

Chapter 2: The Client

Section 2A: Helping the Plaintiff

by Susan Mooney and Rebecca Rolfe

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(Note: In Kentucky, the moving party seeking a domestic violence order is referred to as “petitioner,” not “plaintiff.”)

Introduction

Domestic violence and sexual assault are simple in their effectiveness to hurt the victim yet complex in their impact on the individuals. Each individual survivor's response to her victimization is affected by the specifics of her situation, the response of the people close to her, and widespread cultural attitudes about gender-based violence. Myths and misinformation about gender-based violence can negatively affect her ability to recover from being abused as well as undermine the ability of the people around her to provide support and understanding. For example, the myths that most sexual assaults are committed by strangers may inhibit a survivor's ability to define an experience of date rape as rape. Belief in this myth may mean that the police are less likely to take a report of the rape or to follow up with a serious investigation. It may mean that friends or family members do not believe that she was raped or blame her for the assault. It may mean that a jury needs to be educated about the reality of sexual assault in order to understand and believe the survivor's experiences.

It is extremely unlikely that you have not been socialized with sexual assault and domestic violence misinformation. Facing the reality of sexual assault and domestic violence is the most important preparation you can undertake before entering this field. You will not only need to evaluate your own understanding of these issues, but may need to educate others in the legal process including the judge and/or jury. Fortunately there are many tools available to you in your education process. Most urban communities and many rural communities have rape crisis agencies or domestic violence shelters to provide resources and education. Literature and written resources are widely available. A bibliography and resource directory are included in the appendixes to assist you in your research and education. 1

The goal of this chapter is to inspire you to do the background work necessary to be an effective attorney in these cases. Working with survivors of abuse is an honor that we sincerely hope you recognize. Your openness, sensitivity, and awareness will allow you to witness the amazing ability of survivors to carry on in spite of tremendous challenges.

Representing survivors of domestic violence and sexual assault offers you unique opportunities and challenges as an attorney and as an individual. Your effectiveness as an advocate depends

on your fundamental understanding of sexual assault and domestic violence. From: D. Frazee, A. Noel, A. Brenneke, Violence Against Women - Law and Litigation. (1997).

Preparing to Work with Survivors of Gender-Motivated Crimes

No other area of the law will demand more of you than working with survivors of gender-motivated crimes. An examination of your motivations for representing survivors of sexual assault and domestic violence is critical. Be prepared to face your clients' pain, provide other resources for your clients, and be challenged in your ability to maintain healthy boundaries. Counselors, attorneys, and activists are driven by their altruism, commitment to justice, and desire for change. Anything less on your part will not serve your clients and will be a barrier to your success.

Your sensitivity to your clients' experiences and needs as survivors of sexual assault and domestic violence is paramount to your successful advocacy on their behalf. Society's perceptions and stereotypes influence your clients' understanding of their experiences and also shape your own interpretation and understanding of your clients' experiences. Your clients' experiences mean that they have had no choice but to confront unhelpful social notions about victimization. You have to confront willingly those ideas to understand your clients' experiences and prepare yourself for representing them in the process.

Society's tendency to "blame the victim," although not as blatant as it used to be, is still a factor. It is no longer acceptable to ask: "What was she wearing?" or "Was she asking for it?" Now, more subtle, insidious assumptions undermine survivors' perceived credibility and access to the justice system. As an advocate, understanding the dynamics of sexual assault and domestic violence is as crucial as understanding the law. In order to represent a survivor effectively, you must understand why a woman stays with a batterer or why a woman submits during a sexual assault. It is essential to educate yourself on these issues so as to avoid re-victimizing survivors. Do not wait until you have a client to learn about domestic violence or sexual assault. Any display of insensitivity on your part, especially in the first meeting, may well cause damage in ways that are not immediately apparent.

The best way to help your clients avoid a full blown crisis is knowing how to address issues as they arise – and the best way to do this is to understand the issues and know your local resources. Inevitably your clients will have needs that you cannot meet. Your local rape crisis centers and domestic violence programs have the resources and expertise to educate you and your clients as well as to identify additional resources. You might participate in a training program provided by a rape crisis center, domestic violence shelter, or program for batterers. Learning about domestic violence and sexual assault is also a process of coming to terms with your own perceptions and assumptions. Doing so in a supportive, interactive environment can be extremely helpful.

Your relationships with programs that work with sexual assault and domestic violence survivors will build your own network of support. Working in the context of pain and tragedy can be stressful and draining. While you need to be sensitive to your clients' experiences, you must also distance yourself from them. Your own personal support system can be essential in maintaining

this balance, especially if sexual violence has touched your own life. If surviving a sexual assault has motivated you to advocate for other survivors, you could experience some additional personal and emotional challenges. Survivors who work with other survivors are often confronted with their own experiences in the process. This can be a powerful experience because understanding others' lives and experiences is often helpful in understanding yourself. For you, and for your clients, you must have your own support system.

Gender-motivated crimes differ from other civil rights violations in that the perpetrator of a gender-motivated crime frequently had some type of relationship with the victim. The overwhelming majority of sexual assaults are perpetrated by someone known to the victim. In domestic violence cases the victim and perpetrator have shared some form of intimate relationship. In order to advocate effectively for your clients, you must be clear about how these perpetrator-victim relationships both facilitate the crimes and complicate society's response.

You must recognize the degree to which these gender-motivated crimes change clients' lives and understand the control that perpetrators frequently maintain. We will discuss client safety more fully later; the point here is to recognize that, particularly in domestic violence cases, the perpetrator can be extremely dangerous. Violence often escalates, and most domestic violence homicides occur when the battered partner attempts to leave the abuser. Do not ignore the potential threat that the perpetrator can be to your client and to you.

Limits and Boundaries

It is important for you and for your clients that you recognize, articulate, and maintain appropriate boundaries. Sexual and domestic violence results in a loss of power and control and is a fundamental transgression of boundaries. Empowerment for survivors is a process of regaining control of their lives. The empowerment process will be greatly facilitated by your ability to maintain appropriate limits and boundaries and provide your clients with the information they need to make their own choices. Your failure to maintain appropriate boundaries can hurt your clients and, ultimately, their cases. No doubt these clients will require more involvement than your clients with other types of legal issues. For example, face-to-face contact is crucial; it would be inappropriate to communicate with these clients primarily through written correspondence. At the same time, it is important to maintain your boundaries. For example, if your client has a need for shelter you can assess her options with her and assist her in finding appropriate resources; however, you cannot have a client moving into your guest room.

To clarify what you can, and cannot, provide to your clients, discuss with them your understanding of the attorney-client relationship. Differentiating your role from that of a counselor or therapist is vital to the success of your attorney-client relationship. Your client may need emotional support and it is important for you to help her connect with other sources of emotional support so she can begin to build a support network beyond your attorney-client relationship.

Part of the empowerment process for survivors is to regain control of their lives and this is often manifested by an intense interest in their cases. You must be clear about what kind of

communication and contact you can realistically provide your clients and then maintain that agreement. In addition to communicating with them as agreed, it is important to provide information they need to make their own decisions. One aspect of your role is to minimize the loss of power which clients often experience in the attorney-client relationship and the legal process.

Understanding Survivors of Gender-Motivated Crimes

Because each individual reacts and copes in unique ways, generalizations about sexual assault and domestic violence survivors are not useful. Some considerations, however, can be enlightening and helpful for working with these clients. Frequently, sexual assault and domestic violence survivors pursue a legal strategy to escape their abuse, to ensure the perpetrator will not hurt someone else, to validate that what happened was wrong, or to help get their lives together. Survivors may not articulate these motivations, but you should realize these potential motives to assist your clients in defining their goals. It is also essential that you understand your clients' motivations so you can realistically evaluate the likelihood of reaching those goals.

Clients may test you to evaluate your sensitivity and advocacy skills. They may carefully process your language, your assumptions, and your reactions to their experiences. The task for the client is to prove her credibility and give you the information you need to evaluate the potential of her case. Your task is to prove that you are trustworthy and to exhibit your sensitivity to her needs. At this juncture she is evaluating you and your sensitivity as carefully as you are evaluating her and her case.

