

JUDICIAL CHECKLIST

Prepared by the Judicial Subcommittee of the American Bar Association Commission on Domestic Violence

DEFINING THE ISSUE

Domestic violence is about **POWER AND CONTROL**. Physical abuse is only one tactic among many used by batterers to enforce their control over a victim. Other methods include emotional abuse, psychological coercion, isolation, economic control, immigration status-related abuse, sexual assault, and stalking or harassing behavior.

Domestic violence is **CHOSEN BEHAVIOR** and is rarely caused by substance abuse, genetics, anger, stress, illness, or problems in the relationship, although these factors are often used as excuses and can exacerbate violent behavior. Abusers may justify their actions by blaming the victim, but courts should not accept this as a justification.

Courts are uniquely positioned to hold batterers accountable and to increase safety for victims. **DOMESTIC VIOLENCE** civil protection orders are available in every U.S. jurisdiction. Some jurisdictions have additional civil protection orders for victims of **STALKING** and/or for victims of non-intimate partner **SEXUAL ASSAULT**, including teens and other affected family members.

COMMON EFFECTS OF VIOLENCE ON VICTIMS

- fear of offender violence
- denial, detachment, lack of affect
- rage
- blames self or circumstances
- rationalizes batterer's behavior, minimizes violence
- unaware of legal and social options
- isolation from family and friends, and/or from others who share the victim's language, faith, culture, etc.
- self-medication by use of alcohol and/or drugs
- low self-esteem, shame
- depression, anxiety, suicidal thoughts
- post-traumatic stress disorder, exhaustion
- use of defensive/protective violence
- difficulty managing daily tasks because of obstacles created by the abuse

COMMON PERPETRATOR ATTITUDES & CONDUCT

- "Jekyll-Hyde" personality: polished and likeable in public while abusive at home
- intimidating
- consistent, persistent attempts to control victim
- self-centered, narcissistic, claims to be the "real" victim
- minimizes and denies own behavior & instead blames victim, circumstance or others
- dependent on victim, jealous and possessive
- low self-esteem, inadequate or desperate feelings once caught
- promises "It won't happen again" or "I didn't mean it"
- authoritarian, uses children to "spy" on other parent
- substance abuse

JUDICIAL CONSIDERATIONS IN CIVIL PROTECTION ORDER CASES

FULL FAITH & CREDIT

The Violence Against Women Act 2005 (VAWA) mandates that every state, recognized tribe and territory provide full faith and credit to protection orders issued by other states, tribes or territories. This includes provisions in protection orders relating to custody, visitation and support. For the purposes of full faith and credit under VAWA, a protection order is any injunction, protection order, restraining or other order issued for the protection of victims of domestic violence, sexual assault, dating violence or stalking.

- VAWA requires enforcement of orders issued by other jurisdictions, including custody provisions, if:
 - ✓ *the issuing court had jurisdiction over the subject matter and parties, and*
 - ✓ *the respondent had both notice and the opportunity to be heard.*

There is no requirement that the order be registered to receive full faith and credit.

- Help facilitate full faith and credit enforcement by including the following language in your protection orders:
"This civil protection order has been issued in compliance with the notice and due process requirements set forth in the Violence Against Women Act of 2005, 18 U.S.C. §2265 and the laws of this state. This order, and all of its provisions, is enforceable in all fifty (50) states, the District of Columbia, tribal lands, and U.S. territories."

MUTUAL ORDERS (*i.e., orders issued against both parties on the basis of only one petition*)

Because mutual orders are issued *sua sponte*, without a petition by the respondent and a finding that the respondent is entitled to protection, they are unauthorized in most jurisdictions and should be discouraged. Mutual orders can increase the risk to victims.

- ✓ Pursuant to VAWA, mutual orders are not entitled to full faith and credit in other jurisdictions.

- ✓ Courts and law enforcement agencies receiving federal funding must certify that their laws, official policies or practices prohibit the issuance of mutual protection orders.

FIREARMS AND OTHER WEAPONS

18 U.S.C. §922(g)(8) prohibits persons subject to "qualifying orders of protection" from possessing a firearm or ammunition in or affecting commerce. Violation of the law is punishable by up to ten years in prison.

