

AMERICAN BAR ASSOCIATION

COMMISSION ON DOMESTIC VIOLENCE

**GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
FAMILY LAW SECTION**

**TORTS TRIAL AND INSURANCE PRACTICE SECTION
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NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION
NATIONAL ASSOCIATION OF WOMEN LAWYERS
NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS**

Submitted to the House of Delegates

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases*, including the Preface, dated August 2007.

Approved August 13, 2007.

Standards of Practice
for
Lawyers Representing Victims
of Domestic Violence, Sexual Assault and Stalking
in
Civil Protection Order Cases

Preface

Domestic violence, sexual assault and stalking are epidemics in our society with dramatic, negative effects on individuals, families and communities. These crimes know no economic, racial, ethnic, religious, age or gender limits. Moreover, although these crimes can and do occur independently, they may also occur together, committed by the same perpetrator against the same victim. A sexual assault victim may have been stalked prior to the assault; a domestic violence victim may experience systematic rape in addition to physical and psychological abuse. Because these crimes may overlap and intersect, it is essential that lawyers providing legal assistance to victims be informed and educated about them individually and collectively.

In order to understand the dynamics of a particular domestic violence, sexual assault or stalking case, it is important to understand the broader continuum of violence in which these cases occur. By conservative estimates, 1.5 million women in the United States are assaulted by their intimate partners every year.¹ Nationally, one in three women will experience sexual violence in her lifetime,² and one in twelve women will be stalked in her lifetime.³ Although women are the victims in the majority of these crimes, men are also victims: the same studies reveal that 835,000 men are physically assaulted by an intimate partner annually in the United States, one in five sexual assault victims are male, and one in forty-five men is stalked in his lifetime.⁴ The need for protection from violence cannot be underestimated.

Civil protection orders for victims of domestic violence are available in every state. Though states have begun to enact statutes specifically creating civil protection orders for victims of sexual assault and stalking, only a minority of states have stalking civil protection orders and fewer still have civil protection orders available for victims of non-intimate partner sexual assault.

¹ Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey* (2000), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm>

² *Id.*

³ Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 169592, *Stalking in America: Findings from the National Violence Against Women Survey*, (1998), available at <http://www.ojp.usdoj.gov/nij/pubs-sum/169592.htm>

⁴ See *supra* notes 1, 2 and 3.

Civil protection orders are typically issued by state or tribal civil courts after a showing of abuse or violence or the likelihood of imminent harm. They may include a variety of provisions that vary from jurisdiction to jurisdiction requiring, *inter alia*, that the perpetrator (1) stay a certain distance from the victim, (2) not assault or otherwise abuse the victim, and (3) refrain from direct or indirect contact with the victim. Civil protection orders vary in their duration (e.g., emergency, temporary or “permanent”), and in many jurisdictions may include remedies such as emergency monetary assistance, temporary child custody and support, and housing. Similarly, in every jurisdiction there is an enforcement mechanism whereby the victim may call upon law enforcement to enforce the provisions of the civil protection order when it is violated. In these ways, civil protection orders are intended to provide tangible, specific protection for victims that have experienced domestic violence, sexual assault or stalking.

Victims of domestic violence, sexual assault and stalking do not seek protection orders readily, often concerned that the court will not believe them and fearing that the abuse will continue even after the protection order is obtained. Many victims are concerned about having to face the perpetrator in court, or fear losing their privacy. In domestic violence cases, the majority of victims complain of serious physical assault, threats to kill or harm, or attempts or threats to take children. Protection orders are emergency remedies designed to provide for immediate safety. Nonetheless, victims of domestic violence, sexual assault and stalking are regularly murdered by their assailants when they try to escape, even after the court has issued a civil protection order, demonstrating that these orders can be ineffective without enforcement and skilled, holistic advocacy.

