

Prosecution of Domestic Violence Cases

By Elliot H. Gourvitz

2.1. PRE-INCIDENT PREPARATION.

Most of the time you will first learn of a domestic violence case from a victim after the occurrence of the act. In rare instances, a potential victim will contact you prior to an incident, aware of the fact that their spouse is abusive, has threatened them, where your feels that they have the propensity to do harm to them.

In other instances, while you are preparing or in the middle of a matrimonial case, your client may relate to you her fear that domestic violence may take place.

Your first obligation, as basic as it may seem, is to inform your client that no one has to be subject themselves to domestic violence. That there are remedies and that there they are not powerless. Tell them about domestic violence, the battered women's syndrome, the abuser male and the Domestic Violence Act.

If the form of domestic violence is harassment, I instruct my clients to have a voice activated tape recorder handy, which can be purchased for under \$80.00 from Radio Shack, in order to substantiate their case. I also inform them that if they are one of the parties to a telephone call, that it is alright to tape telephone conversations between themselves and the other party on the phone, the potential abuser.

FOREWARNED IS FOREARMED.

I also instruct them how to prepare for the aftermath of a domestic violence incident.

I stress to them the importance of calling the police immediately upon an occurrence happening in order to protect themselves. If their house has an alarm system with a panic button, I remind them that that's available, as well as having a cellular phone handy, or a friend to check on them periodically at the anticipated height of the problems.

I advise them to keep some cash stored outside of the house and readily available for them. I suggest they have an extra set of keys to the car, and make sure when they lock the car, that it cannot be easily blocked, in a garage or in a driveway, facilitating escape if necessary.

I also instruct them to have extra clothes for themselves and their children.

Have prescription drugs, medical insurance cards, and their attorney's telephone number, again stored in a separate place can aid the victim.

If they know of any weapons that are in the house, dispose of them themselves, hide them if they determine that is a better course, but not in the house; or turn them in to the police.

These few simple steps can be a lifesaver in more ways than one.

PRE-INCIDENT CHECKLIST:

PREPARATION

Cash - Stored out of house

Keys - Extra Set - Hidden

Tape recorder or video tape

Police call access - panic button, cellular phone, friend

Clothes - Extra for self and children

Prescription drugs or medical insurance cards

Lawyer's telephone number

Weapons - Dispose of or hide.

2.2. POST-INCIDENT PREPARATION

The initial concern in your interview is for your client to describe the incident which gave rise to the domestic violence, "the triggering event". Get an exact narrative as detailed as possible concerning what occurred.

Assuming that the client has already filed a complaint, review the complaint and the certification, as well as the temporary restraining order with your client, to make sure that it is accurate and to determine whether there are any omissions or inconsistencies between orders on the complaint and what your client is telling you.

If the complaint has not been issued, prepping your client to file same, following the procedures in 2.4 infra, called "Filing the Complaint".

Determine whether there was physical violence, any threats of physical violence, or any acts of harassment. Pulling telephones out of the walls, punching hands through walls, throwing objects even if they didn't hit the victim, are acts of physical violence or harassment.

Find out if there has been any history of previous domestic violence. Were there any other complaints filed and either acted upon or dismissed? If acted upon, what became of them, how were they decided by the Court and are the restraints still in place? If the restraints were removed, or the temporary restraining order never converted into a final restraining order, find out why. Were promises made by the abuser for counselling, anger management, alcohol or drug therapy, which were not complied with or had little use.

Besides the plaintiff, were there any other witnesses to the event? Small children, or any children of the marriage are generally not good witnesses and should be avoided if at all possible. Most witnesses only see the aftermath of the domestic violence rather than being eye witnesses to the events themselves. These witnesses are still valuable in order to testify to the state of mind of the victim, the state of mind of the abuser and to testify

as to what was told to them immediately before or after the incident, as well as to describe the physical condition of the parties or the place the event took place.

Inquire if any of these witnesses were present at previous

events or heard of any promises that were made by the abuser to reform.

If the witnesses are unfriendly, subpoena them or have them interviewed through third parties.

Expert witnesses and professionals such as police and doctors can be interviewed prior to trial and if necessary subpoenaed to trial.

Physical evidence should be preserved such as torn clothing, broken dishes and weapons used. Photos should be taken of the injuries and scene of the incident, specifying with as much accuracy the details of what is depicted, by whom the photograph was taken and the date on which it was taken.

