAMINATION

When planning the direct examination of your client, continue to be selective. Don't try to have your client testify about every incident. Typically, your client's direct examination should include testimony about following:

- The two most recent incidents of abuse
- Two or three of the worst incidents of abuse (in addition to the most recent)
- The general nature and frequency of abuse
- Incidents resulting in serious bodily injury or medical attention
- Incidents involving the use of weapons
- Threats to kill
- Stalking behavior and/or obsession with monitoring daily activities
- Testimony that establishes the need for and/or entitlement to support or other ancillary relief
- Testimony to support a child custody determination.

The following example demonstrates a typical structure for direct examination of your client:

1. Establish the identity of the parties and their relationship to one another.

   Include any other foundational facts that you need to prove as a preliminary matter to entitle her to a protective order.

2. Elicit facts that humanize your client and give her credibility.

   Does she work, is she a full-time parent, how long have the parties been married, is she in the military?

3. Introduce the children if child custody is at issue.

   Do they have any children together? What are their names and ages? Are the children currently living with her?

4. Set the stage for the abusive incident.

   Do not just ask your client to describe what happened! The court should know the date, the day of the week, the hour of the day, the place, and the environment in which the abuse took place before your client ever describes it. This process also moves your witness into an active memory of the incident - she will begin to testify as if she was there again and her testimony will be much more powerful.

   Example:

   Q: Ms. Smith, directing your attention to Sunday, January 1, at approximately 1 a.m., where were you?
   Q: Who else was home with you?
   Q: Did you see the Defendant, Mr. Smith, that morning?
   Q: What room were you in when you saw Mr. Smith?
   Q: What were you doing at that moment?
   Q: What happened when he came into the living room?

   Once the witness begins to describe the incident of abuse, let her tell the entire story as completely as she is able.

5. Follow up the description of abuse with more detailed questions, and clarify any vague or confusing language.

   Example 1:

   Q: Can you describe how Mr. Smith pulled you out of the living room?
   Q: Can you demonstrate to the court how Mr. Smith strangled you?
   Q: How long did he keep you in the bedroom?
   Q: It's been a week since that incident – how do you feel physically today?

Example 2:

Q: When you said, “the next thing I knew, he had me against the wall,” what did you mean?
Q: Describe how he was keeping you restrained against the wall.
Q: How long was he holding you like that?

*Here, you would also ask your client to describe and show any injuries still visible from the most recent incident, or introduce corroborating evidence such as photographs or medical records.

6. Transition the witness to testimony about the history of abuse.

Q: Ms. Smith, is this the first time Mr. Smith physically harmed you?

7. Ask questions about the history of abuse (you should have chosen about three additional incidents for detailed testimony).

Q: Has Mr. Smith physically harmed you in the past?

Q: How many other times would you say Mr. Smith has physically harmed you in the past?

Q: Besides the incident that you just testified about, when was the last time he harmed you?

(Now go through setting the stage again and getting a description).

* Here, you would elicit testimony about the worst incidents, any incidents involving strangulation, the time she was most afraid, threats, stalking, and weapons. For each, specific incident, go through the process of setting the stage and getting detailed testimony.

8. Ask questions that complete the story of the abuse and transition the witness to post-abuse competency.

Q: After your husband beat you, what did you do to protect yourself?
Q: Since you’ve been separated from your partner, how have you felt? Has anything been different? What?
Q: Have you noticed any changes in the children since you left their father?

9. Address negative facts to take the sting out of her anticipated cross examination.

Bury these issues in the middle of your direct examination.

Q: Why didn’t you call police that night?

Q: Why didn't you get medical treatment?
Q: Have you contacted your husband since you obtained this protective order? Why?

10. Ask questions that establish her entitlement to ancillary relief, such as custody, support, use and possession of a home or car, etc.

Use transitional statements to clue her into the fact that you are changing topics.

Q: Ms. Smith, I'm going to move to a different topic now. Since your children were born, who has been their primary caretaker?

* See section II.D., p.16 for discussion and tips on your case for child custody. Here, you will need to transition your witness to "positive parenting" themes that establish her role as the primary caretaker and best parent.

11. Finish strong.

Q: Ms. Smith, why are you asking this court for a protective order?
Q: Are you still of afraid of the defendant today? Why?

C. TIPS FOR ELICITING A STRONG NARRATIVE FROM YOUR CLIENT

- Make sure you have planned a way to start and end strong
- Paint a vivid picture of at least 3 individual incidents (if you can)
- Pace yourself and your client (slow her down if necessary)
- Stay focused on the violence, but also introduce testimony about its effects

For example:

Q: After he began following you and showing up at your home and work, did your daily routine change in any way?
Q: In what way?
Q: How is your life different because you have had to make these changes?

- Always go back to elicit compelling details that the witness avoided describing
- Where appropriate, incorporate positive parenting themes
- Show that your client's behavior or actions were logical in the context

Example:

Q: After you got your temporary restraining order, did you have contact with your husband?
Q: Who initiated that contact?
Q: Why did you call him?

A: Because after I got the order, he stopped calling me. I got scared because at least when he's calling I know what kind of mood he's in. It felt scary because I didn't know if today was the day he would decide to kill me.

- Provide testimony that shows the reasonableness of your client's responses to abuse (anger, retaliation, withholding visitation, etc.)

Q: Why did you refuse to send your son to visitation that day?

- Use "sign-posts" or signals, to transition your client's testimony to new topics and to create context for the fact finder:

Q: Now I'd like to direct your attention to what happened the day after Mr. Smith was arrested.

- Transition your witness before cross examination:

Q: How did the abuse end?
Q: What did you do to get safe?
Q: Describe how your life is different since he's been out of the house?

- Keep your witness focused on the "core story" and thread your case theme throughout.

D. PREPARING YOUR CLIENT FOR DIRECT EXAMINATION

1. Schedule a Time to Prepare Your Client in Advance for Direct Exam

It is imperative that you schedule a time before trial to review and practice your client's direct examination with her. Unless it absolutely cannot be prevented, it is inadvisable to prepare your client on the day of trial; she will be too nervous and anxious to prepare adequately, and you risk asking questions that she doesn't understand, or worse, that she answers to the detriment of your case.

2. Talk to Your Client about Your Legal Goals for Direct Exam

Begin your client's preparation by discussing the legal elements you must prove in her protective order case. This will help her understand why each and every detail that occurred during her abusive incident will not be important to the judge, and it will stress which details are important to the court. Understanding this will help her stay on track during her direct exam. And, she might not get irritated with you if she happens to stray into legally irrelevant details and you are required to interrupt and cut her off.

Make sure your client clearly understands your case theme, what facts and evidence in her case are most compelling, and what evidence best support her claims. If she understands your theme, she might echo that theme in her testimony, providing you with richer testimony from your client. If a client has a tendency to be distracted by issues that don't support her "core story," such as the batterer's recent infidelity, or his name-calling towards her, be sure to talk with her about it so that she understands where her focus needs to be.

3. Role Play Your Direct Exam with Your Client

Now practice asking the questions you will ask her in court, and listen to her answers. This part of trial preparation is quite important because it is when you learn that your client interprets your questions in an entirely different way than you intended. Or, you learn about a new, important fact that hadn't come up in your earlier interviews with her. Then revise your direct accordingly.

When you are practicing the direct examination with your client, make sure that you give her accurate feedback as to how the court will interpret her testimony, and give her suggestions for alternate ways to frame the same information. For example, when asked about their abuse, many clients will say, "We started fighting." You must explain to your client that the court will understand this to mean that they were both voluntarily hitting each other, rather than he punched her in the face after a verbal argument. Help her find better phrases that more accurately describe what happened during the incident. Many new attorneys feel that there is something slightly improper or unethical about telling your client about what facts are important, or not important to the court, or how to describe those facts to the court. There is nothing unethical in telling your client which facts are most germane to her case and which facts are irrelevant to her case. Similarly, it is not unethical to help your client find more accurate phrases to describe her abuse than she might normally use. This, in fact, is your duty as her attorney. Remember, she has no idea what is important to the court – but you do!

4. Other Courtroom Tips

- Have a discussion with your client about how she will feel when she sees her partner in court, and how she will feel testifying in front of him. Help prepare her for the emotions the hearing might trigger.

- Don't discourage clients from being emotional during testimony. Emotional honesty is powerful. The exception to this rule is anger. Discourage clients from falling into the trap of showing anger that the abuser can use against her.

- Make sure your client understands that being "tough" in court to prove something to her batterer can backfire.

- Reconcile all inconsistencies or seemingly illogical facts and behavior in advance of court. If it doesn't make sense to you, it won't make sense to the judge.

- Know the bad facts in your case: ask your client whether she is worried about any issues that might be brought up in court.

- Encourage your client to use language and style that is natural to her.

- Avoid discussing domestic violence terminology that, if repeated during client testimony, will sound disingenuous and coached (i.e. "he's obsessed with power and control").

- Identify and address a client's tendency to "gloss over" details of painful events. Practice doing it differently.

- Identify and address client's tendency to minimize, deny, or use language that characterizes abuse as mutual (such as "we were fighting"). Practice doing it differently.

- Ask the client to make a timeline of abuse that can serve as a reference point for both of you as you prepare for court.

- Make sure your client understands the process of objections.

- Practice the direct for both substance and pace.

E. DEALING WITH DIFFICULT CLIENTS

Domestic violence survivors who are experiencing the effects of abuse rarely present in ideal form. Know your client and have a plan to deal with barriers to an effective direct examination:

- The overly talkative client
- The avoidant client
- The stoic client
- The reactive client
- The angry client
- The unrealistic client
- The passive client

In all of the above circumstances, diligent client preparation can mitigate the impact on your case. Have a frank discussion with your client about the emotional tendencies that could make her testimony seem less compelling.

* For guidance on representing clients with mental health issues, the National Center on Domestic Violence, Trauma & Mental Health has published an excellent resource guide: "Representing Domestic Violence Survivors Who are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys," written by Seighman, M., Sussman, E., and Trujillo, O. (December 2011) This handbook can be found at: http://www.csaj.org/documents/407.pdf.

F. PREPARING YOUR CLIENT FOR CROSS EXAMINATION

Just as you prepare your client for her direct examination, it is equally important to prepare your client for cross examination. Too often, inexperienced attorneys leave this preparation to the last minute, when clients are most nervous and least able to digest the instructions given them by their attorney. If you try to prepare your client for cross examination minutes before court starts, your preparation will be useless. So, schedule a time before the day of court to prepare your client specifically for cross examination. This can usually be done at the same time as your preparation of her direct examination.

Step 1: Anticipate your client's cross examination by putting yourself in the role of defendant's attorney.

The first step in preparing your client to be cross examined is to brainstorm all of the potential areas of cross examination that she might be asked about. To do this effectively, you will need to look at her case critically from the position of the defendant. Ask yourself the following questions:

- What are the factual weaknesses in plaintiff's case?
- What are the legal weaknesses in plaintiff's case?
- What are the weaknesses in requested relief?
- Has she made any impeachable statements?
- Has she engaged in behaviors that weaken the strength of her claims of abuse or fear of the defendant?
    - Did she fail to call police?
    - Did she fail to get medical treatment?
    - Did she remain with the defendant after the abuse?
    - Was there a long delay before she filed?
- Has she engaged in behaviors that the court will look critically upon, such as drug or alcohol abuse, extramarital affairs, multiple dismissed protective orders?

Next, ask your client what topics she thinks the defendant will bring up in court that might put her in a negative light – whether they are true or not. Be clear that you're asking this question for the purpose of getting prepared for court; otherwise, she might think that you are losing confidence in her case. Most batterers have already told their victim what negative things they will raise in court if she ever files against him, so pay particular attention to these topics. See Client Interview, Section B.2., p. 9, on how best to elicit this information from your client.

Step 2: Draft a cross examination of your client.

Next, prepare an actual cross examination of your client as if you were the defendant's attorney. This really forces you to explore the weak aspects of your case.

Step 3: Instruct your client on how to manage cross examination questions.

The best way to prepare your client for cross exam is to role play it with your client, where you ask the tough cross examination questions you have prepared and she has the opportunity to practice answering those questions.

"Yes," "No," or "I don't know." Before you begin the role play, instruct your client on how to manage cross examination questions. It is best if she keeps her answers brief and refrains from elaborating on them. Attorneys will often advise their clients to answer only, "Yes," "No," or "I don't know the answer to that question" in response to cross examination. Most people feel attacked and defensive during cross examination, so they will want to explain their answers, usually to their detriment. This instruction to answer briefly can help a nervous client stay in control of these emotions during the stress of cross examination.

Lose the attitude on cross. Another important instruction to emphasize in your client's preparation is that she must not engage in any angry, rude, or aggressive speech on cross examination. You must explain to her that this will only support the defendant's assertion that she is crazy, or was the first aggressor/instigator of any fights. Let her know that opposing counsel may ask an innocuous question but do so in an insulting tone of voice in order to get a reaction from her, so she should not react to the tone of voice. Similarly, she should not react to a question she regards as insulting: counsel are permitted to ask any question on cross examination for which they have a good faith basis. No matter how much she finds the question ridiculous or insulting, she needs to answer it. This also means that she is not entitled to ask questions back to the cross examiner, such as, "What are you trying to get at with that question?" She is only to answer simply and honestly. Reassure her that her honesty and lack of defensiveness in answering cross examination questions will gain her more points with the judge than trying to be clever.

Objections. Finally, instruct her that if you object to a question, she is not to answer it until she is instructed to do so by you or the judge.

Step 4: Role play the cross examination with your client.

Be clear this is a role play. Be absolutely clear with your client that you are now going to engage in a role play, and that you are going to pretend to be her abuser or his attorney. This is crucial to make clear so that she doesn't misunderstand that her own attorney is challenging her. Use a combination of different tones of voice, so that she can experience being charmed, insulted, or pushed by opposing counsel. When she answers briefly as you have instructed her to, make sure to praise her for doing a good job. If she takes the bait and starts to argue with you in the role play, take a time out, review what went wrong, get back into role and practice it again.

When a client is having a particularly difficult time responding to cross examination calmly, suggest that she not look at the cross examiner and respond to him as if she was responding to a complete stranger; i.e., polite but professional.

Step 5: Ask your client for feedback.

Finally, ask your client what topics worry her the most on cross. The role play might have reminded her of issues not previously discussed that she is worried about how to answer

V. Evidence

A. OVERVIEW

Evidence is the method by which you tell your client's story as well as the means by which you convince the trier of fact of the strength of your client's story. In domestic violence cases, evidence most commonly takes the form of oral testimony, but it can also be visual, such as photographs and videos; tactile, such as a knife or a torn shirt; documentary, such as texts, emails, pay stubs or tax returns; auditory, such as voicemail messages or 911 calls; or demonstrative, such as a witness demonstrating how she was strangled. You should try to weave in as many different methods by which you present your client's story as you have available, as it all works to strengthen her case and convince the trier of fact.

It is imperative that you understand the key legal concepts underlying the admissibility of evidence. This will help you argue for the admission of evidence you want the judge to consider, as well as for the exclusion of evidence you don't want the judge to consider.

For evidence to be admitted at trial, it must be both authentic and relevant:

1. Authentic: A foundation of authenticity must be laid before any evidence is admitted. Authenticity means that the evidence is actually what its proponent claims it to be. In other words, how do you convince the court that this piece of evidence is the actual object that you say it is? How do you know that a particular email came from the respondent? How do you know that a smashed cell phone is your client's cell phone? Is this the actual knife he put to her throat, or did she just pull it out of her kitchen drawer? Questions directed at authenticity answer this foundational question.

> **Fed. R. Evid. 901 – Requirement of Authentication or Identification**
>
> (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

2. Relevant: In addition to authenticity, the evidence must also be relevant. This means that the evidence tends to prove or disprove some fact at issue in the case. For example, a picture of your client with a black eye is terrific evidence of injury. But if the picture was taken after she was in a car accident two years before her abuse, it is irrelevant to your case of domestic violence.

Fed. R. Evid. 401 – Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 402 – Relevant Evidence General Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided [by the Constitution, statute, these or other rules]. Evidence which is not relevant is not admissible.

If evidence lacks either authenticity or relevance, it will be excluded. Keep this in mind both when you are drafting your direct examination, as well as when your opponent is attempting to admit evidence damaging to your case. You might be able to keep the damaging evidence out if your opponent fails to lay a proper foundation for either authenticity or relevance.