Building client relationships can take some time. If clients are not forthcoming, do not assume they are lying. It is in your mutual interest to allow your relationship to develop as naturally as the environment will allow. Your clients may not tell you everything all at once; they may not be ready to talk about certain aspects of their experiences or they may not recognize the significance of everything that occurred. They may not trust you enough yet to give you all the information or they could be protecting themselves from being blamed. Also, even though they may think they have told you everything, you may not understand it because they may use language differently than you to describe what happened. There is a tension between the demands of the legal process and the way most people communicate and develop relationships. There may also be a difference between the words that your clients use to describe their experiences and the words that will be necessary to use in formal legal proceedings. Talking about these differences with your clients will help them learn how to communicate with you and with others through the legal process – and this will help their cases.

Understanding the significance of the language you use is key to facilitating the development of your attorney-client relationship. Minimizing an experience or overreacting to it – even unintentionally – can inhibit clients' willingness and ability to communicate with you. An experience that may seem devastating to you might be, due to its repetition, a normal everyday occurrence for the survivor. Also, in light of more traumatic experiences, it might be insignificant. A client may avoid telling you the full extent of the abusive experience if you overreact initially. Similarly, if you discount the significance of a painful experience a client

might avoid elaborating or sharing more evidence of abuse. With practice you will learn clients' cues as to the appropriate responses.

You must know what to ask your clients and how to ask it. Frequently, a battered woman will not divulge that she has been raped unless she is specifically asked if she was raped or forced to have sex. Likewise, a sexual assault survivor often will not talk about being prostituted or the use of pornography unless prompted. It is important that you sort out the specific details of clients' experiences. Sometimes, from the clients' perspectives, the specifics blend together in one continuous abusive experience and you need to discover these details in order to build their cases.

Using your clients' words might enable them to talk more easily with you about their experiences. For example, if a survivor describes her experience as an "attack," you should use the word "attack" until you know the details of the incident. Allowing clients to name and define their own experiences will keep you from substituting your own preconceptions and assumptions concerning their experiences.

Even after you believe a client has fully disclosed her experiences to you, it can be helpful to use the same language she uses in describing her experience. Society's misconceptions about violence against women, and its tendency to blame the victim, result in many words related to violence against women having cultural and/or personal connotations. For example, some women do not feel comfortable using the word "rape" even though it may factually describe their experiences, while other women find it empowering to use this term. It is important to be sensitive to a client's vocabulary concerning her experience. Focusing on language is a good springboard to talk to a client about the language the legal process requires. Educating her on the need eventually to use unfamiliar language with which she is perhaps uncomfortable will give her an opportunity to prepare herself.

Your Clients' Immediate Needs

In addition to any assessment You make about Your clients' legal matters, it is important to identify their other needs. Whether or not you are able to provide legal assistance, it is always appropriate to refer them to other sources for assistance and support. You are under no legal obligation to provide these referrals, but this support is vital in this field. You will most certainly be contacted by survivors to whom you will be unable to provide legal assistance. Providing them with appropriate referrals, legal or otherwise, could literally save someone's life.

A survivor's decision to interact with the legal system requires a great deal of courage. Support and understanding for her decisions about the legal system are essential to your productive relationship with her. In most cases, the survivor may not have reported any or all incidents to the police. Most sexual assaults and incidents of domestic violence are never reported to the police. A National Victim Center survey found that only 16 percent of women who were raped reported the rape to the police and the FBI estimates that only 10 percent of domestic violence is reported to the police. Most rape crisis centers and domestic violence agencies consider these estimates low. Often some period of time passes between an assault and a report. The National

Victim Center survey found that in reported rapes, there was frequently a delay of twenty-four or more hours from the time of the assault to the time a police report was filed. Women state many reasons for not reporting sexual violence: fear stemming from the violence, fear of exposure by the media, and/or fear of going through the legal system. Many women have a well-founded distrust of the criminal justice system, as it has a long history of failing women – particularly in cases of sexual assault and domestic violence.

If you determine there will be some interaction between the client, or potential client, and law enforcement your role will be to minimize the potential for harm to your client. Local law enforcement responses to these crimes run the gamut from excellent to horrible, so prior knowledge about your community's protocols and history of response to women making reports of gender-based violence is essential. Many local rape crisis and domestic violence agencies provide advocates to accompany survivors when they make police reports and help them negotiate the criminal justice system.

Safety

Determine, as soon as possible, whether a client is in any danger from the perpetrator. Most survivors do not contact an attorney immediately following an assault, if they are in immediate danger from the perpetrator they usually contact either a victim services program or the police. Do not, however, assume a client is not in danger. It is important to determine the whereabouts of the perpetrator and what access he might have to the client. In domestic violence cases, the perpetrator is likely to be an ongoing threat and, in fact, violence often escalates when a survivor attempts to leave her battering partner. Just because the perpetrator is not present does not mean he is no longer dangerous.

Familiarize yourself with your local resources so that you and your clients can determine the best strategy to ensure their safety. Knowing the local police department's track record, and written and unwritten policies concerning intervening in domestic violence and sexual assault cases, will help you advise your clients. In addition, your having a prior relationship with the local women's shelter could help get your clients into a safe living situation.

Medical Care

Survivors of sexual assault and domestic violence often do not seek immediate medical care. Determine your clients' needs for medical treatment regardless of when the assault occurred. This is not only important for your clients' health, it could provide valuable evidence for proving a case. Battered women who have suffered long-term abuse and some sexual assault survivors may have injuries of which they are not aware, or have long-term problems that require medical care. Be aware that your clients may need your emotional support to pursue this medical care. Your clients may also have financial constraints that prevent them from seeking medical care. The emotional and/or financial barriers to your clients receiving medical care can be more easily addressed if you are familiar with your local communities' resources ahead of time.

Not all medical providers are aware of survivors' needs and you may have to seek appropriate and sensitive providers. Be aware of clients' concerns about laws pertaining to payment for

medical exams, mandatory reporting requirements to law enforcement by medical professionals, procedures for forensic exams, and methods of victim restitution in your state. Again, your local rape crisis and domestic violence programs could provide valuable information.

A client who has been sexually assaulted may have questions about testing for pregnancy and sexually transmitted diseases, including HIV. Be prepared to hear her questions and provide resources so she can get further information.

Information

Information is power. The experience of gender-based violence is fundamentally an experience of loss of control. Regaining control of one's life and body is an essential part of recovery for survivors and access to information and decision-making is crucial. Most survivors need legal information in order to make decisions that will work for them. Keep in mind that most people are not familiar with, or comfortable with, the legal system so be prepared to provide basic information. It is very important that clients are told what will happen, and that you keep commitments you make to your clients.

Many survivors interpret the legal definitions of gender-based crimes or the inability of the legal system to address their experiences as further invalidation of their experiences, or as more victim blaming. You must explain the legal issues, validate their experiences, and where necessary, educate them on the differences between the legal interpretation and the reality of their experiences. Just as a client may use language different from the legal system to define her experience, the most egregious offense from her perspective may not qualify as a legal offense.

It is very important that each client clearly understands what she can expect from you as an attorney. How often will she hear from you? What is the next step? When will it happen? If you are difficult to reach, you may need to involve a more accessible associate who will be familiar with your cases. Your clients can then contact this associate when you are unavailable. Survivors frequently complain that they cannot reach their attorney, the attorney did not call them when expected, or the attorney didn't return messages. As an attorney you, no doubt, have many cases ---- for the survivor this is likely her only case. Be consistent, clear, and dependable with your clients in order to develop the kinds of relationships that will lead to successful cases.

Costs

Each client's economic situation will vary. Assess each client's financial needs and resources early in the process because, if she is eligible for assistance, time delays are typical. For instance, she will not get her first welfare check the day she applies despite the desperation of her need. Disability and insurance payments are likely to have lengthy delays between the filing of paperwork and payment. If a client reported the crimes to the police, she may qualify for reimbursement or benefits under a victim assistance program. While this is not a reason to encourage her to report the crimes, keep this in mind as you evaluate her situation. The Victims' Rights and Restitution Act of 1990 requires that state or county governments pay certain costs related to being a victim of crime. Implementation of this requirement has varied by jurisdiction.

Your relationship with local domestic violence and sexual assault programs will again be helpful to determine your local policies and programs.

If your client is a battered women, her escaping the battering may well depend on finding the economic resources to feed, house, and clothe herself and her children. Helping her secure these resources and escape her living situation will probably require the help of a local domestic violence program. If your client does not already have some sort of relationship with the domestic violence program, you may need to advocate on her behalf. You may also need to help her contact a family law attorney who could help her collect child support resources from the perpetrator.