Documentary evidence should be collected including former complaints and/or dismissals, police reports, hospital and doctors' reports of this incident and previous incidents, bills for treatment, etc. If possible, video tape both the injuries and the scene.

If your client is using drugs or alcohol to excess have them stop in case tests are ordered at time of trial.

If there was a tape of the proceedings between your client and the judge when the original complaint was signed, secure a copy of it or the transcript. If there was a 911 call or other phone calls with the police, get copies of those.

Get copies of the medical bills, paying special attention to uncovered medical bills which can be reimbursed.

Have your client prepare financial information including getting copies of income tax returns, and if time permits, prepare a Case Information Statement setting forth all of their expenses. If not, compile the financial statement or a budget sheet that is provided by the court.

Be prepared to show that your client has occupied the household, and have an alternate plan for the defendant where they can live in the event that the domestic relations order is granted, i.e. mother, father, friend, brother etc. Remember it is not necessary that the house be in the plaintiff's name or the apartment be leased to the plaintiff for them to secure sole possession. Also remember that there is no longer any in house restraining orders, so once the order is entered, the defendant will not be permitted to remain in the house with the plaintiff. If it is impractical for the plaintiff to remain in the household, have another apartment available to which they may move with or without the children, and secure the costs of same, so that at the time of asking for relief, the defendant can be made to pay for the victim's rent, if the defendant had already a duty to support the victim.

If the defendant has been the one responsible for payment of the rent or mortgage payments on the dwelling in which the victim lives, and has a legal duty to do so; and it has not previously been resolved or pending in any other matrimonial action, get the amount of the monthly mortgage or rent payments so that you can be prepared to ask the court for continued payment.

If your client does not wish to return to the scene of the domestic violence, and is moving out of the house to another location, determine the cost of moving and travel expenses, as well as the new rent.

Be prepared to calculate and prove out of pocket expenses such as loss of earnings due to the injury, medical expenses or damages to property. Not only have the bills, but the witnesses either on call or subpoenaed to testify as to the bill, the necessity of same and the appropriateness of the charge.

If time provides and you can review pay stubs and/or income tax returns, prepare child support according to the Child Support Guidelines.

Future medical bills which will be necessitated by the act of domestic violence should be calculated and be prepared to be presented.

If personal property has been damaged or destroyed, take pictures of them as well as getting estimates for the replacement.

Inquire of your client as to whether or not they believe that the abuser, your client or the children need professional counseling as a result of the incident or of the previous abuse, select a psychologist, psychiatrist, or a health center, and find out the cost. The Court can order the abuser to pay for these.

If your client believes that the defendant has a substance abuse problem, alcohol or drug problem, or believe that they would benefit from anger management or other psychological help, inquire as to this also. You should also determine through the help of the court or probation department, what programs are available in the county, preferably free of charge to aid the defendant. If you believe that the defendant should undergo a psychiatric evaluation, ask for same.

Prepare an attorney's certification of services which should also include the time that you are going to be in the trial for submission to the court.

In extreme injury cases, or in horrific domestic violent situations, be prepared to make an application for punitive damages. This may involve using an expert in order to establish the level of same.

If there are further restraints needed other than from the residence that the victim wishes the abuser to stay away from, such as the children's school, their place of employment, family members or friends, etc. be prepared to ask the Court to include these.

You should also inquire whether or not the victim wants to stop the defendant from contacting not only herself, but the above people, either by phone or any other means of communication, which prohibition can be specified in the order.

If the victim has left the residence, or is in the residence and the defendant has taken any necessary personal items, such as an automobile, checkbook, health identification documents, keys to cars or keys to the house or any other personal effects, get a list of these so you may be prepared to ask the court in the order to have them returned.

If the victim believes that the defendant may ask to come back to the residence to get their belongings, you should suggest that they pack their personal belongings neatly, any necessary business records that they might need (after making copies for themselves), and get them available for the defendant. This would expedite matters and might obviate the necessity of them coming back at all.

If there are any weapons in the house, hunting knives or guns, they should be taken out of the house and given to the police; and if not easily accessible, secure a court order so that they may be taken from the inaccessible places and given to the police.

