KING COUNTY SUPPLEMENT TO

The National Center on
Domestic Violence, Trauma & Mental Health's

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys

The Domestic Violence & Mental Health Collaboration Project

King County, WA
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Introduction

The Domestic Violence and Mental Health Collaboration Project is a partnership of domestic violence advocates, mental health service providers, legal aid providers, and domestic violence survivors. We are collaboratively addressing how perceptions about mental health affect domestic violence survivors' experiences with family law and protection order cases and how those cases affect the emotional wellbeing of survivors.

Some domestic violence survivors have mental health concerns that were exacerbated by experiencing domestic violence. Many others experience mental health concerns as a direct result of the abuse and coercive control perpetrated by their partners. Domestic violence survivors who have experienced trauma or mental health concerns face significant barriers in participating in the legal process. Unfortunately, many survivors find themselves at risk of continued abuse and trauma when they attempt to secure safety for themselves and their children through the legal system. People who are abusive frequently manipulate the legal process to portray survivors as mentally unfit in order to obtain custody of their children, or play into social stigma to discredit survivors. On top of this, survivors risk further trauma when having to reveal and litigate the details of the abuse they have experienced including how trauma has impacted their mental health.

Recognizing all of this, the National Center on Domestic Violence, Trauma & Mental Health (National Center) created *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys*. This excellent resource, written by Mary Malefyt Seighman, JD, Erika Sussman, JD, and Olga Trujillo, JD, provides attorneys with valuable information and practical tips on how to represent domestic violence survivors effectively in civil matters when mental health may be a factor.

The Domestic Violence and Mental Health Collaboration Project created this King County Supplement to the National Center's handbook to provide attorneys with the local information you need to successfully represent survivors in King County courts. We have created this supplement with the permission of the National Center.

For the sake of brevity, we will refer to the National Center's publication as the "National Attorneys Handbook" and to this document as the "King County Supplement."

The King County Supplement is intended to be used together with the National Attorneys Handbook. We recommend that you read the National Attorneys Handbook

first, and then use the King County Supplement to find specific discussions relevant to attorneys practicing in King County, Washington.

When you read the National Attorneys Handbook, you will see many references to state and local laws, rules, and practices. We created the King County Supplement so you could easily access all of the relevant local information without having to research it yourself. For each section of the National Attorneys Handbook (except the 1st one which makes no local references), we provide:

- The page in the National Attorneys Handbook that we are supplementing
- The reference from the National Attorneys Handbook that we are addressing
- The local information you need including links to relevant statutes and rules

We hope that reading the King County Supplement along with the National Attorneys Handbook will help you to be better able to represent domestic violence survivors with mental health concerns successfully in Domestic Violence Protection Order (DVPO) and family law cases in King County.

In addition to the King County Supplement, the Domestic Violence and Mental Health Collaboration has created several publications collectively called the "Family Law Toolkit." These can be downloaded for free at:

- www.kccadv.org/reports/mental-healthdv-reports/family-law-toolkit-for-attorneys/;
- www.kccadv.org/reports/mental-healthdv-reports/family-law-toolkit-for-mental-health-providers/; and
- www.kccadv.org/reports/mental-healthdv-reports/family-law-toolkit-for-survivors/.

Throughout the King County Supplement, we reference relevant parts of the Family Law Toolkit, but we encourage you to explore the whole Toolkit.

This guide is for educational purposes only. It is not legal advice. The information in this guide was current at the time of its publication, but laws, links, and other content may have changed.

Section Two: Client Counseling

Page 13 of the National Attorneys Handbook
Some state courts (e.g., Ohio and Rhode Island) have developed special provisions that allow for out-of-court testimony by victims of sex crimes, abuse, and neglect who live with mental disabilities, thereby helping them to avoid retraumatization in the courtroom.

In Washington State, courts may schedule a hearing by telephone to reasonably accommodate a disability, or in exceptional circumstances to protect a survivor from further acts of domestic violence.[1] Survivors who want to utilize this option for a Domestic Violence Protection Order proceeding can contact the King County Protection Order Advocacy Program to discuss the pros (e.g., avoiding trauma) and cons (e.g., not being able to see or be seen by the commissioner) of participating via phone in hearings and to make the necessary arrangements. See our Domestic Violence Protection Orders handout for more information.