- Ensure the order is a "qualifying order of protection" under federal law:
 - ✓ *respondent has been accorded notice and opportunity to be heard*
 - ✓ *petitioner is an "intimate partner" or the child of either party (18 U.S.C. §921(32))*
 - ✓ *order includes a finding that the respondent is a credible threat to the intimate partner or child, or prohibits future use or attempted use of physical harm reasonably expected to cause bodily injury; or*
 - ✓ *order prohibits respondent from continuing to harass, threaten, stalk or otherwise engage in acts that would place the intimate partner in reasonable fear of bodily injury to themselves or the child*
- Where appropriate, order and verify surrender of weapons to law enforcement; respondents should be ordered to file the receipt from the police agency or proof of sale to the court.
- When the protection order issues, provide the following warning, either verbally or in writing, to the respondent, as required by 42 U.S.C. 3796gg-1 (e):
"As a result of this order, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal law under 18 U.S.C. 922(g)(8) [and/or state law]. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney."

JUDICIAL CONSIDERATIONS REGARDING CUSTODY AND VISITATION IN DOMESTIC VIOLENCE CASES

Studies indicate that at least 50% of disputed custody cases involve domestic violence, and that abusive fathers are more likely to seek sole custody than non-abusive fathers. Studies also indicate the risk of international child abduction is higher when the respondent is foreign-born and can legally travel outside the US. Adverse effects to children who witness domestic violence are well-documented, including aggressive behavior, depression and cognitive difficulties. Children are at a greater risk of being abused if their mother has been abused. This is particularly true after separation, even if there was no prior abuse of the children.

JURISDICTION

- ❑ Is respondent from another jurisdiction? Consult state's long-arm statute or tribe's statute conferring jurisdiction.
- ❑ Is petitioner from another jurisdiction? If so, is petitioner fleeing abuse?
- ❑ Consult state's relocation statute.
- ❑ Consult state's enactment of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) [or Uniform Child Custody Jurisdiction Act (UCCJA)].
- ❑ Consult Federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A ("Full faith and credit given to child custody determinations").
- ❑ Is child Native American/Alaska Native? Consult Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901-1963.

EFFECTIVE ORDERS: Carefully craft custody/visitation arrangements to serve the child's best interest by protecting the child and the victimized parent.

- ❑ Award sole custody to non-abusive parent, at least until batterer completes court ordered programs and otherwise demonstrates that children will be safe.
- ❑ Explicitly articulate the day, time and location for visitation or exchange. Do not order visitation as "reasonable" or "mutually agreeable." Police and courts will be unable to enforce such a ruling.

- ❑ Address holidays and birthdays, in case they do not fit into the regular visitation/exchange schedule.
- ❑ Include timed windows for exchanges and consequences for a perpetrator's lateness or failure to appear.
- ❑ Consider supervised visitation and/or exchange through visitation center, intermediary not involved in perpetuating the violence, or location away from abused party (especially when parental abduction and/or safety of child is a concern).
- ❑ Start with short, time specific, supervised visits to batterer, and increase time pending compliance; restrict overnight visitation.
- ❑ Order no use of alcohol or drugs during or prior to visitation.
- ❑ Order that child's passport be turned over to non-abusive parent, that abusing parent post bond and that child not be removed from the jurisdiction.
- ❑ When necessary have the order translated into a parent's primary language.

CUSTODY EVALUATIONS: Custody evaluations must be performed by experts who have had appropriate training in domestic violence and who understand:

- ✓ How domestic violence affects adult and child safety.
- ✓ How the perpetration of domestic violence (not acts of self-defense) may reflect on parental fitness.
- ✓ That domestic violence may encompass physical, sexual, or emotional abuse or threats of abuse to the children.
- ✓ When it is appropriate to limit the perpetrator's access to the child(ren), based on the abuser's history and pattern of abuse.

