

## What Civil Justice Practitioners Can Do To Make a Difference

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- ◆ **Increase victim access to competent counsel.** Competent representation of victims of sexual assault, dating and domestic violence, and stalking requires a shift in traditional strategy from conciliation to advocacy and from routine processing to careful preparation for litigation.
- ◆ **Design a civil legal system that is responsive to violence against women.** Ensure that each judicial district has a system for providing comprehensive legal assistance to victims of sexual assault, dating and domestic violence, and stalking.
- ◆ **Adopt custody codes that articulate “safety first” as the controlling legal principle in custody and visitation cases involving domestic or sexual violence or stalking.** Consider the welfare of the abused parent as integral to the child’s welfare, and provide victims the resources they need to safeguard children.
- ◆ **Promote the recovery and future safety of victims of sexual assault, dating and domestic violence, and stalking.** Draft new statutes and policies as needed to ensure safety and justice for victims and accountability for perpetrators.
- ◆ **Develop and implement statewide and tribal protocols for law enforcement, prosecution, courts, and state registries.** Establish standards for practice, continuing education requirements, and certification programs for all professionals who handle cases involving violence against women.
- ◆ **Consider making violation of criminal protection orders related to violence against women a crime.** Amend codes to create explicit crimes for violating criminal protection orders issued in any jurisdiction related to sexual assault, dating and domestic violence, and stalking.
- ◆ **Exempt victims of sexual assault, domestic violence, and stalking from mediation or other alternative dispute resolution processes.** Recognize that these victims may be unable to participate fully or freely in mediation.
- ◆ **Ensure that decisions reached in marital dissolution, child custody, and other family law proceedings for cases involving domestic violence or child abuse adequately safeguard victims and their children.**
- ◆ **Change statutes, processes, and policies to prevent victims from bearing the primary economic burden of male violence against women.** Review the civil legal system and the practices of insurance companies, victim compensation programs, employers, and government.
- ◆ **Be aware of the risks of mediation in cases involving domestic violence.** As a general rule, mediation is inappropriate in cases in which one party has perpetrated domestic or sexual violence against the other.

## Chapter 3

# Enhancing the Response of the Justice System: Civil Remedies

### Access to Civil Legal Remedies

During the past three decades, victims and their advocates have urged state legislatures to craft civil laws that address violence against women and offer comprehensive remedies to victims.

Law reform was designed to focus on the range of complex problems faced by many victims. Changes were made across a broad spectrum of civil law, including family law, administrative law, and laws related to privileged communications, professional responsibility, torts, injunctive relief, insurance, housing, immigration, and government benefits. Civil legal reform seeks to prevent future violence, enhance victim safety, eliminate the coercive power of perpetrators over victims, enable victims to establish lives independent of perpetrators, provide restitution for losses sustained from the violence, prevent discrimination against victims, and enhance victim access to justice.

Such reform recognizes that competent representation of victims of sexual assault, dating and domestic violence, and stalking requires more than knowledge. It requires a shift in traditional strategy from conciliation to advocacy and from routine processing to careful preparation for litigation. Civil litigation typically moves slowly. Victims of violence require immediate, and often emergency, access to courts to obtain protection and to secure economic relief for medical attention or to relocate for safety. Even if a woman is eligible for free legal assistance, long waiting lists may render that eligibility meaningless. Private attorneys who might otherwise be affordable may be beyond the reach of

many victims because of the emergency nature of their legal needs or the time involved in full litigation.

The amount and quality of reform made to the civil legal system to address violence against women have been significant. However, effective and consistent implementation of policy reforms in the law has seen less progress. Celebration of achievements must be coupled with an examination of the challenges that remain.

Outlined below are specific actions that courts, Congress and state legislatures, tribal governments, state and federal funding agencies, law schools, mentoring programs, licensure programs, and the private sector (including banks and employee assistance programs) can take to end violence against women.

### Increase Victim Access to Competent Counsel

**1. Provide adequate resources and increase access to competent counsel for sexual assault survivors, battered women, and stalking victims.**

- ◆ Provide training on topics related to violence against women (including the range of legal and social issues affecting victims of sexual assault, dating and domestic violence, and stalking) through law schools, licensure programs, continuing legal education programs, pro bono projects, and law firms. Consider including questions about domestic violence issues on the bar exam.

- ◆ Establish mentoring programs, supported by the bar, that offer expert consultation to lawyers handling civil litigation for victims of sexual assault, dating and domestic violence, and stalking.
- ◆ Allocate adequate resources to ensure that legal assistance, including representation and advocacy, is provided at no cost to indigent victims and available on a sliding scale for others.
- ◆ Designate funds to support sexual assault and domestic violence programs that assist victims seeking civil remedies.

**2. Coordinate efforts between and share resources among law firms and law schools, victim service organizations, and legal services programs to provide quality representation to victims.**

- ◆ Identify current delivery systems, assess available resources, devise referral networks for victims, and provide training for attorneys on the dynamics of violence against women.
- ◆ Provide leadership at the bar level to ensure that each judicial district has a system for providing comprehensive legal assistance to victims of sexual assault, dating and domestic violence, and stalking.
- ◆ Provide the information and support necessary to address attorneys' concerns about the complexity of some cases involving violence against women and their limitations in terms of expertise, time, or other resources to fully represent victims.
- ◆ Devise pro bono systems at state and local bar associations and law firms to help represent victims of violence. Beyond individual representation, some private firms sponsor or coordinate pro bono projects in partnership with domestic violence programs, law schools, and legal service agencies.
- ◆ Develop materials to publicize the existence of civil legal remedies for victims of sexual assault, dating and domestic violence, and stalking.
- ◆ Compile and publicize referral lists of attorneys willing and competent to take civil cases involving violence against women.

**3. Make low-interest loans available to victims seeking representation for civil claims arising from violence against women.**

- ◆ Widely publicize the availability of such loan programs through victim advocacy programs, employee assistance programs, and lawyer referral systems.

**4. Provide assistance to pro se litigants pursuing protection orders and seeking other civil law remedies.**

- ◆ Use community-based legal advocates to assist unrepresented battered women who seek protection orders and accompany them to court.

**Design a Civil Legal System Responsive to Violence Against Women**

**5. Establish systems for expedited processing of victim claims whereby women can acquire comprehensive, detailed, and readily enforceable protection orders.**

- ◆ Explore dedicated docketing and specialized courts for domestic violence cases as strategies to provide swift access and enhance the quality of judicial review.
- ◆ Establish filing and service fee waiver rules for victims of domestic violence to enable them to more readily obtain protection from the courts.

**6. Institute compliance reviews to ensure perpetrator accountability.**

- ◆ Provide tight scrutiny and close supervision to deter recidivism and improve compliance with court orders, including payment of economic awards.

**7. Educate the judiciary.**

- ◆ Provide ongoing judicial education on laws related to violence against women, including information about resources available to the courts.
- ◆ Provide ongoing judicial education through the testimony of experts and legal memoranda to help judges fully comprehend matters that may require more specialized remedies than other cases.

## Custody

In the past decade, most states have adopted statutes requiring courts to consider domestic violence as a factor in custody and visitation determinations.<sup>1</sup> More than one-half of state custody codes direct courts to consider sexual assault by one parent against the other in custody deliberations, and stalking by a parent is a factor to be considered in about one-fifth of the states.<sup>2</sup> Some custody codes create a presumption against custodial awards to an abusive parent.<sup>3</sup> Some codes preclude an award of joint custody if one parent has battered the other, and others require that a court find that a parent who is a perpetrator of domestic abuse does not pose a threat of harm to the child before awarding visitation to that parent. Other codes specify that a visitation ruling must be designed to best protect the child and the abused parent from further harm or that supervised visitation must be considered. Other statutes require courts to consider whether the batterer has participated in intervention programs designed for domestic abusers when determining if access is to be granted.<sup>4</sup>

Prior to the adoption of these provisions, custody judges routinely concluded that violence toward the other parent had nothing to do with one's ability to adequately parent, and most court decisions revealed that judges did not believe that domestic or sexual abuse of one parent by the other fundamentally compromised the interests of children. These decisions were embedded in traditional legal principles or presumptions favoring joint custody, frequent and continued contact between children and both parents, and awards to the "friendly parent." All of these principles viewed the right of a parent to access as superior to the right of a child and nonabusing parent to safety.

Over the past decade, courts have increasingly taken into account the recommendations of custody evaluators, guardians ad litem, mediators, or other conciliation professionals when making custody and access awards. Often, this process has produced highly interactive parenting plans. In cases involving domestic violence, joint custody orders

or orders requiring frequent and continued contact between the perpetrator and the victim can be very dangerous. Such custody and visitation orders inadvertently provide the perpetrator with ongoing access to the victim, which often results in further physical violence, harassment, or control.

Protection order statutes in virtually every state contain provisions for temporary custody and visitation awards that prioritize safety. Many civil protection order statutes enable parents to obtain protection orders for themselves and their children.

Notwithstanding the significant statutory reform of the past 15 years and a similar expansion of case law related to violence against women, courts remain reluctant to issue custody orders that construct clear protective provisions for abused parents and children, limit abuser access to the children, and permit abused parents to make independent decisions about child rearing. Further, courts are generally unwilling to let abused parents relocate with the children to gain safety and support. Supervised visitation programs are available in too few jurisdictions, and few of the existing programs have established procedures related to sexual assault, dating or domestic violence, or stalking.

Children experience violence in many forms. At times, it is specifically directed toward them; often, it is the violence directed by one parent against the other. Violence against women often includes violence that is physical, sexual, and economic. It can include extreme forms of physical violence such as being strangled, thrown down stairwells, or raped. It also encompasses threats that terrorize family members and pets, false imprisonment and hostage taking, and psychological abuse that belittles and demeans. It may involve obsessive scrutiny of the victim's behavior and her social contacts, or the denial of access to health care, schooling, and employment. It often involves the intentional subordination of the interests of the victim and children. It may include surveillance of the victim and children by following them and by organizing others to observe them and report back to the perpetrator. It is intentional

behavior designed to control the victim and keep her in the relationship.

The well-being of children is inextricably linked with the safety of nonabusing parents. Unless abused parents can protect themselves and their children from further abuse, nurture and guide their children, establish stable and economically secure homes, and help restore children's health and connection with a supportive community, the well-being of children is at risk.

Outlined below are specific actions that state legislatures, the bench and bar, victim advocates, and related professionals can take to end violence against women.

## **The Role of State Legislators**

**1. Adopt custody codes that articulate “safety first” as the controlling legal principle in custody and visitation cases involving sexual assault, domestic violence, or stalking.**

**2. Enact rebuttable presumptions against awards of sole or joint custody to perpetrators of sexual assault, dating and domestic violence, and stalking and in favor of abused parents in the home community or any other location.**

◆ Base presumptions on those contained in the Model Code on Domestic and Family Violence developed by the National Council of Juvenile and Family Court Judges.

**3. Adopt state codes containing provisions that the absence or relocation of a parent because of an act of domestic or sexual violence or stalking may not be a factor that weighs against the abused parent in determining custody or access.**

◆ Avoid penalizing victims for relocating to confidential locations or temporary housing where they can be protected.<sup>5</sup> Recognize that battered, sexually assaulted, and stalked victims often leave the marital or family domicile to escape the violence and gain safety.

**4. Adopt codes that approve emergency transfers of custody or changes in the status quo only when the risk posed to the child by remaining in the care of the custodial parent is significant.**

**5. Adopt codes that authorize the appointment of guardians ad litem or counsel for children in custody cases involving sexual assault, dating or domestic violence, or stalking.**

◆ Ensure that the advocate understands the risks of violence and potential remedies and is permitted to participate in custody deliberations.

◆ Permit these advocates for children to seek independent evaluation of the risks posed by the abuse.

◆ Recognize that many custody cases now proceed without counsel for either parent. Even when attorneys are retained, their clients are not the children and their professional responsibility is to represent the interests of their clients, not the children.