Prepare a visitation schedule for the non-custodial parent, whether it is your client or the abuser, if they are not a danger to the children. If they are, you may ask for a "risk assessment" to be discussed later. If your client is the person who usually did not have residential custody, and perhaps is a working parent, have available their new schedule which includes the people who will aid in taking care of the children, their availability in cases of emergencies, and any substitutes for them to babysit or take care of the children.

The visitation plan should be drafted and minimize any contact between the parties on pick up and drop off. Curb side pick up, intermediary third parties and at worst, a police station are alternatives to facilitate the transfer of the children.

You should also inquire after any other matter that concerns your client which may or may not be able to be asked for at time of the final hearing, if you are successful in obtaining a final restraining order.

2.3 CLIENT PREPARATION CHECK LIST

PROSECUTION

Exact narrative of triggering event

Previous history of domestic violence

Testimonial evidence - subpoena and/or interview fact witnesses;

Interview expert witnesses including police and doctors

Physical evidence - torn clothing, broken dishes, photos and/or videos of injury and scene of incident

Documentary evidence - former complaints, police reports, hospital and doctors' reports, bills for

treatment, estimates for future treatments, 911 tapes, transcripts of initial proceedings for temporary restraining order before Judge.

[] If client is using drugs or alcohol have them stop in case tests are ordered

[] Prepare financial information - tax returns, case information statements, budget list

[] Calculate and prove

[] Loss of earnings due to injury

[] Child Support - Guidelines

[] Gather checks and finances. Get life, medical and car insurance policies

[] Estimates for actual bills for repair or replacement of damages or destroyed personal property

[] Cost of counselling for victim, children and/or defendant

[] Necessity for abuser to be counselled - anger management and psychiatric expenses

[] Estimate of past or future travel expenses

[] Prepare an Attorney Certification of Services

[] Further restraints - school, employment, family members, friends etc.

[] Proof of occupancy of residence or a plan of alternate residence that your client needs

[] Payment of rent/mortgage

[] Return of personal items: check books, keys, health and insurance documents

[] Seizure of weapons

[] Prepare parenting time schedule

2.4 FILING THE COMPLAINT

In some instances you may get involved before the complaint is filed by the client. If you do get involved beforehand, you are able to instruct your client as to where to file the complaint, how to file the complaint, what to include, and what relief they can request.

WHERE:

A complaint can either be filed in a Municipal Court or in the Family Part of the Superior Court. Municipal Court judges for many reasons better left unmentioned, are more apt to sign a complaint based on less substantial allegations than a Family Court judge. A denial by a municipal court judge does not preclude the victim from filing the very same complaint with the Superior Court.

The Municipal Court is usually open during court hours, but judges are usually available on telephone call notice at any time when they are called by police, not only to take the complaint and order a search warrant for weapons, but on behalf of the defendant to set bail.

The Superior Court is open during regular court hours, and the victim usually sees a domestic violence coordinator who screens the allegations previous to being allowed to present their cause of action to a judge.

In either one of these cases, this is an ex parte action, in which the victim is asking the judge to enter certain restraints and relief immediately without the benefits or detriments of the defendant's participation.

The complaint may either be filed where the act of domestic violence occurred, where the victim resides or is sheltered or where the defendant resides. After being called by the victim at the scene of the domestic violence, the police have been instructed to transport the victim to the Municipal court or to the Family Part of the Superior Court; but most

likely, they will simply telephone the court for an emergent temporary restraining order and, most likely, to the Municipal Court judge with whom they are familiar.

A complaint can also be filed if the domestic violence took place out of the State of New Jersey.

If your client has fled the residence for their protection, they need not give their new address or divulge where they are presently residing.

In some instances, where the domestic violence is not substantial, it is probably wise to make the application before a Municipal Court judge rather than a Superior Court judge. They seem more inclined to grant restraining orders and are less inquisitive. Also, the Act provides that a denial of a restraining order by a Municipal Court judge or even an administrative dismissal of the complaint does not bar the victim from filing a complaint in the Family Part on the same incident and getting the same relief that they would have gotten before. Thus you might have two bites of the same apple or two judges to whom you can appeal for relief.