Washington Civil Rule 43(a)(1) provides that at trial testimony of witnesses shall be taken orally in open court unless otherwise directed by the court or by rule or statute. The rule also states that a court can, for good cause in compelling circumstances and with appropriate safeguards, allow testimony in open court by contemporaneous transmission from a different location. In a family law case, where the domestic violence survivor has mental health concerns, you could argue that being present in the courtroom with the abusive partner would be particularly traumatic for the survivor. You could ask the court to allow testimony from a different location.

Evidence Rule 611 (a) allows the court to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. This evidence rule can benefit domestic violence survivors with mental health concerns by allowing the court control over how evidence and testimony is presented to avoid re-traumatizing the survivor.

There are additional state laws and rules which protect the rights of persons with disabilities to fully and equally participate in court proceedings. See RCW 49.60.040 and General Rule 33. More information about these provisions, examples of reasonable

[1] RCW 26.50.050

accommodations, and a discussion about the pros and cons of requesting an accommodation can be found in the Language and Disability Access component of the Family Law Toolkit.

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[9]*Consult your state's family code for the factors that a court may consider in making custody decisions, and the weight given to particular items.*

Under RCW 26.09.191, courts must consider several factors that can lead to restrictions on residential time, decision making, and dispute resolution. Some of these factors lead to mandatory restrictions, meaning that the court *must* limit residential time, order sole decision-making to the non-restricted parent, and limit dispute resolution to court action only if it finds these factors. A history of acts of domestic violence is one of these factors. The other factors include willful abandonment, abuse of a child, and assault or sexual assault. In addition, a parent's residential time shall be limited if the court finds that the parent was convicted as an adult of a sex offense.

In addition, the court may consider other factors to restrict time, decision-making and dispute resolution. Mental health falls under this permissive category. Therefore, it is important to do a risk analysis before disclosing mental health information in a family law case. In order to trigger a limitation, the mental illness must be both long-term *and* interfere with the performance of parenting functions.[2] Even if the court finds that the mental illness is both long-term and interferes with parenting, the court can still decide not to impose a limitation.

If the survivor has ever received mental health services, then you should talk with the survivor about the possible implications of the release of mental health-related information and develop strategies to combat attempts by the opposing party to use it to damage the client's case.

If the client's mental health becomes an issue in the case, the attorney can argue that although a mental health concern exists, it is not long term and/or it does not interfere with parenting functions. Refer to the parenting functions, as outlined in RCW 26.09.004, and show specific examples of how the client successfully performs those parenting functions. If an attorney can show that the client is able to manage the mental health concerns well and that there is no negative effect on parenting, then there is a better chance of avoiding restrictions.[3]

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[2] RCW 26.09.191(3)(b)

[3] See e.g., Paisley v. Paisley, 167 Wash.App. 1012 (2012). The court found that mental health may not adversely affect the children. A well-controlled condition may not affect ability to parent. This is an unpublished case and cannot be cited as legal precedent.

A detailed discussion about the best interests analysis and the statutory factors considered by the court can be found in the Collaboration's publication, *Keeping the Focus on Domestic Violence: A Relative Risks Guide for Attorneys Representing Survivors*.

Page 20
What your state's code requires for insurance records to be released as part of a civil legal case or child protective services administrative proceedings.

In Washington State, the statutes do not specifically address whether insurance records are required to be released in civil cases or Child Protective Services proceedings. Attempts to obtain mental health information via insurance records should be challenged as confidential information to be treated as mental health records. See discussion supplementing Page 21 regarding strategies to challenge this. RCW 70.02.050 (1)(d) does provide that a heath care provider may disclose health care information, except information related to sexually transmitted diseases, without the patient's authorization if the disclosure is for payment. This may include information necessary for a patient to make a claim or for a claim to be made on their behalf. This may be a concern for survivors who have insurance through their abusive partner since health care information may be disclosed to the abusive partner for insurance payment.

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What your state's code requires for mental health records to be released as part of a civil legal case or child protective administration proceedings. Does the statute provide standards for release that are relatively difficult or easy to meet?

In Washington State, there are statutory safeguards that make it difficult to access another person's mental health information. RCW 70.02.230 outlines when mental health information and records are allowed to be disclosed. There are no specific allowances for permissible disclosures for domestic violence, family law, or Child Protective Services proceedings. Many of the permitted disclosures apply in the context of mental health commitment proceedings under RCW 71.05 or procedures related to determining criminal insanity under RCW 10.77. There is the catch-all permissible exception under RCW 70.02.230(o) when disclosure is pursuant to a lawful court order.

Page 20
Does your state code explicitly provide for a psychotherapist-patient or a counselor-client privilege? Who qualifies under this privilege? What are the exceptions?