## **The Role of Judges and Attorneys**

**6. Make safety for both adult victims and their children a priority in custody and visitation determinations involving sexual assault, dating or domestic violence, or stalking.**

◆ Protect children from the violence of perpetrators. Recognize the fear, chaos, isolation, intimidation, psychological distress, risk of physical and sexual abuse, developmental disruptions, and exposure to criminal conduct that children experience when living in the context of sexual assault, dating and domestic violence, and stalking.<sup>6</sup>

◆ Modify awards to afford more generous access to the formerly violent and abusive parent only when safety has been restored and the abusive parent has accepted responsibility for the violence and consistently demonstrates compliance with custody orders.<sup>7</sup>

**7. Ensure that the family court bench and bar are informed about sexual assault, dating and domestic violence, and stalking.**

- ◆ Provide training on the dynamics of violence against women and its impact on adult victims and their children.

**8. Afford adult and child victims the opportunity to fully describe the violence inflicted on them and its meaning.**

- ◆ Recognize that the written report of sexual abuse, domestic violence, or stalking against parents, even a description of the child's experience in witnessing or being targeted for violence, may not convey the extent of the abuse or the risk.<sup>8</sup> Nor does a detailed description of an individual incident fully reveal the nature or lasting effects of these acts of violence.
- ◆ Recognize that without awareness of how an incident fits within patterns of violence a judge cannot identify stalking,<sup>9</sup> the risk of escalating violence, or its impact on abused adults and children.<sup>10</sup>

**9. Recognize the link between the welfare of children and the welfare of the abused parent, and, where appropriate, enhance the capacity of victims to safeguard and nurture their children.**

- ◆ Equip abused parents with the power to safeguard their children. Protect the abused parent and provide her a carefully drafted custody order and the authority to make decisions without intrusion by the perpetrator so that she can establish stability and security in the child's life.<sup>11</sup>

**10. Address the issue of whether a parent who batters, stalks, or sexually abuses another parent can be a "friendly" parent.**

- ◆ Before awarding custody or unprotected access to perpetrators of violence against women, consider the following questions:
  - ◆ Can a person be a good parent if he instills profound fear in his children—fear for themselves and fear for their mother?
  - ◆ Can a parent who engages in violent criminal behavior be a good parent?

- ◆ Can a person be a good parent if he denies his abusive behavior and blames the other parent or the children?
- ◆ Can a person who lacks the capacity to place the needs of the children above his own be a good parent?
- ◆ Can a person who jeopardizes the health and well-being of his children and their mother be a good parent?

**11. Prohibit perpetrators of incest from obtaining access to their adult victims' children by using "grandparents' rights" statutes.**

- ◆ Assist adult incest victims when the perpetrator seeks visitation with the adult victim's children.

**12. Assess whether a history of domestic violence exists in every custody case.**

- ◆ Understand that many abused women do not disclose violence experienced at the hands of their partners. They may not view themselves as battered, may believe that sexual abuse is the prerogative of men in marriage, or may not characterize surveillance by husbands as stalking.
- ◆ Even if counsel and the client decide not to raise the issue of violence in custody proceedings, counsel must keep in mind the nature and history of any violence in the relationship when assessing a client's capacity to mediate, withstand cross-examination, and resist the demands of the abuser.<sup>12</sup>

**13. Approach custody cases involving violence against women with vigorous advocacy.**

- ◆ Prepare to act as advocates for victim safety, and persuade courts to order the necessary protections. Custody practice for many family law practitioners does not typically involve litigation. Rather, it focuses primarily on negotiation of a parenting plan and division of legal responsibilities, which may fail to address safety concerns.
- ◆ Consider which custodial or visitation arrangements will best serve clients. Custody orders in cases that involve violence should be demonstrably different than those in cases in which there has been no violence.

**14. Employ experts to help the court understand the violence inflicted by perpetrators and its effects on victims and children.**

- ◆ When appropriate, prepare to provide the court with information regarding the victim's state of mind. A victim's ambivalence toward the perpetrator, her immobilization in the face of violence, any pattern of separation and reconciliation, her help-seeking behaviors, her concerns about the risk posed by the perpetrator to the children even if they have not been targeted for abuse, or her belief that the perpetrator may try to kill her or the children may all be difficult to understand absent the assistance of an expert with knowledge about violence, its risks, and its impact.
- ◆ Offer independent expert testimony about violence and its impact on adults and children when appropriate. Although custody evaluators are employed by courts to advise judges about parenting plans and custodial awards, few are experts on sexual assault, dating or domestic violence, or stalking.

**15. Try cases involving sexual assault, dating or domestic violence, or stalking to preserve a full record for appellate review.**

- ◆ Carefully assess which parent was the abuser and which the abused in cases in which perpetrators assert that the abused parent also assaulted or stalked them. Present evidence about which parent was the primary aggressor, inflicted injury, induced fear, and initiated or defended against violence.
- ◆ Provide testimony on these issues to ensure that both trial and appellate courts are able to assess risk and devise appropriate remedies.

**16. Provide abused parents access to counsel throughout custody cases, particularly in circumstances in which courts compel mediation of custody or access.**

- ◆ Actively assist and advise abused clients participating in court-ordered mediation. Mediation is generally inappropriate in domestic violence cases but may be mandated by courts.
- ◆ When appropriate, accompany abused parents to mediation and advocate for safe agreements.

If mediation reaches an impasse, seek emergency orders to protect abused parents, and counsel abused parents before they sign any proposed agreement.

- ◆ Help abused parents understand their legal rights, and increase their ability to devise custody and visitation plans that fully protect themselves and their children.

## **Civil Protection Orders**

Protection order codes were initially crafted to address domestic violence. The scope of these codes has been enlarged over the past 25 years, and now many encompass sexual violence,<sup>13</sup> stalking,<sup>14</sup> and child abuse. Most states do not offer protection to victims who do not have a preexisting relationship with the person who has sexually assaulted or stalked them.

The breadth of relief enumerated in most state codes and the Model Code on Domestic and Family Violence<sup>15</sup> is designed to curtail perpetrator access to and surveillance of victims, prevent the perpetrator from using tactics that intimidate the victim, restrain abusers from undermining the decisionmaking abilities of victims and disrupting their daily lives, accord victims and children safe shelter, provide for the economic needs of victims, compensate for the losses sustained from violence, stabilize custodial rights and responsibilities, and, foremost, protect victims and their children.<sup>16</sup> Protection orders can be powerful legal remedies for victims of sexual assault, dating or domestic violence, or stalking.<sup>17</sup>

The issuance of mutual orders of protection undermines the safeguards contemplated by civil protection order statutes and may expose the victim to elevated risk of abuse and injury. Unless a judge has ascertained that both parties have inflicted abuse and that both are likely to use violence, threats, or coercive conduct, an order should restrain or compel only the abuser.

Mutual orders imply that both petitioner and respondent pose a continuing risk of violence to



each other, and they convey a message to law enforcement that both parties are culpable for wrongdoing. When confronted with a mutual order, enforcing officers are often reluctant to assess probable cause and determine who is the primary aggressor. As a result, law enforcement officers often enforce mutual orders against both parties or refuse to enforce the orders.

The consequences of arrest for victims who have committed no violent or criminal act but who are bound by a mutual order are profound. Victims may lose their good reputation, may lose custody of children or employment, may be evicted by landlords, or may be unable to post bail.

In a protection order issued against both parties, provisions against the petitioner are not entitled to full faith and credit if no cross- or counter-petition, complaint, or other written pleading has been filed by the respondent seeking such a protection order; or if a cross- or counter-petition has been filed and the court did not specifically find that each party was entitled to such an order.<sup>18</sup> (For more information about full faith and credit, see section below, “Full Faith and Credit for Protection Orders.”)

Most state codes prescribe criminal sanctions for violations of protection orders, either as criminal contempt of court or a separate misdemeanor offense.<sup>19</sup> Repeated or multiple violations of a protection order may be charged as felonies.<sup>20</sup>

## Court Structures and Processes

Many courts have responded to the high demand for civil protection orders by establishing separate dockets and sometimes dedicated courtrooms.<sup>21</sup> Automation of court records has dramatically expanded in the past several years, as has the software that permits judges hearing protection order cases to access criminal history and criminal court databases, family law decisions, and juvenile justice records. Electronic registries of protection orders have facilitated intrastate and interstate enforcement of protection orders.<sup>22</sup>

Judges can play a significant role with protection order applicants. The very environment of the courtroom can facilitate or impede justice-seeking.<sup>23</sup>

The protection order process is generally designed to enable applicants to advise the court about the protections they need to secure safety, independence, and restoration. When judges find that abuse has occurred, most have broad discretion to issue orders tailored to the particular risks posed by the perpetrator and safety requirements of the victim. Judges also have broad latitude in designing systems to promote compliance with their orders and imposing sanctions for noncompliance, as well as modifying orders to better protect adult and child victims.<sup>24</sup>

## Advocacy

Within the past 10 years, particularly since funding was made available by the Violence Against Women Act,<sup>25</sup> the participation of domestic violence advocates in protection order proceedings has dramatically increased. This advocate participation has often led to an increase in the victim’s physical safety and moral support, as well as the issuance of detailed orders that provide all available relief.

Victim/witness specialists employed by courts and advocates employed by community-based domestic violence programs have become integral to the protection order system in many judicial districts over the past 10 years.<sup>26</sup> Victim/witness specialists are typically limited to case assistance, while advocates may work with victims on other legal or human services issues. Advocates also are charged with monitoring the legal system and seeking reforms that enhance safety, accountability, and justice. There is typically no communications privilege between the victim/witness specialists and victims, while there is often one between advocates and victims.

Outlined below are specific actions that state legislatures, the bench and bar, court administrators,



victim advocates, and related professionals can take to end violence against women.

## The Role of State Legislators

**1. Expand protection order codes to provide protection to victims of sexual assault, dating or domestic violence, or stalking who do not have a relationship with the offender.**

- ◆ Eliminate the requirement that petitioners have a preexisting relationship with the perpetrator.

**2. Review current protection order codes to assess whether additional provisions might enhance safety and justice for victims of violence against women.**

**3. Fund court services to facilitate the development of user-friendly and effective courts. Consider the following factors when setting funding levels.**

- ◆ The efficacy of protection orders, in part, depends on how quickly litigants can gain access to the courts. This access is facilitated by court staff. In some jurisdictions, state law directs court personnel to help victims complete applications and obtain proof of service of orders. In several metropolitan courts, domestic violence attorney-coordinators have been retained to coordinate services for victims and obtain protection orders.

- ◆ Safety in the courthouse is critical. To promote the safety of litigants, employees, and the general public, some courts have established secure waiting rooms and childcare facilities. Security in the courtroom has been enhanced. Escort service to public transportation or parking lots is sometimes offered.

- ◆ Interpretation for deaf and hard of hearing people and translation services for individuals not fluent in English are essential for victims to be heard and to ultimately secure adequate protection.

- ◆ Provision of certified copies of protection orders, proof of service, and confirmation of placement in the state registry is critical for enforcement. Victims and law enforcement personnel must be supplied with appropriate copies of legal paperwork.

- ◆ Enforcement mechanisms such as electronic systems for verifying that weapons have been surrendered, a feedback loop that confirms batterer participation in a batterer intervention program, mandated drug and alcohol services, or retention of a specialized probation officer to oversee compliance require funding for proper implementation.

- ◆ To expedite case processing, enhance victim safety, and promote perpetrator accountability, some judicial districts have established dedicated domestic violence courts. For these specialized courts to be the “one-stop shop” for which they are designed, supplementary resources must be allocated.<sup>27</sup>

**4. Adopt codes that waive filing and service fees for protection orders.**

- ◆ Comply with conditions of VAWA’s formula grants to states that require grantees to provide the U.S. Department of Justice with written assurances that victims are not required to pay filing, service, or any other fee related to criminal domestic violence cases or civil protection order cases.<sup>28</sup> Some states have enacted codes that simply exempt protection order applications from fees and costs. Others provide for waiving costs to victims. Several specify that fees and costs should be assigned to abusers upon the entry of a final court order.

