

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

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On behalf of the

National Center on Domestic Violence, Trauma & Mental Health

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December 2011

This project was supported by Grant No. 2008-TA-AX-K003 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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Acknowledgements

This handbook represents the culmination of a three-year project. We wish to thank all those who contributed to it.

We owe a debt of gratitude to the women whom we interviewed and who shared their experiences with us so openly. They taught us much about the gaps in representation and services that they and many others face across the country, and affirmed our belief that this is an area in need of improvement. Their stories shaped the direction of this project and guided the writing of this handbook.

We offer a special acknowledgement to our esteemed colleagues who generously and kindly offered their time and expertise to review draft outlines and offer comments, suggestions, and insights: Karen Bower, Jill Davies, and Becki Truscott Kondkar. Their assistance was invaluable.

We also wish to thank the participants in our December 2008 expert panel meeting, who encouraged us and offered their perspectives: Karen Bower, Catherine Cerulli, Romilda Crocamo, Barbara Hart, Julie Kuncze Field, Catherine Mazzotta, Kelly Miller, Peter Macdonald, Shery Mead, Emely Ortiz, Terri Pease, Denice Wolf Markham, Carol Shoener, Beth Scullin, and Maureen Sheeran. We also wish to thank Lydia Watts of Greater Good Consulting for her excellent meeting facilitation.

We are particularly grateful to Carole Warshaw, MD, for her ongoing support for this project and for her vision that serves as the foundation of the National Center.

Finally, we would like to express our sincere thanks to Amy Loder, Program Manager with the Office on Violence Against Women, for her guidance and help with this project.

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About the National Center on Domestic Violence, Trauma & Mental Health:

The mission of the National Center on Domestic Violence, Trauma & Mental Health is to ensure that all survivors of domestic violence and their children who are experiencing the mental health effects of trauma and/or living with a psychiatric disability can access the resources that are essential to their safety and well-being. To these ends, the National Center is committed to developing responses to the range of trauma-related issues faced by survivors and their children that are accessible, culturally relevant, and both domestic violence- and trauma-informed. The Center's work is survivor-defined and rooted in principles of social justice.

The efforts of the Center are organized into four strategic objectives:

- ❖ **Raising public awareness** about the intersection of domestic violence, trauma, substance abuse and mental health through up-to-date analysis of research, policy and practice.*
- ❖ **Building the capacity of systems and agencies** to address the traumatic*

effects of abuse and to facilitate healing and recovery.

- ❖ **Promoting policies** *that support collaboration and improve system responses to survivors and their children experiencing the impact of domestic violence and other lifetime trauma.*
- ❖ **Contributing to research** *that advances knowledge and builds the evidence base for responding to trauma in the lives of DV survivors and their children.*

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Introduction

In recent years, those who work with survivors of domestic violence have become increasingly aware of the connection between trauma and domestic violence, as well as other effects of domestic violence on a survivor's mental health. The release of relevant research findings and available technical assistance that address this intersection through specialized trainings, educational materials, and tailored consultations have influenced the perspectives and work of many domestic violence advocates. It has catalyzed changes in the ways that local domestic violence programs offer and provide services to survivors living with trauma-related and other mental health impacts of domestic violence, influenced program standards and policies promulgated by statewide domestic violence coalitions, and prompted advocates to begin or renew efforts to engage with mental health providers in order to make services more accessible and appropriate for survivors who seek them.

Still, survivors who turn to the legal system for protection from the abuser, custody of their children, and assistance with other civil legal needs encounter significant barriers. This can occur for different reasons. First, the processes in which a survivor must engage to achieve legal objectives can trigger the effects of trauma, making it difficult for a survivor to fully participate in her case. Second, in many cases, the opposing party proffers testimony or introduces other evidence about the mental health of the survivor in an attempt to use societal stigma about mental health for the purpose of damaging her credibility and/or raising doubt about her parenting abilities.

We envisioned this project as a vehicle for creating a tool to assist attorneys who represent survivors when trauma or other mental health challenges are a factor in a case. Specifically, we wanted to offer lawyers practical information about the ways in which trauma and mental health can intersect and impact the civil legal cases of survivors and provide guidance on how to partner with a survivor and zealously represent her. To support this work, the National Center on Domestic Violence, Trauma & Mental Health applied for and received Violence Against Women Act funding through the Technical Assistance Program of the Office on Violence Against Women, U.S. Department of Justice.¹

As a first step in the project, the National Center convened a roundtable meeting of individuals who interact with survivors in the course of a legal case. Participants representing attorneys, domestic violence advocates, the judiciary, the research field, mental health peer support, and mental health providers gathered for a one-day meeting in

¹ For more information about the Office on Violence Against Women, go to www.ovw.usdoj.gov.

Chicago to offer their perspectives on the barriers that survivors face when trauma or other mental health challenges affect a legal case, share their experiences and strategies, and provide input on the kinds of materials that might be useful to attorneys.

While the input offered by the roundtable participants was useful in formulating ideas and learning about strategies, it also highlighted the need to gather more specific information about the barriers that individual survivors are facing in the legal system with regard to trauma and other mental health challenges.² To this end, we embarked upon the second phase of the project, in which we conducted telephone interviews with survivors for the purpose of learning about their experiences with the legal system when they were involved in a case in which trauma or other mental health challenges were a factor. We received the names and contact information for 50-75 women. We contacted and conducted a brief screening interview (either by phone or email, depending on the information that we received) with each person who expressed an interest in being interviewed. Of all of the women with whom we spoke or emailed, seven had the most relevant experience. Most of those whom we did not interview had not participated in a civil legal or criminal case against the abuser or had not done so within the last ten years. All of the survivors that we interviewed had been a party in a civil legal case against the abuser; all but one of these interviewees was also a victim in a criminal case against the abuser, and one was a survivor who was charged with a criminal offense against the abuser. During the interviews, which typically lasted two hours, we asked a variety of questions to capture information about survivors' perceptions of the strengths and weaknesses of the representatives of the various disciplines with whom they had interacted including community-based advocates, mental health providers, attorneys, custody evaluators, child protective services, judges, law enforcement, prosecutors, and victim-witness specialists. At the conclusion of the interview phase, we produced a summary of the interview findings, organized by discipline. We included a compilation of system gaps and needs, based on what we learned from the interviewees and the individuals who had participated in the roundtable meeting.

What we learned through these processes reaffirmed our belief that survivors encounter serious barriers when it comes to participating in legal cases and achieving the legal outcomes they desire, especially when trauma or other mental health challenges are a factor. In terms of attorneys, the survivors that we interviewed spoke about the positive attributes of the lawyers with whom they had worked – including their zealous advocacy, treating them as partners in the process, and their knowledge of domestic abuse. However, they also highlighted the ways in which attorneys fell short, including offering ineffective or harmful legal and strategic advice, failing to fight for the survivor, and exhibiting a lack of understanding about the intersection of trauma, mental health, and domestic violence. The

² While some of the meeting participants are survivors of domestic violence, none had been involved in a civil legal case against the abuser within the past ten years.

survivors with whom we spoke also offered recommendations about what is needed for attorneys to better work with and represent survivors. Their suggestions included a need for more information about working with survivors who have experienced trauma and building the case in a way that does not allow the mental health challenges to overshadow the domestic violence that they have experienced. In particular, survivors felt it was important for attorneys to be able to show that trauma and other mental health challenges are often caused by the domestic violence itself and therefore should not operate to penalize survivors in their legal cases. Additionally, survivors indicated that attorneys should listen to survivors more, view and include them as partners in the legal process, and recognize and value their expertise.

This handbook was created for the overall purpose of providing guidance to attorneys so that they can help survivors achieve their civil legal objectives when trauma or other mental health challenges are a potential factor in a case. We do this in two ways. First, it is our intent to help attorneys identify when trauma may be an issue so that they can partner with the survivor to craft personal and legal strategies that help her to stay safe, avoid circumstances that can potentially trigger the effects of trauma, and develop plans for when triggers do arise. Second, we offer guidance on each step of a civil case related to the possibility of the opposing party or others raising issues about the mental health of the survivor. The handbook is intended to help attorneys anticipate with their clients the kinds of mental health-related case theories and evidence that the opposing party may attempt to procure and introduce, respond to such attempts, deal with custody evaluators, decide whether to negotiate or proceed to trial, choose and utilize experts, cross-examine the opposing party, and craft a closing argument.

The handbook features strategies that aim to keep trauma and other mental health challenges from becoming the central focus or even a consideration in the survivor's case, and guidance for limiting it when mental health evidence is introduced by the opposing party. We do not advocate for the anticipatory introduction of mental health records or other evidence related to the mental health of the survivor in an effort to defuse attempts by the opposing party to use mental health information against her. The authors understand, though, that some attorneys have had some success in doing so.³ The handbook is grounded in survivor-defined advocacy – an adaptation of the “women-defined advocacy” model that Jill Davies, Eleanor Lyon, and Diane Monti-Catania wrote about in their 1998 book, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications); we advocate partnering with survivors to plan for safety, assess risks, develop strategies, and plot the course of her case.

³ For more information, see Denise Wolf Markham, *Mental Illness and Domestic Violence: Implications for Family Law Litigation*, *Journal of Poverty Law and Policy* 23, 30 (2003).

Finally, a note about language. In this handbook, “survivor” means an individual who has experienced domestic violence. We use this term interchangeably with “client.” For purposes of brevity and simplicity, survivors/clients are referred to as female but we intend to be inclusive of both men and women. All abusers and opposing parties are referred to as male, but it is understood that there are also abusers who are women. We use the term “opposing party” to refer to an individual who perpetrated domestic violence upon the survivor and/or her children, and who is a party to a survivor’s civil legal case.

Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.⁴ Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- ◆ The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- ◆ What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as “flat affect”). She may be intellectually present but emotionally detached.
- ◆ The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- ◆ The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

⁴ See Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- ◆ Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- ◆ Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

- ◆ Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- ◆ Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- ◆ Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- ◆ Recognizing that survivors may be unable to access all of the details;
- ◆ Providing options and the time and space for survivors to make fully-informed decisions;
- ◆ Validating the survivor's feelings throughout the process;
- ◆ Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- ◆ Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- ◆ Finding supports for developing alternative or additional coping strategies;
- ◆ Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- ◆ Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.⁵

⁵ Adapted from Jill Davies, *Helping Sexual Assault Survivors with Multiple Victimization and Needs, A Guide for Agencies Serving Sexual Assault Survivors* (July 2007).

Section Two: Client Counseling

Survivor-centered advocacy is based upon a partnership between the attorney and the survivor. The partnership draws upon the experience and knowledge of the survivor and the skills and resources of the attorney. The goal is to combine the expertise of both survivor and attorney to devise strategies that address the particular and comprehensive needs of the individual survivor. This partnership can proceed in three steps: (1) analyzing the risks, (2) reviewing previous/current safety plans, and (3) devising legal strategies.⁶

Work With The Survivor To Gain An Understanding Of Batterer-Generated And Life-Generated Risks.

Lawyers cannot begin to devise legal strategies for an individual client without gaining an understanding of the batterer-generated and life-generated risks she faces.

Trauma-informed legal advocacy takes time, but in the long run, it leads to more efficient, more effective legal advocacy for survivors. Here are some pointers for gathering the critical context:

- ◆ Be sure to schedule adequate client meeting time for you to gather this critical context.
- ◆ Give the client space to tell her story, so that she can identify her concerns as she prioritizes them.
- ◆ Use open-ended questions to facilitate information sharing.
- ◆ Listen more than you talk.