If your client is a survivor of sexual assault, you also need to assess her economic situation and stability. Do not assume that because she has a job or a place to live there are no problems. Consider, with her, what impact the victimization has had on her job. Her job security may have suffered. It is not unusual for survivors to take time off, miss days, and/or be less productive. If her employer is unaware of the assault, or is insensitive, employment problems may be looming for your client. She may also have housing problems. If the assault happened in her home, or if the perpetrator is an ongoing threat there, she may need to move.

If a client is currently on public assistance it is important to assess her status. Is her caseworker fully aware of her situation? Is the caseworker supportive? Assess how long the benefits will continue and discuss strategies for identifying other sources if necessary. Some of the services your client may need are available at low or no cost to her.

Ongoing Forms of Assistance

The best situation is one where the survivor has a network of friends, family, and social service agencies to provide support and advocacy. This network is essential to your ability, as her attorney, to maintain boundaries and to your client's ability to participate fully in the legal process. The breadth and quality of services vary from community to community. A survivor's primary resource will be her own internal strength and her support network can help her tap that strength.

The legal process does not operate in a vacuum. Due to the slow nature of the legal system, you must be concerned about your clients' ongoing well-being. Be aware of the issues that your clients face because any difficulty they may be having with these issues could affect their ability to proceed with the legal process. Also, be prepared to refer your clients to local resources; however, if clients already have supportive networks to help keep their lives together, your role will be more limited.

Emotional Impact

Pursuing any legal action takes an emotional toll on sexual assault and domestic violence survivors. Legal actions require that survivors recount their experiences and keep track of both old and new information pertaining to the abuse. This makes the assault or violence a present, not a past, experience. The abuse may have stopped, but their experiences have not ended. Your

clients' coping abilities will likely improve as you work together, but be prepared for day-to-day variances as each client struggles with the emotional impact of the abuse and the alienation of the legal process. Ensuring that your clients have ongoing emotional support is essential – it is crucial that they have someone (other than you) with whom they can discuss these issues.

It is important that you assess your clients' emotional support needs and resources to ensure that they are prepared for the long-term legal process. Clients with adequate resources for emotional support are better able to deal objectively with the legal issues. Discussing clients' emotional support needs and resources can be a good way to develop positive attorney-client relationships with clear boundaries.

Some clients will have personal support systems, such as friends or family, while others may be isolated from personal sources of support. Do not assume that friends and family members are supportive, or that survivors with supportive personal relationships do not need additional support. Realize that a client may be in crisis which is very difficult to deal with alone. Support from a rape crisis or domestic violence advocate or from an individual counselor or support group can provide critical emotional support. Encouraging clients to get support and providing them with resources is more appropriate than attempting to provide that emotional support yourself.

Each survivor will experience some emotional fallout from the abuse. Coping strategies for dealing with the emotional pain vary greatly. The general term for the emotional aftermath of trauma is Post Traumatic Stress Disorder. More specifically, Rape Trauma Syndrome defines responses to sexual assault and rape. Survivors are vulnerable to depression, suicide attempts, substance abuse, and/or other mental or physical health issues stemming from their experiences of victimization. As an attorney you need to understand your clients in order to work with them and build their cases. The brief description which follows provides some basic information to sensitize you to your clients' trauma. You will, no doubt, learn more as you handle more cases of gender-based violence.

Rape Trauma Syndrome

Sexual assault is a life-changing event that results in a major life crisis. While few sexual assault survivors require long-term psychiatric treatment, many do experience extensive emotional trauma. The crisis can transform survivors, particularly if they have support and understanding. The quality and amount of support survivors receive, combined with their own coping abilities, help determine whether a crisis is a minor life disruption or a major interruption in a survivor's ability to function.

There are recognized patterns of reaction and stages of coping that provide a general understanding of survivors' reactions to sexual assault. This pattern has been recognized as Rape Trauma Syndrome for over twenty years. A survivor generally passes through the four phases of Rape Trauma Syndrome. Survivors proceed at varying paces through these phases, and the stages are not stagnant (e.g., entering the adjustment phase does not mean the survivor will not experience acute reactions again). The four phases are:

During the Attack

Survivors describe feelings of disbelief that the attack is happening, believing that sexual assault happens only to other people. There is often a feeling of terror and fear of being killed or mutilated; the violence of the assault is experienced as a physical threat. Commonly there is an overwhelming feeling of powerlessness. Survivors often experience dissociation during the event. This is a complex reaction, simplistically described as emotional or mental separation from the physical events that are occurring.

Acute Phase

Reactions during the acute phase may last a few days or for weeks. Survivors describe general feelings of anxiety and fear of not being believed, fear of retaliation, and continuing feelings of powerlessness. Emotions are often extreme, from feeling emotionally shut down to feeling emotionally overwhelmed, and survivors may swing back and forth between these extremes. They may also experience disruptions in sleep and eating patterns, physical soreness, and disassociation from their bodies.

Adjustment Phase

Survivors' attempts to adjust and to return to a sense of normalcy in their lives may last for weeks or months. Survivors may experience feelings of denial, dependency on others, isolation, and humiliation. In addition, they may have flashbacks and continued sleep and/or eating disturbances. During this period, survivors may feel an intensification of ongoing life problems and they may experience breakdowns of usual coping strategies.

Integration/Resolution Phase

The process of integrating the sexual assault with survivors' life experiences may take months or years, or it may never happen. Key to this phase is survivors learning to turn their feelings outward rather than inward, and learning to turn their anger toward the perpetrator instead of internalizing it. This process frequently includes feelings of depression, rage, hostility, shame, need for control, and anxiety.

Since each survivor responds to her assault in a unique way, do not rely on these phases extensively. It is critical to realize that for a client, the act of describing the traumatic events may trigger reactions from any of the above phases. It will not be unusual for a client to experience depression, an increased need for control, heightened rage, or dramatically fluctuating emotions. It will be important to discuss with clients how they might feel seeing a perpetrator in court, discussing the details of their victimization in extensive detail, and other events which may trigger emotional responses.

In addition to Rape Trauma Syndrome, sexual assault often stimulates crisis in other areas of women's lives. Existing coping strategies are severely tested, resulting in crises in survivors' employment and personal relationships. In addition, primary relationships are often severely strained or broken after a sexual assault.

Dynamics and Impact of Domestic Violence

While most sexual assaults are single incidents, violence in relationships is situational in that it develops and lasts over a period of time. Domestic violence often begins with a pattern of intimidation and control by one partner, and may not involve physical violence initially. As the intimidation progresses and escalates, physical control and violence is commonplace. Domestic violence survivors often learn the dynamics of the abuse and develop sophisticated systems of behavior and coping mechanisms to attempt to minimize or simply survive the abuse. For example, batterers are often jealous of their partner's friendships and attempt to isolate them within the relationship. A batterer may use violence to control his partner's outside friendships. A battered woman in this situation may stop seeing outside friends or family in an attempt to reduce or avoid the violence, even though in the long run this further isolates her from possible sources of emotional and practical support. Because the situation can be very complex, an understanding of the dynamics of domestic violence is key to understanding survivors' experiences and reaction.

Batterers utilize a range of power abuses to control their victims, including isolation, emotional abuse, economic abuse, sexual abuse, using children, and threats. Domestic violence is rooted in various power dynamics which usually begin long before the first physical battering. The batterer uses isolation, emotional abuse, and creation of economic and emotional dependency to establish an imbalance of power and control in the relationship. Physical abuse encompasses a broad range of physical force from pushing, shoving, and slapping to beatings, sexual assaults, using weapons, and ultimately to murder.

Domestic violence advocates recognize a cycle of violence to describe the dynamics of a violent relationship:

Tension Building Phase

Tension and stress begin to build, minor incidents of battering occur, and the battered partner attempts to appease the batterer. This dynamic often involves the whole family and frequently lasts a long time.

Explosion

The batterer loses control with an acute battering incident. This phase usually lasts 24 hours to a week and is when women frequently attempt to leave the relationship or seek intervention.

Honeymoon Phase

The batterer is apologetic, loving, and swears he will change and that the violence will end. This phase is usually longer than the explosion phase but shorter than the tension building phase. As the honeymoon phase ends, the relationship moves back to the tension building phase and the cycle begins again.

As violent relationships continue through this cycle, several dynamics shift. The battered partner becomes further isolated and dependent on the batterer. The cycles also shorten with more frequent, severe, and extreme violence.