**5. Review and clarify stalking provisions in protection order codes.**

- ◆ Protection order statutes have been amended in some states to make it explicit that victims of intimate partner stalking are entitled to relief. Victims do not have to show physical or sexual assault but must identify conduct such as surveillance, harassment, intimidating intrusion, or statements that put a victim in fear of bodily injury or create significant emotional distress to be eligible for protection. In other states, codes have been enacted that provide for antistalking orders against intimate partner stalkers.<sup>29</sup>

**6. Mandate that courts consider the safety of children of the victim in protection order proceedings.**

- ◆ Make safety for victims and their children a priority when assessing the needs of children in

the context of domestic violence. Although the traditional yardsticks for evaluating custody and access in custody cases are “the best interest of the child” and the “rights of children to access to both parents,” these measures must make safety a priority. Children exposed to domestic violence require safe, stable, and fear-free homes.

**7. Amend protection order statutes as necessary to include spousal and child support and to specify that temporary support issued in protection orders is intended to address the economic needs of victims.**

- ◆ Recognize that many battered women, sexual assault survivors, and stalking victims have suffered economic losses from the violence, such as property destruction, dissipation of assets, or personal injury. Temporary support orders in protection orders can help establish the economic bridge to safety and autonomy.
- ◆ Amend codes to approve upward departures from the guidelines based on costs of relocation, emergency services, health care, and other extraordinary expenses that violence precipitates.
- ◆ Permit judges to issue temporary support orders based on either the statutory guidelines or the requirements for establishing a separate, safe home and basic economic viability for adult and child victims.
- ◆ Charge perpetrators with the foreseeable costs of their violence.

**8. Enact confidentiality programs to protect battered, stalked, and sexually abused victims.**

- ◆ Enact programs that afford victims a confidential mailing address.<sup>30</sup> Mail is sent to a program address and then redistributed to victims.

**9. Consider adopting protection order codes that respond to the unique needs of teenage victims of sexual violence, dating and domestic violence, and stalking.**

- ◆ Ensure that such codes provide adequate protections and enforcement mechanisms when both the victim and the perpetrator attend the same school or live in the same neighborhood.

## **The Role of Judges**

**10. Craft detailed protection orders.**

- ◆ Craft orders that award the specific relief sought by the victim and outline the consequences of noncompliance.<sup>31</sup>
- ◆ Consider applications for modifications and extensions of orders in light of the continuing risks posed by perpetrators.

**11. Avoid issuing mutual protection orders.**

- ◆ Unless it is determined that both parties have inflicted abuse and that both are likely to use violence, threats, or coercive conduct, an order should restrain or compel only the abuser.
- ◆ If it is determined, after a hearing, that both parties have committed domestic abuse and both have valid petitions, enter two separate orders, one enjoining the abusive conduct by one party and the other enjoining the conduct of the second party.

**12. Include custody awards and safeguards related to access in protection orders.**

- ◆ Create legal barriers to the control strategies employed by batterers after separation.<sup>32</sup>

**13. Make provisions in protection orders for the support of abused adults and children.**

- ◆ Recognize that economic viability is often a critical factor in the decisionmaking of battered women as they plan for safety and separation from the perpetrator.<sup>33</sup> The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.<sup>34</sup>

**14. Take all appropriate action to ensure that orders will be followed.**

- ◆ Provide written and oral notice of potential state and federal penalties for violating protection orders. Advise victims of methods for enforcing orders and inform them of their right to have their orders enforced by other states, tribes, and territories.
- ◆ Provide law enforcement with specific directives in protection orders related to service, victim assistance, firearms confiscation, registries, and detention of suspected perpetrators pending arraignment for violations of orders.

- ◆ Enumerate in protection orders the conduct prohibited, such as surveillance, following, or communication through third parties. Without these details, stalking behavior is often not readily identified by police officers.
- ◆ Facilitate achieving full faith and credit by including the “identifiers” required by the Protection Order File (POF) maintained by the National Crime Information Center (NCIC) in orders.
- ◆ Enhance enforcement of firearms prohibitions by including the requisite “Brady findings” in protection orders so that orders may be recorded in the federal instant check system related to screening of potential firearms purchasers.
- ◆ Require regular reports to the court about perpetrator attendance at and completion of court-mandated batterer intervention programs, and require programs to notify court personnel immediately of any violence.<sup>35</sup>
- ◆ Convene periodic compliance hearings to assess whether perpetrators have desisted from violence and to ascertain if they have fulfilled the mandates of orders.
- ◆ Encourage compliance by placing those subject to protection orders in intensive probation services.

**15. Place hearings for violations of protection orders on accelerated enforcement dockets.**

- ◆ Promote safety, limit opportunities to intimidate and dissuade victims, and deter recidivism through prompt disposition of violations. When the violation of a protection order is charged as a misdemeanor or filed as civil or criminal contempt, the case should be set down for hearing within 10 days of charging. For felony violations, the case should be scheduled for a date no more than 60 days from the alleged violation.

**The Role of Court Administrators and Judges**

**16. Implement protection order system audits to identify strengths and weaknesses and recommend appropriate improvements.**

- ◆ Examine structures, forms, protocols and guidelines, docketing, the demeanor and practices of all court and related personnel, order production and distribution, and courtroom security to assess whether systems are user-friendly, efficient, timely, and justice-supporting.<sup>36</sup>
- ◆ Evaluate outcomes for victims and the compliance of perpetrators.

**17. Institute structures and processes that promote accountability of perpetrators and safety and justice for victims.**

- ◆ Establish protection order processes that are accessible and user-friendly, enabling pro se litigants to initiate applications and gain adequate protections.
- ◆ Consider simplified forms and instructions available in languages spoken in the jurisdiction; electronic or telephonic filing of pleadings and proofs of service; expedited and specialized dockets; hearings on the record; judicial access to police incident reports, criminal history, and other family law databases; mechanisms for maintaining confidential addresses of applicants; and accessible registries of orders to enhance access to legal remedies.
- ◆ Ensure that personnel who administer the protection order system are knowledgeable and committed to providing appropriate assistance to petitioners.<sup>37</sup>
- ◆ Institute compliance monitoring systems and/or hearings, procedures for enforcement of firearms prohibitions, guidelines for acquiring NCIC identifiers and Brady indicators, practice guides for documenting service, systems for immediate entry of orders into statewide and local law enforcement registries or databases, and mechanisms for giving victims timely notice of court proceedings, any change in status or noncompliance of perpetrators, and any supplemental orders.

**The Role of Advocates**

**18. Advance the agency of battered women, sexual assault survivors, and stalking victims.**

- ◆ Inform victims about legal rights, the need to seek counsel regarding the law, potential

remedies, and the legal process. It is unethical for advocates to substitute their judgments for those of victims.

- ◆ Encourage the ability of victims to make considered choices.
- ◆ Work with court personnel, police, and prosecutors to obtain and enforce court orders that enhance victim safety.

#### 19. Assist with enforcement of protection orders.

- ◆ Provide careful instruction on how to ensure that police have received copies of orders, that police are aware of the specific risks posed by perpetrators (e.g., suicidal ideation, use of firearms, stalking, violent criminal history), that orders are entered in state or local police registries, that officers can locate victim residences or places of employment, and that firearms have been surrendered.
- ◆ Give victims information about how to seek enforcement of their orders in other counties, states, tribes, or territories, and facilitate providing victims with notice of the status of violation hearings.
- ◆ Provide advocacy as necessary with police and prosecution agencies when perpetrators violate orders and elude accountability.

### The Role of Attorneys and State and Local Bar Associations

#### 20. Initiate pro bono services for victims seeking protection orders, particularly those cases facing contested hearings in which abusers have retained counsel.

- ◆ Devise programs providing a range of pro bono legal assistance to protection order applicants—from protection order clinics for victims, to review of pleadings, representation at contested hearings, facilitation of settlement, and advocacy for enforcement.
- ◆ Instruct and mentor other attorneys about violence against women and the available legal remedies.

#### 21. Explore methods of providing legal services to victims who require legal action beyond protection orders.

- ◆ Include family law representation as well as representation on other issues that also arise from violence, such as bankruptcy, torts, government benefits, and employment or housing discrimination.
- ◆ Develop alternative payment and delivery systems, including targeted pro bono initiatives and revolving loan funds; mentoring opportunities for young lawyers; and support for and representation in impact litigation.<sup>38</sup>

### Full Faith and Credit for Protection Orders

The Violence Against Women Act (VAWA) contains a provision known as “full faith and credit” that directs states and U.S. territories to honor valid protection orders issued by other states, tribes, and territories and treat these orders as they would their own.<sup>39</sup> Victims who must relocate for safety or who work, visit, or travel in nearby states or on Indian lands can now seek enforcement of protection orders wherever the protection may be needed. Under VAWA, law enforcement officials and prosecutors must enforce protection orders even if the order was obtained in another jurisdiction. Judges must enforce valid orders issued by their colleagues from other jurisdictions. In addition, violators of protection orders issued in other jurisdictions may be subject to prosecution under new federal crimes created by VAWA for violators and other domestic violence perpetrators whose criminal conduct involves multiple jurisdictions or who possess a firearm.<sup>40</sup>

The full faith and credit provision does not detail how jurisdictions should enforce the orders of other jurisdictions (sometimes referred to as “foreign orders”). Thus, states must create their own enforcement mechanisms to ensure that their criminal justice systems are enforcing orders from other jurisdictions. In some jurisdictions, state law hinders enforcement by requiring that victims register or file foreign orders prior to enforcement or

by notifying respondents when a foreign protection order has been registered or filed. Similarly, state foreign judgment statutes may jeopardize victim safety by requiring notice, publication, or payment of filing fees prior to enforcement of out-of-state protection orders. Delays caused by such filing requirements may allow a batterer to violate a protection order issued in another jurisdiction with impunity, while notice to the batterer reveals the location of a victim who has fled to escape abuse. Moreover, under the Violence Against Women Act of 2000, federal law prohibits registration as a prerequisite to enforcement of an order issued in another jurisdiction and prohibits notifying the batterer that an order has been registered unless requested by the victim.<sup>41</sup>

Although the full faith and credit provision was incorporated into VAWA to address the problem of the lack of enforcement of foreign orders, it is clear that intrastate enforcement is still a challenge. There are still jurisdictions in which police, prosecutors, and judges do not enforce orders issued in other counties or jurisdictions in the same state. Mechanisms are being devised at the state and local levels to achieve the goal of the federal full faith and credit provision—creating safety for victims wherever they are located.

Outlined below are specific actions that state legislatures, law enforcement personnel, the bench and bar, court administrators, state registry personnel, victim advocates, and related professionals can take to end violence against women.

## **The Role of State Legislators**

### **1. Enact legislation that enhances implementation of the full faith and credit provision of the Violence Against Women Act of 1994 (VAWA).**

- ◆ Use state legislation to clarify how prosecutors, law enforcement, probation officers, judges, clerks of court, and other relevant criminal justice personnel should treat orders issued outside of the state.
- ◆ Prohibit the assessment of fees and costs for application and service of protection orders.

### **2. Fully underwrite the costs of law enforcement registries and court databases related to violence against women.**

- ◆ Provide adequate funding to meet the technological and personnel needs of information systems so that they can document all orders issued, and enter these orders into the NCIC protection order file.
- ◆ Ensure judicial access to criminal history and status, family law dispositions, or juvenile and mental health records related to the alleged perpetrators who come before the court, and to orders issued within the judicial district and between judicial districts within a state.

### **3. Consider making violation of criminal protection orders related to violence against women a criminal act.**

- ◆ Amend codes to create explicit crimes for violating criminal protection orders related to sexual assault, dating and domestic violence, and stalking. Establish that violating any protection order is a crime whether the order was issued in that state or in another jurisdiction.

### **4. Do not require notice or filing as a prerequisite to enforcement of foreign protection orders.**

- ◆ Amend statutes as necessary to ensure that they comply with federal law by not requiring notice or filing as a prerequisite to enforcement of protection orders issued by other jurisdictions.