B. WITNESS TESTIMONY

Unless a witness is an expert witness, a witness must have personal knowledge of an event to testify about it. That means that the witness must have been:

- present at the relevant moment;
- had opportunity to observe, hear, or perceive the event;
- have relevant experience (e.g. recognizes voice)

Fed. R. Evid. 602 – Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

When conducting a direct exam of any witness, make sure the witness testifies as to the basis of their personal knowledge BEFORE they testify about the event.

Example:
Q: Ms. Smith, where were you on January 1 at 9 PM?
A: I was at my daughter's home.

Q: Did you see anyone that evening?
A: I saw my daughter and Jack Jones, the defendant.

Q: How do you know Jack Jones?
A: He's been my son-in-law for ten years.

Q: Where did you see Mr. Jones on January 1?
A: He was standing in the living room of my daughter's home.

Q: How far away from him were you?
A: I was two to three feet away from him.

This foundational testimony lets the judge know that your corroborating witness was physically present at the relevant time and place, can identify the parties, and therefore has personal knowledge from which to testify to the next, relevant question:

Q: Did you see him do anything that evening?
A: I saw him punch my daughter and drag her out the front door.

Getting Hearsay Admitted

Much of the testimony of your client and any corroborating witnesses will be based upon what that witness observes. But very often you will also want a witness to testify about what they heard. For example, you may want your client to tell the court about her batterer's threat to kill her. You may want your client's best friend to describe the hysterical phone call she received from your client at 2:00 a.m., immediately after your client was abused. You may want your client's mother to tell the judge how her 4-year old grandson blurted out in the car that his mommy is "a whore and a liar" after she picked him up from visitation at his father's. In order to get these statements admitted, you will need to be very familiar with your state's evidentiary rules on hearsay.

Hearsay is generally defined as an out-of-court statement that is offered for its truth.

Fed. R. Evid. 801(c) – Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fed. R. Evid. 802 – Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court. . . or Act of Congress.

Hearsay is generally inadmissible because the witness lacks personal knowledge of what they are reporting in the courtroom. For example, when a defendant starts to testify that his son told him

that your client hit their son, this statement is inadmissible hearsay because the defendant has no personal knowledge of the incident, only what the son said to him.

There are, however a variety of specific exceptions to the general rule against hearsay because the circumstances under which these certain statements were made carry a high degree of reliability and trustworthiness. You must become familiar with the Rules of Evidence in your state and the case law interpreting these exceptions so that you know how and when you can seek the admission of otherwise inadmissible hearsay. The following are hearsay exceptions commonly used in domestic violence cases:

1. Statement by a party-opponent: "The statement is offered against a party and is [ ] the party's own statement. . . ." Fed. R. Evid. 801(d)(2). You will probably invoke this type of hearsay more than any other type of hearsay. The "statement by a party-opponent" exception allows your witness to repeat what they personally heard the defendant say. Note that there is no requirement that the statement be against the defendant's interest when made.

Example:

Q: Ms. Smith, after your boyfriend beat you up, did you hear from him?
A: Yes, the next morning.

Q: How did you hear from him? (Establishes personal knowledge)
A: He called me on my cell phone.

Q: What did he say to you?
A: He said, "I'm sorry I hurt you last night. I just get so jealous."

Q: Were those his exact words?
A: Yes.

To the best of her ability, have your witness testify as to the party-opponent's exact words. This will enhance your witness' credibility and protect her from claims of exaggeration or fabrication upon cross examination.

2. Present sense impression: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed. R. Evid. 803(b)(1). This hearsay exception, sometimes referred to as "the spontaneous declaration," includes statements made while the declarant is experiencing the event, or immediately thereafter. The statement must describe or explain the event. The time period for the declarant to be under the influence of the event or condition is considered by commentators to be quite brief.

Example:

Q: Ms. Jones, were you on the telephone with Ms. Smith, the plaintiff, the evening of January 1?

A: Yes, I was.

Q: Did you hear anything unusual while you were on the phone with her?
A: Yes, I heard what sounded like a thump and then Mary screamed.

Q: Did you hear her say anything after she screamed?
A: Yes, she said, "Gerald, you just punched me in the face!"

Q: Do you know who Gerald is?
A: That's her boyfriend.

Here, the witness will be permitted to describe what she heard the plaintiff say while the plaintiff was being punched in the face. Under these circumstances, the out-of-court declarant – the victim – was still experiencing the event or condition as she was exclaiming about that event.

3. Excited utterance: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(b)(2). This exception permits a witness to recount what an out-of-court declarant said while the declarant was still under the stress of excitement caused by an event or condition but before any opportunity for reflection could occur.

McCormick – On Evidence (§ 297, 3rd Ed.)

[Excited utterances require that] there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of an observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought.

Evidence commentators generally agree that a declarant could still be under the influence of an event or condition hours after the incident, and that the excited utterance need not be about the incident itself. To admit statements pursuant to this hearsay exception, therefore, it is key that you first establish that the declarant, usually your client, was still under the "stress of excitement" of the event or condition. This can be established by asking questions about the client's emotional or physical state before you ask about the statements.

Example:

Q: Ms. Jones, did you hear from my client, Ms. Smith, at any time after midnight on January 1?
A: Yes, she called me around 2 a.m.

Q: Can you describe her emotional state when she called you?
A: Yes, she was yelling and crying a lot. It was hard to understand what she was saying sometimes, she was crying so hard. I'd say she was hysterical.

Q: Did she tell you what she was crying about?
A: Yes, she said that her boyfriend had just tried to kill her.

Q: Did she tell you specifically what he had done to her?
A: She told me that he'd strangled her and raped her.

4. Then existing mental, emotional or physical condition: "A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed. . . ." Fed. R. Evid. 803(b)(3). This exception is useful to help prove how the declarant felt or thought at a particular moment. In domestic violence cases, this exception can be useful to prove that your client or their children are afraid of the batterer.

Example:

Q: Ms. Jones, do you know Sammy Smith?
A: Yes, that's my 4-year old grandson.

Q: Do you have any responsibilities for his care?
A: I do the visitation pick-up and drop-off at his father's house every week.

Q: Can you describe your grandson for the court?
A: He is usually a happy, easy-going, pleasant child. He's funny and gets along with everyone.

Q: When you dropped Sammy off for visitation on January 1, how would you describe his emotional state?
A: He was fine, normal, happy.

Q: Did you pick up your grandson later that day from visitation?
A: Yes, I did.

Q: When you picked Sammy up from visitation, did you notice anything unusual about his behavior that day?
A: He was very agitated the minute he got into my car. He was shouting and yelling and throwing things in the car. He was so out of control that I had to pull over and stop the car.

Q: What did you do after you pulled the car over?
A: I asked him why was he acting like that?

Q: What did he say to you?
A: He said that he was very angry at his mommy, that daddy had said she was a whore and a liar, and that mommy was keeping him from visiting daddy. He told me he didn't like any of us anymore.

You can absolutely count on a hearsay objection to this line of questioning, so it is important to be prepared with argument and caselaw to support the admission of these observations and statements by Sammy's grandmother. The line of questions and the witness' responses make it clear that the out-of-court declarations by Sammy are not being offered for the truth asserted – i.e., that mommy is a whore and a liar – but that daddy's discussion of these topics with Sammy have caused Sammy significant mental and emotional distress. The testimony is admissible to prove Sammy's then existing state of mind or emotion.

C. OFFERING PHYSICAL EVIDENCE

When you seek to admit physical evidence, you must use a specific procedure for identifying, authenticating and asking the court to admit the exhibit. Practicing this procedure in advance of trial will insure the smooth and orderly admission of exhibits as well as communicate to the other side that you know what you're doing in the courtroom. For all exhibits, you should use the following procedure to have them admitted:

Step 1: Have the exhibit marked for identification.

If you practice in a jurisdiction where courtroom clerks are responsible for marking exhibits, ask the judge for permission to approach the courtroom clerk in order to have your exhibit marked. "Your Honor, may I approach the clerk?" The clerk will attach a sticker to the exhibit that identifies the party offering the exhibit ("Plaintiff") and the number of the exhibit ("#1"). If, however, it is the usual practice in your jurisdiction for you to mark the exhibit yourself, attach a sticker to the exhibit that identifies the party and the number of the exhibit. If you can, do this before court to save time.

Marking the exhibit with a party designation and a number serves two purposes. First, it allows you, as the lawyer, to refer to the exhibit without identifying it.

> Wrong:"I'm handing you a copy of your text messages dated January 1."
>
> Right: "I'm handing you what has been marked for identification as Plaintiff's Exhibit Number 1."

Second, marking the exhibit and referring to that exhibit by its number make a clear record for appellate purposes as to what is being identified or testified about.

> Wrong:"What does this picture show about your injuries? What injuries can you see in this picture?"
>
> Right: "What does Plaintiff's Exhibit #1 show about your injuries? What injuries are shown in Plaintiff's Exhibit #2?"

Step 2: Show the exhibit to opposing counsel.

State aloud on the record that you are showing opposing counsel the exhibit, again without identifying it. If you are introducing documentary evidence, plan ahead and give your opponent an exact copy of the exhibit.

"Let the record reflect that I am showing opposing counsel what has been marked as Plaintiff's Exhibit #1."

OR

"Let the record reflect that I am providing opposing counsel an exact copy of what has been marked as Plaintiff's Exhibit #1."

Step 3: Ask to approach the witness.

Step 4: Have the witness identify and authenticate the exhibit.

Before you ask the judge to admit the exhibit, you must have the witness identify the exhibit, and establish its authenticity and relevance. Hand the witness the exhibit and begin asking questions that establish the exhibit's authenticity. Then, follow up with questions pertaining to the exhibit's relevance.

Q: Ms. Smith, I'm handing you what has been marked as Plaintiff's Exhibit #1 – can you please identify that for the court?

Authentication questions will differ depending upon the type of evidence. Pictures require different authentication questions from business records. Examples of different authentication questions for common types of evidence in domestic violence cases are provided below.

Step 5: Move for the admission of the exhibit.

"Your Honor, I move the admission of Plaintiff's Exhibit #1."

It is at this moment that your opponent may properly object to the admission of your exhibit. For every piece of evidence that you seek to admit, anticipate in advance any objections that might be raised to block the admission of your exhibit and be prepared to defend its admissibility.

If your opponent offers evidence that you object to, make sure you object to that evidence when it is formally offered. Consider asking the court to allow you to "voir dire" the witness more fully to attack the exhibit's authenticity or relevance. A "voir dire" is when you are allowed to ask the witness questions on a preliminary matter, such as an exhibit's evidentiary authenticity.

"Your Honor, may I voir dire the witness as to the authenticity of this document?"

D. PHOTOGRAPHS

Photographs are the most frequently used evidence in domestic violence cases. A photograph can both corroborate the abuse as well as the injuries suffered by our clients. As representations of things not physically present before the court, the authentication of a photograph requires that it "correctly depict" or show how the object in the picture looked at the time the picture was taken. Pictures depict a fleeting moment in time that has now passed. Therefore, it is imperative that proper authentication of a photograph include a question that establishes that the picture accurately shows how something looked on a specific date.

Make sure you are able to offer pictures into evidence smoothly using the 5-step process described above by practicing it in advance of your hearing.

[Do Steps #1 through #3 first]

Q: Ms. Smith, I'm handing you what has been marked Plaintiff's Exhibit No. 1 – can you please identify it for the court?
A: That's a photograph of me.

Q: What part of your body does Plaintiff's Exhibit #1 show?
A: It shows my left eye.

Q: Can you describe how your left eye appears in that photograph?
A: It's almost swollen shut. My eye is black and blue all around the eye, almost down to my cheekbone.

Q: When was that photograph of your eye taken?
A: On January 2nd, the day after my husband punched me.

Q: Does that photograph fairly and accurately depict how your eye looked 1 day after your husband punched you?
A: Yes, it does.

Q: Your Honor, I move the admission of Plaintiff's Exhibit #1.

Note that the date that the photograph was taken serves two evidentiary purposes: first, it sets the foundation for its authentication in that the photograph must fairly and accurately show how the plaintiff looked on a particular date. Second, the date of the photograph establishes the relevance of the exhibit because it was taken after the plaintiff was abused, a fact of consequence in the litigation.

After you have authenticated a photograph but before you move its admission, consider using it as springboard for your client to testify to facts about her injuries that she might not have

discussed fully yet, such as how much her eye hurt after she was hit, how it felt on the day the picture was taken, how it feels now, or if she is having any vision problems in that eye. If you want your client to testify to those facts while looking at the photograph, you should do this before you move the exhibit's admission because once the picture is admitted, you will hand it up to the judge.

E. TORN OR BLOODY CLOTHING

Damaged clothing often demonstrates in a visceral, intimate way how violent an incident of abuse was. With physical evidence such as a piece of clothing, identification of the object is established by having the witness testify about some characteristic about the object or its history that distinguishes it from other similar objects. Authentication of the object is established by having the witness testify that they have not changed or altered the object from the date it was damaged.

[Do Steps #1 through #3 first]

Q: Ms. Smith, I'm handing you what has been marked as Plaintiff's Exhibit #2 for identification – can you identify it for the court, please?
A: That's the shirt I was wearing when my boyfriend beat me up last week.

Q: How do you know that's your shirt?
A: I bought it at Target two months ago.

Q: Can you describe the condition of Plaintiff's Exhibit #2 before January 1?
A: It was in perfect condition.

Q: Can you describe its condition after your boyfriend hit you last week?
A: It's torn all along the neckline where he used it to strangle me, and it has blood all down the front from my nose bleeding.

Q: Is it in the same or substantially same condition as it was on January 1 after your boyfriend assaulted you?

Special Note: If you plan to introduce any item with blood on it, it is recommended that you place it in a see-through Ziploc bag before trial. This will protect you and any courthouse staff from handling an object with blood on it.

F. WEAPONS

Introducing weapons, such as a knife or a gun, as an exhibit in court can be very effective to help prove your case, but weapons pose special logistical challenges. You will need to explore with your client in advance of trial how she can identify this particular knife or gun. If the knife is a generic knife found in the kitchen, such as a steak knife, you and your client will need to discuss how she is able to specifically identify that knife as the weapon used by her abuser from all of the other exact

same knives in her kitchen drawer. Usually this can be answered by how your client obtained possession of the weapon following the abusive incident, and how she maintained the weapon until your court date.

The second challenge requires you to coordinate in advance how you physically get the weapon into the courthouse. Consider phoning courthouse security in advance of court to make sure that you comply with all necessary procedures to allow the weapon into the courthouse.

[Do Steps #1 through #3 first]

Q: I'm handing you what has been marked as Plaintiff's Exhibit #3 for identification. Can you identify this for the court?
A: That's the knife my girlfriend put to my throat on January 1.

Q: How can you tell that it is the same knife?
A: She threw it against the wall when she left. I picked it up the next day and put it in an envelope. Then I gave that envelope to my attorney.

Q: Is it in the same or substantially same condition as it was on January 1?

Q: Have you or your attorney altered or changed it in any way since January 1?

G. TEXT MESSAGES

Text messages have become an increasingly vital type of evidence in all areas of litigation, but especially in domestic violence litigation. Text messages can show the build-up to an abusive incident; they can establish culpability when an apology is sent after an abusive incident. But they can also be employed offensively by batterers who are savvy enough to anticipate their use in litigation or who might purchase spoofing software to fabricate text messages that make it look as if they were sent from their victims. Success of a case may turn on the sole issue of whether a text message was sufficiently authenticated.

Federal cases have upheld the authentication of text messages based upon testimony that the defendant and the witness have reliably used the same phone numbers to exchange text messages in the past, and that the text was identified by the witness as having been received from the defendant. See, e.g., United States v. Fults, 2016 U.S. App. LEXIS 6070 (6th Cir. Tenn. 2016), United States v. Sterlin, 466 Fed. Appx. 792 (11th Cir. Fla. 2012), United States v. Hunter, 266 Fed. Appx. 619 (9th Cir. Ariz. 2008). Text messages can be authenticated circumstantially as well. In Dickens v. State, 175 Md.App. 231 (2007), a husband was convicted of the premeditated murder of his wife based in large part upon the admission of text messages sent to her containing threats to kill her. The Maryland appellate court held that text messages could be authenticated through "circumstantial

evidence such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be." The prosecution in Dickens did just that when it linked text messages to the defendant based upon the content of one text message that contained information known only to the defendant, his wife and her boyfriend; another that referenced the defendant's desire to see his daughter; and another by the use of a nickname used by the defendant. Identification of text messages from a batterer might also include his habitual use of certain emojis, contractions or misspellings.