People other than the abuser and the abused survivor are often involved in the violent dynamics. Children are frequently drawn into the violence, as witnesses to the battering and used as tools to manipulate the battered partner. Of course, children might also be victims of physical or emotional violence themselves. Even when the children do not see or experience the violence, they are usually aware of the power dynamics and are drawn into the abusive family system.

Others are also often aware of the violence even though they may choose not to confront the issue. Bruises, and attempts to disguise or minimize them, are common signs of battering. Even without physical signs of battering, others may be aware of the abusive interpersonal dynamics. Both the physical and emotional signs of battering are frequently ignored by friends and relatives.

There are external and internal factors which keep battered partners in the relationship. Financial dependence, lack of social support, lack of systemic support (e.g., insensitive criminal justice system, insufficient domestic violence shelters, inadequate child care, lack of job-training opportunities), and fear of the batterer are the major external factors which make it difficult for women to leave violent relationships.

Internal factors that may also affect battered women's ability to leave a relationship result from a sense of isolation and dependency. Battered survivors may have become extremely isolated from other sources of support including friends and family members. They may be economically dependent on the battering partner, or fear losing their children. The emotional abuse may have broken down their self esteem. If the batterer is blaming the survivor for her abuse, combined with society's tendency to "blame the victim," the survivor could have internalized these feelings and have convinced herself that she is responsible for the violent dynamics. For survivors, the battering may have become a normal, everyday occurrence.

Ensuring that clients have avenues for addressing their emotional needs requires that you find a delicate balance between their needs and the needs of the case. A client's well being in the present and for the future must take precedence over the needs of the legal case. Because issues may arise in counseling sessions that do not benefit the case, you need to be familiar with your state's confidentiality protections. Some states provide confidentiality protection for counselors at rape crisis centers and battered women's shelters while others afford that only to credentialed therapists. It is up to you to help each client identify the best source of support with the least potential for damage to her case.

Impact of Other Experiences of Oppression

In order to understand the dynamics of sexual assault and domestic violence you must examine sexism and other forms of oppression. Oppression supports a system where gender-based violence is pervasive and this shapes an individual survivor's experience. Discrimination based on sex, race, age, sexual orientation, class, religious beliefs, country of origin, or physical ability all interlink to support a culture of violence and oppression. Gender-based violence is just one example of the violence and oppression that these systems generate.

As an advocate, it is important to be aware that these different forms of oppressions influence your clients' experiences in very significant ways. Do not ignore or minimize the various forms of oppression as this is seen as an invalidation of survivors' experiences. It is challenging to understand experiences that are different from your own, and this requires diligence to avoid redefining your clients' experiences in your own terms. Even if a client cannot articulate the connection between her experience of violence and other forms of oppression and sexism, the feeling of the connection likely exists. Survivors of sexual assault and domestic violence suffer significant emotional consequences which they may recognize from their previous experiences with racism, heterosexism, ageism, or ableism.

Because your clients will likely be very aware of your sensitivity to these issues, it is important that you examine your own biases to avoid misunderstanding clients' experiences. Your challenge is to avoid using your own life experience as the benchmark for how survivors should view their own. Care and sensitivity regarding all forms of oppression, particularly those you have not experienced yourself, will help you understand your clients' experiences from their perspectives rather than your own.

You must also pay close attention to the ways in which oppressions might shape clients' courtroom experiences. It is important that you discuss any concerns with your clients in a sensitive and open manner. Your sensitivity to these issues will help your clients communicate more openly with you about their concerns. Because many of these forms of oppression are pervasive, you may need to educate the court and the jury as part of the presentation of your clients' cases.

Other Legal Matters

Many of your clients may be involved in more than one legal action. If perpetrators of sexual assaults are being prosecuted in criminal court, the survivors likely will receive instructions from the District Attorney. These survivors may receive contradictory or unclear information regarding the criminal process so it is crucial that you protect their interests regarding the civil case. If there are criminal prosecutions occurring, your client may be eligible for support and assistance from a victim advocate. A rape crisis center or domestic violence program can assist in determining the availability of these services.

Domestic violence survivors may be involved in divorce and/or family court proceedings which increases the antagonism with the perpetrator. For example, a batterer may try to intimidate the survivor by instigating a custody battle. It is very important that you stay abreast of your clients' other legal actions, as you may need to help them identify other legal resources. You may be one of the few attorneys in your community with expertise in this area, and even attorneys with the best of intentions who are unfamiliar with the civil case may provide inaccurate advice to your clients. What may be good for one case may be bad for the other. Your assistance and advice in negotiating these conflicts can be very valuable.

Your Clients and the Legal Process

If clients are working with advocates from an agency, or have primary support persons, it may be helpful to include those support people in the legal process. Clients will want to discuss what has happened after each step and having another person available who was present can help them review what happened and get an objective perspective. Advocates can help your clients address emotional reactions to the legal process and help them remain clear about what has occurred and what to expect.

Providing Your Clients with Adequate Information

Your clients need some basic information to be prepared and to reduce their potential for trauma. Discuss with your clients who will be present at each stage. Survivors must be told if their perpetrator will be present or even if there is a chance that he might be present. If a perpetrator may be present, meet your client at a neutral location and arrive at the appointment together. Encountering a perpetrator without you as a buffer could be traumatic or even dangerous. Explain to your clients which proceedings they have the option to attend, which they need not attend, and any from which they are excluded. In essence, make sure each client knows her options and has ample opportunity to exercise them.

Always be honest with your clients. Do not attempt to protect them by withholding information you think might be potentially painful. Discuss potential strategies the defense may use to attack a client's credibility. Knowing this in advance will help clients prepare emotionally. Explain to your clients what areas the defense is allowed to explore, and what other areas the defense may likely attempt to explore even though it is prohibited.

Providing your clients with written information concerning what will happen at each phase can help reduce their stress and anxiety about the process. Having this written information could also reduce the number of phone calls to you. Tell your clients, ahead of time, if there is any possibility that any given phase might be postponed. Survivors need to prepare themselves emotionally for each event so it is disconcerting if a hearing is canceled, seemingly, without any warning. To whatever extent possible, provide your clients with realistic timelines. Information like this is vital to your clients' attempts to take control of their lives. Do not subject your clients to yet another power relationship,

where you retain control of all the information and power. From your clients' perspective, success with the legal process may depend as much on how you handle this process as on the legal outcomes.

Preparing for Formal Proceedings

You must understand how much each client knows about the legal system to determine how you can help them feel more comfortable. Consider your clients' socioeconomic status, education, and familiarity with the legal system to help you assess in what ways you can help them.

Do not overlook the issue of a client's appearance. A survivor's attire and appearance will increase her confidence, if not her credibility, and some clients may need help determining what to wear. Some survivors may be overly concerned with their appearance because of their fear of not being believed. Others may be hesitant to raise the issue due to a lack of resources, while others may not realize the potential affect their apparel can have on their perceived credibility. Do not dictate your clients' fashions or reinforce social stereotypes about how women should dress, as your clients might interpret this as one more way society blames them for their victimization. While avoiding your own preferences and tastes, provide supportive suggestions with the goal of enhancing your clients' confidence and credibility.

Decision-Making Process

You must understand your clients' priorities. A survivor whose primary motivation is to hold her abuser accountable for his behavior will have different priorities than a survivor whose primary motivation is to receive financial compensation for her victimization. Once again, clear communication is the key. Understanding each client's priorities will help you advise them on decisions concerning who to name as defendants, what issues or incidents to include in complaints and responses, dropping of charges, and settlement offers. You must separate your wishes from your clients' wishes and reconcile for yourself the desire to get attorney's costs covered. Like all your other clients, survivors may hear information they want to hear and filter out information with which they disagree. Being clear about clients' priorities and motivations will help you understand clients' decisions.

Socio-Economic Considerations

Just as gender-based violence affects every aspect of survivors' lives, every aspect of survivors' lives affect their experiences of gender-based violence. Your clients' race, economic status, sexual orientation, age, physical and mental ability, and gender will shape their victimization experiences as well as their interpretations of those experiences. Similarly, your own assumptions, experiences, and biases will shape your interpretations of their experiences. Additionally, the legal system's response to victimization is influenced by these factors. For instance, due to systemic racism and classism, a woman of color or working class woman will probably be perceived as having less credibility and less "value" than a white or middle class woman. Understanding these influences will

help you establish compassionate and productive relationships with your client – which is critical for building effective cases and supporting your clients throughout the legal proceedings. You must be prepared to address these influences in the system if you are going to advocate effectively for your clients or to litigate their cases. You must be prepared to understand and confront the biases in the system which can work against your clients.