## **Justice System Reform**

### **5. Develop and implement statewide and tribal protocols for law enforcement, prosecution, courts, and state registries.**

- ◆ Ensure the uniform implementation of protocols designed to aid in enforcement of all protection orders.

### **6. Adopt protocols and provide ongoing training for law enforcement on how to enforce protection orders whether issued in that jurisdiction or another jurisdiction.**

- ◆ Address the following issues in protocol and training: the necessity of verifying the validity of a foreign order only if the order does not appear valid on its face; service of process; filing proofs of service; regular inclusion in incident and arrest reports of information related to

full faith and credit and potential federal crimes; routine submission of all protection orders with case files for charging review; NCIC registry and processing; notice of enforcement actions to prosecutors in issuing and enforcing jurisdictions; firearms management; requests for detention or bail conditions; and victim notification related to arrest, custodial status, conditions on release, and charges filed.

**7. Adopt protocols and provide the training necessary for prosecutors to ensure enforcement of protection orders.**

- ◆ Address the following issues in protocol and training for prosecutors: comprehensive charging of violations of protection orders and corresponding infractions of the enforcing state's criminal code; requests for pretrial detention for perpetrators crossing jurisdictional lines to commit violence against women; communication with prosecutors from issuing jurisdictions about underlying orders and preferred venue for prosecution; referral procedures to federal authorities for prosecution of protection order violations when appropriate; and the elements of case preparation for prosecution of order violations.

**8. Promulgate standardized protection order forms, and adopt rules of court to enhance enforcement of protection orders by judicial districts beyond the issuing jurisdiction.**

- ◆ Develop and implement standardized protection order forms, and require their use by all courts within the state. Use of standardized forms can ensure that the language necessary for enforcement is incorporated into all orders granted. Standardized forms also increase the likelihood of enforcement outside the issuing judicial district.<sup>42</sup>
- ◆ Promulgate rules of court to promote enforcement of protection orders issued in other judicial districts both within and outside the state or jurisdiction.

**9. Craft protection orders and instruct litigants in a manner that promotes enforceability.**

- ◆ Follow requirements of the local, state, and NCIC protection order registries when issuing orders. While uniform statewide forms should provide specific instructions regarding inclusion in registries, judicial care to complete the forms is imperative.
- ◆ Inform the parties that the order is enforceable in all jurisdictions and that violations may expose offenders to prosecution for state, tribal, and/or federal crimes.
- ◆ Enforce all provisions in the out-of-state protection order, even if the order includes a specific remedy not available in protection orders issued in the enforcing state. However, the laws of the enforcing state determine the sanctions that can be imposed.
- ◆ Develop procedures for court clerks to notify issuing courts of violations and dispositions related to foreign protection orders.

**10. Develop systems and operating procedures to enhance enforcement of all protection orders.**

- ◆ Design registries to document all orders issued (civil and criminal). Include all ex parte/temporary and final protection orders issued within the state; all orders issued by other jurisdictions but filed or registered within the state; orders issued by tribal courts located within the state (as a courtesy to and on the request of tribes). Include the judicial district and contact information for the issuing court; service status; the date of entry and expiration of the protection order; the specific relief granted; the name of the applicant and the names of all protected persons; the name, address, date of birth, Social Security number, and any other identifying characteristics of the perpetrator; the Brady record indicator; and any history of violations.
- ◆ Exclude identifying information about the protected parties from registries (e.g., addresses and other identifying or contact information). Should a registry include any of this information, institute measures to limit disclosure and maintain confidentiality.

- ◆ Establish procedures at the local level for filing protection orders issued by other jurisdictions in databases. Establish guidelines to periodically update foreign order entries to account for any modifications or terminations.

**11. In the several states in which registration of orders issued by other jurisdictions with local courts is required, adopt operating procedures to facilitate registration of foreign protection orders and ensure that such registration is not a prerequisite for enforcement.**

- ◆ Institute procedures for court clerks responsible for registering or filing orders issued by other jurisdictions. These procedures should include a waiver of filing or registration fees, a list of the documents necessary for filing/registration (e.g., certified copy of the protection order, affidavit stating the order is extant, proof of service), a rule barring notice to the abuser of the filing or registration of a protection order from another jurisdiction without the victim's consent, authority for registration without judicial review or assessment of validity, and documentation of filing of the foreign order.

## **The Role of Advocates and Attorneys**

**12. In every jurisdiction, promote the enforcement of protection orders issued by other jurisdictions.**

- ◆ Advise victims that an order must be enforced in any county, state, or U.S. territory under the full faith and credit provision of VAWA. Give victims explicit instructions, including a written information sheet, detailing how to obtain enforcement of orders locally.<sup>43</sup> Specifically, ask if the victim is planning to leave the issuing jurisdiction for any reason, including travel for work, vacation, visits with friends or family, shopping, or to escape the abuser. If the victim is likely to travel outside the jurisdiction, prepare a packet of information specific to enforcement in the foreign jurisdiction.<sup>44</sup>
- ◆ Consult with advocates and attorneys in other jurisdictions about enforcement of civil and criminal protection orders. Should counsel or advocates learn that another jurisdiction does not have procedures for enforcing orders issued by foreign jurisdictions, work with agencies or

the bar to ensure compliance with the full faith and credit provision of VAWA.

## **Alternative Dispute Resolution in Family Courts**

Alternative dispute resolution is increasingly substituted for litigation to resolve custody and other family law disputes when a negotiated settlement between the parties cannot be achieved.<sup>45</sup> Whether by statutory mandate or court rule, many courts now require family law litigants to use mediation or another conciliation process to resolve family law claims.<sup>46</sup>

A central principle of mediation is that the parties must have the capacity to mediate fairly. This means that the parties should have relatively equal power in the relationship, full information about the resources available to each person and any outstanding or future financial obligations, sufficient independent economic capacity, comparable planning and negotiation skills, a willingness to recognize the postseparation needs of the other party and any children, and the ability to protect their own interests in the process of mediation.

In many family law cases, mediation works well—for example, when the parties are in relative agreement with each other, have good conflict resolution skills, maintain equivalent power in their familial relationship, have the capacity for economic independence after divorce, and are committed to shared parenting.

Violence, coercion, and intimidation create profound power imbalances. Men who batter or sexually assault their partners do so through a variety of tactics, all designed to hold power and control over their wives or partners. Men who batter and sexually violate their partners commonly claim the right to make all the decisions for the family; they believe that they are entitled to control all aspects of family life and oversee the activities of their partners. Men who abuse their partners as a means of gaining power or control cannot “cooperate” in mediation or other conciliation processes. Nor do



they feel compelled to comply with any agreement reached between the partners.

At the same time, women who are battered may be unable to participate fully or freely in mediation. They routinely assess the risks or costs of non-compliance with their abusive partners' demands, particularly related to disclosure of abuse.<sup>47</sup> In mediation or in legal proceedings, battered women may not appear intimidated or fearful, but they may nonetheless be doing quick mental calculus to avert danger, achieve safety, and gain some authority to manage their lives. They may be weighing whether to assert their legal interests against the likelihood that doing so may compromise their safety.

Men who abuse their partners may prefer alternative dispute resolution because they feel able to determine the outcome through coercion, manipulation of mediators or other involved parties, intimidation, and even violence. The alternative process may also provide batterers with opportunities for continued contact with their victims; meanwhile, batterers may appear to be reasonable and cooperative participants to mediators untrained in matters related to violence against women.

As a general rule, when one partner perpetrates sexual or domestic violence or stalks the other, mediation is not an appropriate mechanism for resolving family law claims.<sup>48</sup> The Model Code on Domestic and Family Violence contains provisions related to mediation in the context of domestic violence. It specifies that if a protection order is in effect, courts should not order or refer the parties to mediation. Additionally, the Code provides that in cases in which there are allegations of domestic violence but no protection order in effect, the court may only order or refer the parties to mediation if several conditions are met: The victim must request the mediation, the mediation must be provided by a certified mediator who is trained in domestic and family violence and conducted in a manner that protects the safety of the victim, and the victim must be permitted to have a support person (including but not limited to an attorney or

advocate) in attendance at any mediation session.<sup>49</sup> The American Bar Association has taken this principle one step further and recommends that in any case (whether custody-, divorce-, or business-related), court-ordered mediation should include an opt-out right for any party in cases in which one party has perpetrated domestic violence against the other.

Outlined below are specific actions that state legislators, court personnel (including judges, administrators, attorneys, and paralegals), state and bar foundation funders, law school staff and administrators, victim advocates, and victim service providers can take to end violence against women.

## The Role of State Legislators

### 1. Adopt codes that exempt victims of sexual assault, domestic violence, and stalking from mediation or other alternative dispute resolution processes.

- ◆ As a general rule, an allegation of abuse occurring within the 2 years preceding the action should trigger the exemption. Alternatively, a protection order, criminal conviction, or any judicial finding related to the violence of one party against the other should be the basis for exemption.<sup>50</sup>

### 2. Require that state courts establish standards for practice, continuing education requirements, and certification programs for all mediators or alternative dispute professionals who handle cases involving domestic violence or child abuse.<sup>51</sup>

- ◆ Ensure that mediators receive instruction on issues related to violence against women, including the power imbalance between victims and perpetrators, the risks posed by intimate partner violence, and the need for continued screening and assessment of danger throughout the mediation process.
- ◆ Affirm the principle that agreements must never compromise the safety interests of victims and children.
- ◆ Ensure the availability of counsel for victims throughout the mediation process, and allow for the presence of support persons for victims at conciliation sessions.

- ◆ Ensure that victims of violence are not coerced into mediation or other conciliation processes that are unsafe, unfair, or unaccountable.

**3. Require that all mediators and court personnel who refer parties to alternative dispute resolution screen for domestic violence and child abuse.**

- ◆ Establish standards to screen parties for domestic violence, including an assessment of the danger posed by the perpetrator, as mandatory for mediators.<sup>52</sup>

**4. Consider limiting the confidentiality of alternative dispute resolution sessions when threats of bodily harm or violent conduct are made during mediation.<sup>53</sup>**

## **The Role of the Court**

**5. Devise standards to allow the practice of alternative dispute resolution according to local rules in locations where state codes do not establish standards related to domestic violence or child abuse.**

- ◆ Include guidelines that call for ongoing screening,<sup>54</sup> risk assessment, safe termination and referral back to the court; advocate and attorney participation in mediation; specialized methods for mediation in cases involving domestic violence or child abuse; the ethical responsibility to protect, warn, and provide safety to victims during mediation; parameters on confidentiality; and limitations on neutrality related to victim safety and victim safeguards in proposed agreements. Require that any agreement offered to the court include financial statements of each party and a joint stipulation of the facts relating to agreements on custody and economic matters.
- ◆ Require education of mediators about domestic violence, child abuse, the impact of violence on victims, the coercive controls exercised by perpetrators, and how to measure the capacity of victim and perpetrator to “cooperate” and reach fair and safe agreements.

**6. Provide all court personnel with training on domestic violence and the safety requirements of victims.**

- ◆ Ensure that family court judges and court personnel are knowledgeable about domestic violence and child abuse. Instruct them on relevant behaviors and impact and appropriate remedies

and safeguards in family law cases involving violence against partners or children. Inform court staff about specialized mediation practice in the context of domestic violence or child abuse.

**7. Screen for domestic and sexual violence, child abuse, and stalking, and provide notice to victims of any exemption from mediation.**

- ◆ Screen for domestic violence and child abuse to safeguard victims and ensure the appropriate interplay between the legal and the alternative dispute resolution processes.
- ◆ Alert mediators to any allegation of domestic violence or child abuse when a litigant elects mediation.

**8. Avoid ordering mediation in cases in which domestic or sexual violence, child abuse, or stalking has occurred between the parties.**

- ◆ Ensure victim input in decisions about mediation or litigation. Most state codes provide exemption or opt-out prerogatives from mediation if there is evidence of domestic or sexual violence or child abuse.