Washington State recognizes privilege for the psychologist-patient and counselor-patient relationship, as well as privilege for licensed mental health counselors,

independent clinical social workers, and marriage and family therapists. Washington State also recognizes privilege for domestic violence and sexual assault advocates.[4]

Under the psychologist-patient privilege, the psychologist must be licensed. The licensing process requires a showing of good moral character, holding a doctoral degree, having no less than two years of supervised experience, and passing a board exam.[5]

Under the counselor-patient privilege, the counselor must be registered under chapter RCW 18. A counselor is defined as an individual, practitioner, therapist, or analyst who use therapeutic techniques (including social work, mental health counselling, marriage/family therapy, and hypnotherapy), for a fee, to help ameliorate mental, emotional, or behavioral problems.[6]

Licensed mental health counselors, independent clinical social workers, and marriage and family therapists have higher level education and training requirements including holding a master's or doctoral level degree, passing a board examination, and completing extensive hours of supervised experience.[7]

While the National Attorneys Handbook does not mention this, it is worth noting here that domestic violence advocates and sexual assault advocates in Washington State also have privilege.[8]

Information about privilege exceptions are addressed below in the discussion supplementing Page 21.

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What do the rules of evidence say about release of information?

The Washington State Rules of Evidence do not specifically address the issue of the release of mental health information. Rule ER 501 merely refers to a non-exhaustive list of statutory privileges. Privileges specifically listed include: Counselor, Physician-Patient, Psychologist-Client; and Registered Nurse.

[4] RCW 18.83.110; RCW 18.225; RCW 5.60.060
[5] RCW 18.83.070
[6] RCW 18.19.020
[7] RCW 18.225.090
[8] RCW 5.60.060

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(6) Whether state statute or case law allows for a blanket exception to mental health record confidentiality or psychotherapist or counselor privilege pursuant to a subpoena, and how likely the court is to grant a request to subpoena your client's mental health records or the appearance of her/his mental health care provider(s).

Under RCW 70.02.230(o), information about someone's mental health diagnoses or treatment may not be released to a third party unless the person signs a written authorization, or under certain limited exceptions including by a specific court order.

A subpoena/subpoena *duces tecum* alone is not sufficient to require a person or agency to testify about or release a survivor's mental health records. However, a subpoena cannot simply be ignored because a court can hold the person in contempt which can result in a fine or jail time.

Under RCW 70.02.060, when a discovery request or compulsory process is served on a health care provider for records, the provider and patient will both be informed of what information is being sought and the time they have to seek a protective order, which should be at least 14 days. If a subpoena/subpoena *duces tecum* is served seeking the client's mental health records, then the attorney should file a motion to quash the subpoena and ask the court to not require or limit the disclosure of mental health information. The attorney can also seek a protective order under Washington Court Civil Rule 26(c) to restrict discovery of mental health information or records.[9] Reasons to quash the subpoena and seek a protective order include the survivor's right to confidentiality and privilege.

In Washington State, there have been cases where the courts have found that mental health records can be released despite privilege. For example, in *Marriage of Nordby*, the father appealed a case that granted custody to the mother where the trial court refused to allow discovery of the mother's medical records related to her mental health. Relying on prior precedent analyzing the physician-patient privilege, the Court of Appeals found that where medical records are relevant and necessary to determine the best interests of the child, they may be discoverable.[10] The Court of Appeals also found that the test for fitness of custody should be the present condition of the parent and not any future or past conduct.[11] The Court also clarified that a trial court may impose

[9] Civil Rule 26(c) provides that a party or a person, from whom discovery is sought based on good cause, can upon motion ask the court to protect a party or person from annoyance, embarrassment, oppression, or undue burden including an order prohibiting or limiting the discovery.
[10] In re Marriage of Nordby, 41 Wn. App. 531, 536 (1985).
[11] Id.

protective orders regarding the content of the records as necessary and that discovery of medical records should be allowed only where circumstances clearly indicate harm to the child, rather than be routine in custody cases.

If the survivor shares mental health information, or the court orders that the information be released, you may try to limit the disclosure by:

- Filing the mental health information/records under seal by the court (see the Sealed Personal Health Care Records form at www.kingcounty.gov/courts/scforms.aspx), so that it is not available to be seen by the general public although it will still be accessible to the opposing party;
- Asking the court to review the information *in camera* (privately) without sharing the information with the abusive partner;
- Asking the court to limit the release of information to certain records or only to certain persons such as a parenting evaluator. The court could limit the evaluator's ability to share that information in their report or with the opposing party.[12]
- Asking the court to deny the abusive partner's request for the mental health records by showing that it is not relevant to the issue of current parenting ability or that the value of the information is outweighed by the damage to the survivor in the violation of their privacy. See *In re Marriage of Nordby*[13]

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(a) Production of the records or testimony of the individual would violate the counselor-patient privilege or confidentiality. You should directly address all exceptions enumerated in the relevant state code section that could possibly apply in the case.