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ACCESS TO THE COURTS

LEGAL ACCESS:

PARTIES & STANDING

Domestic violence is documented across all boundaries of race, class, ethnicity, sexual orientation, national origin, physical ability and age. Mistaken assumptions about who can be a victim and who can be a perpetrator can restrict access to the courts by discouraging certain victims from coming forward. Consider the following potential victims of domestic violence:

- ✓ Minors in dating relationships
- ✓ Elders abused by spouses, dating partners, adult children or grandchildren, or caregivers
- ✓ Persons with disabilities abused by intimate partners, parents, siblings or caregivers
- ✓ Immigrants (with or without legal status) and persons with limited English proficiency
- ✓ Victims of human trafficking, commercial sex trade, and international "matchmaking" agencies
- ✓ Lesbian, gay, bisexual and transgendered persons

- ✓ Military personnel and/or their intimate partners

PHYSICAL ACCESS: American with Disabilities Act; state law

- Consult state and federal laws to ensure compliance with legal minimums for physical access to the courts.
- Ensure courtroom is free of architectural and communication barriers (e.g., signs, alarms).
- Provide auxiliary aids or services when they are necessary to ensure effective communication (e.g., using a TTY or relay service for litigants who are Deaf or hard of hearing; providing Braille documents or reading documents to a blind litigant).
- Ensure that service and companion animals are permitted in facilities unless the animals pose a direct threat to the health or safety of others.
- Ensure that persons with disabilities are not charged to cover the costs of needed accommodations, including cost to hold hearings at acces-

sible locations. When the respondent has means, order that the costs of accommodation be paid by respondent.

LANGUAGE ACCESS: Title VI of the Civil Rights Act; Americans with Disabilities Act; state law

- Consult federal and state law to ensure compliance with legal requirements for language access to the courts.
- Utilize professional and/or qualified interpreters. Know how to qualify an interpreter for legal proceedings. In no case should a party's child or other family member interpret.
- Be aware that some language communities are very small, and effective communication requires that the party must be comfortable with the interpreter chosen and satisfied that there are no potential conflicts of interest or safety concerns.
- When the respondent has means, order that the costs of interpreters/translators be paid by respondent.

GOALS OF JUDICIAL INTERVENTION

stop the violence • protect the abused party, children • protect family members, general public • hold perpetrator accountable for violence through court sanctions and regular compliance reviews • restore and validate victim • provide adequate security for all parties prior to, during and after court proceedings, including exclusion of weapons • stop emotional, financial, physical, immigration-related and other forms of abuse used to control and coerce victims and children • provide restitution to abused party and financial support (e.g., property division, child support, and maintenance of basic needs such as clothing and health insurance) • convey to the general public that domestic violence is a crime and "not just a family matter" • break intergenerational cycle of violence • referrals to supportive, culturally competent community-based services, such as victim services programs, counseling, employment, immigration or housing assistance • order structured visitation or custody arrangements to ensure stable, safe environment for children with the non-abusing parent

JUDICIAL CONSIDERATIONS IN ANY DOMESTIC VIOLENCE CASE

DUE PROCESS

- ❑ Personal service and/or prior notice to all parties?
- ❑ Notify victim when service will be attempted or has been completed.
- ❑ Opportunity for all parties to be heard?
- ❑ Protections for *pro se* petitioners and defendants?

JURISDICTION

- ❑ Any violence or threats made to victim within court's jurisdiction?
- ❑ Is respondent from another jurisdiction? Consult state's long-arm statute or tribe's statute conferring jurisdiction.
- ❑ Is petitioner from another jurisdiction? If so, is petitioner fleeing abuse?
- ❑ Are children involved? (if so, see custody and visitation section)
- ❑ Is there an existing civil order from another jurisdiction requiring full faith and credit pursuant to 18 U.S.C. 2265?
- ❑ Valid orders of protection from other jurisdictions must be honored and enforced, even if not registered.
- ❑ All foreign-born persons, without regard to immigration status, are constitutionally guaranteed access to US courts. *Plyer v. Doe*, 457 U.S. 202, at 210 (1982).

EFFECTIVE ORDERS

- ❑ Use clear, precise and concise language; avoid any ambiguity which could result in misinterpretation by parties or law enforcement.
- ❑ When necessary have the order translated into a party's primary language.
- ❑ Avoid conflicting orders. Identify other orders governing the conduct of the parties (criminal, family, protection order, child/adult protective, orders from other jurisdictions).
- ❑ Include information relevant to enforcement such as jurisdictional basis, penalties for violation, weapons prohibitions, and contact information for the court.