**9. Refer victims to community-based advocacy organizations for safety planning and to obtain legal counsel when considering options related to marital dissolution, child custody, and other family law proceedings.**

- ◆ Apprise victims of the importance of speaking with an advocate before making any decision about electing to participate in mediation or pursue litigation.
- ◆ Make referrals to designated victim service agencies.

**10. Recommend that unrepresented parties in family law cases consult with counsel before electing or commencing alternative dispute resolution.**

- ◆ Recommend consultation with counsel about the processes of mediation, negotiation, and litigation to help unrepresented parties evaluate their capacity to mediate.
- ◆ Encourage victims to consider both benefits and risks of mediation, as well as the sufficiency of the jurisdiction’s specialized mediation practices and victim safety measures.

**11. Scrutinize proposed agreements in cases involving domestic violence or child abuse to evaluate whether the provisions adequately safeguard victims and their children.**

- ◆ Review agreements to evaluate whether the provisions compromise the fundamental safety or economic interests of victims. When an agreement is fundamentally unfair or places a victim in jeopardy, reject the proposal.
- ◆ If the parties use a mediator who is not on the referral list and the judge concludes that an order is unfair or unsafe, advise the parties that an order will not be issued and notify the parties that the mediator may not be qualified to act as a mediator in such cases.

### **The Role of Attorneys**

**12. Participate in alternative dispute resolution sessions when it is necessary to protect the interests of abused clients and their children.**

- ◆ Actively assist and advise abused clients participating in court-ordered mediation. When appropriate, counsel should accompany abused clients to mediation and advocate for safe agreements.

**13. Seek training on domestic violence and mediation.**

- ◆ Become educated about domestic violence, its consequences and risks, and the remedies that may help victims achieve safety, as well as specialized mediation practices for cases including domestic violence and child abuse.
- ◆ Continuously reevaluate the need for a protection order during mediation because the mediation process itself can be a trigger for increasing levels of violence.

### **The Role of Victim Advocates and Service Providers**

**14. Provide services to victims of sexual assault, domestic violence, and stalking who are involved in family law disputes.**

- ◆ Provide legal advocacy to victims in protection order and criminal cases and in family law matters.

- ◆ Offer support services to victims who are engaged in mediation.

**15. Develop programs to educate court personnel, mediators, judges, and attorneys about matters related to violence against women.**

- ◆ Collaborate with local experts to develop appropriate training curriculums.

### **The Role of State and Bar Foundation Funders**

**16. Underwrite the cost of establishing systems for family law dispute resolution that safeguard victims and afford them counsel and advocacy.**

- ◆ Provide funding for the development of model mediation standards that address cases involving violence against women. Develop a training curriculum for mediators on sexual assault, dating and domestic violence, and stalking, as well as specialized mediation systems that address domestic violence.
- ◆ Underwrite the costs of technical assistance for courts, bar associations, law schools, and advocacy organizations to help them meet the needs of battered spouses or parents related to mediation and legal processes.
- ◆ Provide funding for counsel for indigent victims, mentoring programs for young attorneys, and advocacy services in family law cases regardless of the method of dispute resolution.

### **Insurance Discrimination Against Victims of Violence Against Women**

Insurance companies have discriminated against victims of domestic violence and sexual assault by denying them access to health, life, property, casualty, and disability insurance. Underwriting policies or practices throughout the industry include criteria for deciding whom to cover, what to cover, and how much to charge for the coverage that is provided. These guidelines exclude many victims of violence against women or set fee schedules that are beyond the reach of some victims. Even

those victims who obtain coverage are frequently not aware of the exclusion provisions within their policies, which are too often written in terms not understandable to nonlawyers or not disclosed by insurance agents.<sup>55</sup> Some insurance companies have stopped writing coverage for programs that provide assistance to victims. Even individuals who provide emergency housing in their own homes have been penalized because of their service to victims.<sup>56</sup>

The consequences of such discriminatory insurance practices are profound. Victims, unable to afford insurance or excluded from coverage based on their partners' violent or abusive conduct, may be unable to obtain health and counseling services. They may be unable to secure their homes to prevent violence or intrusion by perpetrators or third parties. They may be held to a higher standard when making worker compensation claims. They may be unable to afford to repair cars damaged by perpetrators; as a result, they may be unable to transport children to school or themselves to work. They may be unable to access counseling needed for themselves and their children as a result of the violence.<sup>57</sup> In the extreme, some battered and sexually assaulted women are compelled to return to living with an abuser to obtain critical health and counseling services or meet the economic needs of their children.<sup>58</sup>

Outlined below are specific actions that state legislators, state insurance department personnel, insurance providers, self-insured employers, and advocates can take to end insurance discrimination against victims of sexual assault, dating and domestic violence, and stalking.

## **The Role of State Legislators**

**1. Enact statutes based on the model laws of the National Association of Insurance Commissioners to prevent insurance discrimination against victims of sexual assault, domestic violence, and stalking in relation to health, disability, life, and property/casualty insurance.**<sup>59</sup>

**2. Authorize state insurance departments to investigate and administratively adjudicate claims of discriminatory insurance practices.**

- ◆ Provide state insurance departments authority similar to that held by state public utility commissions over utility industries.

**3. Establish an executive-level, independent office of Insurance Consumer Advocate and charge that person with the responsibility, among others, of identifying and remedying insurance practices that are discriminatory against victims of violence against women.**

**4. Enact codes to prohibit insurance practices that deny coverage to victim service agencies.**

- ◆ Prohibit the denial or cancellation of policies for crisis centers, shelters, safe homes, and counseling centers or other agencies that provide assistance to victims based on the class of clients they serve.

## **The Role of State Insurance Department Personnel**

**5. Establish policies and procedures to prevent discrimination against victims of sexual assault, dating and domestic violence, and stalking and the agencies that serve them.**

- ◆ Fully exercise fiduciary responsibilities to the public by carefully examining all claims of discrimination against victims of sexual assault, domestic violence, and stalking. Examine internal procedures for handling claims of discrimination based on victimization and evaluate issues such as access, timeliness, and outcomes. Allocate resources to expedite processing victim claims.

- ◆ Convene policymakers and representatives of the insurance industry to carefully examine the societal implications of excluding the most vulnerable of claimants from economic remedy through insurance claims.

## **The Role of Insurance Providers**

**6. Do not exclude claims related to violence against women and family members based on intentional acts of sexual assault, domestic violence, and stalking.**

- ◆ Voluntarily initiate new guidelines. Most insurance carriers exclude intentional wrongful and injurious acts from coverage in the policies they write.<sup>60</sup> In addition to exclusions for intentional conduct, many insurance policies are written to exclude coverage for sexual assault, harassment, or molestation.<sup>61</sup> Victims of sexual assault, domestic violence, and stalking are particularly vulnerable to economic dislocation arising from the intentional acts of perpetrators.
- ◆ Even if elimination of these exclusions is not feasible, narrowly drawn limitations or caps on recovery can assist victims without jeopardizing the viability of the industry.
- ◆ Do not deny claims for medically necessary services as a result of sexual assault.

7. Evaluate health care guidelines for self-insured employers and eliminate any discrimination against victims of sexual assault, dating and domestic violence, and stalking.<sup>62</sup>

## Tort Law and Practice Reform

### Costs of Violence Against Women

The financial costs of violence against women in this country have not yet been fully calculated. However, by any appraisal the costs are staggering.

Sexual assault is estimated to involve costs totaling at least \$110,000 per victim with an estimated 1.1 million victims each year.<sup>63</sup> The out-of-pocket costs for a sexual assault victim average \$5,100, and the balance is based on loss of wages, pain and suffering, and loss of quality of life. The aggregate yearly out-of-pocket costs for sexual assault victims total about \$7.5 billion, and when the intangible losses are added, the yearly cost of sexual assault reaches \$127 billion.<sup>64</sup>

The yearly medical expense for women who are victims of domestic violence is estimated to be \$61 million.<sup>65</sup> Indirect costs, such as diminished quality of life and pain and suffering, are estimated at \$65 million annually.<sup>66</sup> Lost pay and broken or stolen property total \$89 million each year.<sup>67</sup>

Batterers frequently destroy family property—battered women’s telephones, televisions, cars, house walls and furniture, birth control devices, children’s favorite toys, family heirlooms, and clothing are frequently damaged or destroyed. Abusive men often take away their partners’ earnings and incur debt in their partners’ names. Service providers for battered women report that the losses sustained through batterer property destruction and theft prior to separation may average \$10,000 per perpetrator.<sup>68</sup>

Businesses in the United States lose an estimated \$3 to \$5 billion each year in absenteeism, lower productivity, higher turnover, and health care costs due to domestic violence, according to the Bureau of National Affairs.<sup>69</sup>

The number of domestic violence victims who sustain physical injury is estimated at 2 million annually, with another 2 million subjected to non-injurious violence.<sup>70</sup> Research on the cost of violence against women indicates that the estimated totals underestimate the actual cost. Whatever the amount, it is immense and represents huge social and economic losses to society.

### Costs of Violence Prevention

The psychological scars and anguish (known as “rape trauma syndrome”) experienced by most women who are sexually assaulted can disrupt their personal and professional lives for years or even decades. Men who perpetrate violence against women, especially against those with whom they are in intimate relationships, are almost certain to repeat their violence.<sup>71</sup>

Victims of domestic violence employ numerous strategies to avert further violence and safeguard themselves and their children. These victims are best able to remain safe if they can limit or eliminate perpetrator access to them. Thus, many women relocate, establish independent households, or employ various security measures to prevent further abuse.

**Costs of relocation.** The costs of relocation for battered women and children are not currently captured in national studies. However, service providers report that relocation for women and children who are displaced by domestic violence may cost a minimum of \$5,000 per relocation.<sup>72</sup> Many battered women separate several times from batterers before they can effect a permanent separation. Survivors of sexual assault and stalking also relocate when they feel unsafe. Research is needed to precisely identify the costs of relocation.

**Costs of independent living.** The most likely predictor of whether a battered woman will permanently separate from her abuser and establish an independent household is whether she has the economic resources to survive without him.<sup>73</sup> The three critical ingredients of economic independence for battered women are income from a source other than the batterer,<sup>74</sup> adequate transportation, and sufficient childcare arrangements.<sup>75</sup> Research has found that women generally experience declines in economic well-being after divorce, while men generally experience small to substantial gains.<sup>76</sup> These findings underscore the difficulty that many women encounter in their attempts to achieve independent living after leaving an abusive partner.

**Costs of security and other safety strategies.** Victims who do not relocate or fully separate from perpetrators may invest in safety strategies. They may change or increase the number of locks on their homes or install security systems. They may alter their routines to reduce contact with the perpetrator (and any alteration may have economic implications). For example, they may change jobs or work different hours, worship in a church in a nearby community rather than the local church, shop in stores farther from home, or change babysitters.

## **Who Pays the Price of Violence Against Women?**

Victims bear the primary burden of the economic losses suffered from male violence against

women, although insurance companies, crime victim compensation programs, employers, and state and federal governments do pay significant amounts each year. Communities also pay a stunning toll. Some of the losses incurred by communities are economic, but the interruption and dislocation in women's lives affect communities more profoundly. Perpetrators often pay virtually nothing.

State codes contain a broad array of tort provisions (i.e., provisions that cover wrongful acts other than breach of contract), and each state has a different statutory configuration. Criminal conduct may give rise to tort claims. Torts based on criminal behavior include assault; battery; intentional, reckless, or negligent infliction of emotional distress; false imprisonment; rape; stalking<sup>77</sup>; transmission of sexually transmitted diseases; defamation; wrongful death; property destruction; sale or dissipation of property; fraud; and securities fraud. Tort codes contain provisions related to economic wrongs that may not be criminal, including interference with contractual relations, concealment, breach of fiduciary duty, and undue influence. There are third-party torts related to foreseeable acts of violence against women.<sup>78</sup> Tort law also potentially provides for claims by indirect victims or witnesses to violent conduct who are injured or harmed indirectly by the tortious conduct.<sup>79</sup> In limited circumstances, when a bystander fails to intervene against the violence, a tort claim may be successfully prosecuted against the bystander.<sup>80</sup> There are also torts related to abuse or exploitation by professionals who provide service to victims.<sup>81</sup>

Outlined below are specific actions that state legislators, attorneys and members of bar associations, crime victim compensation personnel, and advocates (including members of state coalitions and victim/witness specialists) can take to end violence against women.