Access to justice is essential to ensuring that victims of domestic violence, sexual assault and stalking receive the protection and remedies necessary to prevent and minimize the lifelong, devastating effects of these crimes. These Standards recognize the importance of victims’ full access to the civil protection order remedies available to them. In addition, lawyers may seek further guidance from other American Bar Association Standards of Practice for use in conjunction with these Standards: *Standards for the Provision of Civil Legal Aid, Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means and Standards of Practice for Lawyers Representing Children in Custody Cases.*

Use of the Standards

These Standards are presented as aspirational guidelines for the operation of legal service providers, pro bono legal service providers, and individual lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases. They are based on the combined and distilled judgment of individuals with substantial experience in the area. These Standards do not create any mandatory requirements and failure to comply with a Standard should not give rise to a cause of action or a finding of a legal ethics violation, nor should it create any presumption that an individual lawyer, legal service provider, or pro bono legal service provider has breached any legal duty owed to a client or to a funding source.

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History

In October 2005, with generous funding from the Office on Violence Against Women, U.S. Department of Justice, the *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases* (“Standards of Practice”) project was launched. Led by the American Bar Association Commission on Domestic Violence and its partner organizations, the Washington Coalition of Sexual Assault Programs, Texas RioGrande Legal Aid and the National District Lawyers Association’s National Center for the Prosecution of Violence Against Women, the project developed these Standards of Practice.

The purpose of the Standards of Practice is to provide a reference tool for practicing lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases. The Standards of Practice are intended to cover a wide range of victim issues that should be considered to provide effective representation to victims of diverse backgrounds in civil protection order cases.. The Standards contemplate practice in all US state court jurisdictions, but are not intended to be a comprehensive resource on tribal court practice.

The goals of the Standards of Practice are: (1) to improve the quality of legal representation of victims of domestic violence, sexual assault and stalking; (2) to enable lawyers to effectively, ethically, and holistically represent victims in civil protection order cases; and (3) to raise awareness about the need for high-quality representation for victims of domestic violence, sexual assault and stalking in civil protection order cases.

A Standards of Practice Steering Committee met for the first time on May 8, 2006 in Washington, DC. The Steering Committee was comprised of 16 individuals, including practitioners, judges and others with various areas of expertise in civil protection orders. With the Steering Committee’s advice, guidance and discussion, a draft of the Standards of Practice was created.

To receive substantive and structural feedback on the draft version of the Standards of Practice, the project partners designed three Working Group meetings, gathering lawyers from three geographic regions to maximize diverse input. The first Working Group meeting took place on September 18, 2006 in Chicago, IL. The second

meeting took place on December 1, 2006 in Seattle, WA, and the third meeting took place on February 12, 2007 in Austin, TX.

All of the Working Group meetings were comprised of approximately 10-12 legal practitioners who handle civil protection order cases in various capacities. Through a series of discussion questions, the project partners facilitated dialogue among the meeting participants to garner substantive and constructive comments to inform the drafting of the Standards of Practice. Finally, the project partners submitted a completed draft of the Standards of Practice for peer review by practitioners and national subject matter experts in a series of conference calls. With this input from "front-line" practitioners and pro bono lawyers, we believe that the Standards of Practice are a helpful and practical resource for lawyers representing victims in civil protection order cases. It is our hope that these Standards of Practice will not only be an invaluable resource to lawyers, but will also increase the quality of legal services to victims of domestic violence, sexual assault and stalking.

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I. PURPOSE & SCOPE

The purpose of these Standards of Practice is to provide a reference for lawyers representing victims of domestic violence, sexual assault and stalking in civil protection order cases, and to encourage lawyers to provide high quality legal representation to those clients. These Standards keep the needs of the client at the center of representation and strive to build public confidence in a just and fair legal system by working to promote safety for victims of domestic violence, sexual assault and stalking, and accountability for perpetrators.