- ❑ Protect confidentiality of victim's address/ phone number. VAWA confidentiality provisions also preclude use of the family courts to learn about any U or T visa case.
- ❑ If your court posts court records publicly on the Internet, seal information relating to victim's and children's names and locations.
- ❑ Include clear & specific consequences of deviating from provisions of order.
- ❑ Notify respondent of any firearms prohibitions that may apply once the order issues, particularly the federal firearms prohibition under 18 U.S.C. 922(g)(8).
- ❑ Use "catch-all" provisions creatively to permit maximum safety for victims and children, e.g.
 - ✓ *Order respondent to pay mortgage/rent, or not to deplete assets*
 - ✓ *Order respondent to retain and produce immigration documents, to cooperate with immigration proceedings, and not to contact DHS regarding the petitioner*
 - ✓ *Award ownership of car, pets, etc.*
 - ✓ *Where needed, order support for victim and children*
 - ✓ *Order respondent to relinquish firearms to local law enforcement for the duration of the order*

ENFORCEMENT

- ❑ Include in orders consequences for failure to comply, and enforce them against the respondent (to whom the order is directed).
- ❑ Schedule case monitoring conferences when necessary, and consider excusing the petitioner from appearing.
- ❑ Consider civil and/or criminal contempt sanctions, as appropriate.
- ❑ No removal of protections unless victim has had prior notice and opportunity to be heard.

MEDIATION, PARENTING EDUCATION AND/OR COUPLES THERAPY

Any program requiring the parties to communicate or spend time together is **dangerous** and **ill-advised**, as it provides an opportunity for further abuse, manipulation and retaliation.

- ✓ When a consent order is presented to the court, be sure that no coercion was used to obtain the consent of the petitioner; be sure all consent orders include anti-violence provisions, and that certified interpreters are utilized where necessary.
- ✓ Couples therapy and/or joint parenting classes should not be ordered in domestic violence cases.
- ✓ Mediation and other forms of alternative dispute resolution are usually inappropriate due to safety, control, and intimidation concerns.
- ✓ Mediation should not be ordered over the objection of an alleged victim. If mediation is ordered, a mediator should not undertake family mediation without appropriate and adequate domestic violence training.

ANGER MANAGEMENT VS. BATTERER'S INTERVENTION

- ✓ Anger management programs are **not appropriate** for perpetrators of domestic violence, sexual assault or stalking, because they fail to adequately address the seriousness of the violence, they can minimize the dynamics of power and control at the root of these behaviors, and they have not been shown to reduce violence.
- ✓ The effectiveness of batterer's intervention programs (BIPs) is undetermined. If the respondent is ordered to attend a BIP, the court should ensure that the program is a certified program that is designed to address the unique needs of this perpetrator population.
- ✓ Compliance with the program does not in itself ensure the safety of the parties. Perpetrators should be required to demonstrate reformed behavior for a period of time after completing a BIP.

PLANNING FOR SAFETY

In most cases, violence will escalate in frequency and severity when the victim attempts to end the relationship. Court staff should be prepared to address the heightened safety considerations to the victim and to court staff.

COURTHOUSE SAFETY

- screen for weapons at entry to the courthouse
- always have bailiffs available in the courtroom and hallways
- never require the parties to spend time alone together, and arrange for separate or guarded waiting areas
- order respondents to remain in the courthouse an additional 10-15 minutes after petitioners leave
- provide a bailiff escort for petitioners, witnesses, advocates and counsel as they leave the courthouse
- have a bailiff stand between the parties when they appear at the bench
- prevent respondent from attempting to directly address petitioner in court
- require that parties sit on opposite sides of the courtroom
- require certified interpreters when any party is limited English proficient

DANGER ASSESSMENT: An assessment, typically via a screening instrument, designed to gauge the future risk of injury or homicide to the victim by the perpetrator of domestic violence, sexual assault and/or stalking.

Common Risk Factors in Perpetrator:

- suicidal and/or homicidal ideation
- escalation in frequency & severity of violence
- access to weapons
- threatened or actual violence against children or animals
- violence toward pregnant victim
- short courtship
- victim has children not by perpetrator
- depression or other mental health issues
- substance abuse
- stalking
- intense jealousy
- perpetrator makes statements like "Maybe I love her too much"