See discussion supplementing Page 21 above.

[12] GALR2(p) requires a GAL to maintain documentation to substantiate recommendations and conclusions. Unless prohibited or protected by law and consistent with GALR2(n), the information shall be made available for review upon written request of a party or the court. GALR2(n) provides that a GAL may recommend that the court seal the report or a portion of the report to preserve the privacy, confidentiality, or safety of the parties or the person for whom the GAL was appointed.

[13] In re Marriage of Nordby, 41 Wn. App. 531, 536 (1985).

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Factors to examine in this decision making process include the culture of the particular court, the facts and circumstances of the case, and the laws of the jurisdiction.

In King County, the court routinely refers parties in a contested family law case for a parenting evaluation to assist the court in determining the child's best interests. Attorneys should be cautious about arguing too zealously against an evaluation being ordered, as judges have broad discretion to do so, and it may make the client look uncooperative. See our Family Law Evaluations handout for arguments you can make regarding parenting evaluations and mental health evaluations.

In Washington State, the court has authority to order an investigation and/or to appoint a guardian ad litem under RCW 26.09.220. In King County, the case may be referred to Family Court Services (FCS), which is a department of the Superior Court, a guardian ad litem (GAL), a Court Appointed Special Advocate (CASA), or a private evaluator. The Family Law Toolkit has a Parenting Evaluators Comparison Chart that compares and contrasts the four types of evaluators including how they are selected, their education and training requirements, and cost.

According to Local Family Law Rule 13(b)(2), all parenting plans, custody, and visitation cases not resolved by mediation or another alternative dispute resolution process (ADR), may be referred to Family Court Services or another suitable person or agency to investigate and write a report for the court prior to trial. Per King County Local Family Law Rule 16(a), ADR is required no later than 30 days before trial. However, cases involving domestic violence may be granted a waiver from the ADR requirement.

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(1) The Law Requires Grant of Custody. Under the law of many states, where there is evidence of domestic violence, no evaluation is needed to determine that a child's best interests are served by granting custody to the protective parent.

In Washington State, evidence of domestic violence alone will not prevent the court from ordering an evaluation. Pursuant to RCW 26.09.191(4), in any case in which a limiting factor is alleged, the court is to screen the case to determine whether further assessment is needed. To decide whether to order an evaluation, the court considers whether it can obtain sufficient evidence as to the relevant factors from the parties without independent investigation. See *In re Marriage of Nordby*, 41 Wn. App. 531

(1985). The court may admit the recommendations of any evaluator, but does not have to follow the recommendations.

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(2) Trauma Caused by the Abusive Parent Cannot Be Used Against Victims in Custody Case. Attorneys should consult with their local statutes to determine the law governing child custody evaluations.

Some states have statutory provisions that state that the effects of domestic violence cannot be used against victims in custody litigation.

Washington State does not have a statutory provision preventing the effects of domestic violence (e.g., resulting mental health issues) from being used against survivors in parenting plan decisions. People who are abusive may try to use a domestic violence survivor's trauma against the survivor in custody proceedings even when the abusive partner was the one to inflict the trauma.

Attorneys should still argue that the abusive parent should not be permitted to use the survivor's alleged mental illness (caused by the abusive parent's acts) to limit residential time. If abuse has caused trauma or worsened a pre-existing mental health illness, the attorney can show that the mental health of the survivor is likely to improve with time away from the abusive partner, improved safety, and supportive services or treatment.

It is also important to point out to the court that post-separation abuse may still be impacting the survivor's mental health. People who are abusive often increase or begin new controlling tactics after the relationship has ended in effort to maintain or regain control. The survivor's mental health may not have fully improved yet because the survivor is still living in fear and may be anxious about the safety of their children. Again, attorneys should remind the court to assess the relative risks of mental health and domestic violence, and emphasize that domestic violence is a mandatory restricting factor in the statute, whereas mental health issues may be used only when the court finds that the concern is long term and interferes with parenting functions.

See discussion supplementing Page 27 for statutes and rules related to parenting evaluations.

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Assess the Qualifications of a Custody Evaluator - First, determine that your jurisdiction has guidelines for designating evaluators with particular competence in domestic violence.