Previous Abuse

If a client previously experienced gender-based violence, you need to understand the potential impact of these previous experiences. Your client's memories of the outcomes of her prior victimization may affect her expectations of the current legal proceeding and may be influencing her motivation in pursuing this legal action. Survivors of multiple experiences of victimization usually develop complex and effective coping strategies.

Be aware that the defense may attempt to use a client's prior victimization as a strategy either to discount her experience, or to attack her credibility. Inform your clients of this possibility so that they can prepare themselves emotionally. You may be able to utilize legal strategies to protect your clients. Most states have some form of Rape Shield law designed to protect victims from undue attacks. You may be able to identify other privacy protections within the law. It is important that you prepare yourself to defend your clients against these debilitating and painful defense tactics.

Cultural Considerations

Gender-based violence is rooted in philosophical, political, social/cultural, and economic systems – all of which are fundamentally gender-biased. Social and cultural beliefs inform every aspect of the way we view gender-based violence including ideas about resistance, power differentials, survivors' and perpetrators' responsibilities, and the seriousness of gender-based crimes. Undoing, for example, the negative social attitudes about sexual assault and domestic violence, can be a lifelong process whether we are advocates, or survivors, or both. Cultural differences shape the way you, and your clients, view these issues, so it is important to avoid imposing your own cultural biases and interpretations on your clients. For instance, if you are a white male attorney and your client is an African American woman, you are going to have different cultural assumptions and beliefs. Carefully guard against imposing your standards and beliefs on her and avoid assuming that your beliefs are the correct ones.

Sexual Assault and Domestic Violence in Gay and Lesbian Relationships

Sexual assault and domestic violence do occur in gay and lesbian relationships. Although the experience of violence may be the same as in heterosexual relationships, lesbians and gay men must also confront the homophobia that permeates the social service and legal systems. Shelters, the police and criminal justice systems, social services providers, and medical personnel may minimize, dismiss, or ridicule a survivor. Your sensitivity to gay and lesbian issues and the potential for the homophobic treatment these clients might receive is essential for working with a lesbian or gay survivor.

Male Survivors

Men are also sexually assaulted. Male victims are overwhelmingly assaulted by other men, and most men who rape other men self-identify as heterosexual..

If you are working with male survivors of sexual violence you will need to be familiar with local support services available for this population. Like female survivors, male survivors need support to cope with victimization. Male survivors also face some unique challenges. Males in our society are socialized differently from females, they have different expectations of themselves, and they give different meaning to their victimization. In general, the tools you develop to advocate effectively for female survivors will serve you well with male survivors: sensitivity, setting clear boundaries, and being aware of local resources.

Citizenship Status

In circumstances where your client is not a United States citizen and does not have legal documentation, it is essential that you immediately assess with her the options that may be available to her. Sections of VAWA and VAWA II ("Trafficking Victims and Violence Protection Act of 2000) provide protection for battered immigrants and their children if the abusive spouse or parent is a United States Citizen or Legal Permanent Resident ("green card holder"). There are also protections for victims of domestic violence whose spouses (or partners) are not permanent residents, if these individuals have been helpful to law enforcement in investigating or prosecuting the crime. In these cases, you should make sure that an immigration attorney immediately begins the process of filing a petition on her and her children's behalf to sever the dependency on the batterer for legal residency. Here again, familiarity with the resources in your area is important. Since not all immigration attorneys will be sensitive to domestic violence issues, it would be wise to find or to educate an immigration attorney with these provisions of the VAWA before the need arises. Also, make sure that the client understands her status and the protection that is or is not provided by the VAWA.

In many cases, the perpetrator will threaten deportation in order to silence the survivor. Some clients avoid seeking help in order to protect themselves, and the batterer, from discovery by the INS. It is very important to determine, early in the process, if the perpetrator is a threat on this basis. Some batterers in their determination to maintain control over the survivor, will risk their own deportation by contacting the INS regarding their victims' status. The most important thing you can do is to give your client realistic information about the risk she is taking so that she can make an informed decision about whether or not to go forward.

Communities vary dramatically in their philosophies about reporting undocumented citizens to the INS when they have been a victim of crime. Your familiarity with a client's community will help you assess the potential risk. It is imperative that neither you nor your client be surprised by problems with her immigration status. Preparation for

dealing with this issue is very important because the INS often acts first and asks questions later. It is very difficult to advocate on immigration issues if you and your client are not prepared before they arise.

Conclusion

Our goal has been to inspire you to do the background work necessary to be an effective legal advocate on behalf of survivors of sexual and/or domestic violence. There are several key elements in developing a successful client-attorney relationship: the commitment you bring to educate yourself about the true dynamics and impact of gender-based violence; your understanding of how life experiences can shape each survivor's interpretation of gender-based violence and the legal system; your familiarity and relationship with local resources to assist your client; and your ability to define and fulfill an appropriate role for yourself as a resource and legal advocate on her behalf. Perhaps the most important thing you can bring to your work with a client is a respect for her strength and vitality in the face of overwhelming odds. You are by definition a part of her recovery process. By refusing to see her solely as a victim of violence and respecting her for her ability to survive, you are assisting her process of transitioning from victim to survivor. Working with cases of violence against women may well be some of the most challenging work you do. This work may also be the most significant contribution you can make to the lives of individual women and to the status of women as a group.

Chapter 2: The Client

Section 2B: Protecting the Confidentiality of the Mental Health Records of Victims in Criminal and Civil Litigation

*Carol E. Jordan, M.S., Executive Director
Governor's Office of Child Abuse and
Domestic Violence Services*

*Karen Quinn, J.D., Deputy General Counsel
Kentucky Justice Cabinet*

Having gone through the trauma of domestic violence or sexual assault, victims are often in need of counseling or other mental health support to aid them in recovering from the crime. In such situations, mental health providers, victims, and attorneys all encounter the question of when client records will remain confidential from the prosecution or any lawsuit which may result from the attack.

Kentucky's rules of evidence require that, in certain circumstances, clients' mental health records are confidential and privileged from disclosure during civil or criminal proceedings. In order for mental health providers and victims of sexual assault and domestic violence to ensure that client records remain confidential and receive the maximum degree of protection accorded by law, they must be aware of the rules of evidence regarding the privileges, Kentucky statutes which mandate reporting of domestic violence and child abuse, and the case law interpreting those rules and statutes.

Attorneys should note that the degree of protection accorded mental records can vary depending upon whether the issue being litigated is one involving a child or one involving an adult victim. For adult victims, the scope of the privilege varies depending upon whether the victim is a victim of domestic violence or of sexual assault.

KENTUCKY RULES OF EVIDENCE RELATED TO PRIVILEGED COMMUNICATIONS

Kentucky has two privileges contained in the Rules of Evidence which protect communications between victims (patients or clients) and their mental health providers:

Kentucky Rule of Evidence (KRE) 506 is the counselor-client privilege, which applies to certified school counselors, sexual assault counselors, certified professional art therapists, certified marriage and family therapists, certified professional counselors, individuals who provide crisis response services, and victim advocates (except those employed by a Commonwealth or county attorney) and fee-based pastoral counselors. This rule states that:

a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE: A KENTUCKY LAWYER HANDBOOK
SECTION 2B: PROTECTING THE CONFIDENTIALITY OF THE MENTAL HEALTH RECORDS OF VICTIMS
IN CIVIL AND CRIMINAL LITIGATION

- 50 -

counselor, and persons present at the direction of the counselor, including members of the client's family. KRE 506(3)(b).

The definition of "confidential" as it relates to communications is if it "is not intended to be disclosed to third persons, except persons present to further the interest of the client in the consultation or interview, persons reasonably necessary for the transmission of the communication, or persons present during the communication at the direction of the counselor, including members of the client's family." KRE 506(a)(3). The privilege may be claimed either by the client or by the counselor on the client's behalf.