It is common for an abuser to attempt to use information about the mental health of a survivor to further the abuse and to gain advantage in a legal case. Develop an understanding of the ways in which the battering partner has used the survivor's mental health history in the past to further his power and control.⁷ Examples might include a batterer:

- ◆ Using a psychiatric diagnosis to silence his partner (e.g., "Who will believe a woman who is bipolar?").
- ◆ Threatening to sue for custody of the children and use her mental health history against her during the custody proceedings.

⁶ Jill Davies, *An Approach to Legal Advocacy with Individual Battered Women* (2003).

⁷ See Mary Malefyt Seighman & Erika Sussman, *Interviews with Survivors of Domestic Violence Who Have Experienced Trauma or Mental Health: Reflections on Their Experiences in the Justice System: Summary and Recommendations* (2010).

- ◆ Using a survivor's mental health history to convince systems (e.g., law enforcement, courts) that the survivor is not credible, that she is not a fit parent, that she needs to be institutionalized, etc.

Engage the client in analyzing the batterer-generated mental health risks that she faces now and in the future. Analysis of mental health risks may be complex. For example: a survivor who has suffered depression and anxiety as a result of her partner's abuse may suffer additional risks if her partner continues to abuse her upon her departure.

Battered women who lived with mental health conditions before they were with their partner may find that they have limited options available to them. For example: a survivor may face a greater risk of losing custody of her children, and she may be more vulnerable to future physical attack.

Partner With The Survivor To Devise Legal Options That Fit Within The Broader Context Of The Survivor's Safety Plan (Including Both Short And Long Term Goals)

The process of legal strategizing with survivors must take place within the broader context of safety planning. That context is what makes legal advocacy on behalf of survivors challenging; this is certainly true for survivors who are experiencing trauma-related and/or other mental health concerns.

Functionality and the Americans with Disabilities Act

Trauma-informed legal advocacy for domestic violence survivors requires that the lawyer work with the survivor to ensure that she can participate in the process fully. The Americans with Disabilities Act (ADA) is a critical piece of federal legislation that can assist survivors in accessing full participation.⁸

The ADA entitles individuals to protections stemming from their disabilities—related both to one's physical health as well as mental health.⁹ Lawyers should think with their clients about how the ADA can assist a survivor in the course of the legal advocacy process. Clearly, just because an accommodation is available does not mean that a client will want to avail herself of the accommodation. Therefore, the lawyer and client must dialogue about

⁸ Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§12101 *et seq.* (1990).

⁹ Under the ADA, an individual with a "disability" is a person who has a physical *or mental* impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Under Title II of the Act, no qualified individual with a disability shall be unreasonably discriminated against, or excluded from participation in or benefits of the services, programs, or activities of state and local government, including the judicial branch.

the challenges she anticipates during the course of advocacy and in the courtroom and consider the risks and benefits of requesting particular accommodations.

Exploring Legal Options

Jill Davies suggests the following process to engage survivors in exploring the legal options that a survivor may have available.* Attorneys who have more recently begun working with survivors of domestic violence may especially wish to review this list.

Options—Consider the various legal remedies that are available to address the survivor’s circumstances. For example: civil protection order, custody order, criminal charges, public benefits, VAWA self-petition, etc.

Requirements - Examine whether the survivor meets the legal requirements for the remedy. Who is eligible? What does the person need to prove to be eligible?

Legal Process - Know the legal process required to access the option. Which court? What forms are required? When is the court open? Are there unique requirements established by local court or judge?

Additional Considerations—Know about other considerations. Will the legal option enhance her safety and that of her children? Could seeking this legal option make things worse for her? Does she have control over whether to initiate the court case or is the case in the hands of someone else (i.e., a prosecutor)?

Examine each of the above steps in partnership with the survivor. The answers to many of the questions will have a direct impact upon the survivor’s life and her safety plan. She will need to know about the specific practical realities so that both she and you can: identify the barriers, craft solutions that address the barriers, and determine whether the remedies can address and meet her individual risks and needs.

*Jill Davies, *An Approach to Legal Advocacy with Individual Battered Women* (2003).

Examining Accommodation Strategies

Engage in a nuanced conversation with your client about how her ability to function will come into play during a courtroom proceeding. The key question is: *does your client feel that she can participate in the litigation process?*

The answer to this question will depend greatly upon the challenges that your client anticipates and the types of accommodation strategies you and she develop together to address those challenges. The following are some ideas to consider:

- ◆ Practice direct and cross-examination of your client to help her feel more comfortable with the process.
- ◆ Bring a support person to the hearing or trial (family member, friend, therapist, advocate, etc.).
- ◆ If your client begins to dissociate or to look like she's shutting down, request a recess from the court.
- ◆ If you do take a recess, work with your client to explain what happened and re-orient her to where she is.
- ◆ If your client is unable to recover that day, connect her with a mental health practitioner who can help her to re-enter the courtroom space with less trauma and equip her with strategies to help her get through her testimony and fully participate in the process to the best of her ability.

Attorney Self-Assessment

All lawyers doing this work should partake in an honest self-assessment to determine whether they are prepared and able to address the particular needs of a survivor facing trauma and mental health challenges. It may be helpful to ask yourself the following questions:

- ◆ Do I have the desire, patience, temperament needed to advocate for survivors who are struggling with trauma and mental health challenges?
- ◆ Do I have the skills needed to support survivors when they find themselves triggered by the legal advocacy process?
- ◆ If I don't personally possess all of those skills, who can I collaborate with to ensure that my client is getting the accommodations and support that she needs to fully participate in the process?

When Your Client is Unable to Testify

Under some circumstances, courts may consider a person to be "unable to testify" under the rules of evidence, and therefore entitled to an out-of-court deposition. Such a deposition allows a witness to contribute her testimony while avoiding the trauma of testifying in the courtroom. It is generally permissible provided the testimony meets the

other applicable rules of evidence. 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.

Assessing the Risks and Benefits of Accommodations

Lawyers will want to discuss with survivors the pros and cons of requesting accommodations. At the very least, a request for accommodations requires that the litigant disclose her disability.

Pros of Requesting Accommodations:

- ◆ If your client anticipates that mental health will be raised during the course of the trial, disclosure may carry little risk.
- ◆ Accommodations may help your client to participate more fully in the proceedings by reducing the potential negative impacts of participation (e.g., triggering of the effects of trauma).

Cons:

- ◆ If mental health is unlikely to be raised otherwise, the risk of stigma or unwarranted prejudice may be greater.
- ◆ Disclosure may result in mental health or trauma being raised as a substantive issue by the opposing party.
- ◆ In a custody case, this additional attention drawn to the mental health of your client may influence the weight given to this factor in the best interest consideration.

The calculus has real implications for your client and the way that she will experience the legal process. Therefore, she must be involved in analyzing and ultimately making this important decision.

Collaborating with Trauma- And Domestic Violence-Informed Mental Health Professionals to Address The Survivor's Range Of Legal And Mental Health Needs

Even the most seasoned domestic violence lawyers cannot know all there is to know about mental health issues facing survivors. Nor can attorneys take on the role of mental health professionals. For these reasons, it is critical to develop relationships with qualified mental health providers. Note that it will be important, prior to taking on any one case, to identify individual mental health practitioners who understand the political and individual context of coercive control and have expertise in trauma-related mental health conditions. During the course of your representation, you may consult with this mental health provider in crafting safety plans, in identifying remedies, and, when needed, to serve as an expert

witness. As with all collaborations that an advocate builds, you must obtain the informed consent of the survivor prior to sharing any information with the mental health provider. Be sure to be specific with your client about the scope, content, and time frame of the consent she is providing.

Encouraging Survivor-Driven Decision-Making

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think their attorneys want. As the attorney of a survivor living with trauma, you may experience this in several ways. Your client may ask you directly, “What do you think I should do?” or, from your conversation, she may intuitively pick-up on what she *thinks* that you want her to do.

As a result, you may think the survivor is making a decision for herself, when in fact she is trying to do what she thinks you want her to do. This is a problem that many lawyers (and other “helping professionals”) face. We are often asked what we think the client should do. We believe it is our job to answer this question. However, it is critical that we resist the temptation to tell our clients what to do. Knowing the law is not enough. You do not know the survivor’s life circumstances well enough to make this judgment. Even you did, it is the survivor who will have to live with the consequences of the decision. Lacking such context, you may suggest something that is not safe for the survivor. Or the survivor may not be able, for other reasons, to take the steps that you are recommending; she may then lose trust in you. Indeed, she may stop working with you altogether, without explanation.

In any of these situations: If a survivor is trying to accommodate what you have suggested without thinking through how it impacts her own circumstances, then she is not determining the course of her legal advocacy.

To avoid this, and to promote her active decision-making, you might try the following:

- ◆ Do not present legal options until you have had time to gather a contextual understanding of your client’s life circumstances and the abuse she has experienced.
- ◆ Make sure that you thoroughly discuss the choices. Do not move forward based upon a simple yes or a nod.
- ◆ When you present an option, engage your client in analyzing both the risks and the benefits, based on her individual life circumstances, as she anticipates them. You might ask:
 - ❖ If you were to do X, what about it might cause you to worry? What negative consequences can you foresee? What are the possible benefits?

- ◆ Once you have identified specific risks related to particular legal strategies, work closely with the survivor to create options that mitigate the risks she has identified. Then, engage her in considering the risks and benefits of those solutions.
- ◆ Give the survivor time outside of your meeting to make decisions, so that she can consider the options with the support of her family, friends, or an advocate.

Section Three: Discovery and Evidence

This section discusses important considerations related to mental health records and testimony on civil legal cases involving issues of domestic violence. It examines the implications of mental health treatment, the importance of conducting a risk assessment with your client about the disclosure of mental health information, and the development of strategies to respond to attempts by the opposing party to obtain and introduce mental health information about a client. Attorneys should consider the factors and strategies discussed below in light of the survivor's expressed needs and desired outcomes, the facts and circumstances of the case, and the culture of the court. The use of experts is covered in Section 6: Selecting and Preparing Expert Witnesses.

Consider the Implications of Mental Health Treatment on a Case

During your initial interview(s) with your client, you likely learned whether she has sought or is currently seeking treatment from a mental health care provider. The opposing party may try to seek release of information related to mental health treatment to impeach her credibility, and to demonstrate that she is emotionally or mentally unstable and therefore an unfit parent. Societal stigma related to mental health diagnoses and symptoms can carry significant weight in a case. Mental health may also be considered as a factor in the determination of the best interest of a child as part of a custody case.¹⁰ If your client has ever received mental health services, you will need to work closely with her to consider the implications of the release of her mental health-related information and develop strategies to combat attempts by the opposing party to use it to damage your client's case.

In order to do this in a manner that continues to build trust and further solidify the partnership you are creating with your client, you will have to initiate and proceed with this conversation in a delicate manner. Remember that the stigma and shame of mental health-related conditions are often internalized. In your discussions about these issues, try to avoid feeding into that shame and stigma.