## The Role of State Legislators

1. Review current statutes and assess whether additional enumerated tort provisions are needed to promote the recovery and future safety and well-being of victims of sexual assault, domestic violence, and stalking.

2. Enact civil remedies comparable to those in the Violence Against Women Act of 1994 that permit victims who may not obtain justice in the criminal system to pursue civil actions against perpetrators.

- ◆ Create a civil cause of action for gender-based violence.

- ◆ Allow claims to be filed in state courts that assert not only the tort of “assault and battery” but also (where available) a state constitution-based claim under due process and equal protection provisions, noting that some state constitutions forbid such conduct even without state action.

3. Enact legislation that permits use of expert testimony in civil cases to explain the psychological and emotional impact of sexual assault.

4. Establish and enforce penalties for professionals who sexually assault clients.

- ◆ Include as possible sanctions suspension, disbarment, removal of license or credentials, publication of the offense in industry and professional publications, and notice to the individual’s current client/patient base.

- ◆ Collaborate with professional associations to establish sanctions for members who physically or sexually assault their clients.

5. Consider enacting new torts of sexual assault, partner abuse, or stalking.<sup>82</sup>

- ◆ Explore why so few perpetrators of sexual assault, dating and domestic violence, and stalking are subject to judgments related to the injuries inflicted on victims and their treatment.<sup>83</sup> Explore whether deficiencies exist in laws governing familial and spousal immunity, governmental immunity, statutes of limitations, court or statutory rules related to mandatory joinder, waiver, and issue or claim preclusion.<sup>84</sup>

6. Eliminate any spousal immunity defense to tort claims by abused women.

7. Remove the “entireties exemption” for judgments against perpetrators of sexual and domestic violence.

- ◆ Recognize that some perpetrators who inflict violence against women are able to protect certain assets by marrying another person and thereafter titling property as “entireties” rather than “jointly held” assets. Entireties property is usually exempt from claim or attachment for a judgment because it is equally owned by the third party and the perpetrator. Modify codes to allow access to these assets for damages resulting from violence against women.

8. Amend tort codes concerning the statute of limitations in torts involving violence against women and children.

- ◆ Extend the statute of limitations period.

- ◆ Alternatively, specify that the statute of limitations begins only when the longest lasting of these things has occurred: the abuse ends; the victim can act independently of the perpetrator (free of intimidation or fear of reprisal) or has safely separated from the perpetrator; or the victim apprehends, or should reasonably have apprehended, that an injury or loss was sustained as a result of the violence.<sup>85</sup>

9. Approve the doctrine of “continuing tort” in state statutes to permit retroactive recovery for all injuries inflicted by perpetrators as part of a pattern, intermittent or continuing, of violent or abusive conduct.<sup>86</sup>

- ◆ Recognize that domestic violence, and some types of sexual abuse, often encompasses a continuing course of abuse.<sup>87</sup> Each act compounds the injury of all former abusive conduct. The damage of one injurious assault cannot be estimated discretely but must be calculated based on the entire course of contact.

10. Encourage a legal climate that fairly addresses the tort claims of victims seeking redress for the wrongs inflicted upon them.

- ◆ Remove any bias in the justice system confronting poor women, women of color, disabled women, lesbians, non-English-speaking or immigrant women, young or elderly women,



and women who have been convicted of crimes.<sup>88</sup>

## The Role of Attorneys and State and Local Bar Associations

**11. Challenge any residual belief in the entitlement of men to use physical or sexual violence against women, whether inside or outside the family, and reject notions of men's right to exercise power over wives or female partners.**

- ◆ Consider violent or abusive conduct toward women as egregious and compensable, just as the same conduct directed at male strangers or other third parties merits recovery.<sup>89</sup>

**12. Educate judges and juries about the entrapment and terror suffered by victims of sexual assault, dating and domestic violence, and stalking; the impact rape trauma syndrome has on a victim's ability to participate in the legal process; and the deliberate strategies of perpetrators to maintain control over victims.**

- ◆ Provide education on the injuries suffered by female victims of male violence, the fear induced by the violence, the losses sustained, and the burdens and costs of prevention of further violence.<sup>90</sup>

**13. Identify abuse and inform victims of potential tort claims and other civil remedies.**

- ◆ Screen clients for abuse as part of providing competent representation.
- ◆ Evaluate the range of civil remedies available when a history of abuse is identified.<sup>91</sup>

**14. Establish bar association-sponsored mentoring programs to help law firms represent victims of sexual assault, dating and domestic violence, and stalking.**

## The Role of Advocates

**15. Initiate outreach and education efforts to inform victims of potential tort claims and remedies.**

- ◆ Counsel victims about economic remedies that might help compensate for the crimes and injuries inflicted upon them.

- ◆ Inform victims of the civil tort claims that can be brought against perpetrators or others. Advise victims that fines in criminal cases, crime victim compensation, and economic awards in protection orders do not foreclose supplementary tort relief.
- ◆ Expand media campaigns to include notice to victims about possible recovery and time limits under state tort law for sexual or domestic violence.

## Resources

### **Battered Women's Justice Project—Civil Division**

Pennsylvania Coalition Against Domestic Violence  
6400 Flank Drive, Suite 1300  
Harrisburg, PA 17112  
Phone: 1-800-903-0111, ext. 2  
Fax: 717-671-5542

The Battered Women's Justice Project (BWJP) works with advocates and victim service providers to educate communities about domestic violence and ensure targeted, appropriate responses to cases of domestic violence. BWJP functions through a partnership of three nationally recognized organizations: the Domestic Abuse Intervention Project, which addresses the criminal justice system's response to domestic violence (including the development of batterer programs); the Pennsylvania Coalition Against Domestic Violence, which addresses civil court access and legal representation issues of battered women; and the National Clearinghouse for the Defense of Battered Women, which addresses issues raised when battered women are accused of committing crimes, including killing an abusive partner.

### **Criminal Justice Information Services Division**

National Crime Information Center  
Federal Bureau of Investigation  
1000 Custer Hollow Road  
Clarksburg, WV 26306  
Phone: 304-625-2000  
Fax: 304-625-5843

The Criminal Justice Information Services (CJIS) Division serves as the FBI's focal point and central repository for criminal justice information services. Programs administered under CJIS include the National Crime Information Center, Uniform Crime Reporting, the Integrated Automated Fingerprint Identification System, and the National Incident-Based Reporting System.

**Commission on Domestic Violence—Law School Initiative Project**

American Bar Association  
740 15th Street NW., Ninth Floor  
Washington, DC 20005-1019  
Phone: 202-662-1737  
Fax: 202-662-1594  
E-mail: [abacdv@abanet.org](mailto:abacdv@abanet.org)  
Web site: [www.abanet.org/domviol](http://www.abanet.org/domviol)

The Commission on Domestic Violence Web site provides American Bar Association policies, training materials, legal briefs, and sample legal forms relevant to domestic violence issues and proceedings. The site also includes information about upcoming events and training opportunities and links to other resources and organizations.

**Employment Law Center**

Legal Aid Society of San Francisco  
1663 Mission Street, Suite 400  
San Francisco, CA 94103  
Phone: 415-864-8848 or 1-888-864-8335 (in California only)  
Web site: [www.employmentlawcenter.org](http://www.employmentlawcenter.org)

Through its Employment Law Center, the Legal Aid Society of San Francisco works to secure equal opportunity in employment as a fundamental civil right. The center addresses cases in which domestic violence victims have employment law issues. Center efforts to address workplace issues include advice and counseling, litigation, community education, and advocacy.

**International Association of Chiefs of Police**

515 North Washington Street  
Alexandria, VA 22314  
Phone: 703-836-6767 or 1-800-THE-IACP  
Fax: 703-836-4543  
Web site: [www.theiacp.org](http://www.theiacp.org)

The International Association of Chiefs of Police (IACP) fosters cooperation and the exchange of information and experience among police administrators throughout the world and advocates high professional standards of police performance and conduct. The IACP Web site provides information on training opportunities, conferences, awards, and campaigns, as well as links to *Police Chief Magazine* and other publications, information on international activities and outreach, and legislative and policy updates.

**Minnesota Center Against Violence and Abuse (MINCAVA)**

Web site: [www.mincava.umn.edu](http://www.mincava.umn.edu)

The MINCAVA Electronic Clearinghouse provides extensive and up-to-date educational resources about all types of violence, including higher education syllabi, published research, sources of funding and training, professionals and organizations in the field, and searchable databases containing more than 700 training manuals, videos, and other publications and products. Resources are presented alphabetically by topic. The site also includes a list of "Action Alerts"—descriptions of campaigns, protests, and projects and how to get involved.

**National Center for State Courts**

300 Newport Avenue  
P.O. Box 8798  
Williamsburg, VA 23185  
Phone: 757-253-2000  
Fax: 757-220-0449  
Web site: [www.ncsconline.org](http://www.ncsconline.org)

The National Center for State Courts (NCSC) works to improve the administration of justice in the United States and abroad through research, education, consulting, and information services. The Web site includes information on NCSC technical assistance and consulting services, projects, and initiatives, as well as an online library database, calendar of events, and links to related associations and organizations.

**National Center for Victims of Crime**

2000 M Street NW., Suite 480  
Washington, DC 20036  
Phone: 202-467-8700 or 1-800-FYI-CALL  
Fax: 202-467-8701  
E-mail: mail@ncvc.org

The National Center for Victims of Crime's (NCVC's) mission is to help victims of crime and their families rebuild their lives. NCVC works with local, state, and federal agencies to enact legislation and provide resources, training, and technical assistance. The NCVC Web site provides relevant statistics, links to publications, and referrals to participating attorneys.

**National Center on Full Faith and Credit**

1601 Connecticut Avenue NW., Suite 701  
Washington, DC 20009  
Phone: 1-800-256-5883, ext. 2  
Fax: 202-265-5083

The National Center on Full Faith and Credit promotes interjurisdictional enforcement of civil and criminal protection orders (per the full faith and credit provision of the Violence Against Women Act of 1994). The project provides ongoing assistance and training on full faith and credit, federal firearms prohibitions, and federal domestic violence and stalking crimes to law enforcement officers, prosecutors, judges, court administrators and other court personnel, private attorneys, victim advocates, and others who work with victims of domestic violence and stalking.

**Resource Center on Domestic Violence: Child Protection and Custody**

National Council of Juvenile and Family Court Judges  
P.O. Box 8970  
Reno, NV 89507  
Phone: 1-800-52-PEACE  
Fax: 775-784-6160  
Web site: www.nationalcouncilfvd.org

The Resource Center on Domestic Violence: Child Protection and Custody provides professionals in the field of domestic violence and child protection and custody with access to information and assistance. The Web site includes information about

available technical and training services, publications, and information packets and links to related online resources.

**Standing Committee on the Delivery of Legal Services**

American Bar Association  
541 North Fairbanks Court  
Chicago, IL 60611  
Phone: 312-988-5761  
Fax: 312-988-5483  
E-mail: whornsby@staff.abanet.org  
Web site: www.abanet.org/legalservices/delivery.html

The American Bar Association's Standing Committee on the Delivery of Legal Services focuses on improving the delivery of legal services to the public, specifically people of moderate income. The committee studies alternative methods of providing legal services, conducts pilot projects to test and evaluate new methods of delivering legal services, and encourages members of the bar to employ such alternative and new methods.

**Women's Law Project (Insurance Discrimination)**

125 South Ninth Street, Suite 300  
Philadelphia, PA 19107

The Women's Law Project works to advance the legal and economic status of women and their families through litigation, advocacy, public education, and direct services including a telephone counseling and referral service. Project staff are experts in insurance discrimination.

