

**American Bar Association Commission on Domestic Violence**  
**Continuing Legal Education Teleconference Series**  
*Litigation Tips In Domestic Violence Cases:*  
*A Techniques and Strategies Teleconference Series*

**CASE PLANNING**

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Notes	Outline
	<p><b>I. DV BASICS AND SCREENING</b></p> <ul style="list-style-type: none"> <li>A. Attorneys representing victims of domestic violence must have a working knowledge of domestic violence</li> <li>B. Must be able to identify power and control tactics</li> <li>C. Should know the elements of the crime of domestic violence in their jurisdiction</li> <li>D. Should strive to empower the client with knowledge of the court system</li> <li>E. Must be aware of cultural considerations relevant to the populations with which you are most likely to work</li> </ul> <p><b>II. INTERVIEWING THE CLIENT</b></p> <ul style="list-style-type: none"> <li>A. Interview Considerations <ul style="list-style-type: none"> <li>1. Confidentiality <ul style="list-style-type: none"> <li>a. Considerations re: including advocate, family member or support person in interview</li> </ul> </li> <li>2. Client's mental and emotional state <ul style="list-style-type: none"> <li>a. Assessing client's ability to communicate to attorney</li> </ul> </li> </ul> </li> </ul>

- b. Assessing client's ability to understand communication or instructions from attorney
- c. Post-Traumatic Stress Disorder
- d. Mental health counseling options

#### B. Interview Techniques

1. Use listening skills
2. Ask open-ended questions
3. Assess the client's legal and non-legal needs
  - a. Living expenses and arrangements
  - b. Medical bills
  - c. Bills (past due and upcoming) health insurance
  - d. Gas
  - e. Transportation
4. Beware of characterizations in questioning
5. Utilize victim advocate
6. Important screening questions
  - a. In general
  - b. Additional screening questions will be necessary for specific special populations with which you are most likely to work
7. Dealing with difficult people
  - a. Difficult clients
  - b. Difficult lawyers
  - c. Difficult judges

### C. Creating a Safety Plan

1. Client
2. Work
3. Home
4. Church
5. Traveling
6. Court appearance (and traveling to and from)
7. Children
8. School
9. Daycare
10. Pets
11. Other family members
12. Protection for client's family
13. Protection from batterer's family, if necessary

### D. Lethality Assessment

1. Severity of injuries
2. Use of weapons
3. Frequency and form of violence
4. Threats to kill
5. Isolation
6. Stalking
7. Potential triggers
8. Criminal history

## **III. DRAFTING THE PLEADINGS**

A. Addressing Immediate Needs

1. Victim confidentiality/victim safety
2. Alleging facts that constitute domestic violence
3. Requesting remedies
4. Stay away / No contact (at home, work, school, church, etc.)
5. Don't commit acts of domestic violence
6. Exclusive use of home
7. Exclusive use of automobile
8. No 3<sup>rd</sup> party contact
9. No firearms or weapons
10. Payment of debts/bills
11. Payment of utilities
12. Temporary custody
13. Temporary support
14. Temporary visitation
15. Collection of belongings
16. Living expenses
17. Medical bills
18. Health insurance
  - a. Client – Check (anonymously) with batterer's insurance carrier, if that is Client's health insurance source – Some carriers cancel insurance upon separation.
  - b. Children – If children are on Title XIX, non-custodial parent will likely have to pay one half the monies expended at a later

date.

19. Gasoline

20. Kids' lunches

21. Attorney's fees

22. Temporary Motions set the date from which the Judge can order child support spousal support, etc.

23. Keep your case plan in mind

#### B. Obtaining Protection Orders

1. Allege facts that constitute domestic violence according to statutes

2. Support with evidence

a. Client testimony

b. Medical records

c. Pictures

d. Third party conversations/observations

3. VAWA language

### **IV. CASE PREPARATION**

#### A. Evidence / Fact Gathering

1. Utilize the victim advocate to assist in gathering evidence and locating witnesses

2. Keep safety as the paramount objective

3. Chain of custody

4. Medical records

5. Phone records

6. Emails

7. Expenditures
  8. Third party conversations / observations
  9. List of evidence in ABA Commission on Domestic Violence Litigation Manual
  10. Difficulty gaining cooperation with criminal prosecutor
- B. Utilizing Discovery in Divorce, Custody, and Support Cases
1. Interrogatories
  2. Request for production of documents
  3. Request for admissions
- C. Preparing and Interviewing Witnesses
1. Witnesses have varying storytelling abilities and personalities
  2. Develop a witness interview sheet
  3. Prepare your witnesses for testimony
  4. Typical witnesses in a domestic violence case
  5. Use expert witnesses where appropriate
- D. Prepare the Client for Court
1. Having to testify in front of the batterer
  2. Batterer cross examining the victim
  3. Batterer and opposing counsel intimidation tactics
  4. Prepare the client to be on the offensive regarding skeletons in the closet