For example, you could say, *"I understand that you have been proactive in taking care of yourself and making sure you can be an even better parent for your child(ren). I admire your fortitude and courage in doing this work on your mental health concerns. Unfortunately, the other side may try to use your efforts to show that there is something wrong with you and that you are an unfit mother. So, let's talk about how we might address that possibility. First, do they know about your mental health concerns and your efforts to address them? Second,*

¹⁰ 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.

how do you feel about bringing it up before they do? Third, can we involve your therapist in our case as a witness on your behalf?

Taking this strength-based approach will help your client to see her efforts in a positive manner. If you continue to talk about it with her in this way you will reinforce what her therapist has likely also brought to her attention: that her foresight in dealing with these concerns is very positive and will help her to be the best parent she can be. Doing this will help her to respond better to the opposing party's efforts to attack her with information about her mental health challenges or treatment that she has sought.

Conduct a Risk Analysis with Your Client About Disclosure of Mental Health Information

If you or your client believe that your client's mental health will be a factor that will affect the case outcome, you will need to conduct a risk analysis related to mental health-related evidence.

A risk analysis considers:

- ◆ What evidence will potentially be available;
- ◆ How difficult or easy it will be for the opposing party to obtain it;
- ◆ What information it will contain;
- ◆ Whether it will be damaging and, if so:
 - ❖ To what degree;
 - ❖ What would the consequences be of the introduction of such evidence; and
 - ❖ Would introducing it affirmatively bolster the case and mitigate its harmful effects.

Conducting a risk analysis will help to prepare you and your client for the possibility that documentary and/or testimonial evidence of mental health challenges will be utilized by the opposing party. It will also help you to develop and implement a strategy to defeat the effect intended by the opposing party.

Affirmative release of mental health information

Potential Benefits:

Some attorneys believe that pre-emptive release of information about a client's mental health and providing up-front explanations about it can be beneficial to a case. This approach can be useful in certain circumstances. It can send a message to the court and the opposing party that you and your client are not concerned about your client's mental health and that you do not consider it to be damaging. For example, you may decide to

introduce direct testimony from a mental health provider who has treated your client in which she states that your client is completely functional; that she is a responsible and competent parent, employee, and member of the community; and that the trauma and/or mental health symptoms that she sometimes experiences do not negatively impact her life (or the lives of her children, in a custody or visitation case). This can work to the advantage of your client and can *normalize* the fact that your client lives with mental health challenges.

Potential Risks:

However, entering mental health records and other information or introducing mental health professionals' testimony, can result in unintended harmful consequences once they are in the hands of the opposing party. There may be information in mental health records, for example, that did not appear to be damaging when you examined it, but that is used to demonstrate that your client lacks credibility or has demonstrated poor parenting skills.

Analyzing Whether to Preemptively Disclose:

If, after you conduct a risk assessment, you determine that it is likely that the opposing party already has or will obtain potentially harmful information about your client's mental health, you will need to discuss with your client whether it is more likely than not that preemptively disclosing it would support your case, or whether it would have negative consequences for the desired case outcome, your client's life goals, the safety of your client or family members, her economic status, or her privacy.¹¹ Additionally, releasing mental health information about your client – if it has not already been raised by the opposing party – could possibly elevate your client's mental health to a central focus of the case rather than keeping it on the violence that the opposing party perpetrated.

As a first step, after consulting with your client about proceeding with the case, and with the permission of your client, it is important to obtain and examine your client's mental health records and assess them for aspects that may be helpful or harmful to the case. Factors in this decision will likely include: the type of case on which you are representing your client, the case timeline, the relative ease or difficulty of obtaining records, and cost. Conducting a risk analysis will help you to make a decision about and aid in the development of your overall case strategy with regard to mental health.

¹¹ Office on Violence Against Women grantees and subgrantees receiving Violence Against Women Act funds must protect the confidentiality and privacy of persons receiving services to ensure their safety and their families' safety. Check with your OVW program manager about the confidentiality requirements with which you/your agency may be required to comply.

Consider:

(1) **Types of evidence** that may be available about your client's mental health such as:

- ◆ Insurance records that include diagnoses and services provided, and medications prescribed to alleviate symptoms.
- ◆ Mental health treatment provider files including examination or assessment results, diagnoses, and clinician notes.
- ◆ File notes kept by victim service providers including domestic violence programs or organizations providing more general services to victims of crime.
- ◆ Children's school records.
- ◆ Testimony of your client's mental health provider(s) related to mental health diagnosis, symptoms, treatment, and concerns.

Discussing Evidence with Your Client

It is important to discuss the risks and the types of evidence with your client in a non-judgmental fashion. People living with mental health challenges are often encouraged to seek support from friends and family in addressing these issues. Talking about their diagnoses can help normalize the condition for the survivor and lead to acceptance. This is critical for healing. The manner in which you discuss these points will affect how they feel about their actions. Recognizing that a survivor was proactive in seeking help and support for mental health concerns is an important message to convey. The more you do this, the more a survivor will believe you and believe in themselves. It also further strengthens your partnership and trust.

(2) **Statutory confidentiality and privilege provisions** that may apply, such as:

- ◆ 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.
- ◆ What your state's code requires for mental health records to be released as part of a civil legal case or child protective services administrative proceedings. Does the statute provide standards for release that are relatively difficult or easy to meet?
- ◆ Does your state code explicitly provide for a psychotherapist-patient or a counselor-client privilege? Who qualifies under the privilege? What are the exceptions?
- ◆ What do the rules of evidence say about release of information?

Applicable exemptions or exceptions related to statutory confidentiality and privilege statutes, which would allow disclosure or release of information to particular individuals or under certain circumstances such as:

- ◆ Family members or others who are participating in the diagnosis or treatment. If so, what information may have already been made available to them related to diagnoses, treatment goals, and medications?
- ◆ Hospitalization proceedings.
- ◆ Any breach of duty by the psychotherapist or the patient.
- ◆ When the mental state of a client is an element of a claim or a defense.
- ◆ Child custody cases when the mental state of a party is an issue and resolution of the issue requires disclosure.
- ◆ Counselors whose duties and role do not strictly meet the definition of counselor included in the statute.
- ◆ Suspected child abuse or neglect.
- ◆ Past civil or criminal proceedings in which the judge ordered a mental health assessment or examination, or which were required as part of a child protective services case.
- ◆ Collection proceedings for unpaid mental health services.

(4) Whether any of your client's **mental health information has previously been released** as part of another legal case or administrative proceedings, whether they are now considered part of the public record, and whether they can be accessed at the court that had jurisdiction over the case or elsewhere.

(5) Whether your client has signed any **blanket or limited releases** allowing a psychotherapist, counselor, or advocate to disclose information about her mental health or services provided, the information that may be released, and the circumstances under which information may be disclosed.

(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).

(7) Whether your client's mental health treatment was ever covered by a **health insurance policy provided** by the opposing party's employer or which was privately purchased by the opposing party.

Developing Strategies Related to the Disclosure of Mental Health Information

If you believe that written records or the testimony of a mental health care provider or others will be available to the opposing party and you wish to prevent the opposing party from admitting them into evidence, you should discuss what actions you will take to prevent their inclusion and what your response will be if they are admitted. You will need to consider the culture of the court and the facts and circumstances of the case in determining whether to object to introduction of mental health evidence, and at what point in the case (i.e., pre-trial or during a hearing or trial).

You will need to prepare for the following possible circumstances:

- ◆ Attempts by the opposing party to obtain information about your client's mental health status or treatment – either informally (e.g., attempting to learn information about your client on the phone or via office visits with the mental health provider) or through formal channels such as by asking the court to issue a subpoena for the provider's records, testimony, or deposition.
- ◆ Attempts by a court-assigned evaluator to contact your client's mental health provider and interview him/her about your client, or obtain records.
- ◆ Attempts by a child protective services agency to contact your client's mental health provider to learn information about your client through records, an interview, deposition, or testimony.

Possible strategies that you consider with your client may include the following:

(1) Communicate with Your Client's Mental Health Provider(s)

Talk with your client about the reasons why she may want to inform her mental health provider that she is currently or will be a party to a civil legal case involving issues of domestic violence. This includes:

- (a) **Privilege and Confidentiality:** The necessity of the mental health provider maintaining the privilege and/or confidentiality over communications and records regarding services provided to your client.

The provider may receive a subpoena for records or to appear at a deposition, hearing, or trial for the purpose of providing testimony about your client. You should request that the provider contact you immediately if the opposing party or anyone else makes any attempts to gather information about your client (whether by subpoena, phone call, email, or other means). Response to a

subpoena is generally required quickly (e.g., within ten days); the sooner you know, the more quickly you can generate a response and prevent the release of information.

- (b) Record Keeping. The provider should consider the case context when she makes future records about your client. You, your client, and the mental health provider should be aware that all information is potentially discoverable. Talk with the provider about how notes of sessions with your client could be misinterpreted or used against her in the case.
- (c) Preparation for Trial. If your client agrees, the mental health provider needs to be a part of the team that is preparing the case. The provider can contribute by helping your client to prepare documents that illustrate and demonstrate her positive attributes including her competence as a parent, her foresight in seeking and receiving mental health assistance when she needs it, and her contingency planning for the future. The provider can also help you craft arguments related to your client's mental health symptoms and how they do not impact her credibility related to the abuse or care for the child(ren).
- (d) Waiver for Communication with Provider. If your client is willing, she can sign a written waiver allowing you to communicate directly with her mental health provider. Any such waiver should be very specific in terms of the information that can be disclosed and the time period for which it is operational.

Remember that these conversations need to be handled carefully so that your client is making a decision based on what she knows and believes, not on what she thinks you want her to do. You do not want your client agreeing to something simply to accommodate you. This is very important for maintaining the trust that you have built with her. It is also critical to her continued participation in the case that she think this through thoroughly. You may suggest that she talk it over with her advocate, a close friend, or her therapist. The risk in not taking the time here is that a decision to accommodate you could potentially derail your case at the last moment if she changes her mind. This is less likely to happen if it is truly her decision.

(2) Response to Subpoena. If the opposing party obtains a subpoena for the mental health records of your client, or for the deposition or trial testimony of your client's mental health, you can prepare and file a motion to quash that argues that the subpoena should be cancelled or nullified on the grounds that:

- (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. Cite the relevant statutory authority – e.g., counselor-patient privilege, confidentiality of mental health and/or medical records – and/or case law.
- (b) *It is unduly burdensome in terms of time or cost.* For example, you could argue that traveling to or appearing at a deposition or hearing would mean that the mental health provider would have to forego client appointments and fees, and that it would be financially burdensome to be required to do so.
- (c) *The information requested is irrelevant to the case issues* because:
- (i) The mental health of your client has not been shown to be at issue in the case.
 - (ii) The information sought is too old (e.g., older than one year) to be relevant to the case.
 - (iii) The information contained in the provider’s records contains personal information that is not related to the case and could be misleading.
- (d) *Release to non-professionals of raw psychological data (e.g., from personality inventories or other instruments, notes from therapy sessions) is unethical* because of the inability of the non-professionals to correctly interpret them and, as such, it may be unduly prejudicial.
- (e) If you or your client believes that the opposing party is using this attempt to gain access to your client’s mental health records as a continuation of his pattern of power and control over your client, you can argue that, in addition to being irrelevant in the case, *the opposing party is seeking the information for the purpose of attempting to intimidate your client and continue his pattern of abuse.*

The mental health provider can also file a separate motion to quash, as well, if he/she chooses.