If for some reason your client is not available themselves to make the application, i.e. out of the state, or injured, the victim can swear to the complaint by the phone. If the person is physically or mentally incapable of filing a complaint, another person may do so if they represent the individual. It is unclear whether represent means that you need an attorney, or somebody who just represents their interest. But before either one of these non-appearances can result in the issuance of a temporary restraining order, the court must be satisfied that there are sufficient grounds for them not appearing and making a personal application.

Even if the victim does not want to sign a criminal complaint, the police officer may do so themselves if they believe an act of domestic violence has been committed.

Whenever a disabled person is subjected to an act of domestic violence, the procedure is the same. Where the actions or omissions against the elderly or disabled do not meet

domestic violence conditions, the victim or the police on behalf of the victim may file a criminal charge against the offender under the N.J.S.A.2C:24-8 "endangering the welfare of the elderly or disabled."

At the time of the issuance of the restraining order, your client will be put under oath and asked questions about the incident. At times, someone else prepares the report and submits it to the judge so that it is already written up before the judge gets it.

In filling out the complaint, it is necessary that you instruct your client to be as specific as possible and complete as possible as to all the allegations. Even at the resistance of the police who want to go home, the court clerk who wants to abbreviate the session as much as possible, insist on telling all of the events that occurred, leaving out nothing. Also be very specific about any past acts of domestic violence. Failure to do all of this may result in the case being compromised.

The criminal acts logically a victim can complain as the basis for the restraining order are as follows:

Assault

Terroristic threats

Kidnapping

Criminal restraint

False imprisonment

Sexual Assault

Criminal sexual assault

Lewdness

Criminal mischief

Burglary

Criminal trespass

Harassment

A hearing on a restraining order is limited to the facts contained in the domestic violence complaint, and it has been found that it is a violation of due process to issue a restraining order based on acts of domestic violence not mentioned in the complaint. If the restraining order is denied on a certain set of facts, it cannot be issued at a later date on the same set of facts as it violates the principals of res judicata and collatera estoppel.

You also must be aware of what relief you can ask for besides the restraint of the defendant contacting the victim.

You can ask for further restraint against the defendant contacting any friends or family either personally or by phone, or coming to the victim's place of business.

A restraining order can transfer custody to the victim and forbid visitation with the minor children until the return date for the safety of the victim and the children.

Automatically, the court will ask if there are any weapons and those will be seized, and except for some exceptions with police officers, the restraint will also be against the defendant for possessing any firearms. A search warrant may be necessary in order to seize the weapons, and the court will issue a search warrant asking for specific weapons and defining the scope of the search.

You have it set forth that the restraint is not only in this state but out of state and even nationwide.

Make sure that you tell the police where the defendant can be served so that they are immediately aware of the restraints.

Remember, bringing the domestic violence complaint does not foreclose the client from bringing criminal complaints in addition to the domestic violence complaint. In all but the most grievous cases, the criminal complaints are not filed against the abuser.

The defendant can ask that the police accompany them to the scene of the domestic violence, if that is the home, in order to pick up his personal belongings.

The Act mandates that the final hearing take place within ten days, and upon proper application by defense counsel, the time can be shortened to two days.

RELIEF AVAILABLE UNDER TEMPORARY RESTRAINING ORDER

Restraining defendant from personal or telephone contact with victim.

Restraining defendant from personal or telephone contact with family, friends, employees and employers, and from coming to place of employment.

Transferring custody if the defendant is the custodial parent of the children to the victim, or establishing a visitation schedule or prohibiting visitation.

Seizure of weapons.

2.5. POLICE INTERVENTION

If you are involved at the very early stages of the battering when the victim calls you, **the first thing to do is to advise the victim to call the police**. At the time the police come, if you are not involved, the police are under an affirmative obligation to tell the victim of their rights.

The police must arrest the assailant if:

1. The victim exhibits signs of injury caused by an act of domestic violence

The word "exhibits" is to be liberally construed to mean any indication that a victim has suffered bodily injury, which shall include physical pain or any impairment of physical condition. Probable cause to arrest may also be established when the police officer observes any manifestation of an internal injury suffered by the victim.

If there are no visible signs of injury, but the victim states that an injury occurred, the officer then should consider other relevant factors in determining whether there is probable cause to make an arrest.

2. A warrant for defendant exists.

There is no definition or explanation of what kind of warrant qualifies. One can assume it is a pre-existing domestic violence warrant, but perhaps a traffic warrant may also qualify.