**Endnotes**

1. Forty-seven states have enacted provisions in custody codes that direct judges to consider domestic violence when issuing custody awards. Source: National Council of Juvenile and Family Court Judges, Family Violence Department. Custody Code Database. June 2000.
2. Ibid.
3. Nineteen states have enacted rebuttable presumptions against awards of custody to a parent who has committed domestic violence against a spouse or parent. Source: Ibid.

4. In July 2000, the American Bar Association adopted a policy urging courts to consider domestic violence when drafting visitation and visitation exchange orders. Source: Ibid.

5. National Council of Juvenile and Family Court Judges (1994). *Model Code on Domestic and Family Violence*. Reno, NV: National Council of Juvenile and Family Court Judges, Family Violence Department. [www.dvlawsearch.com/about/images/new\\_modelcode.pdf](http://www.dvlawsearch.com/about/images/new_modelcode.pdf)

6. Edleson, J.L. (1999). "Children's Witnessing of Adult Domestic Violence." *Journal of Interpersonal Violence* 14(8): pp. 839–870.

7. McHardy, L., and Hofford, M. (1999). *Final Report of the Child Custody and Visitation Focus Group*. Reno, NV: National Council of Juvenile and Family Court Judges, Family Violence Department.

8. For example, punching holes in the walls of the parents' bedroom takes on new meaning if each punch is accompanied by yelling, "That's your arm, that's your breast, that's your teeth, that's your eyeglasses, that's your windpipe." And if the father is holding the struggling mother by the hair and demanding that the child watch while he punches the wall, or if the father rips off the mother's nightgown, or if the father blames the mother for the damage and demands that the cost of the repairs be covered by the money set aside for the mother's trip to a family reunion, or if the father then pulls the phone cord out of the wall and smashes the receiver when the child tries to seek help, the punching "episode" emerges as much more substantial abuse.

9. Stalking is implicated in a majority of domestic violence homicides perpetrated by men. When battered women leave or seek separation from abusers, many batterers begin a course of surveillance and stalking that too often ends in homicide.

10. If prior punching by the father has resulted in injury to the mother or has destroyed the child's Christmas presents, the current conduct evokes

memories of prior incidents and brings the fear of those events to compound the terror precipitated by the present violence. If the current incident interrupted the child's sleep or the father dragged the child out of bed to watch, the child may have difficulty sleeping in the future. As a result of the damage to the phone, the child may fear that any future attempts to seek help will result in severe retaliation even if the father does not make that threat explicit.

11. Schechter, S., and Edleson, J.L. (1999). *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice. Recommendations From the National Council of Juvenile and Family Court Judges*. Reno, NV: National Council of Juvenile and Family Court Judges.

12. Valente, R.L. (1996). "Screening Guidelines." In Goelman, D., Lehrman, F., and Valente, R.L. (Eds.), *The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook*. Washington, DC: American Bar Association Commission on Domestic Violence.

13. Approximately 28 states now include sexual assault in the definition of abuse in civil protection orders statutes.

14. About 20 states now include stalking in the definition of abuse in civil protection order statutes. Most civil protection orders, however, are not based solely on stalking conduct, as stalking is but one aspect of the violence inflicted by perpetrators. Criminal stalking codes also permit victims to seek no-contact or antistalking orders.

15. National Council of Juvenile and Family Court Judges (1994). "Chapter 3: Civil Orders for Protection." In *Model Code on Domestic and Family Violence*. Reno, NV: National Council of Juvenile and Family Court Judges, Family Violence Department. [www.dvlawsearch.com/about/images/new\\_modelcode.pdf](http://www.dvlawsearch.com/about/images/new_modelcode.pdf)

16. Hart, B.J. (1992). "State Codes on Domestic Violence: Analysis, Commentary, and Recommendations." *Juvenile and Family Court Journal* (Special Issue) 43(4): pp. 1–81.

17. Ptacek, J. (1999). *Battered Women in the Courtroom: The Power of Judicial Responses*. Boston, MA: Northeastern University. In Ptacek's study of protection order applicants in two urban communities (one a predominantly white jurisdiction and the other a community of multiple ethnicities), most women found the protection order process very beneficial and 90 percent of them said they would recommend it to an abused friend.

Finn, P., and Colson, S. (1990). *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (National Institute of Justice Issues and Practices Report). Washington, DC: U.S. Department of Justice. NCJ 123263

Harrell, A., Smith, B., and Newmark, L. (1993). *Court Processing and the Effects of Restraining Orders for Domestic Violence Victims*. Washington, DC: The Urban Institute.

Keilitz, S., Hannaford, P.L., and Efke, H.S. (1997). *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*. Williamsburg, VA: National Center for State Courts.

Sullivan, C., Basta, J., Tan, C., and Davidson II, W.S. (1992). "After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter." *Violence and Victims* 7(3): p. 267.

18. 18 U.S.C. § 2265(c).

19. Lehrman, F.L. (1997). "Appendix 4A: Civil Protection Orders." In *Domestic Violence Practice and Procedure*. Eagan, MN: West Group. In those jurisdictions in which violators can be charged with criminal contempt or misdemeanor crimes, victims and their lawyers often prefer to proceed with criminal contempt charges because relief (which may include incarceration for up to 6 months) can be achieved within 10 days. Battered women, both pro

se and represented, report that criminal contempt proceedings offer better outcomes for two reasons: The issuing judge is more likely to order incarceration than a criminal court judge hearing a misdemeanor violation and the immediacy of the consequence and possibility of incarceration enhance future perpetrator compliance.

20. Ibid.

21. Karan, A., Keilitz, S., and Denaro, S. (1998). "Domestic Violence Courts: What Are They and How Should We Manage Them?" *Juvenile and Family Court Journal* 50(2): pp. 75–86.

22. Thirty-two states and the District of Columbia have established electronic registries, 13 states are in the process of developing a registry, and 5 states have neither established nor are contemplating one. The Protection From Abuse Database (PFAD) in Pennsylvania, likewise, is designed to be a seamless electronic application, order, service, registry, and modification system that permits verification by judges and law enforcement throughout Pennsylvania.

23. Wan, A.M. (2000). "Battered Women in the Restraining Order Process." *Violence Against Women* (June) 6(6): pp. 606–632. See also Ptacek, J. (1999). *Battered Women in the Courtroom: The Power of Judicial Responses*. Boston, MA: Northeastern University.

24. One legal scholar suggests that there are many actions that judges can take to protect victims. See Field, J.K. (2000). "Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases." In *Domestic Violence Civil Law Institute (Conference Manual)*. Washington DC: American Bar Association/Young Lawyers Division/Commission on Domestic Violence, at Tab 8.

25. The Violence Against Women Act (VAWA) is Title IV of the Violent Crime Control and Law Enforcement Act of 1994. VAWA 2000 is Public Law 106–386.

26. Virtually all provide court accompaniment, instruction on potential relief and the legal process, assistance in conforming and obtaining certified copies of orders, facilitation of distribution and service of process, referral to community resources, and preliminary safety planning. Some programs assist in pleadings preparation and proposed order development. Others help victims obtain police reports and other documentation of abuse. Many help with crime victim compensation claims. In metropolitan areas, programs may conduct clinics to handle the volume of applicants while attempting to preserve the quality and range of services. Some victim specialists serve as settlement facilitators.

27. Karan, A., Keilitz, S., and Denaro, S. (1998). "Domestic Violence Courts: What Are They and How Should We Manage Them?" *Juvenile and Family Court Journal* 50(2): pp. 75–86.

28. See Section 1101(b) of VAWA 2000, which provides that grantees certify that their "laws, policies, and practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence offense, or in connection with the filing, issuance, registration, or service of a protection order, or a petition for a protection order, to protect a victim of sexual assault, domestic violence, or stalking, that the victim bear the costs associated with the filing of criminal charges against the offender, or the costs associated with the filing, issuance, registration, or service of a warrant, protection order, petition for a protection order, or witness subpoena, whether issued inside or outside the state, tribal, or local jurisdiction."

29. National Council of Juvenile and Family Court Judges (1994). "Chapter 3: Civil Orders For Protection." In *Model Code on Domestic and Family Violence*. Reno, NV: National Council of Juvenile and Family Court Judges, Family Violence Department. [www.dvlawsearch.com/about/images/new\\_modelcode.pdf](http://www.dvlawsearch.com/about/images/new_modelcode.pdf)

30. See Florida, New Hampshire, and Washington for examples.

31. Chaudhuri, M., and Daly, K. (1992). "Do Restraining Orders Help? Battered Women's Experience With Male Violence and Legal Process." In Buzawa, E.S., and Buzawa, C.G. (Eds.), *Domestic Violence: The Changing Criminal Justice Response*. Newbury Park, CA: Sage Publications, Inc.

Finn, P., and Colson, S. (1990). *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (National Institute of Justice Issues and Practices Report). Washington, DC: U.S. Department of Justice. NCJ 123263

Gondolf, E.W., McWilliams, J., Hart, B., and Stuehling, J. (1995). "Court Response to Petitions for Civil Protection Orders." *Journal of Interpersonal Violence* 9(4): pp. 503–517.

Herrell, S.B., and Hofford, M. (1991). *Family Violence: Improving Court Practice*. Reno, NV: National Council of Juvenile and Family Court Judges.

Sullivan, C., Basta, J., Tan, C., and Davidson II, W.S. (1992). "After the Crisis: A Needs Assessment of Women Leaving a Domestic Violence Shelter." *Violence and Victims* 7(3): p. 267.

32. Many batterers seek to "recapture" their battered partners after the issuance of protection orders. When promises, harassment, and economic manipulation do not work, perpetrators seek other strategies to reinsert themselves in the lives of battered women. One method of regaining control over an intimate partner is obtaining custody of the couple's children. Failing that, unfettered access to children enables the perpetrator to maintain surveillance over the battered woman and to attempt to control her through the children. Unregulated access not only disrupts and endangers the lives of the family, but it regenerates fear with each contact. If these tactics do not persuade the battered woman to return, abduction of the children is certain to compel the mother to engage with the perpetrator again, to engage in a negotiation for access to the children with the expectation

that these negotiations will be enlarged to encompass reconciliation.

33. Aguirre, B.E. (1985). "Why Do They Return? Abused Wives in Shelters." *Social Work* 30(4): pp. 350–354.

34. Okun, L. (1986). *Woman Abuse: Facts Replacing Myths*. Albany, NY: State University of New York Press.

35. Keilitz, S.L., Davis, C., Efkanan, H.S., Flango, C., and Hannaford, P.L. (1998). *Civil Protection Orders: Victims' Views on Effectiveness* (National Institute of Justice Research Preview). Washington, DC: U.S. Department of Justice. FS 000191

36. For a protection order system audit tool, contact Battered Women's Justice Project—Civil Issues at 1–800–903–0111, ext. 2.

37. Ptacek, J. (1999). *Battered Women in the Courtroom: The Power of Judicial Responses*. Boston, MA: Northeastern University.

Wan, A.M. (2000). "Battered Women in the Restraining Order Process." *Violence Against Women* (June) 6(6): pp. 606–632.

38. For further information, contact Battered Women's Justice Project—Civil Issues at 1–800–903–0111, ext. 2.

39. Commonly referred to as the "full faith and credit provision," the section covers both civil and criminal protection orders.

40. 18 U.S.C. § 2261(a)(1)–(2) (interstate travel to commit domestic violence); 18 U.S.C. § 2261A (interstate stalking); 18 U.S.C. § 2262(a)(1)–(2) (interstate violation of a protection order); 18 U.S.C. § 922(g)(8) (possession of firearm or ammunition while subject to a qualifying protection order); 18 U.S.C. § 922(d)(8) (transfer of firearm or ammunition to person subject to a qualifying protection order); 18 U.S.C. § 922(g)(9) (possession of firearms or ammunition by a person convicted of a qualifying misdemeanor crime of

domestic violence); 18 U.S.C. § 922(d)(9) (selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that the person has been convicted of a misdemeanor crime of domestic violence).