(3) Response to Attempts to Introduce Mental Health Information. If the opposing party is successful in obtaining mental health information about your client (or already had the information in his or her possession) and attempts to introduce it into evidence, you can file a motion *in limine* to try to keep the evidence out. A motion *in limine* is a request that the court either exclude or include evidence. It can be a powerful tool that can be used to remove support for arguments that the opposing party was planning to rely upon and to

gauge whether the court will find information about your client's mental health to be probative.

The arguments included in a motion *in limine* can include those enumerated in the section on Motions to Quash, above. Additionally, if the opposing party is attempting to introduce evidence about your client's mental health status or treatment that he obtained while they were in a relationship, or through means other than subpoena, you can include additional or alternate arguments such as:

- (a) The opposing party obtained the information improperly by manipulating the mental health provider as part of his pattern of abuse.
- (b) The opposing party obtained the information by improperly accessing your client's private records, such as by opening her mail.
- (c) But for the opposing party's abuse, your client would not have sought mental health treatment; inclusion of mental health evidence about your client would be prejudicial and unjust.

References and Additional Resources

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Section Four: Custody and Mental Health Evaluations

What is a Custody Evaluation?

A custody evaluator is generally appointed to conduct an “evaluation” of the parties and the circumstances of the case. The judge will often delineate specific questions that the evaluation should address, including what custody arrangement is in the best interests of the child. If the case includes issues of domestic violence or child abuse, the evaluator is often charged with making a determination as to whether any such abuse exists or poses a risk to the child. Custody evaluations can vary, but generally include psychological testing of both parents, interviews of collateral witnesses, interviews with the children, observations of parent/child interactions, and review of documents.

Objecting to the Use of Any Custody Evaluator

Many courts across the nation routinely order custody evaluations in every child custody case. However, custody evaluations are not warranted in many, perhaps most, cases involving domestic violence. Indeed, there is a great deal of data (both scientific and anecdotal) demonstrating that custody evaluations often result in dangerous outcomes for protective parents and their children.

Custody Evaluators and Domestic Violence

Even if an evaluator has performed numerous evaluations does not mean that she is qualified to address cases involving domestic violence. Such an evaluation requires specialized knowledge and understanding. For example, an evaluator must have an understanding of the ways in which battering impacts children and protective parents. When an evaluator lacks that qualification, he or she is likely to misinterpret information, perhaps even attributing adaptive or protective strategies to a psychopathology. For all of these reasons, attorneys may wish to consider whether to object to assignment of a custody evaluator at the start of the custody case. Factors to examine in this decisionmaking process include the culture of the particular court, the facts and circumstances of the case, and the laws of the jurisdiction.

The following may serve as the bases for an objection to an appointment of a custody evaluator:

(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.¹² The custody determination should be driven by a statutory presumption against granting custody or visitation to an abusive parent or by the court’s own determination that evidence of domestic abuse necessitates that custody be granted to the non-abusive parent. When there are no previous findings of domestic abuse or when public records do not exist, attorneys for survivors may argue that the current custody case provides a forum for each party to present evidence that enables the judge to make a finding regarding the presence of domestic abuse. This level of due process is what is required of the adversarial process. While courts may feel that additional information is necessary to inform a best-interest analysis, such information will be provided by the parties and must be subject to the rules of evidence, as required by constitutional law.

(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 evaluators. Some states have statutory provisions that state that the *effects of domestic violence cannot be used against victims in custody litigation*. Therefore, whether operating in a state that follows a best interest of the child framework or a presumption against ordering custody to an abusive parent, attorneys may invoke this statute to argue that the abusive parent cannot use the protective parent’s alleged mental health condition (caused by the abusive parent’s acts) to deprive her of custodial access.

Example: In Louisiana, the Post-Separation Family Violence Relief Act creates a rebuttable presumption against awarding sole or joint custody to perpetrators of family violence. The section that sets forth the standard for rebutting the presumption further states, “the fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody.” La. R.S. 9:364.

¹² National Council of Juvenile and Family Court Judges, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide*, at 13 (revised 2006).

Choosing an Evaluator¹³

Minimize the Risk

Once it is clear that the court will appoint an evaluator, attorneys should take steps to avoid or minimize the likelihood that an unqualified evaluator will be appointed:

You may ask the court for:

- ◆ The opportunity to submit the names of proposed evaluators;
- ◆ Time to investigate the proposed evaluator’s qualifications; and/or
- ◆ Time to submit any appropriate objections to the court.

Assess the Qualifications of a Custody Evaluator

First, determine whether your jurisdiction has guidelines for designating evaluators with particular competence in domestic violence. For example, Louisiana requires that the custody evaluator have “current and demonstrable training and experience working with perpetrators and victims.”¹⁴ Attorneys should use these legal standards to advocate for qualified custody evaluators.

The National Council on Juvenile and Family Court Judges (NCJFCJ) recommends that courts consider the following in identifying a qualified custody evaluator:¹⁵

- ◆ Whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization, and the criteria for “certification” (including whether it involved a bona fide course of study or practice);
- ◆ What courses or training (over what period of time) the evaluator has taken that focused on domestic violence;
- ◆ The number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed. *Remember, however, that such experience may simply reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise; and*
- ◆ The number of cases in which the evaluator has been qualified as an expert in domestic violence.

¹³ Much of Section Four is drawn from training materials developed by Becki Truscott Kondkar for a teleconference training hosted by the Center for Survivor Agency and Justice in 2006. For a copy of the training materials and other resources on the topic of Custody Evaluators in Domestic Violence Cases, go to: www.csaj.org.

¹⁴ La. R.S. 9:365

¹⁵ Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide, *supra*, note 11.

Oppose the Evaluator Before the Evaluation Begins

Attorneys should oppose the custody evaluator before he or she begins the evaluation. The following are grounds for opposition:

- ◆ Qualifications/experience
- ◆ Costs/fees
- ◆ Limiting the scope of the evaluation to areas appropriate for the skills and expertise held by the evaluator
- ◆ Use of unreliable, untested, or unethical evaluation practices

Psychological Testing

According to the NCJFCJ's Guide to Navigating Custody Evaluations, "psychological testing is not appropriate in domestic violence situations."¹⁶ Such testing has the potential to misdiagnose non-abusive parent's normal response to the abuse or violence as indicative of mental illness, diverting attention from the coercive behaviors of the abusive parent.¹⁷

The Guide suggests that courts consider the following relevant questions:

- ◆ What is the test being used to measure?
- ◆ How is the test relevant to issues of custody and visitation?
- ◆ Is the test valid for purposes for which it is being used?
- ◆ Is the test recognized and accepted by experts in the field?
- ◆ What are the qualifications necessary to use the instrument?
- ◆ Does the expert have those qualifications?

Relevance and Reliability of Psychological Testing

The NCJFCJ Guide emphasizes the following points with regard to the relevance and reliability of psychological testing in child custody cases:

- ◆ Research shows that "there are no psychological tests that have been validated to assess parenting directly."¹⁸
- ◆ There is no psychological test that can accurately determine whether someone is an abuser or has been abused.¹⁹
- ◆ Standard psychological tests measuring personality, psychopathology, intelligence or achievement do not address the issues most relevant to children or parents' child-rearing attitudes and capacities.²⁰

¹⁶ Id.

¹⁷ Id at 20.

¹⁸ Id.

¹⁹ Id.

²⁰ Such tests include: the Minnesota Multiphasic Personality Assessment Inventory (MMPI-2), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3).

- ◆ Standard tests may confuse symptoms resulting from domestic violence with psychopathology.²¹
- ◆ Tests intended to address trauma (e.g. Trauma Symptom Inventory (TSI)) may assist in determining treatment, but are not appropriate to determine whether a traumatic incident occurred.²²

Parental Alienation Syndrome Has Been Discredited

Parental Alienation Syndrome (PAS) has been discredited by the scientific community, and courts should not accept this testimony. Lawyers should object to the admissibility of such evidence, based on its lack of validity and reliability, as required by *Daubert* and *Frye*. The NCJFCJ Guidelines state:

Unfortunately, an all too common practice. . . is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from “parental alienation syndrome” or “PAS.” Under relevant evidentiary standards, the court should not accept this testimony.²³

Apart from the evidentiary problems it presents, PAS fails to recognize that a child’s alignment with one parent or a parent’s seemingly “alienating” behavior may in fact represent a parent’s strategies aimed at protecting children from harm posed by the battering parent. Indeed, it is for that reason that the American Psychiatric Association determined that there was not sufficient scientific evidence supporting PAS to include it in the DSM V.

How to Proceed when the Evaluator Has Been Appointed and the Evaluation Has Been Performed

Reading the Evaluation

Attorneys representing survivors in child custody cases should familiarize themselves with acceptable evaluation practices.

- ◆ Know the ethical and professional guidelines that govern custody evaluations.
- ◆ Seek professional help in reading the evaluation.
- ◆ Receive training on how to read custody evaluations

²¹ National Council of Juvenile and Family Court Judges, *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide*, (2004, Revised 2006).

²² *Id.*

²³ NCJFCJ *Guidebook* at 24.

- ◆ Conduct research for each evaluation

Consult With the Following Sources for Professional and Ethical Guidelines for Custody Evaluations

- ◆ American Professional Society on the Abuse of Children
- ◆ American Psychological Association
- ◆ National Children’s Advocacy Center
- ◆ State Licensing Board
- ◆ Statutory criteria in your state

Know the Red Flags

When reviewing a custody evaluation, be sure to look out for the following red flags:

- ◆ Dual Roles—The evaluator has acted as or suggested that he/she act as both an evaluator and as a therapist.
- ◆ Reliance on Discredited Science—The evaluator has relied upon professionals or theories that are discredited in the field.
- ◆ References to “bad science” (i.e., inappropriately applied theories and diagnoses, and problematic terms); examples include:
 - ❖ Parental alienation syndrome
 - ❖ Munchausen’s
 - ❖ Enmeshment
 - ❖ Batterer Profiles
 - ❖ Sex offender or pedophile profiles
 - ❖ False Allegations
 - ❖ False Memory Syndrome or False Memory

Conduct Discovery

Lawyers for survivors should always conduct discovery to learn more about the basis for the evaluation and the evaluator. Discovery should inquire about:

- ◆ Training, qualifications, and experience of the evaluator.
- ◆ Testing procedures used in the evaluation. You should ask the following questions:
 - ❖ What protocols were followed in conducting the evaluation?
 - ❖ Where can those protocols be found in the professional literature?
 - ❖ What was the purpose of the evaluation?
 - ❖ What were the specific inquiries?
 - ❖ What was the purported purpose of the various tests administered?
 - ❖ Is that testing designed to specifically ascertain the information sought?

- ❖ What testing procedures were used?
- ❖ What are the qualifications of anyone else involved in administering the testing?

Sources of Information

Whenever possible, custody evaluators should base their evaluations not only on interviews with the parties, but also on corroborating sources of information. There are many reasons for this: the abusive partner may deny their use of violence and coercive control, and their assessment of their partner's parenting may be a reflection of their abusive criticism and/or manipulation; the survivor may present as emotionally unstable, when in fact their behavior is a result of their partner's abuse and/or the survivor is triggered; and a child may identify with the abusive parent out of self-protection.