3. A probable cause that a weapon was involved in domestic violence.

4. The police officer may also arrest a person or may sign a criminal complaint against them if there is probable cause to believe that an act of domestic violence has been committed even if there is no injury.

In some domestic violence cases, there are cross complaints against each other and each party might have signs of injury. Who to arrest? The Manual provides that in determining which party in domestic violence incidents is the victim where both parties exhibit signs of injury, the officer should consider:

A. The comparative extent of the injuries suffered;

B. The history of domestic violence between the parties, if any; or

C. Other relevant factors.

If you are involved in this very early stage and have a chance to talk to the police, but you will find that they are usually intransigent in their positions. Either they have been instructed by their department to arrest everybody, arrest only the man, or look the other way and walk away. Possibly, by talking to them if you represent the victim, you might want to convince them to arrest the abuser, for the protection of your client, and you can point out these requirements. But most time, you will meet resistance in that they do not want to "talk to a lawyer" and they are going to "do their job", despite what you tell them.

The most strenuous argument you must make is in the event that the abuser does have an outstanding warrant against them, and stress to them that it is mandatory to make an arrest.

In one case, the failure to make the arrest by the police resulted in the perpetrator coming back and shooting his estranged wife, and the court not giving the police officers or the police department immunity from suit.

Even if the victim does not want to sign a criminal complaint, the police officer may do so themselves if they believe an act of domestic violence has been committed.

The statute also provides that the victim is to be granted relief and not arrested or charged with an act if they use reasonable force in self defense against domestic violence. Also, if your client even exhibits signs of injury, your plea to the officer is that they were only self defense wounds and that they cannot arrest your client based upon that alone.

If there are any weapons there, they can be seized and you should insist that a search be made for those weapons.

POLICE INTERVENTION:

CALL MUNICIPAL POLICE

ARREST IF:

- 1. Signs of injury caused by domestic violence**
- 2. Warrant - Pre-existing**
- 3. Weapon was used**
- 4. Other history of domestic violence**

SEARCH AND SEIZE ANY WEAPONS IN HOUSE

ASSISTANCE IN FILING COMPLAINT AND TRANSPORTATION TO COURT

FILING COMPLAINT

-

WHERE Municipal Court Judge (after hours) or Superior Court Judge where plaintiff lives or has fled to or where incident occurred.

CITE "TRIGGERING" INCIDENT IN DETAIL

GIVE COMPLETE HISTORY OF DOMESTIC VIOLENCE - BUT ONLY ONE ACT NECESSARY

**IF DENIED BY MUNICIPAL COURT YOU CAN STILL FILE IN
SUPERIOR COURT.**

2.5 MAGIC WORDS TO JUDGE
FROM PLAINTIFF

General

"These disputes are not private wars. Acts of domestic violence are often crimes. The public has an interest, wholly apart from that of the litigants, in the fair and effective resolution of these cases."

Terroristic Threats

There is an atmosphere of hostility in this household culminating in the threat.

It is not whether she is in mortal fear of her life, but whether the statements meet the statutory requirement.

The scales of justice remind us that the public as well as the victim have a right to feel safe when alone in their homes.

"Subjective fear" is the fear produced by and within the mind of the victim as the victim understands and communicates it".

"The public has an interest, wholly apart from that of the litigants, in the fair and effective resolution of these cases. Victims come from a variety of circumstances, but the optimism that often underlies their forgiveness of the abusers should not deny them protection of law when confronted with the party's request."

Harassment

The defendant's conduct taken in the aggregate constitutes domestic violence and defendant had intended to harass plaintiff.

"Placing one's self in a location and remaining there for some time constitutes a 'course of conduct' which is violative of the harassing statute." The court may rely upon prior conduct and common sense to infer that the defendant had intended, and had the necessary purpose to harass his victim.

Any abuser who spontaneously appears or makes surprising communications without any legitimate purpose enhances the victim's apprehension. The fears of a domestic violence victim and the turmoil she or he has experienced should not be trivialized.

The method and manner of communication established a harassing intent to annoy or alarm.

Elliot H. Gourvitz is a matrimonial attorney in Springfield and a frequent ICLE lecturer. This article is adapted from a chapter in his book, *Domestic Violence in New Jersey: A Handbook for the Courts and Attorneys*.