II. DEFINITIONS

- A. “Domestic Violence”:** Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim.
- B. “Sexual Assault”:** Any type of non-consensual touching or sexual penetration, however slight. Sexual assault may be perpetrated by an intimate partner (including a spouse), a non-intimate person known to the victim, or a stranger.
- C. “Stalking”:** A course of conduct directed at a specific person that would cause a reasonable person to experience fear.
- D. “Dating Violence”:** Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by a person who is or has been in a romantic or intimate relationship with the victim, often for the purpose of establishing and maintaining power and control over the victim.
- E. “Victim”:** A person who has been subjected to domestic violence, sexual assault and/or stalking. Other terms used to describe a victim may include “survivor” or “client.”
- F. “Perpetrator”:** A person who commits an act of domestic violence, sexual assault and/or stalking against a victim. Other terms used to describe a perpetrator may include “offender,” “batterer,” “abuser,” or “assailant.”
- G. “Client”:** Any person receiving the services of a lawyer. In these Standards, the person receiving services is a victim of domestic violence, sexual assault and/or stalking who is petitioning the court for a civil protection order, or is the person seeking the civil protection order on behalf of the victim.
- H. “Respondent”:** Any person responding to a petition for a civil protection order. In these Standards, a respondent is a person alleged to have

committed an act or acts of domestic violence, sexual assault and/or stalking and against whom the civil protection order is sought. Other terms used to describe the respondent may include “defendant,” “perpetrator,” “offender,” “batterer,” “abuser” or “assailant.”

- I. “Federally Recognized Tribe”: A group, band, nation or other organized group of indigenous American people, including any Alaska Native village, which is recognized by the federal government as constituting a distinct and historically continuous political entity.**
- J. “Civil Protection Order”: A civil court order, enforceable by law enforcement, intended to protect a victim and to stop the violent, dangerous and/or harassing behavior of a respondent. A civil protection order, if violated, can subject the respondent to criminal prosecution. Other terms used to describe a civil protection order may include “order for protection,” “restraining order,” or “peace order”; however, in some jurisdictions these terms may have a distinct meaning and usage, and may not be enforceable by law enforcement.**
- K. “Safety Plan”: An individualized set of strategies designed to maximize the safety of a victim who may be in danger of further harm from a perpetrator.**
- L. “Lethality Assessment”: An assessment, typically via a screening instrument, designed to gauge the future risk of homicide to the victim by the perpetrator of domestic violence, sexual assault and/or stalking.**
- M. “Full Faith and Credit”: A constitutionally and/or legislatively mandated rule of law requiring each state, federally recognized tribe or territory to recognize and enforce some or all public acts, records, and judicial proceedings of every other state, tribe and territory. The Violence Against Women Act 2005 (VAWA) mandates that every state, recognized tribe and territory provide full faith and credit to protection orders issued by other states, tribes or territories. This includes provisions in protection orders relating to custody, visitation and support. For the purposes of full faith and credit under VAWA, a protection order is any injunction, protection order, restraining or other order issued for the protection of victims of domestic violence, sexual assault, dating violence or stalking.**

III. ETHICAL DUTIES OF LAWYERS REPRESENTING DOMESTIC VIOLENCE, SEXUAL ASSAULT OR STALKING VICTIMS

Lawyers are bound by their jurisdiction's ethics rules in all matters. In order to most effectively discharge their ethical obligations, lawyers representing victims of domestic violence, sexual assault and stalking should comply with the standards of practice identified here.

A. Competent Knowledge of Law

1. Knowledge of Civil Protection Order Law

Before representing a client in a civil protection order case, the lawyer should have competent knowledge of the civil protection order laws in the relevant jurisdiction(s).

2. Knowledge of Related Legal Issues

The lawyer should screen for related legal issues arising from the incidence of domestic violence, sexual assault or stalking. If the lawyer is not competent or available to represent the client in related matters, the lawyer has a duty to refer the client to competent counsel.

B. Competent Knowledge of Domestic Violence, Sexual Assault and Stalking

Before representing a client in a civil protection order case, the lawyer should have competent knowledge of the dynamics of domestic violence, sexual assault and/or stalking.