Notably, the privilege offered by KRE 506 is far from complete. First, it does not apply in cases where the client asserts his physical, mental, or emotional condition as an element of a claim or defense. Secondly, and most significantly for victims and mental health providers, the privilege which protects a record will not apply if the judge, in a civil or criminal proceeding, conducts a hearing and finds that:

- 1) the communication is relevant,
- 2) there are no available alternate means of obtaining the information, and
- 3) the need for the information outweighs the client's privacy interest.

In making the determination on whether to uphold the privilege, the judge may review the mental health records in camera.

KRE 507, the psychotherapist-patient privilege is a stronger privilege, since it contains no exception which permits the judge to abolish the privilege if the communication is found relevant. Included within the definition of "psychotherapist" are those who are licensed to practice medicine and engaged in the diagnosis or treatment of a mental condition; licensed or certified psychologists; licensed clinical social workers; and licensed registered nurses who practice psychiatric or mental health nursing. This rule states that:

A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

KRE 507(b). KRE 507's privilege does not extend to proceedings to hospitalize the patient for mental illness, on issues involving the patient's mental condition where the patient makes the communication during a court examination and has been informed the communication is not privileged, and in cases where the patient asserts his physical, mental, or emotional condition as an element of a claim or defense.

The strength of this privilege is evident from the cases which have addressed it. In Kentucky, the psychiatrist-patient privilege historically has been so strong as to be "placed upon the same basis

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE: A KENTUCKY LAWYER HANDBOOK
SECTION 2B: PROTECTING THE CONFIDENTIALITY OF THE MENTAL HEALTH RECORDS OF VICTIMS
IN CIVIL AND CRIMINAL LITIGATION

- 51 -

as that provided by the law between attorney and client.” Mathews v. Commonwealth, Ky., 709 S.W. 2d 414, 419 (1985), cert. denied, 479 U.S. 871 (1986), quoting Southern Bluegrass Mental Health v. Angelucci, Ky. App., 609 S.W. 2d 931 (1980). Kentucky courts have ruled that the privilege even survives the death of the patient. Williams v. Commonwealth, Ky. App., 829 S.W. 2d 942 (1992). In 1983, when examining the scope of the psychiatrist privilege contained in a predecessor statute to KRE 507, the Kentucky Court of Appeals recognized the valid policy reasons for establishing such a strong privilege:

Confidentiality is essential if psychiatrists are to be in a position to successfully treat their patients. A thorough understanding of the patient’s problems and feelings must be divulged if treatment is to be appropriate and effective. The legislature has seen fit to make such communications privileged. The privilege granted by KRS 421.215 is absolute in the absence of other legislated and recognized exceptions. . . It is not for this Court to take it upon itself to waive the privilege for someone or to carve out exceptions.

Amburgey v. Central Kentucky Regional Mental Health Board, Inc., Ky.App., 663 S.W.2d 952, 953 (1983) (emphasis added); see also Southern Bluegrass Mental Health and Mental Retardation Board, Inc., v. Angelucci, Ky., 609 S.W.2d 931 (1980). On the federal level, the United States Supreme Court has recently acknowledged the critical importance of confidentiality of mental health records by recognizing an essentially absolute psychotherapist privilege in the federal court system. Jaffee v. Redmond, 116 S. Ct. 1923 (1996). However, despite the strong language of these cases, the privileges are NOT absolute. The task for victims and attorneys, then, is to become aware of what “legislated and recognized exceptions” have developed to the privileges, all of which can be found in the statutes and case law.

STATUTES AND CASE LAW RELATED TO PRIVILEGES

Child Custody Cases

After adult victims of domestic violence have sought and obtained a protective order against their abuser, they often then move to seek custody of their children. Many victims of domestic violence report that the most painful wounds they carry from the violence are not the physical injuries which will eventually heal, but the long term emotional harm they have suffered from the abuse. However, if they or their children seek counseling to recover from this harm, they should be aware that the mental health records of both themselves and the children may not be privileged in a child custody proceeding, and are fully discoverable.

The waiver of the privilege arises from both statutory mandate and from the language of the privileges themselves. Under both KRE 506 and 507, the privilege does not extend to cases where the patient asserts his mental condition as an element in a claim. Under the statutes governing child custody, the court determines custody based upon the “best interests” of the child. The best interest analysis includes an analysis of “the mental and physical health of all individuals involved.” KRS 403.270. Similarly, modification of any child custody arrangement also includes an assessment of mental health. KRS 403.340. Case law has consistently found that parents make their mental health an element for the court’s consideration when they seek

custody of children. In Atwood v. Atwood, Ky., 550 S.W.2d 465 (1976) the wife was not permitted to assert a confidentiality privilege concerning her treatment by two psychiatrists, and the court ruled that the two doctors were properly deposed. See also Allen v. Dept. For Human Resources, Ky., 540 S.W.2d 597 (1976) (In a parental rights termination proceeding, mother was not allowed to claim privilege concerning her treatment by a psychiatrist, and psychiatrist was properly called to testify). While Atwood and Allen both involved the mother's mental health records, case law has indicated that the records of children are also admissible in custody proceedings. "We see no logic in permitting one or both of the parents in a custody battle to assert the psychotherapist-patient privilege on behalf of their child, especially when the child's mental, emotional, and/or physical well-being is the key issue in the custody dispute." Bond v. Bond, Ky.App., 887 S.W.2d 558, 560 (1994).

However, despite the fact that the privilege may be waived, attorneys representing victims of domestic violence should still take great care to structure the situation in such a way that the batterer himself is not granted access to the entire records, if possible. The Bond court specified that such care must be taken when admitting such records:

It is likely that the patient (child) has obtained assurances that the disclosures will remain secret. Neither the child nor the therapist wish to reveal the confidences. Yet a proper resolution of the question of best custody or best interest requires a revelation. We will not attempt to require any specific procedure by the trial court, but allow broad discretion. The judge may personally and directly interview the therapist to determine what, if any, information is relevant and material for disclosure; or, the judge may appoint a guardian ad litem pursuant to CR 17.03 for the sole purpose of determining the best interest of the child and for recommending whether, and to what extent, the privilege should be waived.

Bond, 887 S.W.2d at 561.

Statutory Reporting Requirements

The degree of confidentiality which may attach to mental health records in cases of child abuse or cases involving domestic violence committed against an adult victim has not been definitively decided yet under Kentucky law and, at this moment, remains a complex issue. The complexity derives largely from the fact that Kentucky statutes mandate reporting cases of child abuse and domestic violence, and, unlike other jurisdictions, Kentucky case law has not yet addressed the interplay between the privileges and the reporting requirements in these cases.

Duty to Report Cases of Child Abuse

In cases of child abuse, according to statute, "any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state police; the cabinet or its designated representative; the commonwealth's attorney or the county attorney; by telephone or otherwise." KRS 620.030. An abused or neglected child is defined as a child "whose health or welfare is harmed or threatened with harm" by the action or inaction of the child's parent,

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE: A KENTUCKY LAWYER HANDBOOK
SECTION 2B: PROTECTING THE CONFIDENTIALITY OF THE MENTAL HEALTH RECORDS OF VICTIMS
IN CIVIL AND CRIMINAL LITIGATION

- 53 -

guardian, or other person exercising custodial control or supervision of the child.” KRS 600.020(1).

Abuse occurs when such a person:

- inflicts or allows to be inflicted upon the child physical or emotional injury by other than accidental means;
- creates or allows to be created a risk of physical or emotional injury to the child by other than accidental means;
- engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child, including parental incapacity due to alcohol and other drug abuse;
- continuously or repeatedly fails or refuses to provide essential parental care and protection for the child;
- commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
- creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
- abandons or exploits such child;
- does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child’s well-being.

KRS 600.020 (1). The statute does provide for a religious exemption: a parent or other person exercising custodial control or supervision of the child legitimately practicing the person’s religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone.” KRS 600.020(1). “Dependent” is defined as “any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child.” KRS 600.020(15).

According to statute, no person has a privilege to keep confidential information relating to child abuse except attorneys and clergy. “Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglect, or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section. This subsection shall also apply in any criminal proceeding in District or Circuit Court regarding a dependent, neglected, or abused child.” KRS 620.050. Mental health providers are thus under a statutory duty to report suspected cases of child abuse falling within the statutory definition of abuse, and should inform their patients of such a duty before any consultations. In contrast, it would appear that attorneys are exempted from the statutory mandate to report here.