## **V. DEFINING AND PREPARING**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- A. Different from Memorandum of Law or a Court's Narrative Opinion
- B. Detailed and Enumerated
- C. Incumbent on Court to Issue FF/CL in Contested Matters including Trials and Any Evidentiary Hearing
- D. Rules of Civil Procedure Set Forth Requirements for FF/CL (e.g., Rule 52 (a) R.Civ.P.)
- E. The "is," "should," "shall" pleading drafting rule

**VI. WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE REQUIRED BY STATE LAW FOR SOME ISSUES**

- A. When Domestic Violence Is an Issue in Child Custody or Parenting Cases
  - 1. Presumption against joint or sole custody to perpetrator of domestic violence
  - 2. Safe visitation
- B. Child Support
  - 1. Deviation from schedules
  - 2. Modifications

**VII. HOW CAN PREPARING (AND URGING THE COURT TO RETURN) FINDINGS OF FACT AND CONCLUSIONS OF LAW BENEFIT YOUR CLIENT?**

- A. It Can Help You Prepare Your Case
- B. It Can Help You Communicate with Your Client

- C. It Can Help You Communicate with and Persuade the Court
- D. It Can Help You Prove or Disprove Change of Circumstances (Important in Child Custody and Support Matters)
  - 1. Court can be a forum for continued abuse in domestic violence cases; child custody matters are frequently the issues that get relitigated
  - 2. If Court has articulated crisp and succinct FF/CL as a basis for the Court's order, it is easier to determine whether changed circumstances have occurred (which warrants modification of an order)
- E. It Will Help Preserve a Record for Appeal or Protect a Case if it Is Appealed
- F. It May Be Useful in Subsequent Cases Arising from the Same Facts

**VIII. PREPARING PROPOSED FINDINGS AND CONCLUSIONS EARLY IN CASE AS A PREPARATION STRATEGY: CHARTING THE COURSE**

- A. Similar to Early Development of Closing Argument in Jury Trial Preparation: Compare to Discovery Planning
  - 1. What is the claim for relief?
  - 2. What facts are needed to prove the allegation?
  - 3. What [or who] is the source of the facts?
  - 4. What discovery methods are to be used to elicit the facts?
  - 5. What problems are anticipated in admitting the evidence?

6. What are the alternative strategies for obtaining or admitting the facts needs to be proven?
7. How will it be proven?
8. What is needed?

**B. Promotes Purposeful Development of Evidence and Clarity of Preparation**

1. Helps develop crisp, succinct findings the judge would have to infer from the evidence so that client can prevail
2. Helps develop the legal conclusions necessary to sustain a judgment in client's favor
3. Helps identify the precise items of relief to which client is entitled

**IX. CAN ASSIST COMMUNICATION WITH CLIENT ABOUT CASE AND CLARIFY CLIENT'S EXPECTATIONS**

- A. Clients routinely express that attorneys in domestic violence cases do not represent them effectively**
1. Problem sometimes is that attorneys do not adequately understand client's real concerns
  2. Problem sometimes is that there is a breakdown in communication and client does not understand parameters of legal relief available
  3. Attorneys fail to make appropriate referral to help clients address extra-legal needs
- B. Drafting proposed FF/CL and sharing them with your client will help communicate the specific legally important facts necessary to obtain relief client needs, wants, or expects**
1. Promotes a clear understanding

between client and attorney of case  
direction

2. Client can then assist in obtaining and presenting required evidence to prove facts

**X. SUBMITTING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW TO THE COURT AT THE TRIAL (HEARING) WILL ASSIST THE COURT**

**A. Submitting Proposed FF/CL at the Beginning of the Case**

1. Only if it doesn't cost you a tactical advantage. The best result is that the Court would limit opening statement because a full explanation has been provided by you.
2. Opponent could be disadvantaged, indicates to the Court that you are well-prepared and provides the Court a clear roadmap
3. Be aware that the Court thinks it has heard many similar trials and probably thinks that anything beyond two minutes of opening is a waste of valuable Court time
4. Attorneys sometimes wrongfully use opening statements to perform for their clients, rather than for the benefit of the court
5. If proposed FF/CL not submitted at commencement of evidence, use it as an outline of your opening statement. Client's story is more powerful if it is consistent and repeated in the same order of presentation.