It is imperative that you know the caselaw in your jurisdiction on what evidence is required to authenticate text messages if you plan to introduce them in your case. If you plan to introduce a screenshot of a text message into evidence, you will need to structure a 2-tiered authentication query: first, authenticate the content of the text message; second, authenticate the screenshot, which is, in essence, a picture. Some suggested questions to authenticate a text message might include the following:

[Do Steps #1 through #3 first]
Q: Ms. Smith, I'm handing you what has been marked as Plaintiff's Exhibit #4 – can you identify it for the court?
A: It's a screenshot of a text message from my boyfriend.

Q: Ms. Smith, does your cell phone permit you to text?
Q: Have you and the defendant ever texted one another?
Q: How often do you text one another?
Q: What is the date of the text message contained in Plaintiff's Exhibit #4?
Q: What cell phone number did that text message come from?
Q: What is the defendant's cell phone number?
Q: How long has respondent had that cell phone number?
Q: Other than his cell phone number, are there any other identifying characteristics in this text message that indicate to you that the defendant wrote the text?

Once you have authenticated the text message, the screenshot of the text message needs to be authenticated. This can be done in the same way as a photograph:

Q: Is Plaintiff's Exhibit #4 a screenshot of the text message between you and the defendant?

Q: Is it an exact depiction of the text message as it exists on your cell phone today?
Q: Did you alter or change the text message in any way prior to taking the screenshot?
Q: Did you alter or change this photograph of your cell phone text message in any way when you printed out the screenshot?

LITIGATION TIP: If you plan to use a text message, make sure that you look at the entire text message thread on your client's cell phone, both before and after the text message you plan to use. The doctrine of completeness permits the opposing party to introduce prior and post text messages to expand the context of an abuser's statement. There may be text messages from your client to her abuser that you might not want the judge to read.

H. EMAILS

Emails, like text messages, are quite easy to spoof and therefore require some planning in advance about proper authentication. Make sure you are up-to-date on the caselaw in your jurisdiction about authentication requirements and tailor your questions accordingly.

[Do Steps #1 through #3 first]
Q: Ms. Smith, I'm handing you what has been marked as Plaintiff's Exhibit #5 for identification – can you please tell the court what that is?
A: That's an email from the defendant to me.

Q: What is the date of that email?
Q: What email address was it sent from?
Q: Have you ever emailed the defendant at that address?
Q: How long have you emailed the defendant at that address?
Q: What is the topic of this email?
Q: How do you know that email is from the defendant? [identifying characteristics]
Q: How did you print out this email?
Q: Prior to printing out this email, did you alter or change any of the content of the email?
Q: Is Plaintiff's Exhibit #5 a true and accurate copy of the email defendant sent you on January 1 that is currently in your email account?

I. AUDIO RECORDINGS

Authentication of audio recordings rests primarily upon an accurate identification of the voice of the person leaving the message.

Q: Do you have a phone with voicemail capability?
Q: Did you receive a voicemail message from the defendant on January 1?
Q: How many times has the defendant left you voicemail messages on your cell phone voicemail prior to January 1?
Q: How do you know it was the defendant who left the message?
Q: Have you listened to the message?
Q: Can you identify his voice on the voicemail message?
Q: Is that the defendant's voice on your voicemail?

Then ask the court for permission to play the voicemail message into the record.

LITIGATION TIP: Before introducing any voice recording of an opposing party, make sure you have carefully reviewed your state's wiretapping statute and made certain that the voice recording does not violate that statute.

J. VIDEO RECORDINGS

Generally, video recordings are more easily admitted than voice recordings because they often are not covered by state wiretap statutes. However, make sure that the videotape does not violate any other criminal statutes prohibiting surreptitious video recording in private places or that the audio portion of your client's video recording does not violate the wiretap statute. Typically, you will have your client testify as to the authenticity and relevance of a video recording, and then play it for the judge. Make sure that you have shown the recording in advance to opposing counsel.

Q: Ms. Smith, during your assault by the defendant, were you able to video record any of the incident?
Q: How were you able to record the incident?
Q: Where were you when you recorded this video? [public place]
Q: Did the defendant know that you were recording him?
Q: How did he know?
Q: Where were you standing in relation to the defendant when the video was recorded?
Q: Have you altered or changed the video recording in any way?

K. MEDICAL RECORDS

Medical records detailing your client's injuries may often clinch your case because they corroborate the date of abuse, the reported cause of the injuries, and the extent of those injuries. Medical records fall under two exceptions to the hearsay rule: they are both business records and include admissible hearsay in the form of statements made for purposes of medical diagnosis. While your client can testify that she sought medical treatment at a certain hospital or with a certain doctor on a specific date, she cannot authenticate her own medical records because she didn't create them and usually doesn't know what they contain. These records, therefore, must be authenticated by a custodian of the records for the medical facility, or be certified in compliance with your jurisdiction's rules for business records certification.

Fed.R.Evid. 803(b)(6) Records of Regularly Conducted Business

A memorandum, report, record, or data compilation. . . of acts, events, conditions, opinions or diagnoses, made
[1] at or near the time by, or from information transmitted by, a person with knowledge;
[2] kept in the course of a regularly conducted business activity;
[3] it is the regular practice of that business activity to make the memorandum, report, record, or data compilation;
[4] all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [the self-authentication rule pertaining to certified domestic business records] or with a statute permitting certification; and
[5] the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Business records may be admitted without the custodian of those records testifying as to their authenticity if they are certified by the custodian of records, and a copy of the records and their certification is provided to the other side "sufficiently in advance" of their offer into evidence. Fed.R.Evid. 902 (11) – Self-Authentication. This may pose difficulties for many domestic violence litigators as the timeframe between a temporary protective order and a final hearing is often quite brief, and you may not know who or how to contact the other side. If the opposing party objects to the introduction of medical records because they haven't had the opportunity to review them, suggest that the court take a brief recess to allow the other side to read the records. If that doesn't satisfy the other side, suggest a brief postponement of the case for the other side to review the records and test their authenticity.

Once certified medical records are admitted, you will still need to overcome any objections to the content of the medical records. Fed. R. Evid. 803(b)(4) provides the hearsay exception for statements typically contained within medical records, including your client's report of her injuries, the cause of her injuries, any diagnoses (if made for purposes of medical treatment), and any medical history, which might include reports of prior abuse.

Fed. R. Evid. 803(b)(4) – Statements for Purposes of Medical Diagnosis or Treatment

A statement that:
(A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

LITIGATION TIP: As with any evidence you seek to have admitted, always, always, always read your client's entire medical record before introducing it. There might be other statements in the record that might be problematic for her case or highly embarrassing to her, such as a medical history of drug or alcohol abuse, abortions, or mental health problems. Consider redacting the medical record of these statements and argue that they are irrelevant to the issue before the court and highly embarrassing or prejudicial to your client. Also make sure that you redact your client's home address in the records if she is living at a confidential location, as well as her Social Security Number.

L. OTHER HELPFUL BUSINESS RECORDS

1. Paystubs: These business records usually require certification by the custodian of records to overcome the authentication hurdle. But if you didn't have time to get the certification, you might want to have your client try to authenticate them by testifying that she receives them regularly from her employer, and that she hasn't altered or changed them in any way since their receipt.

2. Tax Returns: Usually you will have your client authenticate her signature on the bottom of the tax return, or the identity of her accountant who served as her agent when s/he filed the return on her behalf.

3. Police Reports: Police reports can be tricky business records to get admitted because they so often contain a mix of factual observations by the officer as well as summarized hearsay of what others tell them. You might argue that the date and time of a police report corroborates your client's testimony that an abusive incident occurred on that date and time. Similarly, if the police report includes a description of your client's injuries or the trashed appearance of a home, one can reasonably argue that such factual descriptions are fairly encompassed within the "matters observed pursuant to duty imposed by law as to which matters there was a duty to report" requirement of the Public Records and Reports hearsay exception.

> **Fed. R. Evid. 803(b)(8) – Public Records and Reports**
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report. . . .

This Rule specifically excludes the admissibility of police reports in the criminal context. Consequently, many judges who come from a criminal practice background may be unfamiliar with the part of this Rule that provides a hearsay exception to these reports in the civil context. Be prepared to argue the full or partial admissibility of these reports in the context of your civil protective order, and consider redacting impermissible hearsay from the report.

4. 911 Call Logs or 911 Recordings: Voice recordings of a 911 call, or the 911 operator dispatcher call log, can also provide powerful, often emotional corroboration of your client's abuse.

Because these recordings and call logs properly fall within the Public Records and Reports hearsay exception, try to get them in time for your case and obtain the proper certification by the records custodian.

M. CONCLUSION

The evidence discussed above gives examples of some of the most common types of evidence you may want to admit in your cases. Be inventive and creative in your search for other evidence. Try to stay current on emerging cell phone and computer applications that your clients use as they might provide you with additional corroboration of her abuse. But remember, no matter how novel the evidence, you must still work to get it past the dual hurdles of authentication and relevance.

VI. Cross Examination

A. OVERVIEW

For many litigators, cross examination invokes feelings of apprehension. This anxiety happens when an attorney fails to develop a strategy for cross examination in advance and instead hopes optimistically that it will occur to them during their opponent's direct exam. Your cross examination should not be left to Perry Mason-like moments, but should involve a calculated assessment of the evidence available to you and the points that you know you can or must make on cross examination. At the same time, a key element to successful cross examination is flexibility. Good cross examination planning includes a plan to be flexible and to follow the witness.

To do this, you must prepare in advance for cross examination. Many seasoned litigators report that they spend a full day of preparation for every hour of cross examination! Give yourself time to prepare for this part of the trial – don't leave it to the last minute, or worse, to the middle of the trial.

An effective cross examination will be:

- Focused to make only a limited number of distinct, clear points;
- Structured to support your case theme and your closing argument;
- Delivered in a style tailored to the lawyer who conducts it.

B. PLANNING YOUR CROSS EXAMINATION

Step 1: Brainstorm all potential cross examination topics.

Attorneys pursue a variety of different objectives in cross examination depending upon the facts of the case, so a "one size fits all" approach to cross examination will never work. In one case, you might want to show that the defendant or witness is not credible; in another, that the witness actually agrees with your client's version of the facts. In yet another case, you might want to show that the witness knows other facts that are helpful to your case. You will not be able to do all these things in a single cross examination. So, you will have to brainstorm what purpose would be most helpful to your client's case, what material you have available to achieve that purpose, and focus your cross examination accordingly.

First, brainstorm all possible helpful facts you might want to bring out in a cross examination of a witness: Did the abuser apologize for beating your client in a text message? Did the abuser run before the police arrived? Does the abuser use illegal drugs? Have there been 3 prior protective orders issued against this abuser in the past? Does he leave the children alone when your client goes to work?

Determine whether you have any of the following to work with:

- Admissions by the abuser (letters, texts, emails, statements to police, depositions, pleadings, prior testimony)
- Prior protective orders or convictions
- Evidence of drug, alcohol or mental health problems
- Witnesses to the incident
- Inconsistent behavior by the abuser
- The abuser's possible corroboration of the incident
- The abuser's possible corroboration of the relief you are requesting

Step 2: Analyze which potential cross examination topics will help you in closing argument.

This is where you must be ruthless. If the topic does nothing to advance your theme or core story at closing argument, reject it as a topic for cross examination. For example, if the abuser was recently evicted from his apartment, it might show that he is financially irresponsible, but it probably does nothing to advance your case of abuse and risks making the judge feel sorry for him.

If it adds to your theme, however, start to develop it. Here is an example of a cross examination on a point directly related to the victim's theme.

THEME: Mr. Smith can't control his behavior - even when he knows the Court is watching.

Q: Mr. Smith, when you were in court back in June, the Judge placed some restrictions on your behavior?

Q: Those restrictions included a protective order?

Q: One of the restrictions in that Order reads: "Mr. Smith shall not contact Ms. Smith in any manner except for the exclusive purpose of addressing emergency issues relating to the minor child."

Q: In the event of an emergency, you are to contact Ms. Smith through the "Family Wizard" email program?

Q: When you registered for that program, you understood that the Court would be able to view the messages you sent?

Q: Now, Mr. Smith, you would agree that you have used Family Wizard to contact Ms. Smith about non-emergency issues?

Q: In fact, in some of those messages you called Ms. Smith "horrible"? (have examples/impeachment)

Q: In some of those messages you criticized the way Ms. Smith dresses your daughter? (have example/impeachment)

Q: You criticized the way Ms. Smith styles your daughter's hair? (have example/impeachment)

Q: You've criticized the way Ms. Smith feeds your daughter? (have example/impeachment)

Q: You've criticized the way Ms. Smith disciplines your daughter? (have example/impeachment)

Q: You've accused her of making your daughter sick?

Q: You've accused her of being a bad parent?

Q: You have accused her of being "greedy"?

Q: Now, Mr. Smith, when you sent those messages, you knew that none of those things were emergencies?

Q: You knew that the Court would be reading them?

Q: But you couldn't help yourself, could you?

PRACTICE TIP: Plan for the "what-ifs:" What will you do if the witness doesn't agree with your contention? It is important to practice your cross and anticipate answers from the witness that contradict your cross. What options do you have to follow up in response to any possible answer? Impeachment documents are fabulous to show that he is a liar, but what if you don't have any impeachment documents? For example, what direction will you go if he claims that he didn't cancel the bills? Or if he claims that she attacked him? Make sure you have thought about whether there are other crazy things he will claim that you need to prepare for.

Step 3: Prioritize your cross examination topics from strongest to weakest.

Once you have pruned your topics, you will need to organize them. Start with the strongest area of cross examination. The following is a possible hierarchy of cross examination topics, from strongest to weakest.

Best: The Abuser Admits to the Abuse. If the abuser admits to the abuse, you should start your cross examination there. You will argue in closing that there is nothing for the judge to determine factually because the fact of the abuse is no longer contested. The only thing for the judge to determine is the relief to be awarded. If the abuser has admitted to the abuse in his own direct, or if he has failed to deny it, DO NOT TOUCH IT on cross examination. It will just give him an opportunity to explain his admission away.

Next Best: The Abuser is a Liar. If you don't have an admission, the next best thing is to show that the abuser is a liar. Once he has been shown to be a liar, little or nothing that the abuser says

will be believed by the judge. While lack of credibility is typically established through some type of impeachment evidence, it can also be demonstrated by the opponent's suspicious lack of memory about the incident, by his denial that anything happened even though police arrived, or by the evident injuries to your client.

Next Best: The Abuser is, well, an Abuser. This is where prior convictions or protective orders come in handy to show the violent character of the batterer. You might learn from your client that the abuser was put out of his mother's home recently because he assaulted his mother – use that. If your theme is that this batterer abuses in conjunction with alcohol or drug or mental health problems, cross examine on his DUI or CDS convictions, or participation in a drug or alcohol rehabilitation program.

Weaker: The Abuser's Version Isn't Consistent with Normal Behavior. This is a type of cross examination that exploits an abuser's tendency to minimize and deny the abuse. If the abuser claims that he was the victim of abuse and was only protecting himself from her assaultive behavior, your cross examination might want to cover what a normal person does when they are abused. For example, one might ask:

Q: Mr. Smith, you claim that your wife threatened you with a gun?
Q: I would imagine that you were quite frightened by this?
Q: Especially with your children in the house?
Q: You were concerned for your safety and theirs?
Q: So you called police? [A: No.]
Q: You immediately left the house with the children? [A: No.]
Q: You turned the gun over to the police? [A: No.]
Q: You filed for a protective order? [A: No.]
Q: You filed criminal charges against her? [A: No.]
Q: You phoned her family to try to get some help for her? [A: No.]

When he answers "No" to each of these questions, a judge may start to doubt that the incident ever happened because these are things that normal people do when they are threatened with a gun. In closing argument, you will argue that the abuser's version isn't credible because the abuser didn't do what normal people do under those circumstances.