In particular, the lawyer should understand the potential risk of escalated violence due to litigation, and how the experience of domestic violence, sexual assault and/or stalking may affect the client-lawyer relationship, including the process of establishing rapport with and gathering information, evidence and case direction from the client.

C. Culturally Competent Representation

The lawyer should be aware of the culture of the client and of how violence is understood within that culture.

In particular, the lawyer should understand how the culture of the client may affect client-lawyer communication and trust, identification and presentation of evidence, and remedy selection.

D. Effective Client Communication

1. Communication with Clients

The lawyer should always personally consult with the client prior to representation and prior to court proceedings for a private and meaningful exchange of case-related information.

2. Physical Access to Direct Legal Representation

All clients should have comparable access to the lawyer. When working with clients with physical and/or mental disabilities, the lawyer is obligated to ensure that the appropriate accommodations are in place.

3. Interpreters and Other Language Resources

When the client is not proficient in English or is Deaf or hard of hearing, the lawyer should ensure a neutral, professional, qualified interpreter is available for all client meetings and court proceedings.

4. Confidentiality and Third Party Privilege Issues

The lawyer should inform the client that ordinarily, communication exchanged between the lawyer and client is protected by the attorney-client privilege. The lawyer should advise the client about the applicable rules and laws regarding confidentiality of communications with third parties (e.g. advocates, interpreters, counselors, personal care attendants, legal guardians, support persons) and any effect of these parties' presence on attorney-client privilege.

E. Client Safety

1. Lethality Assessment and Safety Planning

The lawyer should ensure that comprehensive lethality assessment and safety planning occur with the client.

2. Sensitivity to Effects of Trauma

Lawyers should be sensitive to the effects of trauma in their clients, and aware of the effects of vicarious trauma on themselves and their staff.

F. Scope of Representation

1. Client-Centered Representation

The lawyer should advise the client about legal options and consequences, but must ultimately defer to the client regarding legal decisions.

2. Legal Capacity and Duty of Loyalty

The lawyer should determine whether the potential client has the legal capacity to enter into and/or sustain the client-lawyer relationship pursuant to the rules of the jurisdiction, and communicate this to the client. Once the client-lawyer relationship is established, the lawyer must refrain from divulging case-related information gained in interviewing or representing the client to unauthorized third parties.

3. Scope of Representation, Case Closing and Withdrawal

The lawyer should be clear about his or her role in the client's legal matters, including communicating to the client the limits of the lawyer's role and the anticipated time the lawyer will fulfill that role.

4. Coordination with Allied Professionals; Holistic Representation

The lawyer should refer the client to suitable non-legal professionals for support, advocacy and treatment when necessary and seek to holistically represent the client.

IV. PROCEDURES

A. Office Intake Procedures

Intake for victims of domestic violence, sexual assault and/or stalking should be conducted by personnel trained to work sensitively with this client population. Intake should include, at a minimum, a conflict check, a safety assessment, and identification of any accommodations required by the client.

B. Basic Procedural Obligations of the Lawyer

- 1. The lawyer should obtain an interpreter if necessary, advise the client regarding confidentiality of communication, and establish the limits of the lawyer's role.**

- 2. The lawyer should create and maintain a trusting relationship with the client.**
- 3. The lawyer should strive to document every aspect of the case as it progresses, taking written notes of client interviews, witness interviews and other case developments, and collecting other relevant written documentation in the file.**
- 4. The lawyer should interview and counsel the client about the client's goals and desires, review the file and any other information that the client has provided, and help the client determine whether obtaining a civil protection order is the best remedy.**
- 5. The lawyer should advise the client about the civil court system, the proceedings at hand and the lawyer's responsibilities. Additionally, the lawyer should understand the basic criminal procedure for a misdemeanor and felony domestic violence, sexual assault or stalking case so as to inform the client how each case is different if they are occurring simultaneously. If relevant, the lawyer should also understand the basic procedures of child and/or adult protective services so as to inform the client about what to expect if she has a case pending with either agency.**
- 6. The lawyer should inform the client of all relevant available remedies and make sure the client understands the legal implications of not seeking the civil protection order (i.e., whether the civil protection order will be dismissed with or without prejudice, etc.). The lawyer should assist the client with a plan for self-sufficiency and seek economic remedies, where permitted, through the legal process.**