Collateral sources may include:

- ◆ Other family members, friends, neighbors, co-workers of the abused parent, and former partners;
- ◆ Doctors, clergy, teachers, and counselors; and/or
- ◆ Domestic violence advocates and professionals who have become involved with the family due to the abuse.

Pertinent records may include:

- ◆ Police reports;
- ◆ Child protection reports;
- ◆ Court files in the present case and prior cases;
- ◆ Medical, mental health and dental records; and/or
- ◆ School records.

File a Motion in Limine

If your review of the evaluation and the evaluator yield troublesome findings, you may wish to file a *motion in limine* to exclude the evaluator's report, opinions, or testimony.

- ◆ If it appears that the evaluator has used "junk science" such as PAS, you should move to exclude the evaluator's report and testimony.
- ◆ Determine the evidentiary standard governing admissibility of scientific evidence in your jurisdiction. Most states follow some version of the *Daubert*²⁴ or *Frye*²⁵ standards.²⁶

²⁴ *Daubert v. Merrell Down Pharmaceuticals*, 509 U.S. 579 (1993).

²⁵ *Frye v. U.S.* 293 F. 1013 (D.C. Cir. 1923).

²⁶ See Jennifer Hault, The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy, *Children's Legal Rights Journal*, 26(1) (Spring 2006)(analyzing PAS admissibility under Frye, Daubert, Kumho Tire, and Federal Rule of Evidence 702).

- ❖ *Daubert*/Federal Rule 702 standard: Reliable Principles and Methods
- ❖ *Frye* Standard: General Acceptance Test
- ❖ Note: “Any testimony that a party to a custody case suffers from PAS should be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.”

Discrediting/Impeaching an Incompetent Evaluator

When a motion *in limine* is not successful, you will want to use your cross-examination of the custody evaluator to discredit or impeach him or her. Tips include:

- ◆ Retain an expert of your own, and
- ◆ Impeach the evaluator by using authoritative professional literature (including, where possible, publications by organizations to which the evaluator belongs).

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. Although some state statutes say that a request for child custody puts mental health at issue, it is the exception. Therefore, it is critical that attorneys for survivors in custody cases review their statutes. Remember: just because it is a custody case, does not necessarily mean the batterer or the court have the right to have your client’s mental health evaluated. That said, you will want to consider whether to object to a mental health evaluation, based on the court and the particular facts of your case. Once a mental health evaluation enters into evidence, your job will be to analyze and formulate arguments regarding its relevance to the legal issues at hand.

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Violence and the Family: Report of the American Psychological Association's Presidential Task Force on Violence and the Family (1996).

www.leadershipcouncil.org (web site for the Leadership Council on Child Abuse and Interpersonal Violence, a non-profit organization that promotes the responsible use of science. This site provides a tremendous amount of citations to resources).

Section Five: Deciding Which Course to Take and Preparing Your Client for Mediation/Negotiation or Trial

As with all legal cases, those involving domestic violence and trauma require that you and your client weigh the pros and cons of mediation, negotiation, and pursuing a case in court. As an attorney, you consider the law, the court, the facts, and the risks of losing. Your client considers the risks that each of the proceedings could potentially present to her physical and mental health. Together, you and your client develop options that address the risks and optimize the chances of meeting her particular goals – both legal and otherwise. The survivor decides upon whether to pursue negotiation or trial, based upon all of the strategies that you and she have developed.

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. Lawyers for survivors must know more than just the legal remedies available. They must understand the legal requirements and the process for accessing the option. The legal process itself is often just as, and often more, important to a survivor's sense of safety and autonomy. For example, if a survivor feels that the courtroom will expose her to triggers, she may decide that the risks that trial presents to her mental health outweigh the potential legal benefits.

The following are common processes that are important to consider:

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. If there is an exception and your client wishes to avail herself of that exception, submit a motion or be prepared to articulate to the court why mediation is not appropriate in your client's case. You will need to prepare your client if mediation is required and/or if she wishes to pursue mediation. This is especially true in cases involving domestic violence and cases where a survivor has mental health concerns that could be exacerbated. See below for further discussion of how to prepare for negotiation.

Domestic violence exceptions to mandatory mediation came about for good reason. For years, advocates and lawyers have argued that the power dynamics inherent in relationships involving domestic violence make mediation ineffective and potentially dangerous for survivors. Abusers are likely to coerce and intimidate their former partners into accepting terms that they do not want and that are against their and their children's best interests. Attorneys should draw from their jurisdiction's rules and statutory provisions to illustrate the potential harm in the instant case. Despite the risks posed by mediation, some survivors, may choose this course to safeguard against the very real risks associated with trial. As an attorney, you must share the potential risks and benefits of each of these processes and discuss the implications for your client. Do not make assumptions based on generalizations about the litigation process. Rather think with your client about how the processes available are likely to play out in her life.

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. There may be a "court negotiator" who talks to each of the parties and aims to strike a negotiated order to avoid the time and expense of the courtroom. Some may engage in a "shuttle negotiation," in which the court negotiator communicates with each party separately, while others may pull each of the parties into the same room and require that the survivor and abuser be present. Be familiar with the level of involvement required. In other words, some negotiations are a mere formality—a stepping stone before trial. Other jurisdictions require a genuine attempt to settle the matter and avoid the courtroom.

Other than the process concerns, attorneys for survivors should be cognizant of the impact that negotiated orders may have on their enforceability and on subsequent legal cases. Negotiated orders are not subject to an evidentiary proceeding and are, therefore, not subject to due process requirements. As such, the remedies are not supported by factual findings and cannot be used in future proceedings. For example, in jurisdictions that grant custody based on a finding of domestic violence, a negotiated protection order will not suffice as evidence of such abuse.

Testifying at Trial

While the outcome of a trial may be positive, the process may pose risks to the survivor that preclude it as a possibility altogether. This is particularly true for survivors who are experiencing trauma and other mental health challenges. Trials are inherently adversarial in nature. Indeed, the entire process is built upon each side's zealous case presentation. The trial process is likely to present challenges for your client. A range of strategies is discussed later in this section. 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. For example, Ohio has enacted a provision that allows victims of sexual crimes, abuse, or neglect, or who have mental disabilities, to avoid the trauma of appearing in court by allowing them to be deposed out-of-court. These depositions may be introduced in court provided they meet the ordinary rules of evidence.

Consider the Risks and Benefits Depending Upon What the Survivor Wants and What She Knows About the Batterer and Herself

In cases where mediation/negotiation is not required, there are a number of factors to take into consideration to determine which route to take. For example:

- ◆ Is the survivor going to be at greater risk of harm from the abuser if you take this case to court?
- ◆ Is negotiating a settlement or is having a mediated resolution a safer course of action for the survivor and her child(ren)?
- ◆ Do the mediators have any expertise in domestic violence?
- ◆ Would a court proceeding be in the best interest of the child(ren)?

As you think about all these factors you want to also consider how a negotiation would impact the survivor's mental health concerns versus a court proceeding.

If you have noticed the symptoms of trauma, as discussed in Section Six (Selecting, Preparing and Challenging Experts) and you have discussed it with the survivor, her response should be a significant factor in your decision-making process.

For example, if she is aware of her symptoms but does not want her diagnosis disclosed, a trial could jeopardize her ability to keep that information from the opposing party.

If she is aware of her symptoms without any diagnosis, the opposing attorney may also capitalize on her symptoms to discredit her. He can use the symptoms that may come up – a deep, blank stare or an absent look, lack of coherent memory, flat demeanor and/or an overreaction to a comment, gesture, look, or smell – to discredit her. A judge or jury may be persuaded to think that the survivor is unstable, untruthful, or an unfit mother.

The risks to the survivor increase if she is unaware of her symptoms and has no diagnosis. It is possible that if you have noticed these symptoms, the opposing party has, as well. They may be planning to use them to portray the survivor as “crazy,” and a trial could entail a psychological evaluation. This creates unpredictability for the survivor and for your case, depending on who is selected to conduct the evaluation, and how the evaluation is conducted. Oftentimes, symptoms of trauma and dissociation are not recognized as such

and survivors are misdiagnosed as having other, more stigmatized mental health conditions. While it may be easier to link the experience of abuse to diagnoses commonly associated with trauma (e.g., PTSD and other anxiety disorders, dissociative disorders, and depression) other mental health conditions can also be exacerbated by domestic violence and this should be made clear, as well.

If she is aware of her symptoms and is comfortable with disclosure, then you should prepare for how to address any mental health issues that may be raised at trial. You can have an expert normalize her symptoms as those of trauma and common coping mechanisms for the violence that she has suffered. In that case, what you can then focus on is preparing the survivor for trial and how to best manage what could happen so that you know how to help her to stay involved, engaged, and emotionally and physically safe.

Considering Negotiation

Negotiation may not be better for the survivor. Being in an intimate setting with the opposing party, the person who has abused her, may feel threatening and may be “triggering” for the survivor. It is something you will need to consider as you work with the survivor and contemplate whether to pursue negotiation or trial. The negotiation environment, or anticipation of it, could elicit trauma-related responses including dissociation, flashbacks, panic attacks, and/or depression. It could precipitate a mental health crisis or could exacerbate other mental health symptoms. Your client’s response may appear to be an overreaction to a seemingly normal situation, but it is deeply rooted in the trauma caused by the abuse.

As you proceed, discuss the possible risks of negotiation carefully with the survivor. Once you have provided her with information about the negotiation process, partner with her to identify the risks and benefits. Explore the requirements of the jurisdiction you are in around mediation/negotiation and how they look and feel. Respectfully discuss with her the potential risks to her physically, to her case, and to her emotional and mental well-being. Strategize with her what is required and what may be waived, modified, or avoided. Figure out together what might be the best course of action given her situation. Come up with a plan with her as to how she might best proceed. Then, prepare your client for what you cannot control. Discuss with her what may arise during either process, the impact of mental health evidence on the case, the legal structure in your jurisdiction and whether there are exceptions to mediation/negotiation requirements. Examine the different types of negotiation and what may work best.

Preparing Your Client for Court

Once the survivor decides to pursue trial, you then need to prepare her for what to expect. When a survivor has mental health concerns, you may want to discuss the impact the court proceedings may have on her mental health.

Introduce the Court Process

Walk the survivor through each step of the court proceeding and help her to think about her possible reactions.

- ◆ If feasible, meet at the court where the case will be held. With each step, be sure to explain the things that could happen. There is a balance here of giving her enough information to help her know what to expect and giving her too much information, which could possibly overwhelm her.
- ◆ Let her guide you. Check in as you discuss each stage of the process and ask how certain things make her feel, whether she has concerns about the process, and whether there are strategies that you might employ to mitigate her concerns.
- ◆ Ask the survivor if she would like to have one or two supportive people at the court proceeding that can help, should she have a hard time with the process.

Attorney Tip

Some people who have experienced trauma need to know what to expect when proceeding with a totally new experience. It helps reduce anxiety and it builds trust. It is a very important step in preparing a survivor for court.