PRACTICE TIP: Be cautious about using this strategy because the same argument could be applied to your own client!

Weaker: Have the Abuser Corroborate Uncontested Pieces of the Abusive Incident. Consider asking the abuser to corroborate certain elements of the abusive incident that cannot be disputed. This will allow you to argue in closing that, although the abuser didn't admit to the abuse, he admitted to several elements of your client's version of events that corroborate her testimony. For example:

Q: Mr. Smith, you were at home on Sunday, January 1 at about 8 PM?
Q: And Ms. Smith was also there?

Q: And both of your children were home that evening?
Q: You and Ms. Smith began to argue that evening?
Q: You would agree that the argument got heated?
Q: The door frame to your bedroom was broken that night, wasn't it?
Q: Before January 1, that doorframe was in good working order?
Q: And a lamp was broken that night as well, wasn't it?
Q: It also had been in good working order before January 1?
Q: Police came to your house that night?
Q: You didn't call them, did you?
Q: Ms. Smith called them, correct?

These questions will allow you to argue in closing that it is undisputed that an incident occurred that evening, at the home, that there was damage to the home, and that your client called the police. From there it is not a tremendous leap for the judge to believe your client's version of events, rather than the abuser's denial that anything happened.

PRACTICE TIP: Don't forget to cross examine the abuser briefly on uncontested relief issues – such as the fact that your client has been the stay-at-home mom for the last 3 years, or that he makes $60,000 a year, or that the children have always lived with your client.

Weakest: Cross Examine the Abuser on the Incident of Abuse. Don't forego examining the abuser about the incident of abuse. In a surprising high number of cases, abusers will admit to a piece of the abusive incident. For example, the batterer might admit to pushing your client, but deny punching her in the face. This strategy is common for batterers seeking to bolster credibility on the more important denials. If this occurs, you can argue in closing that there is always a sliver of truth in every lie and that, of course, pushing is still an assault.

One benefit of cross examining the abuser on the incident of abuse is that you will have reiterated your client's version of events in the middle of the opponent's case. Another benefit is that the judge will be able to watch the abuser as he denies the abuse. Many judges will find the abuser not credible based upon his denial of the abuse.

There is a collateral benefit for your client if you ask the abuser about the abuse and he denies it. She will have fewer illusions about his capacity to change if he lies on the stand about what he did to her. For many clients, this helps to steel her resolve to separate from him. Be aware, however, that for other clients, his denial of the abuse under oath might discourage her and make her feel more helpless. You must assess this according to each individual client.

PRACTICE TIP: If the abuser has not denied the abuse in his direct exam, do not cross examine on this topic! You will be able to argue in closing that he never denied the allegations and therefore, the only evidence before the court is your client's version of events.

A risk to this type of cross examination is that the abuser will simply deny the abuse entirely. You might want to think through in advance what his motivation to deny the abuse might be, and cross examine him on that. In this example, Mr. Smith has denied any abuse of Ms. Smith:

Q: Mr. Smith, after January 1, you learned that you had been charged with second degree assault on Ms. Smith?
Q: You know that you could face up to 10 years in jail if convicted of that charge?
Q: You would lose your job if convicted?
Q: Also, if this protective order is issued, you will have a finding of abuse entered publicly against you?

PRACTICE TIP: Know your judge. For some, a line of questioning like this might cause the judge to sympathize more with the abuser about the adverse consequences of a protective order to him than the need of your client for protection. This problem is particularly likely to occur when the batterer is a member of law enforcement or the military.

Step 4: Edit and organize your selected cross examination topics.

Each of your selected cross examination topics should state clearly a focused point that you wish to make. Now is the time to re-evaluate those topics to make sure that they drive home that point and that they are all worth making. If the point is too vague, try to re-formulate it to be more specific. If the point gets you off track from your theme, reject it. Watch out for red herring issues that don't advance your theme.

These topic headings will often be your concluding question for that particular section of your cross examination, or the unspoken conclusion you want the judge to reach. In preparing your cross, you may wish to draft questions that lead you up to that point. This can help you to better assess how successful this point will be in supporting the theme of your case. It bears repeating that if the topic does not advance your theme, take it out. Your final list of topic headings will then become the outline of your cross examination.

Example: The abuser has testified that your client is mentally ill and that he passively restrained her during a psychotic episode to protect her from hurting herself. The theme of your case is that your client wasn't psychotic, only battered, and that all of her injuries were caused by his assault of her.

<u>Topic 1: Mr. Smith was angry when he restrained her.</u>

Q: Mr. Smith, you arrived home that night at about 11:30 PM, correct?
Q: You'd been working all day?
Q: You had texted your wife during the day?
Q: And she hadn't returned your text messages?
Q: That was irritating to you, wasn't it?
Q: When you got home, you tried to speak to her?
Q: But she refused to speak to you, correct?
Q: That also irritated you, correct?
Q: That made you angry?
Q: When you put your hands on her, you were angry?

Topic 2: The only injuries Ms. Smith had were from Mr. Smith.

Q: Mr. Smith, it's your testimony that you were only trying to protect Ms. Smith from herself on January 1?
Q: You were only doing what was necessary to keep her from hurting herself?
Q: You would agree that the bruises on her wrists were from you holding her arms down, correct?
Q: Ms. Smith didn't cause those bruises to herself, did she?
Q: You caused those bruises on her?
Q: You would agree that the cut on her lip was from you squeezing her face, wasn't it?

Q: She didn't cut her own lip, Mr. Smith, did she?
Q: You caused that injury on her, correct?
Q: In fact, Ms. Smith had no visible injuries from hurting herself, did she?
Q: The only injuries she sustained that night were from you, Mr. Smith, correct?

Topic 3: Mr. Smith's subsequent actions don't support his story.

Q: Mr. Smith, you say Ms. Smith was psychotic that night?
Q: You didn't call 911 for emergency medical assistance, did you?
Q: You didn't drive her to a hospital?
Q: You didn't call her psychiatrist's emergency number, did you?
Q: You didn't call her family for help?
Q: Even after she was injured by you, you still didn't get her any medical treatment, did you?

Topic 4: Mr. Smith hasn't been involved in her mental health care.

Q: Mr. Smith, your wife has been under the care of psychiatrist for 5 years?
Q: During that time, you have never met with her psychiatrist?
Q: Nor have you ever spoken with the psychiatrist?
Q: You haven't been involved in her mental health care whatsoever?

Now that you have your topic headings, decide which topics really advance your theme and if any are red herrings. In the above example, Topic 4 probably gets you off your theme and may focus too much attention on your client's mental illness. Edit out any topics that don't advance your theme.

Now, organize your remaining topics. Because you want to start strong and end strong, you probably should conduct your cross examination of this abuser in the following order:

Strongest point: Topic 2: The only injuries Ms. Smith experienced were from Mr. Smith
Least strong point: Topic 1: Mr. Smith was angry when he restrained her

2nd strongest point: Topic 3: Mr. Smith didn't get her any help

Pick your 3–5 strongest topics so that your cross examination is punchy and efficient. Make sure you end on a cross examination topic that cannot be objected to. Your organization and pace of cross will be dictated by what topics you have chosen. Keep in mind, however, that some judges will cut short your cross examination if they feel you are drifting into irrelevant topics, so be able to leap to your final strong topic to finish.

C. CLASSIC CROSS EXAMINATION STRUCTURE

1. Friendly, non-threatening information (e.g., work, background)

2. Affirmative information that is helpful to your case (e.g., police came, abuser left the house that night)

3. Admissions or impeachment on key topic (these must be unambiguous admissions and unquestionable impeachment)

4. Challenging information (e.g., he was thrown out of his mother's house due to violence)

5. Hostile information: once you are in this realm of cross, it is unlikely the abuser will concede anything else to you (e.g., he raped her, he punched her 5 times)

6. The strong close

PRACTICE TIP: Just outline the topics for yourself, don't write out every question – this will help you reorganize the topics quickly should you need to inject a new area of cross examination based upon the opponent's direct testimony. It will also force you to listen to the opponent when he answers your cross examination questions.

D. TOP 10 RULES FOR ASKING QUESTIONS ON CROSS EXAMINATION

1. Ask only leading questions. Always.

2. Ask only 1 fact per question. Then build upon that fact in your next question. Here's an example of what might happen when you don't ask one fact per question:

Q: You went to Henry's and ate a ham sandwich?

A: No.

The Fix:

Q: You left your house?

Q: You were hungry?

Q: You stopped at Henry's?

Q: You ordered a sandwich?

Q: It was a ham sandwich?

Q: You ate the ham sandwich?

3. Avoid compound, vague, or confusing questions. Do this by sticking to the rule: One fact per question. Go through every question. If any of them seem long and rambling, try turning those into a series of short punchy questions instead.

Q: Mr. Smith, on the night of January 1, you went to Ms. Smith's house in the middle of the night because she wouldn't answer your calls and you were going to make her talk whether she wanted to or not?

A: No.

The Fix:

Q: Mr. Smith, on the night of January 13, you called Dawn Smith?
Q: She didn't answer the phone?
Q: So you called her again?
Q: She still didn't answer.
Q: Then you drove to her house?
Q: It was the middle of the night?
Q: You knew she would be home?
Q: You didn't care that she didn't want to talk?
Q: You were going to make her talk?

4. Consider removing the "didn't you?" or "correct?" at the end of your questions. Practice asking the questions out loud as "questments," leaving off the "didn't you" and "correct?" phrases at the end. Sometime this small change can help you obtain better cadence and witness control.

5. Mark or identify spaces for strategic pauses -- sometimes you forget in trial.

6. Ask only questions to which you know the answer.

7. Never ask "why" on cross – tell the opponent why.

8. Don't ask the ultimate question – leave it for closing argument.

9. Generally, don't use cross examination to discover new facts.

10. Be yourself but be polite. Very few litigators thunder away during cross examination like a Clarence Darrow. You will need to find your own pace, tone and style during cross examination. You will appear more in control, however, if you strive

to remain polite and professional. Not only will the judge and your opposing counsel appreciate you more for it, but your calm demeanor will contrast sharply with the rudeness and aggression of the abuser.

E. TECHNIQUES FOR CONTROLLING THE WITNESS ON CROSS

There are many techniques for controlling a witness on cross examination, but they all depend upon the type of witness you are examining and your own personal style. Experiment with all of these techniques and use the ones that work best for your courtroom style.

1. Listen to the witness and insist upon an answer.

Many witnesses will avoid difficult questions and talk around the topic. At the beginning, pretend to assume that the witness is not intentionally avoiding the topic. Thank the witness for their answer and ask the question again politely. If the witness continues to not answer the question, ask it again with more firmness. Tell the witness that you need an answer to your question before you move on. Often, the judge will become impatient at that point and will instruct the witness to answer your question. In many protective order cases, it is quite valuable for the judge to observe the abuser avoid an answer to the question because it suggests fabrication, so don't gloss over this moment in court.

2. If the witness gives a narrative answer, examine your question.

Did you somehow invite the narrative? Did you ask a "why" question? Did you ask a compound question? If so, get back to basics by asking one fact per question.

If there was nothing wrong with your question – it was correctly leading with only one fact involved – you have a witness before you who is going to insist on telling his story at every turn. Do not show irritation at this but continue to ask your cross examination questions. Over time, the judge will see that their witness is defensive and aggressive. If the witness is the abuser, this is exactly the image of the abuser that you want the court to see, so don't try to over-control the abuser's responses by cutting him off or telling him to answer the questions "yes or no."

3. Don't ask questions that include some kind of judgment or irrelevant detail.

Too often, cross examiners include judgment-laden words or irrelevant details in their cross examination. The witness will often latch onto the judgment-laden word or the detail, and argue with that. Take out the judgment-laden word and stick to the basic facts.

Judgment-laden:

Q: Mr. Smith, you viciously punched Ms. Smith, didn't you?

Fact-based only:

Q: Mr. Smith, you touched Ms. Smith?

Q: You touched her with your hand?
Q: Your hand was balled up?
Q: Into a fist?

4. Don't begin with "You testified on direct that ….

….you only shoved your wife." This style invites argument over the witness's prior testimony. Just ask the question, "You shoved your wife?"

5. Don't ask the witness to agree with your conclusion.

This is "the one question too many" problem. Leave the conclusions for your closing argument.

F. ADVANCED CROSS EXAMINATION IN DOMESTIC VIOLENCE CASES

1. Try for inadvertent corroboration or misdirection.

Always look for an opportunity to structure your cross examination in such a way where you lead the batterer to inadvertently corroborate some element of your client's case. You can do this by appearing to agree with his justification for the abuse, or by asking questions that focus his attention on a different topic with which he agrees. For example, a batterer might admit to stalking behaviors if you frame the questions in the context of his rationale that he was justified to act that way because she was cheating on him.

Example:

Q: Mr. Smith, you believe that Ms. Smith has been having an affair?
Q: She has denied having an affair to you?
Q: You wanted to get some kind of proof of her affair?
Q: You looked through her cell phone for numbers?
Q: You followed her after work?
Q: You followed her to church?
Q: You recorded her phone calls at home?

An example of misdirection is to ask the abuser about his strong work ethic before talking about his lack of experience as a primary caretaker of children:

Example:

Q: Mr. Smith, you are the sole financial support for your family, aren't you?
Q: You work hard to make sure to provide for your family, correct?
Q: You've worked at AMC Corporation, Inc. for 10 years?
Q: You work there Monday through Friday?
Q: You leave the house at around 7 in the morning?

Q: And you often don't get back home until 7 or 8 PM in in the evening?
Q: You also work a second, weekend job with XYZ, Inc.?
Q: You work that second job to make ends meet for the family?
Q: Your weekend job is 9-5, Saturday and Sunday, correct?
Q: You work most weekends, correct?
Q: When you're at work, Ms. Smith is at home caring for the children, correct?
Q: When you get home on weeknights, the children are already in bed aren't they?

2. Ask about the Incident of Abuse.

Most trial advocacy manuals advise attorneys to never ask a question on cross examination to which they do not already know the answer. Domestic violence cases pose a unique set of conditions, however, that warrant violating this rule. In a significant percentage of domestic violence cases, the abuser will admit to part or all of the abuse. Perhaps this is because he feels pressure to be more truthful with his victim sitting opposite him in the courtroom, watching him; perhaps it is because he is still in the post-abuse phase where he believes that he can win her back – regardless of the motive, there is a substantial likelihood that the abuser will admit to part or all of the abuse if asked on cross about it. Because of this, it is recommended that you always review the specific facts of the abusive incident in your cross examination of the abuser.

SAMPLE CROSS EXAMINATIONS

The following are some sample cross examination questions on specific topics that frequently arise in domestic violence cases. The examples are headed by the contention, or topic, that the area of cross examination covers.

<u>Contention: Abuser is a violent person towards women</u>

Q: Mr. Smith, on January 1, 2012, you pleaded guilty to second degree assault?
Q: That assault was on your former wife, Ms. Smith?
Q: You were sentenced to 3 years, all suspended except for 180 days, correct?
Q: You are currently on supervised probation for the assault conviction?

Q: Ms. Smith subsequently obtained a divorce from you?
Q: The divorce was granted on the grounds of abuse?

Q: This is not the first protective order proceeding that you've been involved in?
Q: In 2014, you were subject to a 1-year protective order?
Q: That protective order was filed against you by your former girlfriend, Ms. Harris?

Q: And now you are involved in another protective order proceeding with your current girlfriend, Ms. Jones?
Q: You would agree that you have a problem with violence towards women you are involved with?

<u>Contention: Abuser engages in controlling, demeaning behavior towards client</u>

Q: On January 1, you and your wife had a disagreement about grocery receipts?
Q: She had gone grocery shopping that day?
Q: You asked to look at the grocery receipts?
Q: She didn't want to give you those receipts, did she?
Q: This wasn't the first time that you have asked to see her grocery receipts?
Q: In fact, it is your practice to see her grocery receipts after she shops for food?
Q: That's because you want to make sure that she buys what she says she buys?
Q: You want to make sure she doesn't use the money for any other purpose?
Q: Your wife leaves for work at 8 a.m.?
Q: It takes her approximately 30 minutes to get to work?
Q: You have asked her to call you when she gets to work?
Q: You want to make sure that she gets to work safely?
Q: On January 1, she didn't call you?
Q: So you called her cell phone?
Q: She didn't answer your call, did she?
Q: So you kept calling?
Q: You called her 15 times over a 30-minute period?