C. Pre-hearing Responsibilities

- 1. The lawyer should interview the client to identify case theory, strategy and evidence; engage in appropriate discovery when permitted and defend against inappropriate discovery requests; and gather and investigate evidence as appropriate.**
- 2. The lawyer should identify potential related legal issues and consequences for the client, such as inter-jurisdictional enforcement of the order, effect of the order on current or future immigration status, intersection of the civil proceeding with criminal prosecution, and crime victim rights.**
- 3. The lawyer should timely file all pleadings, motions, briefs and responses; identify, subpoena and prepare witnesses, including potential expert witnesses; prepare the cross-examination of**

respondent, including the gathering of respondent's written admissions, criminal history and police reports involving both parties; research applicable legal issues; and advance legal arguments.

- 4. If there are children involved and the law of the jurisdiction permits it, the lawyer should discuss with the client her wishes regarding temporary custody and visitation, keeping in mind jurisdictional issues. The lawyer should carefully consider the pros and cons of having the children offer witness testimony, in light of current law and scholarship on childhood development.**
- 5. If the client has privacy concerns, the lawyer should consider how protecting her privacy will affect the case progression and continue to discuss the issue with the client.**
- 6. If the respondent is unrepresented by counsel, the lawyer should consider how this may affect his or her ability to negotiate, conduct the hearing, protect the client during cross-examination, and keep the lawyer and the client safe in the courthouse.**
- 7. The lawyer should prepare a specific, enforceable proposed order that both protects the client and holds the respondent accountable.**
- 8. The lawyer should be cognizant of the client's rights in other forums such as immigration, tribal or criminal justice, and when appropriate, the lawyer should coordinate with those systems.**
- 9. The lawyer should become familiar with the practices of the judge or hearing officer on the case, as well as any local procedural rules or standing orders, and plan for safety at court.**

D. Hearings

The lawyer should participate actively in all court proceedings on issues within the scope of the lawyer's representation of the client.

- 1. The lawyer should prepare for and attend all hearings with the client, using creativity and skill in presenting the evidence. Specifically, the lawyer should prepare and make all appropriate motions, responses and evidentiary objections; prepare, present and cross-examine witnesses and exhibits; and seek every appropriate remedy the client is entitled to under the law, subject to the client's direction.**
- 2. The lawyer should make/protect a record for appeal, ensuring that the court makes specific findings on the record, if possible.**

- 3. The lawyer should seek to ensure that the courtroom is safe for the client and the lawyer, including preparing for litigating against a pro se respondent.**
- 4. The lawyer should consider a negotiated settlement only when it is in the best interest of the client, keeping in mind the danger of mutual orders and the importance of legal findings for inter-jurisdictional enforcement.**

E. Post-hearing Responsibilities

Ethical representation does not end with the hearing. At a minimum, the lawyer should ensure that the client understands the outcome of the proceedings, discuss implementation and any alternative legal options, and, when the client-lawyer relationship has ended, clearly communicate that fact to the former client.

- 1. The lawyer should seek to ensure that the order is clear and accurate and that the client understands all provisions of the order, including its expiration date (if any) and the requirements for renewal or extension. The lawyer should also advise the client about how to modify the order and the availability of civil and criminal contempt proceedings.**
- 2. The lawyer should ensure that the order is served on the respondent and that the client is prepared to respond safely and effectively to violations by the respondent.**
- 3. If the hearing does not result in the issuance of a safe and effective protection order, the lawyer should discuss with the client the process for appeal, rehearing and/or modification.**
- 4. The lawyer should always communicate with the client about case closing procedures, including withdrawal, and implications.**