41. See 18 U.S.C. § 2265(d).

42. To facilitate interjurisdictional enforcement, protection order forms should include all data required for entry into the NCIC Protection Order File (POF), including a numeric identifier for the perpetrator; a Brady record indicator; a statement that the order is enforceable in all 50 states, the District of Columbia, tribal lands, and U.S. territories; certification that any custody provision in the order was issued in compliance with the Uniform Child Custody Jurisdiction Act/Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act; notice that interstate violation of the order may subject the abuser to federal criminal penalties; notice that possession, transportation, or receipt of a firearm while the order is in effect may subject the perpetrator to federal criminal penalties; and contact information for the issuing court and any state or local protection order registry.

43. This may include, for example, a recommendation that a victim deliver a copy of the order to the police department in the jurisdiction in which the victim lives and works, providing the agency with a description and the likely whereabouts of the perpetrator; a suggestion of methods for verifying that an order has been entered into local and state databases and the NCIC file; and a reminder that copies are available from the court clerk, that a copy should be in the victim's possession at all times, and perhaps that copies should be distributed to any place of employment, school, or other activity where a violation is likely to occur.

44. The packet might include the laws of the foreign jurisdiction related to arrest for violation and possible penalties upon conviction, referrals to community-based advocacy services in the foreign jurisdiction, and the requirements for enforcing a protection order in that state or tribe (e.g., any registration requirement and the costs of and process



for registration, information about whether a certified copy of an order must be presented to the police when seeking enforcement, and verification that the order has been included in the issuing state registry and the NCIC POF).

45. Although most family law issues are still settled by negotiation between the parents or divorcing couple either by counsel or pro se, when the litigants cannot reach an accord, some form of alternative dispute resolution is often employed to attempt agreement outside of the judicial process.

46. Through much of this *Toolkit*, the reader will note that the word “mediation” is used rather than the phrase “alternative dispute resolution.” “Mediation” should be read to include all forms of “alternative dispute resolution.”

47. Hart, B.J. (1996). “Rule Making and Enforcement/Rule Compliance and Resistance.” In Sipe, B., and Hall, E.J. (Eds.), *I Am Not Your Victim: Anatomy of Domestic Violence*. Thousand Oaks, CA: Sage Publications, Inc. pp. 258–263.

48. Hart, B.J. (1990). “Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation.” *Mediation Quarterly* 7(4): p. 324.

Pagelow, M. (1990). “Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements.” *Mediation Quarterly* 7(4): pp. 347–364.

49. National Council on Juvenile and Family Court Judges (1994). *Model Code on Domestic and Family Violence*. Reno, NV: National Council of Juvenile and Family Court Judges, Family Violence Department ([www.dvlawsearch.com/about/images/new\\_modelcode.pdf](http://www.dvlawsearch.com/about/images/new_modelcode.pdf)). Section 408(A) is the preferred of two alternatives. Section 408(B) was offered as an alternative for those jurisdictions in which mandatory mediation has been instituted; it precludes mandates except under delimited, protected circumstances.

50. Codes in more than one-half of the states preclude judicial mandates or referrals to alternative

dispute resolution in various civil proceedings in which one party to the action has been abused by the other party. The American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.

51. Keilitz, S.L., Davis, C.V., Flango, C.R., Garcia, V., Jones, A.M., Peterson, M., and Spinozza, D.M. (1997). *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*. Williamsburg, VA: National Center for State Courts. This manual sets forth various safety procedures related to custody mediation in the context of domestic violence. Mediators are largely unregulated by courts or state executive agencies. Few state codes or court rules give explicit direction about mediation in the context of domestic violence. A handful of codes or state rules direct that mediators or alternative dispute resolution professionals meet minimum training requirements on domestic violence. National mediation associations have not promulgated standards for mediation in family law matters related to violence against women.

52. Section 407(1) of the Model Code on Domestic and Family Violence.

53. Many mediators and some state codes and local rules assert that the communications within the mediation sessions should not be disclosed and that the mediator should be bound by a confidential communications mandate. However, in a number of jurisdictions, limitations or exceptions have been made to the rule of confidentiality. Most are related to the issue of fraud or misrepresentation on financial matters, but some address issues of threat of bodily injury or property destruction or violent conduct during a mediation session. The Family Law Act of Ontario requires that financial disclosure forms, promulgated by the court, must be filed with the court before concluding mediation or litigation.

Pennsylvania law, 42 Pa. Cons. Stat. (West § 5949(b) (2002) provides exceptions for fraud,

enforcement of a settlement document, communication or conduct that is relevant evidence in a criminal matter where there has been a threat of bodily injury or felonious property destruction or there has been violent conduct in the mediation session, or for any document that existed independent of the mediation.

54. About one-third of courts interviewed in a recent study on mediation in the context of domestic violence had established screening procedures at intake for mediation. Less than one-third interviewed the parties about present or past abuse. About one-half reported review of pleadings for allegations of domestic violence. About one-half relied on custody evaluations. Source: Keilitz, S.L., Davis, C.V., Flango, C.R., Garcia, V., Jones, A.M., Peterson, M., and Spinozza, D.M. (1997). *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*. Williamsburg, VA: National Center for State Courts. See also *Sample Checklist for Screening by Mediators*, prepared by the Alameda County Family Court Services, p. 110.

55. Durborow, N., and Fromson, T. (1998). *Insurance Discrimination Against Victims of Domestic Violence* (pamphlet). Harrisburg, PA: Pennsylvania Coalition Against Domestic Violence.

56. Ibid.

57. "The costs of treatment for any violence-exposed patient should be covered by insurers. . ."; excerpt from Schechter, S., and Edleson, J.L. (2000). *Domestic Violence and Children: Creating a Public Response*. New York, NY: The Open Society Institute.

58. Durborow, N., and Fromson, T. (1998). *Insurance Discrimination Against Victims of Domestic Violence* (pamphlet). Harrisburg, PA: Pennsylvania Coalition Against Domestic Violence.

59. Ibid.

60. Karp, L., and Karp, C.L. (1989 and 1999 Supplement). *Domestic Torts: Family Violence, Conflicts, and Sexual Abuse*. Colorado Springs, CO: Shepard's/McGraw-Hill.

61. These exclusions have been enacted or adopted increasingly over the past decade as insurance companies have begun to understand the potential cost of making women whole related to the sexual violence of their insureds. Source: Ibid.

62. The first charge of discrimination in health care coverage that came to the attention of the Pennsylvania Coalition Against Domestic Violence involved a self-insured employer. The report sparked the investigation that has uncovered many discriminatory practices and policies.

63. Miller, T.R., Cohen, M.A., and Wiersema, B. (1996). *Victim Costs and Consequences: A New Look* (National Institute of Justice Research Report). Washington, DC: U.S. Department of Justice. NCJ 155282

64. Ibid.

65. Greenfield, L.A., Rand, M.R., Craven, D., Klaus, P.A., Perkins, C.A., Ringel, C., Warchol, G., Maston, C., and Fox, J.A. (1998). *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*. Washington, DC: U.S. Department of Justice. NCJ 167237

66. Miller, T.R., Cohen, M.A., and Wiersema, B. (1996). *Victim Costs and Consequences: A New Look* (National Institute of Justice Research Report). Washington, DC: U.S. Department of Justice. NCJ 155282

67. Greenfield, L.A., Rand, M.R., Craven, D., Klaus, P.A., Perkins, C.A., Ringel, C., Warchol, G., Maston, C., and Fox, J.A. (1998). *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*. Washington, DC: U.S. Department of Justice. NCJ 167237

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74. Browne, A., Salomon, A., and Bassuk, S. (1999). "The Impact of Recent Partner Violence on Poor Women's Capacity To Maintain Work." *Violence Against Women* (April) 5(4): pp. 393–426. Achieving a stable, independent income may be hard for victims. Men who batter their partners interfere with victims acquiring job training. They frequently make it difficult for victims to work because of the violence and trauma they inflict, because they prevent women from going to work, or because they intrude upon and disrupt their victims' work life. Many victims are terminated as a result of perpetrator actions. Upon termination, victims fall into poverty and many must seek welfare.

Victims of violence against women cannot rely on spousal or child support from perpetrators as a predictable, secure source of income. Batterers rarely pay child support or spousal support. One study revealed that upwards of 80 percent of the women did not receive spousal support and approximately 50 percent never received child support 1 year after the entry of protection orders in their favor. Source: Harrell, A., Smith, B., and Newmark, L. (1993). *Court Processing and the Effects of Restraining Orders for Domestic Violence Victims*. Washington, DC: The Urban Institute.

Another study found that men who batter are less likely to pay support than men who do not use violence toward their intimates (45 percent, compared to 76 percent), and batterers are less likely to fully comply with child support orders (28.3 percent, compared to 49 percent). Source: Kurz, D., and Coughy, K. (1989). *The Effects of Marital Violence on the Divorce Process*. Paper presented at the American Sociological Association Meeting, San Francisco, CA.

See also the *Toolkit* chapter "Promoting Women's Economic Security."

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77. Few states have explicit stalking torts. However, recovery by stalking victims is theoretically possible using other tort provisions. Source: Karp, L., and Karp, C.L. (1989 and 1999 Supplement). *Domestic Torts: Family Violence, Conflicts, and Sexual Abuse*. Colorado Springs, CO: Shepard's/McGraw-Hill.

78. Employers, landlords, school administrations, human service agencies, and owners of public accommodations have been found liable for failure to act to reasonably protect against the acts of perpetrators. Most litigation has been on behalf of sexual assault victims.

Many states sharply limit liability against state and local governments for torts committed on government or public premises or by employees of state, county, or municipal government. Generally, the

standards of proof related to the violence, the injury, or the failure of the government to protect foreseeable victims are so high that many, if not most, claims against governmental bodies fail.

See Lehrman, F.L. (1997). *Domestic Violence Practice and Procedure*. Eagan, MN: West Group; and Karp, L., and Karp, C.L. (1989 and 1999 Supplement). *Domestic Torts: Family Violence, Conflicts, and Sexual Abuse*. Colorado Springs, CO: Shepard's/McGraw-Hill.

79. Dalton, C. (1997). "Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities." *New England Law Review* 31(2): pp. 319–395. Two tests are articulated in case law related to the liability of the perpetrator for violence in front of child witnesses—"the zone of danger" test and the "proximity/close family membership/gravity of harm to the direct victim/contemporaneous sensory observation" test. Most children witnessing violence to a parent would fall under one of these tests and liability should attach. Therefore, children who witness the sexual assault, domestic abuse, or stalking of their mothers may recover independent of their mothers' claims. Close relatives of an abused woman or a sexually abused child may also recover for emotional distress.

80. Karp, L., and Karp, C.L. (1989 and 1999 Supplement). *Domestic Torts: Family Violence, Conflicts, and Sexual Abuse*. Colorado Springs, CO: Shepard's/McGraw-Hill.

81. *Ibid.* Most claims have arisen related to sexual misconduct by male therapists or clergy and female patients or parishioners.

82. *Ibid.*

83. *Ibid.* See also Weiner, M.H. (1995). "Domestic Violence and the Per Se Standard of Outrage." *Maryland Law Review* 54(1): pp. 183–241. Quite recently, domestic violence victims have begun to rely on the tort of intentional infliction of emotional distress as a basis for suing their abusers. Courts have recognized increasingly the tort in the marital context. Two state supreme courts have

expressly held that the tort of intentional infliction of emotional distress may be applied to marital conduct. Similarly, law review articles have begun to analyze the tort in the context of domestic violence. The author of this article calls for a per se standard of outrageous conduct related to violation of protection orders issued on behalf of domestic violence victims.

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85. See *Giovine v. Giovine*, 663 A. 2d 109 (N.J. Super. Ct. App. Div. 1995).

Cal. Civ. Proc. Code § 340.15 provides in part that the statute of limitations begins from the date the plaintiff/victim realizes or should realize that the damage or injury was caused by domestic violence.

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