<u>Contention: She's not the first aggressor</u>

Q: Mr. Smith, you claim that Ms. Smith attacked you first?
Q: And that you were afraid of her?
Q: Yet, Ms. Smith is the one who called police?
Q: And she was the one who went to the hospital?
Q: And she was the one who left the house?
Q: She is the one who went into a shelter?
Q: She is the one who has filed for this protective order?

<u>Contention: Victim didn't file for the PO to get a quick custody order</u>

Q: Mr. Smith, you and Ms. Smith separated once before?
Q: About 2 years ago?
Q: Your son was about 3 years old and your daughter was 5 years old at the time?
Q: You and Ms. Smith were separated for about 6 months?
Q: During those 6 months, the children lived with Ms. Smith at her mother's house?
Q: You saw the children almost every weekend?
Q: They stayed with you from Saturday morning until Sunday evening?
Q: Ms. Smith never kept you from the children, did she?

<u>Contention: The victim is not an unfit mother</u>

Q: Mr. Smith, you work full-time?
Q: And Ms. Smith is a stay-at-home mother?
Q: When you're at work, she's at home with the children?

Q: That has been the arrangement between the two of you for at least 5 years?
Q: You haven't paid for a babysitter or daycare during that time, have you?
Q: You have never called Child Protective Services about your children?
Q: You have never been phoned by your children's school?
Q: Your children are doing well in school?
Q: You've never heard about any behavior problems of your children?
Q: Your children have no physical problems?
Q: They're up-to-date on their immunizations and well-child visits?

VII. Impeachment

A. OVERVIEW

Impeachment is a key skill in your cross examination toolkit. Impeachment is used to 1) demonstrate to the trier of fact that the witness is not to be believed because the witness has changed his/her testimony, or 2) show that a fact is different than that testified to by the witness. Once a witness is shown to be a liar, the implication is that nothing the witness said should be believed. Following this logic, it is crucial that you conduct impeachment on key topics as opposed to marginal topics. For example, it will make a difference to the judge if the abuser says he never hit the victim and is impeached by his text message apologizing for punching her. It will make little difference to the judge, however, if the abuser says he makes $12.50 an hour and is impeached by his paystub stating that he makes $13.00 per hour.

Except for an admission by a party opponent, extrinsic impeachment evidence generally will not be admitted as substantive evidence (i.e., it will not be admitted as proof of a fact), but only for the limited purpose of challenging the witness's credibility. Judges (as opposed to jurors), tend to make this technical, legal distinction between substantive evidence and impeachment evidence.

Skilled impeachment requires all of the following:

- Identification of impeachment sources
- Critical assessment of when to decline an opportunity for impeachment
- Smooth execution of the mechanics of impeachment.

B. HOW TO IMPEACH A WITNESS

A beautifully executed impeachment of an opponent using a prior inconsistent statement can be one of the most memorable occasions in one's litigation career. It is well worth practicing the three steps of an effective impeachment so that you can execute it gracefully and effectively in court. If done well, impeachment by a prior inconsistent statement can win your case.

Step 1: Spotlight the false or contradictory statement.

The first thing you must do prior to impeaching a witness is to spotlight the false or contradictory statement. In other words, nail down the lie. You do this by repeating the false statement again with verbal emphasis:

Q: Mr. Smith, you testified on direct examination that you have never raised a hand to your wife?
A: That's right.
Q: It's your testimony today that you have never raised a hand to your wife?
A: Correct.

OR, stated affirmatively,

Q: Mr. Smith, you punched your wife in the eye on New Year's Eve of this year?
A: Never! That's a lie!
Q: You deny punching her on New Year's Eve?
A: That's right – I never hit her!

Step 2: Authenticate the impeaching document.

You are now about to introduce a document that shows the witness to be liar. As you know from the Evidence Chapter, supra, a document must be either self-authenticating or authenticated by the witness in order to be admitted. If the document is self-authenticating, move directly to Step 3. If it's not, ask questions of the witness that authenticate the document:

Q: You use asmith@gmail.com as an email address?
A: Yes, that's just one email address that I have.

Q: Your wife uses dsmith@gmail.com as her email address?
A: Yes.

Q: And the two of you tend to email one another during the day?
A: Yes, it's easier when we're at work.

Q: You've had that email address for the last five years, correct?
A: At least that long.

Q: And your wife has had her email address for the same amount of time?
A: Yes, we created those addresses at the same time.

Q: When you email your wife, you usually sign your email with your nickname?
A: Most of the time.

Q: And the nickname you use is "Big Red"?
A: Sometimes.

Q: Mr. Smith, I'm showing you what has been marked as Plaintiff's Exhibit No. 1 for identification. This is a copy of an email sent from your email address to Ms. Smith's email address on January 1 at 3 AM. You'll notice that it is signed "Big Red." Do you see that?
A: Yeah.

Q: This is an email sent from you to Ms. Smith, isn't it?
A: Looks like it.

Step 3: Confront the witness with the impeaching statement.
If the statement is self-authenticating, impeach in this manner:

Q: Mr. Smith, I'm showing you what has been marked as Plaintiff's Exhibit #1. This is a true-test copy of your conviction for a second degree assault against your wife. On December 1, you were found guilty of having assaulted your wife, correct?
A: Yes, but I didn't do it.

Q: You were sentenced to three years' probation for that offense, correct?
A: Yes.

Q: Your Honor, I move the admission of Plaintiff's Exhibit #1 into evidence.

Notice that the attorney did not ask the ultimate question here – "So, you did put your hands on your wife, didn't you" or "You weren't quite truthful with the court when you said you'd never put your hands on your wife" – because that will be saved for closing argument.

For statements made by the witness, impeach the witness by reading the statement to them and asking them if that is what the statement says.

Q: In this email dated January 1, you wrote Ms. Smith, and I quote: "I am so sorry that I got angry with you last night. I never meant to hurt you." That's what it says in your email, doesn't it?
A: I guess so.

Q: That's what you wrote in your email to your wife on January 1, correct?
A: Yes.

Q: Your Honor, I move the admission of Plaintiff's Exhibit No. 1 for Identification into evidence.

C. REFINING THE MECHANICS OF IMPEACHMENT

- Practice Tip 1: Read it yourself. Some attorneys give the impeaching document to the witness and have the witness read it aloud. In domestic violence cases, you run the risk that the abuser will not read it accurately, will read it too fast to be understood, or will start explaining away the statement before the court hears the entire statement. Therefore, it is generally better for you to read the statement to the court. Make sure to read it with appropriate emphasis and pace so that the court hears the entire statement before the abuser gets a chance to explain it away.

- Practice Tip 2: Read the impeachment accurately. If you attempt to paraphrase it in a way that favors your client but is slightly inaccurate, you open yourself up to the objection that you are mischaracterizing testimony. If your impeachment becomes the subject of

an acrimonious fight over the precise wording of the prior statement, you will have lost the punch of the impeaching moment.

- ❖ Practice Tip 3: Anticipate the doctrine of completeness. This evidentiary doctrine permits the other side to read any sections of the statement that you have left out. If Mr. Smith's email went on to say that he got angry because Ms. Smith admitted to having an affair, and that he shouldn't have hurt her feelings by calling her a "whore," you might want to reconsider using this email for impeachment.

- ❖ Practice Tip 4: Don't ask the ultimate question. Limit the opportunities for the witness to explain away the impeachment or make excuses. Once you have impeached the witness, do not ask the witness to agree that he was either an abuser or a liar – "So, Mr. Smith, you did hit your wife," or "You weren't truthful with the court when you testified earlier that you never laid a hand on your wife." Leave the conclusion for closing argument.

D. IMPEACHMENT USING DIFFERENT SOURCES OF EVIDENCE

1. Common Sources of Impeachment

   - Prior writings
   - Special problems with texts and emails
   - Wage statements
   - Tax returns
   - Bank statements
   - Police report

2. Validating Prior Statements

   a. Police Statements. If the witness has signed a statement made to police, simply establish that the signature is that of the witness.

   Q: Mr. Smith, you gave a written statement to police on August 1?
   A: Yes, I did.

   Q: And you signed that statement?
   A: I think so.

   Q: Let me show you what has been marked as Plaintiff's Exhibit No. 2 for identification. This is your signature at the bottom of the page?
   A: Looks like it.

   b. The Opponent's Deposition.

   Q: Mr. Smith, I took your deposition in my office on March 1 of last year?

Q: A court reporter was present on that day?

Q: She took down all of my questions and all of your answers?

Q: You answered my questions under oath at that deposition?

Q: And on March 10th, you reviewed the deposition for any errors?

Q: You affirmed that there were no errors in the transcript?

c. The Opponent's Prior Court Testimony.

Q: Mr. Smith, you appeared in court last week when you filed for a protective order against my client?

Q: You were sworn in by the clerk before you testified?

Q: You testified that day?

Q: You told the judge that day that Ms. Smith spat in your face?

With prior court testimony, you will need either a recording available to play in court or a written transcript of the prior court testimony if the witness denies making the statement.

d. The Opponent's Own Court Pleadings.

Q: Mr. Smith, this is a copy of your Complaint for Divorce?

Q: This is your signature on the last page of the Complaint?

Q: On page 2, paragraph 4, you stated that you have two other children in addition to your children with Ms. Smith?

3. Validating Other Prior Statements

You may impeach the opponent with other types of prior statements, even though they haven't been written or signed by the witness. When you have such a statement, consider first asking foundational questions that pressure the witness into validating it.

The prior statement was made closer in time to the incident.

Q: Immediately after this incident, you called the police?

Q: The police arrived within 10 minutes?

Q: You gave them an oral statement?

Q: You saw the police officer writing down what you told them?

Q: The events of that evening were very fresh in your mind when you described what happened to the police?

Q: This true-test copy of the police report from that evening reports that you told police that you had pushed your wife, correct?

Q: That's what you told police that evening?

Q: It's now been 4 weeks since that incident?

Q: And your recollection today is less accurate than it was on the day of the incident?

The witness was aware of the importance of the prior statement.

Q: You hired an accountant to prepare your tax returns?

Q: Because you wanted your tax returns prepared correctly?

Q: You didn't want to provide an inaccurate tax return to the IRS?

Q: After the accountant prepared them, she asked you to review them?

Q: You looked them over before you signed them?

Q: Then you signed the return?

Q: Your tax return indicates that you earned $100,000 last year, not $25,000 as you have just testified to, correct?

The witness never complained about a document.

Q: Mr. Smith, you receive regular credit card account statements from your credit card company?

Q: You review those statements?

Q: You look them over to make sure you aren't charged something in error?

Q: If you are charged for something you didn't buy, you contact the credit card company, correct?

Q: You haven't had an occasion to contact your credit card company in the last year, have you?

Q: This is a copy of your May credit card statement – you recognize it?
Q: You looked it over after you received it last month?

Q: You made no complaints about this bill to your credit card company?

Q: On May 15, your statement shows that you purchased a car tracking device, doesn't it?

E. IMPEACHMENT USING OTHER WITNESSES

Don't forget that you can impeach using other witnesses. When you do this, make sure to emphasize the opponent's commitment to the lie. Then call the impeaching witness and ask the impeaching factual question early on in the direct exam.

(Spotlight the lie with the Opponent)
Q: Mr. Smith, you own two revolvers and a shotgun?
A: No, I don't own any guns.

Q: Let me make sure I understand your testimony – you don't own any guns?
A: No, none.

* * *

(Impeach with the Witness)
Q: Mr. Jones (friend of Mr. Smith), have you ever been to Mr. Smith's home?
A: Yes, often.

Q: Have you ever seen any guns at his home?
A: Yes, I believe he has a couple of handguns and a shotgun. We went shooting with them in the fall.

Q: Did Mr. Smith ever say whose guns they were?
A: He always said that they were his guns.

F. SPECIAL EVIDENTIARY PROBLEMS

1. Text Messages and Emails.

Impeachment using text messages can flop if the hostile witness disavows them, leaving you without the necessary authentication step. Consequently, it may be more effective to have your client authenticate the text messages and have them admitted in your case in chief. You can still

consider using them as impeachment, but it may give the opponent an opportunity to claim that they are fabrications.

- ❖ Practice Tip: Many jurisdictions have now issued appellate decisions that describe the process by which one may authenticate text messages and emails. Be familiar with your jurisdiction's case law on this point. Because these means of communication can be easily spoofed, make sure that your direct examination contains questions that link the content of the text message or email sufficiently to the other party. Some opinions require evidence that shows that only the other party would have knowledge of the topics discussed in the text messages or emails, or uses a particular name or style of language that links them to the email.

2. Wage Statements.

Witnesses regularly disavow their own wage statements, claiming that they've never seen their paystubs or that they never look at them once they receive them. Consequently, if you plan to try to impeach an opponent with a wage statement, it is best to subpoena the wage statements to court either from the defendant's employer. In this way, if the opponent disavows them, they are already authenticated and will be admitted without the opponent's validation. If you don't have time to subpoena the employer's documents, try having your client authenticate them. If she sees the paystubs come in the mail every two weeks, they're piled up on the family desk, and they haven't been altered or changed in any way, the court may admit them on that factual basis.

3. Character Evidence.

In many jurisdictions, the abuser's character trait for violence is highly relevant in protective order cases. It bears repeating to many judges that the best predictor of an abuser's capacity for future violence is his past history of violence. Thus, prior protective orders against the abuser, even if taken out by other victims, should be admissible as character evidence of violence. Similarly, convictions for assault or other acts of violence should also be used in impeachment as evidence of the abuser's propensity towards violence. Be familiar with your own state's rule governing impeachment with a conviction. For example, in jurisdictions that closely track the federal rules, convictions must be punishable by more than one year in jail, and not more than 10 years old. In many jurisdictions, case law clearly establishes the relevance and admissibility of this type of evidence in protective order cases.

- ❖ Practice Tip: If custody is at issue in your case, the character trait for violence is always relevant to the fitness of a parent. Be aware, however, that many courts bi-furcate protective order hearings, taking testimony on the relief portion of the protective order only after an act of abuse has been proven. Some of these courts will also not allow in evidence of prior violence, particularly if it was not directed at your client, until after the incident of abuse of your client is proven. If this happens to you, make sure you remember to move this topic to your cross examination of the abuser when you get to custody and visitation issues.

G. AVOIDING COMMON IMPEACHMENT MISTAKES

1. Don't make a "mountain out of a molehill" – as discussed previously, impeach only on key facts.

2. Missing an obvious point – if there is a reasonable explanation for a discrepancy in testimony, you probably should not use this item for impeachment because it will be easily rehabilitated on redirect.

3. Fumbling with the mechanics, getting lost in the paper – particularly when you are impeaching with a series of documents, practice in advance how you will have the documents marked for identification, get the document to the witness and read the impeaching material. If your timing gets lost because you are fumbling with the paper, your impeachment will fall flat.

4. Don't allow your opponent to explain away the discrepancy – you can make sure this does not happen by not asking the conclusory question. "So you lied to this Court, didn't you?"

H. STRATEGIC IMPEACHMENT

Many abusers enter the courtroom readied for battle. For these opponents, it may be best to begin your cross examination with your strongest impeaching material, then your second strongest impeachment material, and so on. This will teach the opponent that you have the means to back up your cross examination questions of him. If the first couple of questions on cross examination embarrass him and demonstrate that he is a liar, he may become more forthright in his answers during the rest of your cross examination.

Some other strategic considerations in impeachment include:

1. If there is a way for the opponent to squirm out from authenticating the document, plan an alternate method to lay its foundation.

2. If you need a piece of evidence in your case in chief, such as evidence of multiple prior protective orders to show a pattern of abuse, don't save this for cross examination, regardless of how tempting the impeachment might appear. It is better to have the evidence admitted in your case-in-chief than risk having it excluded because of a glitch in the impeachment process.

3. Always weigh the pros and cons of saving an impeaching witness for rebuttal. Impeachment of a witness's testimony might be more powerful if it's the last thing the judge hears before ruling.