For an overview of the training and education requirements for evaluators in Washington State, see our Parenting Evaluators Comparison Chart.

Attorneys should use the legal standards for training to advocate for qualified custody evaluators and seek to remove or replace an unqualified evaluator. If a party believes the appointed GAL/CASA is inappropriate or unqualified, the party has three days from the appointment to move for a new GAL.[14]

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Consult with the Following Sources for Professional and Ethical Guidelines for Custody Evaluations: State Licensing Board, Statutory criteria in your state

Washington State does not have professional and/or ethical guidelines specific to parenting evaluations except for licensed psychologists. In Washington State, licensed psychologists who perform parenting evaluators are required to follow the minimum standards set forth in the Washington State Administrative Code.[15] Under these rules, the evaluator must focus on the best interests of the child and consider several factors including relevant cultural and ethnic issues and the existence of limiting factors under RCW 26.09.191. The rules also require that the psychologist be familiar with or obtain consultation regarding aspects of child abuse, domestic violence, substance abuse and family conflict.[16]

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Determine the evidentiary standard governing admissibility of scientific evidence in your jurisdiction. Most states follow some version of the Daubert or Frye standards.

Washington State courts apply the *Frye* general acceptance test rather than the *Daubert* standard in determining the admissibility of scientific testimony.[17] The Frye "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis.[18] If there is a significant dispute among experts in

[14] RCW 26.12.175 and RCW 26.12.177
[15] WAC 246-924-445
[16] Id.
[17] Frye v. United States, 293 F. 1034 (D.C. Cir. 1923)
[18] State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)

the relevant scientific community as to the validity of the scientific evidence, it is not admissible.[19]

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Mental Health Evaluations in General: Most state statutory schemes limit the circumstances under which you can ask for a mental health evaluation. Most statutes say that you must make a finding of good cause.

In Washington State, Civil Rule 35 states that when the mental condition of a party is at issue, the court may order a mental examination by a physician or psychologist upon a motion for good cause. Notice must be given to the party to be examined, and specify the time, place, manner, conditions, and scope of the examination. Subsequently, the party seeking the examination must deliver a detailed written report of the examiner's findings, including results of all tests, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. The report must be delivered within 45 days of the examination and not less than 30 days prior to trial. If a physician or psychologist fails or refuses to make a report in compliance with the rule the court must exclude the examiner's testimony if offered at the trial, unless good cause for noncompliance is shown.

Under King County Local Family Law Rule LFLR 13(b)(3), the court may order a mental health evaluation "when appropriate." The rule does not define what "appropriate" means in this context.

If the court is considering ordering the client to undergo a mental health evaluation, you may argue for a parenting evaluation instead. For more information about this including arguments you can use, see our Family Law Evaluations handout. If a mental health evaluation is entered into evidence, you can challenge the basis and relevance per RCW 26.09.191.

Page 34
Although some state statutes say that a request for child custody puts mental health at issue, it is the exception.

Washington State statutes do not provide that mental health is an automatic issue in parenting plan cases. Mental health is a permissive factor that may be considered under RCW 26.09.191.

[19] Ibid.

Section Five: Deciding which course to take and preparing your client for mediation/negotiation or trial

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Know the Proceedings in Your Jurisdiction and Court: Make sure that you know the structure of the proceedings - negotiation, mediation, and trial - in your particular jurisdiction and under your particular judge.

Mandatory Custody Mediation and Domestic Violence - Some jurisdictions require mediation in every child custody case. Many statutes waive this requirement in domestic violence cases, though others do not. Be sure to know the rules regarding domestic violence custody mediation in your jurisdiction.

Per King County Local Family Law Rule 16(a), family law cases involving domestic violence may be granted a waiver from the pre-trial Alternative Dispute Resolution (ADR) process. ADR refers to the various processes for resolving a case without a trial. The most common forms of ADR are Mediation, Arbitration, and Settlement Conference. Mediation is where a neutral third person helps the parties agree on an outcome. Arbitration is where the parties agree to let a neutral third person decide on the outcome. A Settlement Conference is where the parties meet with a judge, commissioner, or experienced family law attorney, who can advise the parties of what the likely outcome would be at trial, in an effort to help the parties reach an agreement without trial.

According to Local Family Law Rule 13(b)(2), all parenting plans, custody, and visitation cases not resolved by mediation or other dispute resolution process, may be referred to Family Court Services or other suitable person or agency for investigation and a written report to the court prior to trial. ADR is required no later than 30 days before trial.[20] The deadline is listed in the case schedule that is issued when a family law action is filed.