**B. Submitting Proposed FF/CL to the Court at the Trial (Hearing) Conclusion Will Assist the Court**

1. Serves to highlight facts that are

favorable to client's case and advocate application of the law to those facts

2. Specific FF/CL must be issued in some matters (domestic violence and veering from child support guidelines). Proposed FF/CL will help remind the Court to specifically include those
3. Encourages the Court to return written FF/CL which will help provide a record for:
  - a. Appeal purposes
  - b. Modification of child support or custody
4. Lightens the work of the Court when a good model is provided from which the Court can draw Court's own document
5. Again, well-prepared FF/CL impresses the Court and can make Court's job easier

#### C. Generally

1. Helps the Court fulfill its obligation and appropriate desire to make findings of fact on a record which an appellate Court will accept and not refer for rehearing
2. Helps ensure that the Court does not fail to make a finding of an important fact. If you fail in this regard, you will be faced with much work proving the fact to an appellate court
3. Provide a floppy disc, in format compatible with Court's. Contact Court to determine word processing software the Court uses. Make is possible for the Court to work from your document, rather than having to create its own.

## **XI. DEFINING, DISTINGUISHING AND**

## **DRAFTING FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. What Are Findings of Fact?**

1. Definition: A written statement of the ultimate facts as found by the Court, signed by the Court and filed therein, and essential to support the decision and judgment rendered thereon
2. A determination of a fact by the Court, averred by one party and denied by the other, and founded on evidence in a case. “A conclusion by way of reasonable inference from the evidence.” Black’s Law Dictionary 632 (6<sup>th</sup> ed. 1990)
3. Findings can be based on inference; the inference must be based on facts legally proved

### **B. What Are Conclusions of Law?**

1. Judge must first decide the fact issues, and then apply the law to draw one or more related legal conclusions (Conclusions of Law)
2. Those conclusions that a trial judge concludes flow from the ultimate facts

### **C. Bad Examples:**

1. A confusing mess of a document; “Findings of Fact” consisting of serially numbered mixed statements of fact and law followed by “Conclusions of Law,” which are identical duplicated statements
  - a. FF and CL are different in function and purpose – although both may use the same legal language
  - b. Ultimate facts sometimes can

look like legal conclusions – bear in mind the function and purpose of each

2. Bad Styles: A long paragraph, which covers more than one element of the allegations
  - a. Long paragraphs are difficult to follow or assess
  - b. Any single weakness or shortcoming in a long paragraph would infect the whole assertion and the entire paragraph could be disregarded
  - c. Some assertions will be difficult to prove, however, failure to prove them may not be fatal
  - d. Court may have difficulty distinguishing between proven facts and unproven facts in a long, compound issue paragraph

### 3. Examples

## D. Drafting Tips

### 1. Two Alternative Styles

- e. Chronological events. If you choose this style, don't forget to address all the elements. In other words, choice of this style raises risk that the Court may overlook an element.
- f. Elements of tort, contempt, or crime in the order in which they appear in relevant statute or case law; considerations within custody statutes.

### 2. Know your audience

3. Write for the judge and appellate court.

4. Communicate with the Court about when the Court would like to receive the proposed FF/CL
5. Understand how the Court intends to use your proposed FF/CL
6. How well does the Judge know the facts/law?
  - a. Understanding Judge's knowledge dictates detail required in drafting
  - b. Adopt style for specific judge
7. Understand that when you are writing proposed FF/CL, you are providing a roadmap for the trial court and possibly for an appellate court. You should ensure that your document is well-ordered and logical and encompasses only relevant information. The Courts do not want to read extensive, redundant or irrelevant material. That kind of a document will impress the Court with your incompetence.
8. Choice of words
  - a. Choose important words carefully. Words should be congruent with the theory of the case. E.g., - "Assault" is better than "incident" because you are going to prove that an assault occurred. However, "mayhem" is not better than "assault" because "mayhem" has many connotations which would all have to be proved for the Court to adopt that word in a finding of fact.
  - b. Use inflammatory words if appropriate: e.g., "gun," "3 inch scar," "8 stitches," "6 ft. 2 in., 235 lb," "5 ft. 1 in., 105 lb,"

“bruised, “ “gash, “ “ wheelchair,”  
“emergency room physician”

- c. Quote profanities and slurs exactly as your client will relate them during direct examination. This helps the outrageous conduct come through, without overreaching.
- d. Do not be afraid to repeat powerful words. These are valuable points to drive home, and into the Court’s findings of fact. The Court may start to use them in its own thinking, and this helps at the appellate level.