VIII. Closing Argument

A. OVERVIEW

Closing argument is your opportunity to tell your client's story in full. Even if you practice in a jurisdiction that gives you only 30 minutes in which to conduct your protective order hearing, you should still give a closing, even if it is short. In closing argument, you must answer the central question before the court: Why should the court grant your client a protective order? Usually, this entails answering the subsidiary question: Why should the court believe your client?

Closing is the time to remind the judge of your theme and how the facts support your theme. But more importantly, it is the time to argue what those facts mean in your case. When the batterer tells your client that he will never let her go only hours after she secretly signs a lease on her own apartment, you will need to tell the judge what these facts mean - that his statement to her was not the romantic pining of a jilted lover, but a creepy promise that he'll stalk her as a means of getting her to reconcile.

Effective closing arguments do the following:

- Tell the client's story
- Support the story with the facts
- Argue the meaning of those facts
- Rebut or discount negative facts
- Persuade the judge to right the wrong

Judges frequently complain that lawyers in protective order cases make the mistake of simply reciting the facts of the case in closing argument. Particularly in protective order hearings that last less than 2 hours, this can be perceived as insulting; at best, it will be perceived by judges as a waste of their time. Judges report that argument is most useful when lawyers get to the contested issues or facts in their case, and argue those. If the judge has already telegraphed to you what s/he considers to be the most contested issue or fact of your case, it is wise to quickly reorganize your closing and get to that topic promptly. You might still be able to argue everything else that you wanted to in closing, but only after you have satisfied the judge's concern about a particular topic or fact.

B. DEVELOPING YOUR CLOSING ARGUMENT

1. Tell the Client's Story.

People remember facts best when they fit into a story arc. The classic story arc has three basic moments: 1) everything is going well; 2) something bad happens; 3) the bad thing gets fixed. The stories of domestic violence victims fit amazingly well into this classic story arc – make use of that as often as you can.

Invoke your case theme again in your closing. Tell the story according to the facts that actually came in during the trial and argue how those facts support your theme. Explain why the bad thing happened and how the judge can fix it. This will answer a key, but unspoken question in many judges' minds: why did the batterer do it? We all know theoretically that abusers hurt their intimate partners out of a need to exert power and control over them as well as a sense of entitlement to do so. But in closing argument, you will want to personalize how this particular abuser exercised power and control over your client, and what he gained from it.

Remember that courtrooms are made up of human beings. Human beings are most likely to act if they feel that they are helping to solve a problem. Don't be afraid to argue that a protective order can really make a difference for your client – tell the judge that a victim is safer with a protective order than without one, that the abuser needs to know that someone other than the victim is watching his behavior, that the children need to live in a home free from domestic violence. Be persuasive.

2. Support the Story with the Facts.

You may organize your closing chronologically, by the key elements of your case, or by the most contested moments of the case. Whichever organization works best in your case, you will want to weave in the facts that support your case according to that organizational structure.

(Chronologically)

> Your Honor, Mr. Smith is a mean, abusive drunk. Ms. Smith described in detail how Mr. Smith arrived home at 2 AM, so drunk that he urinated on the floor, and then beat her in her head. Ms. Smith's testimony was compelling enough, but their 16-year old daughter, Samantha's, description about how she had to jump on her father's back to pull him off of her mother, demonstrates how intolerable Mr. Smith's behavior has become.

(Key Element of the Case)

> Your Honor, this case turns on Mr. Smith's threat of imminent serious bodily harm. Ms. Smith testified that Mr. Smith texted her at 5 AM on a Sunday morning that he was coming over "to teach her a lesson." She was so frightened that she called Mr. Smith's mother to see if she could stop him. Mr. Smith's mother admitted on the stand – and very reluctantly, I might add - that her son was awake at that hour, pacing the floor, and that he seemed to be very angry. What conceivable reason could a person have to be awake at such an early hour - angry and threatening to "teach someone a lesson?" The only reasonable explanation is that he intended to do her harm. Ms. Smith was entirely justified in being afraid when she interpreted his text message for exactly what it was – a threat to hurt and punish her.

(Most Contested Moment of the Case)

> Your Honor, Ms. Smith has testified that on January 1, her husband dragged her out of bed and punched her repeatedly in the face. Mr. Smith tells an entirely different story – he claims that he was only defending himself when she attacked him because she thought he was sleeping with someone else. This is not just a "she said – he said" kind of case. If you look at Ms. Smith's actions after the assault and compare them to Mr. Smith's actions after the assault, you will know who is telling the truth here and who isn't. What did Ms. Smith do after this assault? She called police, she went to the hospital, she filed criminal charges and she filed for this protective order. She moved out of her home of 15 years and changed her phone number. Are those the actions of an irrationally jealous spouse? No, they are the actions of an injured and frightened person who wants to have nothing more to do with her abuser.

When you argue the facts, you make them work for you in answering that key question - why should the court grant your client a protective order?

3. Argue the Meaning of the Facts.

This is the fun part of closing argument. When you argue the meaning of the facts of your case, you educate the judge about why you selected the evidence you presented. This is the part of closing where you can explain to the judge that while victims of domestic violence often appear to act in counter-intuitive ways, her actions make perfect sense when you enter into her world.

Example:

> Your Honor, Ms. Smith didn't call police after that horrible beating in January because only 1 week earlier, she'd called the police and they told her there was nothing they could do. Why should she think that anything would be different 1 week later?

When you argue the meaning of the facts, you connect up the implications of your cross examination questions for the judge.

Example:

> Mr. Smith's story today that he never laid a hand on my client is simply not credible. You'll remember that in the statement he made to police, only hours after the incident, he admitted that he had shoved Ms. Smith. It wasn't the whole truth, but it was part of the truth. But today, after being charged with assault and facing the possible loss of his job if this protective order is entered against him, his story has changed. Why? Because he has so much to lose by telling the truth. Your Honor, only one of Mr. Smith's statements can be true, and it's the not one you heard from Mr. Smith today in court.

4. Rebut or Discount Negative Facts

Your closing argument must address negative facts about your case that were raised by the other side, or that you anticipate they will raise in their closing argument. If you do not address negative facts, you lose out on the opportunity to put your client's spin on those facts. You will also make your client's case appear weak simply because you have not addressed the opposition. Position your discussion of these facts somewhere in the middle of your closing so that you still begin and end with your client's core story.

A good adage to keep in mind about rebutting or discounting the opposition's facts is to pay particular attention to how you characterize the opposition's issue. If you concede the defendant's language that your client "punched" him in the face first, you will have more trouble countering that fact. But if you argue that she only "shmooshed" him in the face with the palm of her hand, you will have an easier time arguing to the judge that, while her action constitutes a technical assault, it caused him no harm and certainly did not place him in fear. Of course, your characterization of the facts must be in keeping with the testimony and evidence that came in during the trial.

- ❖ Practice Tip: If there is an uncontested bad fact about your client in the case, consider broadening your timeframe about the incident. For instance, if your client hit the defendant while he was passed out drunk on the couch, broaden the timeframe of this incident to show how the abuser had just located her at her new apartment, broken in and torn up the last baby pictures she had of her children. Concede that while it wasn't right, it certainly was understandable.

5. Persuade the Judge to Right the Wrong

Don't hesitate to ask the court to help you protect your client. Collect phrases or statements that you can use to conclude your closing argument with that speak to the human inclination to right a wrong. Consider the following:

- Mr. Smith still hasn't gotten the message that it's illegal to beat your wife. He needs this order to get that message, Your Honor.

- Ms. Smith, like many victims of domestic violence, felt too embarrassed to tell anyone about her abuse. So Mr. Smith's abuse of her has been their family secret for the past two years. Until today.

- One's home should be a place of safety, of security, of sanctuary. But in Ms. Smith's case, it was none of those things. Only if she receives a protective order today will she begin to feel safe at home.

6. Structure the closing so that it has clear points and transitions throughout.

Many lawyers give rambling closing with insufficient transitions between points, causing

essential information and to get buried in the middle.

"Your Honor, now I'd like to turn to the Defendant's claims that he is afraid of Ms. Smith."

C. DEFENDANT'S CLOSING ARGUMENT

If the victim is the defendant in a protective order hearing, your closing argument need not necessarily track the plaintiff's closing. Put forward your strongest opposition to plaintiff's case, whether it is a legal or a factual one.

If the plaintiff has failed to meet a required element of their case, argue how the facts fail to support that element. If the key witness in plaintiff's case has a credibility problem, highlight the contradictory testimony and evidence. Don't forget to argue the pros and cons of each party's motives in bringing or defending against the action and how their actions are consistent or inconsistent with those motives.

D. PLAINTIFF'S REBUTTAL ARGUMENT

While the rules governing closing argument and rebuttal differ in every state, the federal rules limit plaintiff's rebuttal to the topics raised in defendant's closing. Therefore, it is inadvisable to hold back key topics until rebuttal, what is known as "sandbagging," so that you will have the last word on that topic. If you do this, you run the risk that the defendant will not discuss that topic in their argument and you will be prohibited from discussing it.

If you choose to rebut the defendant's closing point by point, keep in mind that this can become tedious for a judge to listen to. If you can, allude to your theme and rebut the defendant's points according to your closing's organizational structure.

E. BRAINSTORMING FOR CLOSING ARGUMENT

The following chart is an aid to assist you in fashioning your closing argument. To adequately prepare for closing argument, you must complete the chart for both sides.

Plaintiff's Argument	Defendant's Argument
Why should the court grant my client a protective order? • Are the elements of a protective order met? • Does the story make sense?	Why should the court deny the plaintiff the protective order? • Has plaintiff missed any elements of a protective order? • The story doesn't make sense because. . .
The plaintiff should be believed because…	The plaintiff should not be believed because …

The defendant should not be believed because…	The defendant should be believed because…
The protective order will solve the problem by…	The protective order won't solve this problem because. . .

IX. Objections

A. OVERVIEW

Many new lawyers are more intimidated by the process of objections than necessary. Simply put, an objection is the way a lawyer requests that a judge consider how the rules of evidence apply to a particular type or form of evidence – a request to consider its admissibility. Objections can also be used to address problems with court processes – the form of a question, the behavior of opposing counsel, or any other issue in the courtroom that might influence the fact-finding process. Once an objection is made, an objection becomes a record that preserves the legal issue for future consideration by a higher court, in case an appeal becomes necessary.

For a less experienced litigator, becoming comfortable with objections is really about connecting knowledge about the rules of evidence with the evidence that arises at trial. But even a lawyer who has mastered the rules of evidence can find the pace at which evidentiary issues must be identified and raised at trial intimidating. Once the moment is gone, it is gone - the evidence is in, and the issue may not be preserved for appeal. That "fleeting moment" is the crux of what makes new lawyers anxious about objections – the process of objecting requires that lawyers 1) process the evidence as it arises, 2) assess its admissibility, 3) identify the rules that apply to its admissibility, and 3) speak up – often, all in a matter of seconds.

The good news is that thorough trial preparation makes this process much easier than it sounds. While there is no substitute for the type of routine trial work that trains lawyers to respond to obviously objectionable evidence with immediacy and ease, there also is no substitute for thoughtful trial preparation to identify likely sources of objectionable evidence in advance. With careful investigation, discovery, and analysis of pleadings, you can anticipate the evidence and plan for objections that apply to it.

B. PLANNING AND ANTICIPATING OBJECTIONS

In domestic violence protective order cases, the shortened time frame can make it difficult to conduct the type of discovery that allows lawyers to be confident that they know what evidence will arise at trial. Lawyers must plan by relying heavily on information from their clients about what the abuser might do or say in court. But there are types and forms of evidence commonly presented by batterers in these cases, and lawyers can plan objections to them.

1. Common Objections in Protective Order Cases

In general, objectionable evidence will arise in two forms: testimony or exhibit. For this reason, the process of planning for objections should include (1) anticipating likely witnesses, and then, for each of those witnesses, anticipating the areas of testimony the witness will cover and (2) anticipating the exhibits or documents likely to be introduced through those witness.

The three most common objections you should be prepared to make are (1) lack of foundation/authenticity, (2) relevance, and (3) hearsay. A lawyer who is prepared to quickly identify evidence that is objectionable for any one of these three reasons will be able to deal with most of the objectionable evidence that arises in protective order cases.

2. Objecting to Exhibits

These objections are often easier to anticipate and plan for than objectionable evidence that comes in through testimony. The most common objections to exhibits in domestic violence cases include:

- Lack of Foundation/Authenticity: Can this witness establish that the evidence is what the opponent says it is?

In domestic violence cases, this objection may arise when the defendant attempts to produce an email, a text message, a Facebook page, or other document of some kind that he purports to have been drafted, written, or sent by your client. Determine whether this witness can lay a foundation that establishes authorship. (See Chapter V. Evidence for detailed discussion)

- Relevance: Does it prove something in the case that matters?

Most batterers are very effective in court at directing the focus of domestic violence hearings away from the issue of abuse. For example, a Defendant in a protective order case may attempt to introduce photographs of a disheveled home to support claims about the victim's mental or emotional state. Determine the relevance of this evidence, not in general terms, but at this stage of the proceeding. Is this evidence probative on the issue of whether abuse occurred? Similarly, it is not uncommon for batterers to present "evidence" or testimony about the victim's infidelity or substance abuse. Unless the Defendant is stipulating that he was justified in physically abusing your client, this evidence should often be excluded as not relevant.

- Hearsay: Is the exhibit, or anything in the exhibit, an out-of-court statement offered for the truth of the matter asserted?

Hearsay evidence may be presented by the batterer in the form of letters from family, friends, or co-worker that support the batterer or his story in some way, letters from child protective services, or police reports that include commentary from officers that diminish your client's credibility. All of these should be excluded on hearsay grounds. (See Chapter V. Evidence for detailed discussion)

3. Objecting to Testimony

Objections to testimony can be harder to plan for in domestic violence cases because discovery opportunities are limited. But abusers often use predictable strategies that you can plan for.

First, abusers can be very effective at changing the focus of protective order hearing to topics other than the abuse. It is your job to make sure that doesn't happen. Make a relevance objection to any testimony or evidence that does not make an OPERATIVE fact in the case more or less true.

- Relevance: Does it prove something in the case that matters?

The types of irrelevant testimony frequently presented by batterers include:

1) Testimony from friends, family, or neighbors indicating that they have never seen the defendant abuse your client. Unless your client's petition alleges that they did see it, this

testimony is not relevant. If necessary, you can stipulate that he hasn't abused her in front of the named witness.

2) Testimony that the victim is a bad parent or has substance abuse issues.
Carefully assess whether a request for temporary custody places any of these facts at issue at this stage in the case – is it probative on the issue of whether the defendant has abused her? In many cases, it is not.

3) Testimony that the victim is cheating. Unless the abuser is going to stipulate that he abused her but she deserved it, testimony alleging infidelity is usually not relevant. On the other hand, you may chose not to object to it because the allegations sound so ludicrous or because the testimony corroborates your client's testimony that the abuser is obsessed with accusations of cheating.

Second, batterers will sometimes try to testify about information that they cannot know from personal knowledge. This type of testimony is usually objectionable as hearsay, and other sometimes sounds like, "I know that she got evicted because her neighbor told me she was arrested."

- Hearsay: Is it an out of court statement being offered for the truth of the matter asserted?

The types of objectionable hearsay frequently offered by batterers include:

1) Assertions about what police officers said
2) Assertions about child protective services workers said
3) Assertions about what a child, family member, or neighbor said

4. Objecting to Questions

During direct examination of a batterer, the most common objectionable questions will fall into two categories:

- The question is leading: the question is suggestive.

- The question calls for inadmissible evidence: the question is attempting to elicit testimony that is otherwise objectionable as hearsay, or on some other evidentiary ground.

C. Ground Rules for Making Objections:

1. Objections must be timely.

   Make your objection as soon as the objectionable issue can be identified.

2. Objections must be simple and specific.

   Stand up, object, and state the legal basis for your objection. Avoid argument.

3. Objections must be repeated each time objectionable evidence or testimony is elicited, even after the objection is sustained or overruled.

   Even if it is awkward, you must raise the same objection repeatedly if the same objection applies - even after your objection has been overruled or sustained.

4. Objections and argument must be directed to the Judge, not to opposing counsel.

   Never address opposing counsel while arguing an objection. You do not need to persuade opposing counsel.