Duty to Report Domestic Violence against Adult Victims

Kentucky statutes mandate reporting cases of domestic violence: “an oral or written report shall be made immediately to the cabinet upon knowledge of the occurrence of suspected abuse, neglect, or exploitation of an adult.” KRS 209.030(3). The statutes then go on to waive the

privilege when a report is filed: “neither the psychiatrist-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.” KRS 209.060.

The statute does not explicitly address the privileges for mental health professionals in KRE 506 and 507 who are not psychiatrists; although presumably the waiver of the psychiatrist-patient privilege would include waiver of the more recent privileges of KRE 506 and 507. Neither does the statute address the applicability of the attorney-client privilege. However, an attorney general’s opinion maintains that attorneys are exempted from reporting domestic violence, although the opinion is interpreting an earlier version of the present statute. Ky. OAG 83-367. On a related note, there is no physician-patient privilege in Kentucky, and an attorney general’s opinion states that physicians are under a duty to report domestic violence when the victim is in need of protective services. Ky. OAG 96-6.

Other Statutory Reporting Duties Imposed upon Mental Health Professionals

Not only are mental health professionals under a duty to report domestic violence and child abuse, but they also have a more generalized duty to warn intended victims and law enforcement of a patient’s threat of violence.

This duty is somewhat limited in that it requires that the patient must have communicated to the mental health professional the intention to commit a fairly specific injury: either “an actual threat” targeted to harm “a clearly identified or reasonably identifiable victim” or conveying an intention to commit “some specific violent act.” KRS 202A.400(1); see also Evans v. Morehead Clinic, Ky.App., 749 S.W.2d 696 (1988).

If the victim is not sufficiently identified, the mental health professional fulfills the duty by reporting to law enforcement only. KRS 202A.400(2).

Finally, the duty can also be satisfied by making reasonable efforts for civilly committing the patient. KRS 202A.400(2). This duty to warn on the part of mental health professionals can be viewed as mirroring a similar provision in the attorney-client privilege which waives the privilege “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” KRE 503(d)(1).

Relationship Between Privileges and Duties to Report

No Kentucky case directly addresses the question of the relationship between the privileges surrounding mental health records and statutory duties imposed upon professionals to report child abuse and domestic violence.

However, a recent Kentucky Supreme Court opinion addressing the child abuse reporting statute and the husband-wife privilege of KRE 504 indicated that statutes and rules of evidence both governing privileges must be interpreted, when possible, in such a way as not to conflict. “One

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE: A KENTUCKY LAWYER HANDBOOK
SECTION 2B: PROTECTING THE CONFIDENTIALITY OF THE MENTAL HEALTH RECORDS OF VICTIMS
IN CIVIL AND CRIMINAL LITIGATION

- 55 -

of the responsibilities of this court is to harmonize the law so as to produce a consistent result . . . the first duty of the court called upon to construct such statutes is to construe them so as to harmonize and allow both to stand.” Mullins v. Commonwealth, Ky., 956 S.W.2d 210, 212 (1997). In Mullins, the defendant’s wife found him engaged in a sexual act with a fourteen-year-old child. She reported the act to the police and then testified in front of the grand jury. At the time of trial, however, both she and the defendant claimed the husband-wife privilege. The Court held that the marital privileges was over-ridden in a case of child sexual abuse, where KRS 620.050 specifically abolishes the privilege, particularly since that privilege exists to further marital harmony. The Court held that in such circumstances, the basis for KRE 504, marital harmony, “can hardly be a valid legal principle when the wife in question calls the police to report the alleged sexual misdeeds of her husband with a child. The marital privilege is subordinate or inferior to the right of the child to be free from sexual abuses.” Mullins, 956 S.W.2d at 212.

When dealing with the very different type of privilege surrounding mental health records and the policy reasons recognized by Jaffee in preserving their confidentiality, the goals of harmony and consistency recognized by the court in Mullins would dictate that the privilege be waived only to the narrow extent of providing the information required by the mandatory reporting statute, with the rest of the communication deemed confidential and therefore privileged. This appears to be the approach taken in other jurisdictions. As explained by one court when determining the nature of the relationship between a statute requiring the reporting of child abuse and the applicable physician-patient privilege:

The legislature may well have decided that the need to discover incidents of child abuse and neglect outweighs the policies behind the medical privilege. Once abuse is discovered, however, the statute should not be construed, nor can the legislature have intended it to be construed, to permit total elimination of this important privilege. The central purpose of the child abuse reporting statute is the protection of children, not the punishment of those who mistreat them. Our legislature expressly recognized this fact in stating the policy behind the reporting act: “to protect children whose health and welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home safe for children through improvement of parental and guardian capacity for responsible child care.”

Minn.Stat. Section 626.556, subd. 1.

This policy . . . is best effectuated by continued encouragement for child abusers to seek rehabilitative treatment. A narrow construction of section 626.556, subd. 8, which would achieve the purposes of the reporting act without destroying the benefits that result when those who maltreat children seek confidential therapy programs, would be, and hereby is, adopted. We hold that the medical privilege is abrogated only to the extent that it would permit evidentiary use of the information required to be contained in the maltreatment report -- the identity of the child, the identity of the parent, guardian, or other person responsible for the child’s care, the nature and extent of the child’s injuries, and the name and address of the reporter.

State v. Andring, 342 N.W.2d 128, 132-133 (Minn. 1984); see also People v. Stritzinger, 194 Cal. Rptr. 431, 437-438 (Cal. 1983) (“If the psychiatrist is compelled to go beyond an initial report to authorities regarding a suspected child abuse and must thereafter repeat details given to him by the adult patient in subsequent sessions, candor and integrity would require the doctor to advise the patient at the outset that he will violate his confidence and will inform law enforcement of their discussions. Under such circumstances it is impossible to conceive of any meaningful therapy.”).

Comity: Inter-relationship between Statutes & Rules of Evidence

Kentucky privileges are now codified in the Kentucky Rules of Evidence, but also are directly impacted by statutes, such as the child abuse reporting statute discussed in Mullins. The Kentucky Rules of Evidence explicitly recognize that the area of creating and/or limiting privileges is one within the province of the legislature, since the rules state that such privileges are provided “by Constitution or statute”, as well as the rules of evidence themselves. KRE 501. However, at least one litigant has argued that the Supreme Court has exclusive authority to promulgate rules of privilege, and that argument was rejected in Mullins. In that opinion, the Court specifically denied the following argument:

Mullins argues that the Court of Appeals erred when it applied the rules of statutory construction to hold that an act of the General Assembly [KRS 620.050 waiving the husband-wife privilege in reporting child abuse] overrides a duly adopted rule of the Court of Justice [the husband-wife privilege contained in KRE 504] and that the Court of Appeals amended KRE 504 to include an exception not contained in the rule and thereby violated KRE 1102. Mullins claims that the Constitution of Kentucky vests this Supreme Court with the exclusive power to amend the rules of practice and procedure, and this Court has specified in KRE 1102 the procedure for amendment of the rules of evidence.

Mullins, 956 S.W.2d at 211. Relying upon principles of comity, the Mullins court found no procedural or constitutional flaw in the legislative enactment of KRS 620.050 to modify the evidentiary privilege of KRE 504. Such judicial recognition of comity with the legislature departs markedly from the Supreme Court’s rejection of privileges which are created unilaterally by the lower courts. See e.g., Weaver v. Commonwealth, 955 S.W.2d 722, 727 (1997) (striking down the common law police surveillance privilege, holding “specifically the rules do not permit the amendment or addition of any new rules of evidence by any court of this Commonwealth except the Supreme Court” and that the Court of Appeals exceeded its authority when it adopted a police surveillance privilege).

Adult Victims of Sexual Assault – Criminal Trials of Perpetrators

While adult victims of sexual assault will not find any mandatory statutory reporting requirements, they do risk losing the privilege through common law infringement upon it: some courts have been providing the defense with access to a victim’s mental health records when they serve as a witness in a civil or criminal proceeding.