Per King County Local Family Law Rule 16(a), cases involving domestic violence may be granted a waiver from the ADR. To obtain a waiver, an attorney must file a motion before the assigned judge on the case, or ask for it orally at the Pre-trial Conference.

[20] King County Local Family Law Rule 16(a)

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Attorneys should draw from their jurisdiction's rules and statutory provisions to illustrate the potential harm in the instant case.

In King County, courts permit domestic survivors to waive ADR because it may be unsafe or unreasonable to ask them to "meet in the middle" with their abusive partners to negotiate during family law litigation. Depending on the survivor's situation, it may not even be safe to be in the same room with the abusive partner. The traditional form of mediation is based on the parties having relatively equal power in the relationship. Domestic violence creates huge power imbalances between the parties, and the abusive partner may abuse the mediation process to further abuse the survivor. The survivor might feel pressure in a mediation to agree to terms due to feeling intimidated.

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Mandatory Protection Order Negotiation: Some jurisdictions, such as the District of Columbia, require that parties to a civil protection order attempt to negotiate their case prior to moving to trial…Other jurisdictions require a genuine attempt to settle the matter and avoid the courtroom.

Washington State does not require parties to a civil protection order to negotiate their case.

Pages 38-39
However, it is worth noting that there are some jurisdictions and courts that allow for evidentiary exceptions that enable survivors to present testimony that was obtained in advance of trial in lieu of trial testimony.

In Washington State, the domestic violence protection order (DVPO) process is intended to be pro se friendly. Under ER 1101(c)(4), the rules of evidence are not applied in DVPO proceedings. This means that the admission of hearsay is allowed for DVPO hearings. See *Gourley v. Gourley,* 158 Wn.2d. 460 (2006). However, the court has the discretion to give all evidence the appropriate weight, so be cautious when submitting hearsay. The court may consider prior testimony and other relevant evidence. If a DVPO is being requested as part of a family law action, such as a petition for dissolution or parenting plan, you can argue that *Gourley* still applies to the DVPO. The standard rules of evidence will apply for all the family law orders (e.g., the temporary orders and the final parenting plan).

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Explore the requirements of the jurisdiction you are in around mediation/negotiation and how they look and feel.

In King County, a non-traditional form of mediation referred to as a "Settlement Conference" is available. Many people with limited means utilize the King County Volunteer Settlement Conference Program. Experienced family law attorneys volunteer their services through this program to help the parties negotiate a settlement. There is also a list of active King County judges and commissioners who may be available to conduct a settlement conference without cost to the parties.

A settlement conference can be conducted "shuttle style," where the parties sit in separate rooms, and the neutral third person or "settlement master" goes back and forth. The Settlement Master can help the parties evaluate the various proposals in light of the available evidence and what the likely outcome would be at trial. For example, a survivor who is represented and has a very favorable parenting evaluation may want to opt for a shuttle style settlement conference instead of litigating the issues at trial. If mediation is used rather than a settlement conference, "shuttle style" is still preferable for cases involving domestic violence. Survivors can choose to have a support person and/or an advocate in the room with them.

Other things to consider for alternative dispute resolutions include:

- The location that is most convenient and safest for the survivor. ADR can take place in the courthouse.
- The gender, experience, and temperament of the person conducting the ADR
- The level of knowledge of the person conducting the ADR regarding domestic violence, trauma, and mental health

These factors should be discussed with your client in advance. If your client is hiring the person conducting the ADR, then the above factors should be taken into consideration when making that choice. If your client is using a volunteer from the King County Volunteer Settlement Conference Program), then the program selects the person.

Attorneys can help prepare the Settlement Conference Master or mediator about the legal issues in the case and the client's goals. This is typically done by writing a letter to the mediator/Settlement Master and including proposed final orders and relevant documents such as protection orders, temporary orders, and parenting evaluations especially if it is favorable to the client. Once an agreement is reached, the Settlement Conference Master or one of the attorneys for the parties drafts a CR2A agreement that puts the agreement in writing prior to being presented in court as final orders. Be aware

that the terms of the CR 2A agreement are binding. Make sure that your client does not feel pressure to sign the CR 2A agreement.

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Discuss with her what may arise during either process, the impact of mental health evidence on the case, the legal structure of your jurisdiction and whether there are exceptions to mediation/negotiation requirements.