5. Objections must be strategic.

   - Not every legally appropriate objection needs to be made (consider whether the information is harmless or will come in eventually)

     - Object when it is meaningful (develop a reputation for knowing the rules and when to invoke them)
     - Avoid the perception that you are hiding something ("the lady doth protest too much")

6. What is good for the goose is good for the gander.

   The way you object at trial can set the tone for opposing counsel and the judge. If you interpose unnecessary objections as a matter of routine, you may invite unwanted disruption from opposing counsel as you conduct your own case. Your objections should be guided by 1) the rules of evidence, 2) common sense, and 3) basic notions of professionalism and decorum.

X. Negotiation and Settlement

A. OVERVIEW

You must prepare for negotiation just as you prepare for litigation. The day of trial is the worst possible time to discuss settlement options with your client for the first time. Just as you must spend time preparing your client for direct and cross examination, you must review the negotiation and settlement process with your client before trial.

B. PREPARE YOUR CLIENT FOR THE NEGOTIATION PROCESS

It is very important that you tell your client in advance that you will be speaking to the opposing party (or his attorney) before the hearing to explore the possibility of settlement. If you do not prepare her for this, she may not understand why you are speaking to the other side and suspect other motives. Many clients have been told by their abusers that he has a "fix" on the court process. If she sees you speaking to the other side, she may suspect that his prediction of a "fix" is happening.

Let her know that engagement in settlement discussions is usual practice in all civil cases. Take the time before trial to explain to your client what the practical and legal consequences of settlement are: it terminates the litigation with the entry of an order; it does not include a finding of fact about the abuse; it usually forecloses any right to appeal. You should explain to her that settlement allows her to better control the content of an order compared to litigating a case, where there is more uncertainty about outcomes. Finally, let her know that you will share with her every offer made by the opposing side before settling any issue on her behalf.

Some clients express the desire to be present during settlement negotiations. This is almost always a bad idea. Particularly if you are negotiating with a pro se respondent, he will most likely speak badly about your client. Spare your client the agitation of hearing him demean her one more time, especially right before trial.

C. EMPOWER YOUR CLIENT BY WORKING WITH HER TO DEVELOP BEST, MIDDLE, AND "DROP DEAD" OFFERS

It is important to understand that many men and women have been socialized differently about negotiating for what they want. Men often have more experience in negotiating for things: just think of who typically speaks to car salespersons or repair persons. When you approach a man to negotiate on behalf of a client, he is likely to understand that this is a negotiation process involving some back-and-forth. Women, on the other hand, sometimes have much less experience negotiating for what they want - many of our clients start negotiations about family matters at what they can't do without, which is their "drop dead" offer.

Studies on negotiation tactics teach us that starting offers are highly predictive of where parties end up in settlement - typically, settlement occurs around the middle point between starting

offers. So, if your client begins her negotiation at her "drop dead" offer, settlement will occur at less than what she can't do without. So, you must teach your client to negotiate by starting higher.

In pretrial discussions with your client, explain this process of negotiation simply. Review her list of what she can't do without. This becomes her "drop dead" offer; in other words, if this offer is not accepted, she will walk away from settlement discussions and go to trial. Now, build up from that offer. Be creative. Explore alternative visitation schedules; different methods of support (e.g., payment of the mortgage rather than direct payments to her); and offers to exchange certain personal property that she might not need. Develop with her an opening offer, a middle offer and confirm her "drop dead" offer. This process will teach your client about the negotiation process and allow her to feel more in control of it on the day of trial.

❖ Practice Tip: Remember that surrender of firearms is not negotiable in protective orders.

Now, you must focus on how best to sell your client's offers to the defendant. Brainstorm in advance how your client's proposals benefit the defendant.

D. NEGOTIATING WITH PRO SE DEFENDANTS

1. First make sure the Defendant is not represented by counsel. After you introduce yourself to the defendant and clarify who you represent, ask him if he is represented by counsel. If he indicates that he is represented, ask him to have his attorney talk to you when s/he arrives. Remember that it is unethical to engage in discussions with parties who are represented by counsel. If he tells you that he does not have an attorney, ask him if he would like to spend a minute with you to explore settlement options.

2. Control your demeanor: be pleasant, helpful and non-judgmental. People are much more likely to settle if they feel that they are not being rushed or judged. You will be much more likely to settle for your client if you appear to be pleasant and helpful at this stage. Defendants are quite sensitive to being judged, so let him know that you do not judge him but are simply trying to explore an agreement between the parties that moves them forward rather than blames anyone for the past.

3. Outline the procedural options available to the parties. Many judges encourage parties to discuss settlement before their case is called. If this is the case in your jurisdiction, outline to the defendant the various procedural options available that day: settlement, trial, postponement. Be careful not to give legal advice to the defendant at any point during your settlement discussions.

4. Start with your best offer. If the defendant indicates a willingness to discuss settlement, go over the terms of your best offer, weaving in how these terms benefit the defendant. For example, a wage withholding order benefits the defendant by creating a record of his payments of support and relieving him of the burden of making sure the payments are made on time.

Organize your opening offer by starting first with the least objectionable terms. Get his agreement on the easiest terms first before moving to more contested terms. For example, he will most likely agree to the typical protective order provision that orders him not to abuse your client in

the future because this requires him to simply obey the law. The more terms that he can agree to, the more invested he will be in a settlement as opposed to going to trial. Save your most difficult terms for the end. Predictably, visitation and support tend to be the more contested provisions in negotiation, so you probably want to deal with these last. If the settlement negotiations start to get heated or appear to be bogging down, utilize your ethical obligation to review all offers with your client as a means of breaking up the negotiation. Take a break, give your client a status report about the negotiations and then return to the defendant with your next anticipated offer.

If the defendant starts to dig in his heels on an unacceptable term, consider terminating settlement discussions.

- ❖ Practice Tip: It is usually at this point that the defendant will attempt to convince you that he didn't do anything wrong. Many litigants want someone to hear their denial – whether it is a lawyer or a judge. Do not defend your client's position at this point – save that for trial. Simply hear him out. Make a mental note of any negative facts about your client that the defendant mentions and is likely to bring up at trial should settlement fail. Remind him that you are not there to judge him, but simply to see if you can reach a settlement before trial.

5. Confirm a final settlement with your client. Once you have reached a tentative settlement on all issues, go over that final list with your client. Make sure she authorizes you to accept the final offer.

6. Confirm the final settlement with the Defendant. If your jurisdiction uses a judge's worksheet that lists all available relief, fill this out and review it with the defendant. Do not assume that the defendant reads well enough to understand the form. Then make sure that the defendant agrees to every term. Let the defendant know that the judge will ask if this is his agreement.

E. NEGOTIATING WITH OPPOSING COUNSEL

1. Do not engage in settlement discussions while the defendant is also present. If the defendant is present with counsel when you begin to discuss settlement, ask counsel if you can speak privately out of the earshot of the parties. Otherwise, your settlement discussions may be affected by counsel's posturing in front of his/her client.

2. Control your demeanor: be pleasant, helpful and professional. During settlement discussions, opposing counsel will often express their opinion about the lack of merit of your client's case and attempt to debate you on the evidence of your case. This should be expected as part of a strategy to force concessions from your client about relief. Do not take the bait to argue about the merits of your case or your evidence. Guide the discussion back to settlement and your client's current offer. Do not take the opposing counsel's opinion personally. Continue to put forward your client's offer in a professional manner.

3. Decide in advance what evidence, if any, you will show opposing counsel. Many opposing counsel will attempt to engage in free discovery during settlement negotiations. Before you begin

to discuss settlement, decide if you intend to show the other side any of your evidence, such as pictures, medical records or text messages. If the evidence is very strong or you have an obligation to turn over the evidence in advance anyway, go ahead and share the evidence.

4. Review the terms of a final settlement with counsel. You would be surprised how many times opposing counsel do not hear or forget key, important terms of a settlement offer when it comes time to review the terms before the judge. A review of all terms of a settlement offer helps to forestall any revision of the settlement agreement before the judge. If opposing counsel suddenly adds a new term at the last minute, tell the judge firmly that this was not discussed in settlement and that you will need a minute to discuss it with your client.

XI. Expert Witness Testimony

A. OVERVIEW

There may be occasions when you have the time, opportunity and need to put on an expert witness. Examples of expert witnesses that might be useful in a protective order case include: police officers, child protection social workers, mental health providers on domestic violence dynamics, PTSD, and the effects on children of exposure to domestic violence, or sexual assault medical providers.

Putting on an expert witness is a bit like riding a roller coaster: chugging up the first vertical incline is hard work, but the rest of the ride is comparatively exciting and effortless. Getting your witness qualified to testify as an expert requires a significant amount of preparation, but once qualified, your expert will be allowed to educate the court on the subject matter they have been qualified on, and to give their opinion about the facts of your case. This means that your expert witness will be allowed to weigh in on an issue in your case that lends significant weight to your position. An expert witness is both a short-term and a long-term investment: an expert helps you explain a complicated issue in your current case, but once your judge is educated about that issue, the judge is likely to apply that knowledge to other cases in the future and discuss it with their colleagues on the bench. Thus, there can be an extensive ripple effect in the courthouse from a single expert.

Qualifying an expert witness need not necessarily be a long and drawn-out affair. Police officers and child protective services social workers can be qualified quickly based upon their experience and training. Once qualified and admitted as an expert witness, their expert opinion can be delivered in a very concise direct examination. However, it is imperative that you know all of the steps that go into qualifying and admitted an expert witness.

B. GETTING YOUR WITNESS ADMITTED AS AN EXPERT

To put on an expert witness, you will need to become educated on the topic yourself. Plan to read up extensively on the topic, and interview your expert generally before you begin to draft a direct examination.

As always, be familiar with the rules of evidence and caselaw in your jurisdiction regarding the foundation that must be laid to offer expert testimony and the boundaries of that testimony, such as whether your expert will be permitted to give an opinion on the ultimate issue. An example of the ultimate issue in a protective case might be: was your client a victim of domestic violence? Is her child's behavioral problem a result of witnessing domestic violence, or a result of your client refusing to allow the child to visit with dad? An expert witness can help you persuade the court of your client's position on the evidence.

Fed.R.Evid. 702 – Testimony by Experts

If 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

1. Specialized knowledge is needed to help the trier of fact.

The first hurdle in getting an expert witness admitted requires that you convince the trier of fact that he or she would benefit from "specialized knowledge" to understand the evidence or to determine a fact in issue. Examples in the protective order context might include:

- a shelter social worker who can discuss the psychological dynamics at work that cause a victim to return to her abuser even after horrific abuse;
- a medical services provider who can explain common victim responses to the trauma of rape;
- a psychologist who can testify about the long-term physical and psychological effects on children who witness domestic violence;
- a child protective services worker can explain to a judge what methods they use to evaluate a child's report of abuse; or
- a police officer can explain police protocol in responding to a domestic violence call for service.

You probably don't need an expert in a case involving routine domestic violence. But if there are unusual facts in your case that require explanation beyond mere argument, you might want to consider putting on an expert witness.

Your opponent will likely argue that the court does not need an expert to explain this topic; that the topic is generally understood, or that the field is insufficiently developed to warrant expert testimony. Be prepared for such arguments with clear, understandable proffers of what the expert will testify to that will be of benefit to the court in deciding your case.

2. The witness must be qualified by knowledge, skill, experience, training, or education.

In order to testify as an expert witness, the witness must have special knowledge or skills that add something to the judge's fund of knowledge. This special knowledge does not have to be in the form of advanced degrees; a witness' experience or skill acquired over a long period of time might serve to qualify someone to testify about that topic. For example, the experience of a domestic violence hotline counselor who has counseled thousands of victims in crisis could well serve as the basis of expert witness testimony on the reactions and concerns of victims immediately following a violent episode.

Getting your expert qualified: The first step in offering a witness as an expert involves a direct examination of the witness' qualifications. In drafting your direct exam of the expert on their qualifications, your examination should answer the overarching question: What special experience, education or training renders this witness particularly knowledgeable about a particular topic?

Topics that you will want to explore thoroughly at the beginning of your direct exam of your expert include:

- Education and training
- Experience
- Research on topic
- Publications on topic
- Instruction of others on the topic
- Specialized skill or knowledge

Unless your opponent concedes the qualifications of your expert, they will be allowed to voir dire your proposed expert before the witness is admitted by the court. The opposing party will want to challenge the qualifications of your expert to show that his/her experience or training is insufficient to allow them to render an opinion. Examples of areas of cross examination in voir dire might include:

- Gaps or omissions in the expert's education or experience
- Witness has never been qualified before as an expert
- Publications or statements by the witness that contradict the opinions given in this case
- Lack of publications or research in topic area
- Age of their credentials (not current enough, or too new in specialty)
- Irrelevance of their specialty to the topic

3. Expert testimony must be on a topic that is generally accepted as reliable in the relevant scientific community.

Once your expert's qualifications have been established, the topic upon which they plan to give expert testimony must also be qualified. The topic must be "generally accepted as reliable in the relevant scientific community." This is often referred to as the expert's "scope of opinion" and it requires that the expert's opinion be grounded in science that has been sufficiently vetted in the scientific community so as to not constitute junk science or mere conjecture by your expert.

In response to a growing number of famous cases that featured expert witnesses who put forward questionable scientific theories, the United State Supreme Court took on the issue of expert testimony and junk science in the famous case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579 (1993). In Daubert, the Supreme Court held that the courtroom was not the proper environment for the vetting of new scientific ideas and theories. Rather, only expert testimony on scientific techniques that were "generally accepted as reliable in the relevant scientific community" could be admitted. An expert's opinion must rest upon a reliable foundation and be relevant to the question at hand. Reliability is established by the requirement that an expert's testimony must pertain to scientific knowledge in the field. "Scientific" is defined as grounded in science's methods and procedures, and "knowledge" connotes a body of known facts or ideas derived from the application of those methods and procedures. In other words, the expert must put forward knowledge that is based upon the research, study and experience and that has been commonly accepted within the community of experts in that field.

So, once your expert's qualifications have been established, the area upon which they will educate the court and give an expert opinion must also be established as an area of commonly accepted scientific technique, approach or theory. The question that your expert must answer and defend then becomes: Is this area of expertise generally accepted as reliable in the relevant scientific community?

The Daubert Test

- Has the theory or technique in question been tested?
- Has it been subjected to peer review and publication?
- What is its known or potential error rate?
- Are there standards controlling its operation?
- Has it attracted widespread acceptance within a relevant scientific community?

Daubert challenges might include attacks such as:

- Topic is not firmly established yet in the scientific community
- Topic is not yet in the DSM-V (Diagnostic and Statistical Manual)
- There is a lack of learned treatises on area of opinion
- Research and studies are too small to support theory
- Topic is just advocacy for battered women clothed in scientific language

Once your expert has made it past these qualification challenges, you will then move to admit your expert witness on the specific topic you want them to testify on. "Your Honor, I move the admission of Dr. Jones as an expert witness on the psychological effects of trauma on victims of intimate partner violence."

C. THE EXPERT'S OPINION

Your expert must hold their opinion to a reasonable degree of scientific certainty. If your expert is in the medical field, the opinion must be held to a reasonable degree of medical certainty; for those in the mental health field, the opinion must be held to a reasonable degree of psychological certainty. The "reasonable degree" language means that it is "more likely than not," essentially a preponderance of the evidence standard. Make sure you explain this legal standard clearly to your expert before putting them on the stand.

Your expert can give two types of opinions:

1) a general opinion regarding the practice, approach or techniques commonly employed in their field of expertise; and/or

2) an opinion regarding the application of those techniques to the facts of your case.

For example, you have a case where your client alleges that she was tased by her police officer-husband with a taser that exploded electrified barbs into her stomach. Her police officer-husband denies ever using a taser on her. You might want to put on a police officer who is experienced with various types of tasers as an expert witness to explain generally how tasers with exploding barbs deploy, the injuries that commonly result from such a weapon, and the methods by which law enforcement can test a taser to see if those barbs had been deployed. If the expert witness only describes how different types of tasers work and the injuries typically caused by their deployment, that expert is giving a general opinion.