Discuss Strategies for Mental Health Symptoms in the Courtroom

If you haven't already, you should gently discuss with the survivor any symptoms that you have noticed during the course of your work together thus far. Make sure she understands that you are only sharing your observations to help the two of you strategize about the court proceedings – it is not due to a lack of confidence in her, or a lack of belief in her case. You are working with her to make sure the two of you are prepared for the court case. For example:

- ◆ If you notice that, when she recounts violent incidents that occurred, she has a flat tone and a deep, blank stare or an absent look, ask her about this. Often, this is a result of an overwhelmingly traumatic experience and the survivor has dissociated in order to cope with it. Her reporting of the experience will be from that safe distance and will lack the terror and physical pain.

- ◆ If she has noticed talk about how counsel for the opposing party may use this against her and say that she is lying, talk about how you might counter that claim.

If the survivor is aware of her affect, you can ask about it during the proceeding so that she may explain her lack of emotion to the court. If not, you may want to discuss using an expert to counter the opposing side's allegations (see Section Six: Determining Whether You Should Have an Expert Witness).

Develop Strategies to Address Your Client's Fears About the Court Process

In addition to the symptoms you have noticed, you also will want to discuss and plan for fears that the survivor may express about the court case. You should ask if the survivor has had panic attacks or if she feels intense fear when the opposing party is in the same room with her. Ask her if she has any strategies for dealing with those. If she has a clinician she sees, ask her to discuss with her therapist strategies to get her through the court proceeding and how you might be able to help.

Whether she has a mental professional helping her or not, suggestions you can offer include the following:

- ◆ Using your body to block the view to the opposing party as much as possible while she is in the courtroom, including while testifying. When you are not able to block his view she should look away from the other side, either focusing on you or a supportive person or advocate at the court.
- ◆ Asking the court for a recess when the survivor feels she needs one or when you notice some of the symptoms of trauma coming up (e.g., if she is dissociating and her responses to questions are slow and incomplete). This is usually a sign of a deeper level of dissociation usually brought on by intense fear or reliving of a particular attack or experience. Discuss whether she knows if this happens to her and how you can help.
- ◆ Once the court is adjourned, in a calm voice, ask her to take some deep breaths and ask her if she knows where she is and what day it is. This is useful for helping a survivor to ground herself in the present and bringing them out of the past. You may need to remind the survivor that she is in the courtroom, her abuser can't hurt her, the opposing attorney asked her a question intended to scare her, she got scared, she "went away," and nothing bad happened. A similar response can also help if the opposite reaction occurs and the survivor is triggered and she is crying uncontrollably or screams at the opposing party. A calm voice reminding the

survivor where she is and what just happened should help her to feel more calm and restore a sense of balance.

- ❖ Discuss this strategy with the survivor before trial. You may not be the best person to help her. Ask her if this would be helpful and if so who she would want to take her through this process. It may be better left to one of her support persons. If she asks you to conduct this exercise with her make sure you feel comfortable doing so. If you do not, it is important to let her know and tell her why. For example, if you are afraid you will not do it right and may cause her harm then it is important to tell her this. This kind of transparency builds trust. If she thinks you are the best person to do it or the only person she has, you may want to practice with her ahead of time.

You want to have extensive discussions with the survivor prior to the court proceedings to help both of you anticipate possible reactions. She is the expert on her own circumstances, so partnership is critical here. Ask her to guide you through any reaction she can think of that may happen.

Preparing your Client for Negotiations

Preparing a client for mediation or settlement negotiations follows a similar course. Walk her through the process step-by-step, so she knows what to expect. Carefully listen to any fears or concerns that she raises. Another important thing to know is that a lot of survivors will sound and talk about their experience as though it was not as bad as it was. This is again part of a coping strategy that helps the survivor deal with the high levels of fear she experienced. We don't always understand this as a coping mechanism. So listen to her concerns carefully. Do not disregard any of them because you do not hear or see a heightened concern on her part.

Discuss strategies for addressing those fears or concerns. For example:

- ◆ Shuttle Negotiation: If she wants to know if she has to be in the same room with the opposing party during the negotiation, see if shuttle negotiation is possible. The survivor may feel better being in another room with her advocate or a supportive friend or family. Arrange for this, if you can. If this is not possible, thoroughly discuss what she is afraid might happen and strategize with her about how you might help her.
- ◆ Breaks: Another strategy is to take breaks so she can get space away from the abusive partner.
- ◆ Support Person: Offer the survivor the opportunity to have her advocate or a support person present with her during negotiation.

- ◆ **Attorneys Only:** If your client wishes, see how much you can negotiate with the opposing attorney without the abuser and your client present.

The contextual, individualized strategizing described above takes time and patience. Listen carefully and respond to all of your client's concerns. This will help you to help her in the best way you can. Strategies that make her more comfortable and that mitigate the impact of the legal process on her mental health ensure more effective legal representation and better case outcomes.

Section Six: Determining Whether You Should Have an Expert Witness

In the course of representing a client who has survived domestic violence, child abuse, or other violent crimes, he or she may have trauma-related concerns requiring a specific and thoughtful strategy in court. This section will provide a number of strategies for thinking about the use of an expert. 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.

Respect Your Client's Coping Skills

Your client is using valuable coping skills in response to trauma and you should respect them as such. *Do not ever try to force your client to feel or "face" what happened to her or connect the thoughts and feelings, even though you believe that this integrity of memory and emotion may help the legal proceeding—that it will make her seem more believable or that it will make it easier for her to assist you.* This form of coping with trauma is instinctive. It is the mind's way of protecting your client from fully knowing or feeling something that may overwhelm her consciousness. If you push her, you may end up with a client who is in crisis, with a diminished capacity to participate in her case or assist you.

Outward Signs of Trauma

Signs of trauma that you may notice personally are:

- ◆ Dissociating during conversations;
- ◆ Having a dazed look or a flat demeanor when describing violent events;
- ◆ Overreacting to seemingly benign situations or events;
- ◆ Startling easily and in a manner that doesn't seem to fit the situation; and/or
- ◆ Having an unusually poor memory for certain topics.

Your client may mention to you other signs of trauma, such as difficulty concentrating, difficulty sleeping, nightmares, and having disruptive flashbacks of a painful event sometimes accompanied by a dazed look or inattentiveness. Your client might mention signs of depression such as having trouble getting up in the morning, an inability to stop crying, a lack of energy, a feeling of hopelessness, feeling sad most of the time, or having thoughts of suicide.

Strategize to Optimize Her Coping Behaviors

Instead, proceed cautiously. If you have not yet discussed the signs you have observed with your client, do so at this point. If your client is aware of these symptoms as trauma-related, it will be a straightforward conversation. If your client is not aware of how she has been affected by her traumatic experiences, do not try to push her to see this. Restrict your discussion to a strategic analysis of what you see and how her demeanor may influence court proceedings. She may have heard similar observations about herself before. In either case, discuss what you have noticed in a gentle, nonjudgmental, and matter-of-fact manner.

For example, you may gently point out that you noticed that her demeanor changed during discussions about a particular incident, describing the violent situation in a flat tone, almost as if she was talking about someone else, and developing a deep, blank stare. You can ask her if she has noticed this, as well. It is very possible that she has not given it a second thought. You can tell her you are aware that this is a common coping mechanism, and that it has probably kept her safe and calm in times of crisis. Discuss also how others may misinterpret these signs of trauma, or that the opposing party's attorney may mischaracterize her coping skills as a problem in her ability to function.

Discuss the options she has in court for addressing this. As stated in Section Two, if the opposing party is not already aware of your client's way of coping with trauma, weigh the pros and cons of disclosure. Again, proceed in a respectful manner, valuing the coping mechanism as opposed to seeing it as a problem. This will help your client to see it this way as well, which will reflect positively in her testimony. Work diligently to avoid feeding into the stigma and shame associated with many mental health concerns.

At the same time, it will be important to account for the court's negative perception of individuals facing mental health challenges. Whether or not your client identifies as someone who is living with trauma-related or other mental health effects of abuse, it can be an issue that is raised by the opposing party for the purpose of gaining advantage in a case. Disclosing that your client has mental health concerns related to the trauma she has endured may leave the judge feeling that she is incapable of caring for her child(ren). It may also have an impact on your client's ability to get or keep a job - another factor that can be used against her. You have to plan for this to come up. Make your respect for your client and her resilience clear, while at the same time acknowledging and strategizing to address the realities presented by courts and other third parties.

The strategy that you and your client develop may include bringing in an expert who is familiar with the dynamics of domestic violence in general and trauma in particular. This expert may help explain that the signs the two of you have discussed is normal for someone

who has experienced trauma. Make sure your client has a chance to think about this strategy, ask questions, and discuss it with a friend, advocate, or other support person before deciding. This ensures that she is indeed in agreement and is not just accommodating your recommendation.

Finding the Best Expert Witness

If she decides that use of an expert is a good strategy to help normalize her behavior to the court, look for a trauma expert that is familiar with the dynamics of domestic violence, specifically the power and control aspects. There are many theories explaining domestic violence: the theory of power, control, and violence as being an entitlement of gender; the cycle of violence theory; psychological theories that hold that abusers suffer from low self-esteem, rage disorders, or simply lack good communication skills. Explore the working theory of any expert you consider and make sure it reflects your theory that domestic violence is a product of power and control and gender privilege. You don't want them contradicting your theory or your case. They need to understand that their role as expert is to normalize the symptoms of and responses to trauma, and help the court understand that these symptoms do not impair your client's ability to function or care for her child. Naturally, the expert must be careful not to pathologize your client's responses.

Can Testify to the Signs of Trauma

At a minimum, your expert should be able to testify to how your client's flat affect and dazed look indicates that your client dissociated when she was attacked, if applicable. The expert could explain how the terror must have been so high that your client instinctively put the attack into her subconscious and that is why her memory is not complete. The expert may be able to infer how terrifying the situation was to your client, given the signs of trauma that she displays when asked about these incidents.

Other expert characteristics to look for include the following:

(1) Can Testify Regarding Triggering. Ideally, the expert will also be able to show how an abusive party can "trigger" your client by his mere presence. The expert may be able to describe how the abusive party knows exactly how and what to say to cause your client to react in a manner that appears "crazy." An expert can explain how a look on the other party's face—or a gesture or smell—can cause your client to re-experience a traumatic incident through a flashback and thereby appear unreasonable, irrational, and even hysterical, when in fact she is actually a calm, creative, intelligent person who has been traumatized.

(2) Can Explain Coercive Control. It is ideal to introduce the opinions of an expert that can see through what appear to be benign comments or actions that are intended to manipulate the expert or intimidate and trigger your client. This type of expert is difficult to find. You are more likely to find someone who is familiar with trauma and other mental health concerns that can explain and normalize your client's actions, demeanor, and behavior. Carefully interview experts on their view of trauma and dissociation, but also on the dynamics of domestic violence. You do not want an expert that is unable to discern tactics of power and control; someone who minimizes interpersonal violence, coercion, and intimidation; or someone who believes that the actions of an abusive party are caused by both parties ("She made him do it." "She pushes his buttons." "It's not really so bad." "She started it. "). In all likelihood, content of this nature will frame the opposing party's position. Rather, your expert should be able to articulate and reinforce your assertion that coercive control is a pattern of tactics designed to intimidate, terrorize, and maintain control over another, and that individuals who engage in coercive control should be held accountable for their abusive and violent behavior.