Depending on the survivor's situation, and the types of ADR available, ADR may be a helpful tool for reaching an acceptable settlement while avoiding the financial and emotional costs that can accompany a trial. The attorney should evaluate possible benefits/drawbacks of participating in ADR with the client, and whether the ADR process is likely to be safe and fair for the client. In a settlement conference, the attorney accompanies the client which may help shift the power imbalance. If the client decides to participate in ADR, be sure to safety plan around it with the client. See our Safety Planning with Domestic Violence Survivors tool for tips on how to do this. It is also a good idea to connect the survivor with a domestic violence advocate for more in depth safety planning. See our Domestic Violence Advocacy Resources tool for available options.

Section Six: Determining Whether You Should Have an Expert Witness

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As with all stages of the litigation process, carefully consider whether these strategies fit the needs and desired outcomes expressed by your client, the culture of the court, and the laws of the jurisdiction.

If the client is likely to experience a trauma response in the courtroom, it may be useful to have an expert testify to explain this to the court. A survivor's behavior in court may not reflect the survivor's typical functioning and behavior, but might instead be a response to courtroom proceedings or to being in the same room with someone who is dangerous. It can be useful for the court to know this is a temporary response to stress and not a permanent state.

However, be careful about pointing out symptoms that are not evident to the court. Avoid making the court believe that the client's symptoms are more serious than they are. Make sure to ask the client ahead of time how to address and respond to any trauma responses that may occur during court proceedings. For example, you can establish a signal for when the client needs to take a break. This will demonstrate respect and consideration for the client and help to establish clear communication regarding the client's privacy. This might also result in a reduced likelihood of trauma responses during court proceedings.

The National Attorneys Handbook suggests contacting local domestic violence programs for possible experts. However, King County domestic violence programs typically do not allow advocates to testify. Most do not have the capacity to offer this service and do not want to risk jeopardizing confidentiality, privilege, and integrity of their relationships with survivors.

Often, survivors turn to their own mental health service providers to be their "expert." The survivor and attorney should consider carefully the consequences of waiving privilege. What the mental health service provider says about their treatment and parenting may affect both the case and the relationship between the survivor and the service provider.

For many clients who go through a Parenting Evaluation and receive a favorable report, it is common for the evaluator to become the client's expert at trial. Be sure the

evaluator is qualified to give their opinion about domestic violence and trauma or their credibility could be attacked on cross-examination.

Consider how a domestic violence, mental health, substance abuse, or parenting expert might be useful to the client, if resources make this feasible and if an appropriate expert can be found.

Section Seven: Cross-Examining the Opposing Party

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[27]*In a custody case or protection order case, you may be able to enter evidence of prior acts of abuse, in your case-in-chief, as well, because many State custody statutes direct the court to consider domestic violence when conducting a best interest analysis, and evidence of past acts of abuse is often allowable in a protection order proceeding.*

In cases where the opposing party has provided direct testimony that he or she has not committed domestic violence, you can introduce evidence of prior abuse to impeach. In a family law or protection order proceeding, you may enter evidence of acts of past abuse in your case-in-chief. RCW 26.09.191 directs the court to consider domestic violence when conducting a best interest analysis. The statute specifically allows evidence of a history of acts of domestic violence, including domestic violence against individuals other than the party. The formal rules of evidence apply in a family law action.

However, the rules of evidence do not apply in protection order cases. ER 1101(c)(4). Protection orders can be used as evidence in family law cases, but it is up to the court to decide how heavily to weigh them. In addition, RCW 26.09.191 requires *a history* of acts of domestic violence, or one assault that causes grievous bodily harm or the fear of such harm. Past acts of abuse that justified a domestic violence protection order might not be considered sufficient for a finding of domestic violence in a family law case if they do not make up a history or if there is one act that the court does not consider sufficiently serious. The attorney should therefore try to show that all the past acts are part of the same pattern of coercive control, and show why they would reasonably cause fear of harm.

It is possible that the client may not know the whole history of the abusive partner's past violence particularly abuse involving prior intimate partners. It is critical to look at any court records involving the abusive partner to see if there are other DVPOs, criminal cases, violations of protection orders or no contact orders, and family law actions. There may be evidence contained in those cases to show a pattern and history of domestic violence that can be used in the attorney's case-in-chief and in cross-examination.

To look up cases in Washington State, the courts have a website at www.courts.wa.gov. Currently, Superior Court criminal cases filed after November 1, 2004 can be reviewed online via the King County Clerk's website at http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx. For cases prior to

November 1, 2004, you can look up the records and documents at the Clerk's office for King County Superior Court. To look up criminal history in Washington State, you can obtain a WATCH report at https://fortress.wa.gov/wsp/watch/. This only includes Washington State criminal history.