If, however, the expert witness also applies that specialized knowledge to an interview of your victim, a review of pictures of injuries on her stomach, and an examination of the husband's taser for evidence of deployment, your expert will also be able to render an opinion that applies specialized taser knowledge to the facts of your case. If, after examining all of the evidence in your case concerning the taser, your expert witness testifies that s/he holds an opinion to a reasonable degree of scientific certainty that the injuries on your client were consistent with the deployment of a barb-dispensing taser, and that the husband's taser utilizing barbs was, in fact, discharged, you have probably just won your case.

Expert witnesses need not take up a lot of time. Once you have qualified your witness to testify as an expert, you can do a lively but brief direct exam of your expert. Here is an example of a direct exam of a child protective services social worker giving her opinion as to whether there has been physical child abuse of your client's children:

[Preliminary qualification and admission already completed]
Q: Ms. Jones, did you conduct an investigation regarding allegations of physical child abuse concerning the Smith children?
A: I did.

Q: What actions did you take to investigate those allegations?
A: I reviewed the petition for protective order that was forwarded to my

office by the court; I did a search of our child abuse database on the family and searched all court records; I interviewed the children individually at school as well as their teachers and school counselor; I interviewed each of the parents, and the children's paternal and maternal grandparents. Finally, I reviewed medical records from the children pediatrician and pictures of the children taken by mother.

Q: Based upon your investigation, do you have an opinion, to a reasonable degree of certainty, whether the Smith children were physically abused by their father?
A: I do.

Q: What is that opinion?
A: I am of the opinion that Mr. Smith physically abused his children.

Q: What is that opinion based upon?
A: First, the children reported to me that their father had used a belt on them to punish them on several previous occasions. On the day in question, their father had made them lie on their beds while he hit them with the belt buckle end of his belt. The children described this incident using age-appropriate language, and it was supported by the pediatrician's notes that indicated the presence of several severe welts on the children's backs and buttocks, along with pictures of these injuries. The children's teachers confirmed that the children reported being beaten by their father, as did their mother.

Q: Is it possible that the injuries you saw in the photographs and that the children reported to you were from another source?
A: It's very, very unlikely.

The following is a general outline of a possible organization of a direct examination of an expert witness after the expert has been qualified and admitted to testify, as well as a general cross examination of that expert:

Outline of Expert Witness Direct Exam

1. Knowledge of topic

2. Statement of opinion

3. Statement of theory/assumptions underlying the opinion

4. Explanation of and factual support for the opinion
   a. Data
   b. Research
   c. Inferences drawn from data and research

5. Theory differentiation (how did the expert rule out alternative explanations in arriving at their opinion?)

6. Strength of opinion

Outline of Expert Witness Cross Exam

1. Expose gaps in expert's personal knowledge of case
(e.g. expert never met parties or their children; never reviewed assessments, tests, or reports; never evaluated party; is giving only a description of studies and theories)

2. Expose the theoretical assumptions underlying opinion(e.g. expert's opinion assumes that domestic violence is occurring in the Family; expert not able to rule out other theories because no personal knowledge)

3. Highlight opposing research

4. Criticize generalization from studies relied upon by the expert

5. Challenge expert's impartiality
(e.g., expert works in DV and is biased towards victims; has relationship with counsel for victim; expert has positional bias, i.e., has published on area, work is dependent upon this point of view, research is dependent upon this viewpoint; expert relied on mother's attorney for all facts of the case)

6. Change assumptions of expert
(e.g., give expert other assumptions and ask for change in opinion. E.g., what if victim had a diagnosed mental health problem such as bipolar disorder: wouldn't a psychotic episode be an equally plausible explanation for incident?)

The Appendix includes some sample direct examinations of expert witnesses on various topics that might be helpful to you in your protective order cases.

APPENDIX

A. RULES APPENDIX

Rules Governing Impeachment (Fed. R. Evid. 608, 609, and 613)

FRE 608 A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

FRE 609 Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, which is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. (If issued due to rehabilitation, is not admissible if there is no subsequent felony conviction. If issued due to innocence, is not admissible.)

(d) Juvenile Adjudications. (Only admissible in criminal cases under certain conditions.)

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

FRE 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 802(d)(2).

Sample DIRECT of DOMESTIC VIOLENCE EXPERT:

How Children Exposed to Domestic Violence are Negatively Impacted

NOTE: Boxed text is for explanatory purposes only – make sure to check these definitions/requirements in your state.

I. DIRECT EXAMINATION

A. EXPERT QUALIFICATIONS

Name
Where do you work?
What is your title?
What do you do there?
How long have you worked there?
What other positions have you held there?

Education
Did you attend college? Where?
Did you obtain a degree? In what discipline?
Did you receive any honors?
Did you attend graduate school? Where?
Did you obtain a degree? What degree was that?
Did you receive any honors?

Licensure
Are you licensed as a Social Worker?
What kind of license do you have?
How long have you been licensed as a _____?
What does that licensure entail?

LGSW - Licensed Graduate Social Worker – MSW. **Graduate Social Worker (LGSW)** shall have: obtained a MASTER'S OF SOCIAL WORK DEGREE from a program accredited by the Council on Social Work Education.

LCSW- Licensed Certified Social Worker – MSW/LGSW *plus at least 2 years of SW experience under the supervision of a LCSW or LCSW-C. **Certified Social Worker (LCSW)** shall have: obtained at least two years, consisting of not less than 104 weeks, of at least 3,000 hours of supervised social work experience; 100 hours of periodic face-to-face supervision in the practice of social work which is obtained under a *contractual agreement form for supervision.

LCSW-C– Licensed Certified Social Worker–Clinical - MSW/LGSW *plus at least 2 years of clinical SW experience under the supervision of a LCSW-C. **Certified Social Worker-Clinical (LCSW-C)** shall have: Obtained at least two years, consisting of not less than 104 weeks, of at least 3,000 hours of supervised clinical social work experience in direct service to clients. Half of the 3,000 hours, 1,500hours, shall consist of face-to-face client contact; 144 hours of periodic direct face-to-face supervision while obtaining clinical social work experience which is obtained under a *contractual agreement form for supervision; supervision in the assessment, formulation of a diagnostic impression, and treatment of mental disorders and other conditions and the provision of psychotherapy
documentation of twelve academic credit hours in clinical course work from a social work program accredited by the Council on Social Work Education.

As a licensed _____, are you authorized to make mental health diagnoses?

Only LCSW-Cs can make mental health diagnoses.

Does your work as a _____ include any training on the effects on children of being exposed to domestic violence?
What is that training?
Do you have any specialized training, experience or education on the effects on children of being exposed to domestic violence?
What is that training?

Have you worked in any other positions that have required you to work with children exposed to domestic violence?
What position(s) were they?
How long held? What did your work at that position consist of?

Research
Have you been involved in any research concerning the exposure effects of DV on children?
What was your research about?
Over what period of time did that research take place?
As part of your research, were you required to review the literature on this topic?
Was your research published? Was it peer-reviewed?

Peer review is the evaluation of work by one or more people of similar competence to the producers of the work (peers). It constitutes a form of self-regulation by qualified members of a profession within the relevant field. Peer review methods are employed to maintain standards of quality, improve performance, and provide credibility.

What is the benefit of peer-reviewed research?

Publications
Have you ever been published? When?
On what topics?
What were your publications?
Were your articles peer-reviewed?

Experience
Have you worked with children?
How long have you worked with children?
In what capacity (ies)?
Have you ever worked with children who have been exposed to domestic violence?
Have you ever diagnosed children who have been exposed to domestic violence?
Are there various treatment modalities for children who have been exposed to domestic violence?
What are those treatment modalities?
Are you trained and experienced in any of those treatment modalities for children exposed to DV?
What are the purposes of those treatment modalities?

Teaching Experience
Do you teach anywhere?
What do you teach?
How long have you taught courses in this area?

Honors and Awards
Have you received any honor or awards?
When?
What received?

Prior Qualifications as an Expert Witness
Have you been qualified as an expert witness in any other cases in _____?
Have you been qualified as an expert witness in any other courts?
How many times have you been qualified?
On what topics have you been qualified to testify as an expert witness?

YOUR HONOR, I move the admission of _____ as an expert witness on the topic of the effects on children who have been exposed to domestic violence.

B. EXPERT OPINION AND THEORY

Are you familiar with the professional research and literature on the effects on children who are exposed to domestic violence?

Is there a generally held view in the mental health and pediatric communities about the effects on children who are exposed to domestic violence?

What is that view? [This is asking for a general summary of the entire opinion]
Do you hold that view, to a reasonable degree of psychological certainty, regarding the adverse effects on children who are exposed to domestic violence?

> This odd phrasing relates to the legal community's requirement that evidence be offered according to a certain level of confidence, or proof. Expert opinions must be held to a preponderance standard, hence the phrase,"a reasonable degree of psychological certainty."
>
> *Black's Law Dictionary* defines the phrase: "A standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought." The same standard applies for psychological thought. A preponderance of the evidence is 51%, or that the conclusion is more likely than not the reason.

How long has this been the generally held view of the psychological community?

<u>Effects on children</u>

Can you describe the ways that children are exposed to domestic violence?

Does it make a difference for children in terms of the effects on them how they are exposed to domestic violence? (For example, is seeing worse than hearing?)

Are there adverse effects on children even if they, themselves, have not been physically abused?

What are the physiological effects on children who have been exposed to domestic violence? Short-term and long-term?

What are the neurobiological effects of being exposed to domestic violence?

What are the emotional and social effects of being exposed to domestic violence?

Do those emotional and social effects differ according to the child's age?

What are the emotional effects on:

Infants?

Toddlers?

Preschool-age children?

Elementary school-age children?

Teenagers?

What are the behavioral effects on children who are exposed to domestic violence?

Infants?

Toddlers?

Preschool-age children?

Elementary school-age children?

Teenagers?

What is the risk for children to be abused themselves if they live in homes where one parent is being abused by the other?

What are the long-term effects on children as they become parents?

Are there any predictors associated with the children's future intimate partner relationships after being raised in domestically violent homes?

Comparison to other traumatic events

How does being exposed to domestic violence compare with witnessing other traumatic events, such as a neighborhood shooting, or natural disaster, like Hurricane Katrina?

Differential diagnosis

The effects of exposure to domestic violence looks a lot like other problems that children have, such as naturally occurring asthma, or ADHD – how can a clinician be certain that the cause of these problems – domestic violence – is the true cause? In other words, how can a clinician make a differential diagnosis?

Resiliency and protective factors

Is there a difference in adverse effects on children who are exposed only once compared to repeated exposures?

Are there any factors that help protect children from these adverse effects that you have described?

What are those resiliency factors?

What are the current recommended treatment modalities for exposed:

Infants?

Toddlers?

Preschool-age children?

Elementary school-age children?

Teenagers?

How effective are those treatment modalities?

Parenting

Has the research discovered any patterns in parenting by the non-abusing parent after a child has been exposed to domestic violence?

Are there any patterns in parenting by the domestically violent parent?

Strength of the research

What do you base these opinions on?

> What is the empirical support the witness has for her opinion in the form of reasonably relied upon data, and sound inferences to a reliable conclusion? The witness who utters the phrase acknowledges that she is not speculating and that she believes that her opinion satisfies professional standards for claims of knowledge.

What resources did you consult to arrive at your opinion?
How extensive is the research on the topic of the effects of DV exposure on children?
Are those resources authoritative?

> An **authoritative source** is a work known to be reliable because its authority or authenticity is widely recognized by experts in the field.

Are those resources reliable?

> **Reliability** is the extent to which an experiment, test, or any measuring procedure yields the same result on repeated trials. Without the agreement of independent observers able to replicate research procedures, or the ability to use research tools and procedures that yield consistent measurements, researchers would be unable to satisfactorily draw conclusions, formulate theories, or make claims about the generalization of their research.

Are those sources valid?

Validity refers to the degree to which a study accurately reflects or assesses the specific concept that the researcher is attempting to measure. While reliability is concerned with the accuracy of the actual measuring instrument or procedure, validity is concerned with the study's success at measuring what the researchers set out to measure. Researchers should be concerned with both *external* and *internal* validity.

External validity refers to the extent to which the results of a study are generalizable or transferable**. Internal validity** refers to (1) the rigor with which the study was conducted (e.g., the study's design, the care taken to conduct measurements, and decisions concerning what was and wasn't measured) and (2) the extent to which the designers of a study have taken into account alternative explanations for any causal relationships they explore. In studies that do not explore causal relationships, only the first of these definitions should be considered when assessing internal validity.

Exposure to DV and the DSM-5

Are the effects of being exposed to domestic violence discussed anywhere in the DSM-5?

Why is exposure to DV not its own DSM-5 category or diagnosis?

SAMPLE DIRECT EXAMINATION
of
MEDICAL EXPERT ON ALS EXAM
(Alternative Light Source)

NOTE: In the vast majority of strangulation cases, there are no visible signs of injury on the victim. An Alternative Light Source exam is a medical examination, typically performed by a LPN, to determine the presence of intradermal bruising. This exam can help corroborate strangulation in domestic violence cases.

I. DIRECT EXAMINATION

A. EXPERT QUALIFICATIONS

Name
Where do you work?
What is your title?
What do you do there?
How long have you worked there?
What other positions have you held there?

Education
Did you attend college? Where?
Did you obtain a degree? In what discipline?
Did you receive any honors?

Did you attend graduate school? Where?
Did you obtain a degree? What degree was that?
Did you receive any honors?

Specialized Training and Experience
Are you familiar with an ALS exam, or Alternative Light Source, exam?
Can you describe what it is and its purpose?
When are ALS exams typically done on patients?
What is the medical benefit for patients in having an ALS exam?
Does it also have a forensic purpose?

Have you been trained in the administration of an ALS exam?
Who were you trained by?
What did that training consist of?
Since you were trained in the administration of an ALS exam, how many ALS exams have you conducted?
Is there a body of research in the interpretation of ALS exams for reports of strangulation?
What is the state of the research on interpreting ALS exams in the context of strangulation?
Is it a commonly accepted practice in the medical community to administer an ALS exam for victims of alleged strangulation?

Teaching Experience
Do you teach anywhere?
What do you teach?
How long have you taught courses in this area?

Honors and Awards
Have you received any honor or awards?
When?
What received?

Prior Qualifications as an Expert Witness
Have you been qualified as an expert witness in any other cases in _____?
Have you been qualified as an expert witness in any other courts?
How many times have you been qualified?
On what topics have you been qualified to testify as an expert witness?

YOUR HONOR, I move the admission of _____ as an expert witness on the administration and interpretation of ALS exams in alleged strangulation cases.

B. EXPERT OPINION

On _____, did you conduct an ALS exam on Ms. Jones?
How did she come to your attention?

Patient Interview
Did you conduct an interview of Ms. Jones prior to the exam?
Why was it important to ask Ms. Jones about the incident and her injuries?
What did you learn from her?
Are there any commonalities in victims' reports of symptoms or injuries after being strangled?
Did Ms. Jones report any of those common symptoms?

Emotional Assessment
Can you describe her demeanor during the exam?
Why was it important to note her emotional state at the time of the exam?

Physical Examination
Did you do a physical examination of Ms. Jones before the ALS exam?
Why did you undertake a physical exam?
Are there any commonalities in victims' physical presentation in strangulation cases?
What did your examination of Ms. Jones indicate?

ALS Examination
Please describe the process of your ALS exam of Ms. Jones?
What were you able to detect about Ms. Jones' physical condition from the ALS exam?
Were you able to take photographs of what the ALS exam revealed?
I am handing you what has been marked as Plaintiff's Exhibits ___ through ____, can you identify these exhibits?
When were these photographs taken?
Are these photographs true and accurate representations of the intradermal bruising on Ms. Jones' neck as revealed by the ALS exam that day?

Opinion Regarding Strangulation
Based upon your experience and training in administering the ALS exam, and based upon your education, experience and training as a licensed practical nurse, do you have an opinion, based upon a reasonable degree of medical certainty, of the cause of Ms. Jones' intradermal bruising?
What is that opinion?

What is that opinion based upon?

Differential Diagnoses
Did you undertake to rule out any alternative causes for Ms. Jones' injuries?
Why is that important?
What other tests or examinations did you do in order to rule other causes of the injury?
What were the results of those other tests?
Based upon the results of these other tests, did your opinion regarding the cause of Ms. Jones' injury change?

Is there any research about the long-term effects of strangulation on a person?
What does that research indicate?

This project was supported by Grant No. 2016-TA-AX-K052 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this document are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women