(3) Understands that Dissociation Arises from Traumatic Experiences. The expert's view of trauma and dissociation is important, as well. An expert who only sees trauma as Post Traumatic Stress Disorder (PTSD) may not understand the complexity of the client's dissociation. Dissociation is one component of Trauma or DESNOS (Disorders of Extreme Stress Not Otherwise Specified) as well as a central component of the Dissociative Disorders spectrum. Sometimes, a clinician may diagnose a survivor as having PTSD with multiple co-morbidities including anxiety disorders, phobias, Bipolar Disorder, Borderline Personality Disorder, or Schizophrenia to explain the symptoms that could be part of a dissociative disorder. You will want an expert that knows both trauma-related conditions and dissociative disorders and who also understands the power and control tactics of domestic violence.

Finding a Qualified Expert

In searching for a qualified expert, contact a local non-profit advocacy program that works with victims who have experienced trauma, such as a rape crisis center or a child abuse program. They tend to have a mental health approach to their programs and refer survivors for healing from the victimization that they have experienced. Local domestic violence programs and state domestic violence coalitions may have trauma experts that they can refer you to. Contacting your state's sexual assault coalition and/or state children's advocacy chapters may also be an option. You may also contact a national

resource center or referral program; there are a number of these that address trauma and dissociation.²⁷

Make sure your selection process includes a meeting between any potential expert witness and your client. Your expert should treat your client with respect – modeling the attitude you want the court to take – and also recognize the importance of gaining her trust. Speak to your client privately after the meeting to determine if she is comfortable using this expert. You will have to be careful here to not influence her decision. If this is the only expert available, your discussion with her should center on what her concerns are about the expert and whether they are so strong that she would rather proceed without one. It may be that she does not like the expert’s manner but is still willing to proceed. Make sure that you fully discuss the pros and cons of this decision and let her think about it before deciding.

After the meeting, interview the expert again. Ask her how she views your client. Questions might include:

- ◆ What symptoms did you notice?
- ◆ What do you believe is the client’s mental health concern?
- ◆ How do these symptoms arise?
- ◆ Is this normal given the situation that the client was in?
- ◆ Does her mental health concern affect her ability to parent? If so, how?
- ◆ What resilience factors did the expert identify? What protective factors?
- ◆ What does the expert believe to be the best result in this case?
- ◆ Does she consider domestic violence (including coercion and intimidation) to be influencing your client’s behavior?
- ◆ Is her response to domestic violence normal?

This discussion will let you know whether this is the expert you want to use in your client’s case. If she sees trauma and dissociation as an explanation for behavior others would see as odd, and views domestic violence as a series of tactics to gain and retain power and control over your client, then you likely have an expert with whom you can work.

²⁷ The National Center on Domestic Violence, Trauma & Mental Health provides technical assistance on the intersection of trauma and domestic violence. Go to www.nationalcenterdytraumamh.org. You can look for trauma experts through various web sites. The International Society for the Study of Trauma and Dissociation (ISSTD) has a directory of clinicians who practice in trauma and dissociation. See www.isst-d.org; Sidran Institute also maintains a list of clinicians, see www.sidran.org. See also the International Society for Traumatic Stress Studies (ISTSS) at www.istss.org.

Preparing the Expert Witness

The expert should meet with your client and her child(ren) in order to determine your client's ability to function and parent her child(ren), despite the trauma she endured. The central issue here is the well-being of the child(ren). If your client can parent well with some limitations, the expert should show the court how resilient and resourceful the client is and how she is showing her child(ren) how much she loves them. The expert should not enter into an analysis of her diagnosis outside of its relevance to her role as a parent.

Challenging the Opposing Party's Experts

You can use the same strategies in finding an expert to challenge the opposing side's witness. Is the witness an expert on trauma and dissociation? Does the expert know the meaning of a flat affect or dazed look? Is she only familiar with Post Traumatic Stress Disorder? This is only one of a number of issues that can develop when a person has been traumatized. Is your expert familiar with the concept of complex developmental trauma? Does the expert conduct clinical work? What kind of clients does the expert normally work with? If she does not routinely work with individuals experiencing trauma and dissociation, then hers may be a superficial analysis. A person who routinely works with clients experiencing trauma and dissociation is in the best position to normalize the behavior. Anyone else is likely to psychopathologize the behavior and conclude that the individual is limited. Does the expert understand both complex trauma and dissociation? Is he or she able to put trauma-related symptoms in context and recognize them as adaptations and as coping mechanisms to survive overwhelming trauma and to help the judge/jury make sense of the survivor's responses in the face of ongoing abuse? However, it is important to *not* raise this if your own witness does not meet this standard. If you do, you will impeach your own witness.

You may also challenge the expert's knowledge of interpersonal violence, and, in particular, the tools of power and control that abusers use. Be cautious here, though, if your expert is not familiar with these issues.

Section Seven: Cross-Examining the Opposing Party

In many custody and protection order cases, the opposing party will attempt to bolster his or her case and refute allegations of abuse by claiming that the survivor has mental health problems and therefore:

- (a) She cannot be believed;
- (b) She becomes out of control and violent and needs to be restrained; and/or
- (c) She is an incompetent parent.

One way that the opposing party will try to demonstrate this is through his direct testimony. Below are some examples of testimony that an abuser may proffer:

- ◆ The opposing party may claim that he has observed the survivor behaving in bizarre, unusual, or unsafe ways due to mental illness.
- ◆ The opposing party may argue that, because the survivor has been diagnosed with a particular mental health disorder, she suffers from delusions that distort her perceptions and, therefore, her claims and testimony lack credibility.
- ◆ If there is evidence of an incident in which the opposing party used force or threatened the use of force against the survivor (e.g., police reports documenting an incident of abuse or the survivor's and/or another witness's direct testimony), the opposing party may claim that he only touched her to "restrain" her because she was "out of control" (leading him to believe that she would imminently assault him), she made direct threats to harm him, or to defend himself because she used force against him. While many judges understand the concept of the primary or predominant aggressor, they may be more likely to believe that the survivor acted in a violent manner when the mental health of the survivor has been raised as an issue. Given the stigma that is associated with mental health and the myth that individuals with mental illness are more likely to be violent, this can be a convincing argument to some judges.
- ◆ The opposing party may offer information about the kinds of medications that the survivor has been prescribed or has taken.

- ◆ He may claim that your client has engaged in self-harm due to her mental health symptoms.
- ◆ The opposing party may offer details of treatment that the survivor has received, including hospitalizations, and information about communications with her mental health provider(s).
- ◆ The opposing party may claim that your client is not capable of fulfilling her parental responsibilities due to mental health symptoms.
- ◆ Apart from the affirmative opportunity to tell her own story during direct examination, you can use cross-examination to discredit the opposing party's testimony. You can also use cross-examination to support aspects of your client's case.

Cross-Examination Points to Remember

- ◆ The scope is limited to areas about which the witness testified during direct-examination and, therefore, must be relevant. The judge has the discretion to determine the subject matter boundaries.
- ◆ If the questions you wish to ask are outside of the subject matter about which the witness testified during direct examination, you can recall the witness during presentation of your client's case-in-chief and question him as a hostile witness.
- ◆ Look for answers that will support closing argument statements.
- ◆ Craft your questions so that they are narrow and leading.
- ◆ Try to limit your questions to those that require a yes or no answer and avoid open-ended responses.
- ◆ Never ask a question that you don't know the answer to already.

Listed below are some areas to consider focusing upon during cross-examination. Depending on the facts of the case, the strategy you have developed with your client, and the direct testimony of the opposing party, you may not need to cover all of the following.

(1) The opposing party's abuse of your client.

(a) He was the predominant aggressor.

For example, if the opposing party has claimed that he used force against your client only to restrain her because she was threatening him, using violence, or was out of control, you can ask questions designed to demonstrate that he was the predominant aggressor such as circumstances that triggered his violence, his mood, and her injuries versus his.

Example:

She wasn't listening to you, right?
Her comments were disrespectful?
They made you angry?

(b) His lack of fear of your client.

If he claims that he had to use force against your client because he was afraid of her violence or threats, you can ask him to verify his height and weight and your client's, you can ask questions that demonstrate that he was not afraid and did not take action to keep himself safe.

Example:

You care about your health, right?
You work out at the gym?
You encourage your wife to exercise, too?
But she rarely does?
You are a big guy?
You are 6 feet tall, correct?
You weight about 200 pounds?
Your wife is about 5 feet, four inches tall?
She weighs about 130 pounds?

(c) Prior acts of abuse.

The opposing party may have provided direct testimony that he is not a domestic abuser and that your client has perpetrated violence. He may, for example, testify that he had to restrain her because she was "out of control" due to her mental health challenges and that her claims of his abuse against her are false. If you have collateral evidence of prior abuse against your client or another individual, you can

impeach him by asking him about past abusive behavior²⁸ including civil protection orders entered against the opposing party, criminal orders, or arrests or convictions for crimes of domestic violence. If the opposing party denies any of these, you can show the opposing party documentation of the prior act(s) and ask that it be entered into evidence.

Example:

When you met my client, you were dating another woman, correct?

Ms. Palmer?

You shared an apartment?

That relationship ended in 2000?

She ended it, didn't she?

She ended it because you had been physically abusive to her, right?

Regardless of it how ended, you did engage in acts of abuse against her, right?

Isn't it true that Ms Palmer obtained a Civil Protection Order against you?

If he answers no, proceed with the following impeachment:

I would like to show the witness a document marked Exhibit A for impeachment purposes. Your Honor, may I have permission to approach the witness?

Do you recognize this document?

This is a Civil Protection Order entered by this court in the year 2000, correct?

If you look at the top of the document that says Petitioner, it lists Lisa Palmer, correct?

You understand that Petitioner means the person seeking the Civil Protection Order, right?

Under Respondent, it has your name, right?

And Respondent is the person against whom protection is sought?

Isn't it true that on June 1, 2000, the Superior Court of XY entered an Order of Protection against you?

²⁸ 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.

(2) The opposing party's manipulation of your client's mental health and exacerbation of mental health symptoms.

(a) Infliction of psychological abuse on your client.

If the opposing party testified that your client demonstrates symptoms of depression or other mental health conditions, you can ask questions designed to demonstrate that he has inflicted psychological abuse upon your client. For example, you can ask about attempts to shame, embarrass, or induce guilt in your client.

Example:

You were home on Sunday morning?
Your wife was in the kitchen, right?
She was making breakfast?
You smelled something burning?
You saw smoke coming from the frying pan?
Your wife had burnt the pancakes, right?
She wasn't paying attention?
She messes things up in the kitchen?
She doesn't know how to cook?
You told her that, right?
She doesn't know how to take care of her family?
You told her that, right?
She's a slow learner?

(b) Actions that were designed to trigger trauma and exacerbate mental health symptoms.

If the opposing party has testified about behaviors that he attributes to your client's mental health condition or diagnosis, you can ask questions that point to his manipulation of her mental health. For example, you can ask questions about how he has deprived your client of sleep, food or other basic necessities, prescription medications, or access to other treatment.

Example:

Your wife takes medications, right?
For her psychiatric condition?
You think she doesn't need the medications?
You try to help her?
You keep them in a safe place?

So that she's not tempted to take them?
She is supposed to see her psychiatrist once a month, right?
She needs you to drive her there?
Because you have the only car?
She has no other way to get there?
You took her there last year?
Two times?
She couldn't get her prescriptions refilled?
Because she needed to see her psychiatrist for that, right?