For out of state criminal history, you should go to the individual state's website and search how to look for criminal history for that state.

You can access the docket of protection order and family law cases at www.courts.wa.gov, but to see the actual documents, you have to go to the Clerk's office at the Superior Court in Seattle or Kent. These records can be viewed for free, but there is a fee for copies. For all non-Superior Court cases, contact the particular court to find out how to access their records.

Section Eight: Closing Argument

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When crafting your argument, consider the culture of the court, the facts of the case, the laws of your jurisdiction, and the needs and desired outcomes expressed by your client.

When crafting a closing argument in your case, take into account any rulings that the judge has made throughout the trial. You may also wish to talk to experienced family law attorneys about their experiences before that particular judge.

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If your state has a presumption against an award of custody to a parent who has committed intimate partner abuse, articulate the presumption provision and highlight the evidence of abuse in the case before the court. If your state requires that the court consider domestic violence in its best interest determination, highlight the statutory language for the court and illustrate the impact of the batterer's conflict on the child and the protective parent.

When concluding your case, be sure to remind the court of the law in determining the best interests of the child. Outline for the court that if it makes certain findings, such as a history of acts of domestic violence, then under RCW 26.09.191(1) and (2), the parenting plan must limit residential time, order sole decision making to the non-limited parent and find that only court action is appropriate as future dispute resolution.

Make sure the court knows that children are always impacted by domestic violence, even when it is not directed against them – whether from observing it or being caught in the middle. Children exposed to domestic violence may develop a wide range of problems, including interpersonal skill deficits, psychological and emotional problems, such as depression and PTSD, and externalizing behavior problems.[21] Be careful to frame this argument so that it does not blame the survivor for staying in the abusive relationship. Remind the court that abuse does not end when the relationship ends. Illustrate how the restrictions you are asking for are necessary for the safety of both your client and the children.

If there are allegations of mental health concerns that have been raised against your client, be sure to remind the court that in order to trigger a limitation the mental health concern must be both long term and impact performance of parenting functions (RCW

[21] Carlson, BE (2000). Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention. Trauma, Violence and Abuse, 1(4), 321-342.

26.09.191 (3)). Remember that even if the court finds that the mental health concern is both long term and interferes with parenting, the court can still decide not to impose a limitation.

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If your state has a statutory provision that prohibits the effects of domestic violence from being used against a party in a custody case, reiterate the requirements of the code section.

Washington State statutes do not prohibit using the effects of domestic violence against a survivor in a family law action. However, there are several arguments that can be made if an abusive partner attempts to use the survivor's mental health concerns to limit their residential time.

- Show the court how the client is managing a mental health issue. Is the client in treatment? Has the client been consistent about getting treatment? If medication is needed, does the client take it consistently? Does the client make plans to minimize the impact of mental health issues on the children?

- Articulate for the court why treatment is likely to be successful. In general, most mental health issues respond well to treatment, especially if the type of treatment is tailored to the specific problem.

- Focus on demonstrating to the court that the client continues to be able to perform parenting functions.[22] Although mental illness can cause difficulty with some parenting functions or cause the parent to have a way of parenting that is different from the norm, many parents with mental illness are still successful at performing many, if not all, parenting functions. Concentrate on the positive. Show

[22] RCW 26.09.004(2) - "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

how the client has developed successful coping mechanisms to be aware of parenting challenges and difficulties, and implement solutions for them.

- Studies have found protective factors can make it less likely that children will experience negative effects from a parent's mental illness. These include:
  - Strong relationships with other family members and the larger community;
  - Support for both the parent and the child; and
  - A stable home environment[23]
- Use the presence of protective factors to argue that the client's mental illness is not negatively affecting the children. Describe support and relationships that the client and the children have in their community. If the child's relationship with the parent is generally positive, this also protects against negative effects.[24]

[23] American Academy of Child and Adolescent Psychiatry, Facts for Families: Children of Parents with Mental Illness (2012).
[24] Reupert, Andrea and Maybery, Darryl. American Journal of Orthopsychiatry, Families Affected by Parental Mental Illness: A Multiperspective Account of Issues and Interventions (2007).

Additional Resources

The Family Law Toolkit for Survivors – created by the Domestic Violence and Mental Health Collaboration Project

How to Get Ready for a Settlement Conference
www.legalvoice.org/tools/documents/HowtoGetReadyforaSettlementConference.pdf.

Working with GALS and Parenting Evaluators: Tips for Parents in Family Law Cases
www.washingtonlawhelp.org.

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