Such rulings derive from Mosley v. Commonwealth, Ky., 420 S.W.2d 679 (1967), which held that a defendant in a rape case was permitted to introduce the testimony of the victim's psychologist on the issue of the victim's credibility. The court did so while making the disturbing comment that "the modern trend is to permit the jury to consider expert testimony in the field of mental disorders and relax the rule in sex offense cases." Mosley, 420 S.W.2d at 681. The most recent ruling in this issue of mental health records is the 1994 case of Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994). In Eldred, a murder case, two witnesses were suffering from psychological problems which conceivably could have interfered with their ability to testify concerning the events they had witnessed. One witness, for example, suffered from total amnesia, and the other admitted to a drug addiction, which along with epilepsy and severe depression, had provided the basis for a social security disability claim. The opinion indicates that the Commonwealth did not urge either the privilege of KRE 506 or that of 507, since the court notes that "there does not appear to be any real dispute that appellant is entitled to discover medical or psychiatric records concerning a witness if certain prerequisites are met." Eldred, 906 S.W.2d at 701. In the Eldred like in Mosley, the court held that the defendant was entitled to discover a witness' mental health history when that information is deemed relevant to a witness' credibility. In such cases, the court itself could subpoena the records and review them, releasing them to the defendant if the court deemed them relevant.

The case law is somewhat in flux on this issue at the moment, however. First, Kentucky cases have not been consistent on this issue. For example, in Williams v. Commonwealth, Ky.App., 829 S.W.2d 942 (1992), the court resolutely refused to disclose the homicide victim's mental health records, finding them privileged and confidential, and holding that Amburgey and Angelucci were dispositive. Secondly, subsequent to Eldred, the United States Supreme Court denied a defendant's right to access a victim's psychological records in Jaffee v. Redmond, 116 S.Ct. 1923 (1996). The Supreme Court held that federal courts would recognize a psychotherapist privilege, and in doing so, affirmed, in strong language, the importance of protecting communications between clients and psychotherapists. Noting that confidentiality "is a sine qua non for successful psychiatric treatment", the Court stated that a psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality." In contrast to the strong public good served by creating a privilege, the Court found that denying the privilege would give defendants only a "modest" evidentiary benefit. Since only a privilege would give patients the needed security to freely talk to their psychiatrists, the absence of a privilege would produce such a "chill" on patient communications to psychiatrists, that there would be little communication and therefore little discoverable evidence anyway. The Court noted that "this unspoken 'evidence', will, therefore serve no greater truth-seeking function than if it had been spoken and privileged." Jaffee, 116 S.Ct. at 1929.

The scope and applicability of Jaffee still need to be defined. On the federal level, one circuit court has recently extended Jaffee to the criminal context, holding that the psychotherapist-patient privilege announced in Jaffee would apply to protect a defendant's statements from compelled disclosure under F.R.E. 501. U.S. v. Glass, 133 F.3d 1356 (10th Cir. 1998). On the

REPRESENTING VICTIMS OF DOMESTIC VIOLENCE: A KENTUCKY LAWYER HANDBOOK
SECTION 2B: PROTECTING THE CONFIDENTIALITY OF THE MENTAL HEALTH RECORDS OF VICTIMS
IN CIVIL AND CRIMINAL LITIGATION

- 58 -

state level, a recent order, issued by Judge William Mains in a Rowan Circuit rape case, has direct impact on the protection of victims' records. In the unpublished case of Commonwealth v. Buttz, the defendant filed a discovery motion with Judge Mains, requesting the mental health records of the victim. At the hearing on the motion, the victim appeared and objected to disclosure of those records, relying upon KRE 507. Judge Mains noted the scope of the privilege of KRE 507, the holding in Eldred, and the language of the Supreme Court in Jaffee which "said in unequivocal terms that communications between a licensed psychotherapist and her patient in the course of diagnosis or treatment are protected from compelled disclosure."

Judge Mains then denied the discovery motion for the records, holding:

In this case, the complaining witness has chosen to exercise her privilege. Under Jaffee, this Court is of the belief that it has an obligation to respect such privilege due to the close similarity between the Federal and State rules. Eldred is not applicable since the complaining witness has chosen to exercise the privilege. Buttz Order of April 8, 1997 at 2.

The analysis provided in Judge Mains' order described above provides victims with a way of circumventing a broad application of Eldred and protecting their mental health records from being divulged to the defense. Essentially, it was Judge Mains' ruling that when a victim claims the privilege afforded her by KRE 506 or KRE 507, the Eldred ruling is not applicable. When such records are requested, then, victims should object to the request and either take the stand to claim the privilege of KRE 506 or 507 or have the therapist take the stand and claim the privilege on the victim's behalf. Whether circuit court orders denying discovery on this basis will be upheld on review can be determined only by the appellate courts. In the meantime, victims and their attorneys are best advised to object to discovery and assert the privileges under the Kentucky evidentiary rules.

Conclusion

As seen from above, many issues still remain unresolved and unlitigated in Kentucky courts concerning the scope and the applicability of the evidentiary privileges shielding mental health records and professionals from judicial discovery or courtroom testimony. Until those issues do reach resolution, victims and attorneys are urged to aggressively assert the privileges contained in the rules of evidence, with the standard response to any subpoenas requesting information being a motion to quash.

Chapter 2: The Client

Section 2C: Reporting Adult Abuse

*Lana Grandon, J.D., Assistant Attorney General & Tamra Gormley, J.D., Director
Victim Advocacy Division, Office of the Attorney General*

What is adult abuse?

Adult

Adult means (a) a person eighteen (18) years of age or older, who because of mental or physical dysfunctioning, is unable to manage his own resources or carry out the activity of daily living or protect himself from neglect, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services; or (b) A person without regard to age who is the victim of abuse and neglect inflicted by a spouse. KRS 209.020(4).

Abuse

Abuse means the infliction of physical pain, mental injury, or injury of an adult. KRS 209.020(7).

Neglect

Neglect means a situation in which an adult is unable to perform or obtain for himself the services which are necessary to maintain his health or welfare, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult, or a situation in which a person deprives his spouse of reasonable services to maintain health and welfare. KRS 209.020(15).

Exploitation

Exploitation means the improper use of an adult or an adult's resources by a caretaker or other person for the profit or advantage of the caretaker or other person. KRS 209.020(8).

What is the Purpose of Mandatory Reporting?

- a. To provide for the protection of adults who may be suffering from abuse, neglect, or exploitation and to bring these cases under the purview of the circuit or district court.
- b. To provide that any person who becomes aware of such cases shall report them to a representative of the cabinet, thereby causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these adults in need of protective services and to prevent abuse, neglect or exploitation. KRS 209.010.

Where Should the Report be Made?

An oral or written report **shall** be made **immediately** to the Cabinet for Families and Children (CFC) upon knowledge of the occurrence of suspected abuse, neglect or exploitation of an adult. The report should be made to the local CFC office or to the statewide toll-free **Adult/Child Abuse Reporting Hotline 1-800-752-6200**. KRS 209.030.

Who Must Rreport?

"Any person, ... having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions in this chapter. Death of an adult does not relieve one of the responsibility for reporting the circumstances surrounding the death." KRS 209.030.

What Information Should be Given?

A report **shall** provide the following information, if known:

1. Name and address of the adult, or the person responsible for his care;
2. The age of the adult;
3. Nature and extent of the abuse, neglect, or exploitation, including any evidence of previous abuse, neglect or exploitation;
4. Identity of the perpetrator, if known;
5. Identity of the complainant, if possible;
6. Any other information that the person believes might be helpful in establishing the cause of abuse, neglect or exploitation.

What Happens When a Report is Made?

Upon receipt of the report, the cabinet will take the following action as soon as practical:

1. Notify the appropriate law enforcement agency.
2. Initiate an investigation of the complaint.
3. Make a written report of the initial findings together with a recommendation for further action, if indicated.

Note: An adult may refuse protective services from the cabinet.

Immunity from Liability

Anyone acting upon reasonable cause in making of any report or investigation or participating in the filing of a petition to obtain injunctive relief or emergency protective services for an adult pursuant to this chapter, including representatives of the cabinet in the reasonable performance of their duties in good faith, and within the scope of their authority, **shall have immunity from any civil or criminal liability** that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or

investigation and such immunity shall apply to those who render protective services in good faith pursuant either to the consent of the adult or to court order. KRS 209.050.

Failure to Report: Penalties

Anyone knowingly and willfully failing to report known or suspected adult abuse shall be guilty of a Class B misdemeanor. A Class B misdemeanor provides for a penalty of imprisonment not to exceed 90 days. KRS 209.990.

Attorney-Client Relationship

OAG 83-367. The Kentucky Adult Protection Act neither requires nor permits an attorney to report, contrary to his client's wishes, spouse abuse inflicted upon his client.

Note: KRS 209.020(4) has been amended since the rendition of OAG 83-367.