Additionally, you can ask questions designed to point to the opposing party's use of coercion, force, or other pressure on your client to use alcohol, illegal drugs, or prescription drugs that were not prescribed to her.

(c) Apparent self-harm by your client was actually perpetrated by the opposing party.
If the opposing party claims that any overdoses that your client experienced were the result of a suicide attempt, you can ask questions designed to point to the fact that your client suffered the overdose due to his use of force, coercion, duress, or fraud that compelled your client to take the drugs.

Example:

Your wife needed to get help?
She went to a psychiatrist?
The psychiatrist gave her pills?
You wanted her to feel better?
You encouraged her to take the pills?
You were standing there while she took the pills?
You got the water for her?
She took 20 of these pills?
While you were standing there?

(d) The opposing party's abuse led to or exacerbated your client's mental health symptoms.

You can ask questions designed to highlight the fact that your client did not suffer from trauma or other mental health challenges before she met and became involved with the opposing party. This goes to the fact that she developed symptoms of depression, anxiety, and/or trauma after beginning a relationship with the opposing party, and that they were natural reactions to and results of his abuse.

Example:

When you met your wife, you fell in love?

She was beautiful?

She was kind?

She was happy?

But, she has changed, hasn't she?

The changes started a couple of years ago?

She couldn't get out of bed some mornings?

She didn't go out as much?

(e) The opposing party attempted to manipulate mental health providers and your client by interfering with treatment or fabricating information designed to trigger her hospitalization.

The opposing party may have offered testimony in which he painted himself as a compassionate partner and who was concerned about the mental health of your client. You can ask questions designed to point to the opposing party's attempts to manipulate mental health providers and further his control over your client by providing false information to them.

Example:

You told the police that your wife had gone crazy, right?

That she had smashed the mirror?

That she had torn up the place?

Because she had mental health problems?

You were afraid that she was going to hurt you or the kids?

She had come after you?

You had to restrain her?

That's how she got those red marks?

You recommended that the police bring your wife to the hospital, right?

You knew they would keep her at the hospital for 36 hours, isn't that right?

Last time, the hospital held your wife for 36 hours?

(3) Your client's strength and resilience.

(a) Your client has excellent parenting skills that are not affected by any mental health challenge.

You can ask questions designed to refute any claims that the opposing party has made about your client's ability to parent the child(ren) because of her mental

health symptoms and his argument that she is not the primary caretaker. For example, you can ask leading questions that demonstrate and bolster your client's direct examination testimony that your client fulfills the majority of the parenting roles and takes care of the children/ren's physical needs (e.g., preparing meals, getting them ready for school, dropping off or picking them up at school or daycare, caring for them when they are ill, taking them to the doctor, overseeing their bedtime routine, reading to them or helping them with homework, taking them on outings, purchasing their clothing and school supplies, etc.), social-emotional needs (e.g., comforting, being affectionate, talking with the child(ren) about their day and about things that happened, discussing social expectations, etc.), and mental growth/schooling needs (e.g., answering questions about how the world works, providing help with homework, involvement with their school activities and attending parent-teacher meetings, etc.). You can ask questions designed to illustrate that your client has fulfilled these roles at times that the opposing party says that she was exhibiting mental health symptoms.

Example:

Your wife gets the kids up in the morning, right?

She makes them breakfast?

And helps them get dressed?

And makes their lunches for school?

She makes sure they brush their hair and their teeth?

She walks them to the bus stop and waits with them every morning, right?

In the afternoon she meets them at the bus stop?

And walks them home?

She helps them with their homework while she makes dinner, doesn't she?

She helps them get ready for bed and reads to them?

Etc.

(b) Your client has shown strength by seeking mental health support when necessary.

If the opposing party has testified that your client's mental health challenges prevent her from being a good parent to the child(ren), you can ask questions designed to illustrate that your client's help-seeking behavior is a strength. For example, you can ask leading questions about when your client first sought assistance from a domestic violence advocate or mental health provider.

Example:

Your wife was feeling tired?

She had trouble sleeping at night?
And she didn't know what was wrong?
She asked you to take her to the doctor?
And her doctor gave her a prescription, right?
She got the prescription filled at the pharmacy, didn't she?
She also went to see a social worker?
The social worker had been recommended by her doctor?
You didn't want her to go?
But she went anyway?

(c) Your client has anticipated times when her mental health symptoms may be exacerbated and has taken steps to ensure that her children will be cared for.

If your client has symptoms of or a diagnosis of a serious mental illness for which symptoms can recur, you can ask questions designed to draw out information about how your client has taken steps to ensure that the children are taken care of and have their needs met in the event that she becomes temporarily unavailable.

Example:

Your wife told you that if she needed to go to the hospital again, that she wanted her mother to take care of the kids, right?
She wanted to make sure that the kids would be cared for during that time?
She wanted you to take them to her mother's house?
Her mother agreed to this?
Her mother would take them to school?
And help them with their schoolwork?
And give them anything they needed?

Section Eight: Closing Argument

The closing argument is a summation of your case theory and the evidence that you have presented. Do not opt out of a closing argument, even if you think that the judge has all of the information that he or she needs to make a decision. The closing is the only opportunity you have to present your entire case theory along with the supporting evidence. In a custody case that involves allegations regarding your client's mental health, it is your final chance to articulate your legal argument regarding best interests of the child, to highlight your client's strengths, resilience, and parenting skills, and to remind the court that the opposing party has abused your client to the point of causing or exacerbating mental health symptoms. In a protection order case, you can use your closing argument to review the standard of proof, the elements of the protection order statute, and the testimony and other evidence that meet the criteria and demonstrate the need for the relief your client seeks.

Below are suggestions for closing arguments that specifically relate to cases in which the opposing party has raised the mental health of your client as a reason why her allegations of domestic violence should not be believed and/or why she the court should not award custody of the child(ren) to her. 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.

Focus on Your Client's Strengths

When seeking custody, emphasize your client's fitness and competence as a parent – reiterate her skills as primary caretaker. Highlight her resilience. Depending on the type of mental health evidence that the opposing party introduced (through testimony, experts, or mental health records), review your client's protective parenting strategies and the strengths that your client and others presented in their testimony related to any mental health challenges. This includes her help-seeking behaviors and caring for her children even while experiencing symptoms. If relevant, review the ways that she has planned for mental health contingencies, such as through the preparation of advance directives.

Review the Legal Standard Governing Custody Cases Involving Domestic Violence

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 conduct on the child and the protective parent.

Remind the Court that the Opposing Party Caused Your Client's Mental Health Challenges

If the opposing party has introduced evidence about your client's mental health in an effort to discredit her testimony or impugn her parenting abilities, highlight the expert testimony or other evidence that shows that your client's trauma and/or other mental health challenges were created or exacerbated by the opposing party's abuse. Argue that the opposing party should not gain advantage in the case due to the trauma that he caused your client. 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. Refer to any social science research that you introduced during the course of the case demonstrating that the mental health of survivors improves when the abuse ceases.

Demonstrate How Your Expert's Opinions Support a Custody Award to Your Client

Review your expert's testimony regarding your client's strengths, resilience, and protective factors, and any other evidence that normalizes your client's mental health response to living with an abuser. If the opposing party introduced evidence of your client's mental health diagnosis, refer to expert testimony clarifying that this does not negate her ability to function as a stable, competent, and loving parent. Review your expert's testimony about the spectrum of mental health challenges and your client's ability to manage any symptoms she may experience in the future. Refer to testimony that explains your client's behavior in court or any behavior that the opposing party claims is indicative of instability.

Highlight Prior Acts of Abuse

While the focus of closing should not be entirely on the opposing party, you should highlight prior acts of abuse that you introduced, including the batterer's use of power and control, rulemaking, and the ways that he has manipulated your client's mental health.

Point Out False Statements

If the opposing party presented false or misleading testimony related to your client's mental health, the abuse, or any other factor, summarize the evidence that refuted it, including testimony that the opposing party gave during cross-examination as well as that which your client offered on rebuttal.

Discredit the Custody Evaluator's Findings

If the opposing party used an expert and/or if there was a custody evaluator, point out the lack of training or expertise in domestic violence and trauma (and their intersection), and/or bias. Demonstrate gaps in the evaluator's investigation or assessment, or other problems with the evaluation process (including improper use of psychological testing and misinterpretation of statements or behaviors). If the custody evaluator has relied upon Parental Alienation Syndrome or any other questionable theory, clarify that the evaluation findings (if the recommendation is for an award of custody to the opposing party) rest upon discredited or disproven theories.

Additional Resources

Materials

Deborah Bray Haddock, MEd, MA, LP, *The Dissociative Identity Disorder Sourcebook* (McGraw-Hill 2001).

Edward W. Gondolf, *Assessing Woman Battering in Mental Health Services* (Sage Publications 1997).

<http://www.sagepub.com/books/Book6702>

Frank W. Putnam, *Dissociation in Children and Adolescents: A Developmental Perspective* (Guilford Press 1997).

From Child Sexual Abuse to Adult Sexual Risk: Trauma, Revictimization, and Intervention (Linda J. Koenig, Lynda S. Doll, Ann O'Leary and Willo Pequegnat, eds., American Psychological Association 2004).

Jill Davies, *Advocacy Beyond Leaving: Helping Battered Women in Contact with Current or Former Partners* (Family Violence Prevention Fund 2009).

http://www.vawnet.org/summary.php?doc_id=2674&find_type=web_sum_GC

Jill Davies, *An Approach to Legal Advocacy with Individual Battered Women* (Greater Hartford Legal Assistance 2003).

<http://www.csaj.org/documents/384.pdf>

Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Jill Davies, *Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors* (July 2007).

<http://www.nsvrc.org/publications/guides/helping-sexual-assault-survivors-multiple-victimizations-and-needs-guide-agencie>

Jill Davies, *Safety Planning With Battered Women* (Greater Hartford Legal Assistance 1997).

http://new.vawnet.org/Assoc_Files_VAWnet/BCS_SafePlan.pdf

The Journal of Trauma and Dissociation

<http://www.isst-d.org/jtd/journal-trauma-dissociation-index.htm>

Judith Herman, MD, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (Basic Books 1997).

Lisa A. Goodman and Deborah Epstein, *Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health and Justice* (American Psychological Association 2008).

Marlene E. Hunter, MD, *Understanding Dissociative Disorders: A Guide for Family Physicians and Health Care Professionals* (Crown House Publishing 2004).

Olga R. Trujillo, JD, *The Sum of My Parts: A Survivor's Story of Dissociative Identity Disorder* (New Harbinger Publications 2011).

Organizations and Web Sites

Center for Survivor Agency and Justice

www.csaj.org

The International Society for the Study of Trauma and Dissociation

www.isst-d.org

Judge David L. Bazelon Center for Mental Health Law

www.bazelon.org

National Center on Domestic Violence, Trauma & Mental Health

www.nationalcenterdvtraumamh.org

Sidran Institute

www.sidran.org

The Significant Other's Guide to Dissociative Identity Disorder

<http://www.op.net/~jeffv/so1.htm>

UPenn Collaborative on Community Integration

www.med.upenn.edu/psych/RRTC.html

When a Parent Has a Mental Illness: Child Custody Issues (Mental Health America)

<http://www.nmha.org/go/information/get-info/strengthening-families/when-a-parent-has-a-mental-illness-child-custody-issues>