

REPRESENTING THE DOMESTIC VIOLENCE SURVIVOR

Critical Legal Issues * Effective Safety Strategies

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This book is printed on acid free paper.

Printed in the United States of America

Library of Congress Cataloging in Publication Data
Representing the Domestic Violence Survivor: Critical Legal Issues;
Effective Safety Strategies / Barry Goldstein, J.D., and Elizabeth Liu, J.D.

ISBN: 978-1-887554-93-0

Library of Congress Control Number: 2013930257

To order, go to <http://www.civresearchinstitute.com/rdv.html> and click on "Add to Cart"

This book is dedicated to Katherine Liu Kang (b. 10/21/2011) whose birth was a beautiful reminder of how important it is to create a world where women and children can live free from violence.

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Acknowledgements

Throughout our careers, the authors have been taught and inspired by courageous and fearful protective mothers who have shared their often heartrending stories in hopes we could save their children and other children. Most of these mothers must remain anonymous to protect their safety from their abusers and too often from courts that did not understand. We will remember their stories for the rest of our lives and feel honored and humbled that they chose to share their stories with us.

We are thankful that our publisher, Deborah Launer, who had the vision to seek to publish this work and the faith in us to write this important book. From the start, Deborah has made this a collaborative process, which made it so much easier to complete our writing. We would also like to thank our line editor, Maxine Idakus, for her professionalism and help in making this book what we want it to be.

The authors would like to thank Mo Therese Hannah for her indispensable work in starting the protective mothers' movement, the Battered Mothers' Custody Conference, and the Truth Commission that led to the process that created *Domestic Violence, Abuse, and Child Custody* (DVAC) and now *Representing the Domestic Violence Survivor*. Rita Smith, executive director of the National Coalition Against Domestic Violence has made protective mothers a high priority in the work to end domestic violence and done everything in her power to make sure DVAC reached the people who needed this information. Joan Meier has been a leading domestic violence attorney, advocate, and researcher for many years, and we deeply appreciate her advice and support throughout this project, and we are especially grateful for her deep insights, especially in chapter 23.

Joan Zorza was our go-to source when we needed the right piece of research or advice to help us put our topic in context. Dara Carlin provided some great ideas about the interactions between male attorneys and protective mothers. Stu Abramson provided his advice and expertise for the chapters about criminal cases. Sarah Buel provided valuable advice and assistance about prosecuting domestic violence cases. We wish to thank Vivian Huelgo, chief counsel of the ABA Commission on Domestic Violence, for providing some of the ABA publications and tools to respond to domestic violence cases. Margaret Drew reviewed several of the chapters and made important suggestions.

Barry Goldstein would also like to thank the following people:

When DVAC was published, I gave a copy to my mom, Judy Goldstein. She immediately looked at the acknowledgements and was pleased with what I wrote. The book is over 700 pages, and she kept saying, "I bet I'm the only one reading the entire book." Not exactly the words an author wants to hear. She did not quite make it, having died shortly after finishing chapter eighteen (my chapter). My mom and dad, Seymour Goldstein, were not activists, but they were good and decent people from whom I learned the importance of helping others. With every cursed story I hear about abusers hurting children, I appreciate still more how lucky I am to have been raised by two loving parents. I hope somewhere they are together and proud of what they have inspired.

Clarice Pollock brought me into the movement to end men's violence against women. Charlotte Watson provided me with my early education about domestic violence. Phyllis B. Frank is my dear friend and mentor who provided me with a framework and understanding of domestic violence that enabled me to engage in much more

advanced work. Mo Therese Hannah helped create the protective mothers' movement and gave me the opportunity to serve in some important roles including as her coeditor, copresenter, and friend. Lundy Bancroft went from an awe-inspiring writer and advocate to a close friend and colleague. I am so pleased I could work with my cousin, Stu Abramson on the criminal chapters. He is like the brother I never had.

Elizabeth Liu has exhibited a professionalism and expertise throughout this project. Her skills have complemented mine. It has been a pleasure to work with her and get to know her better.

Last and most important is the love of my life, my wife, Dr. Sharon Goldstein. She has provided me with the time, resources, and support to pursue my career as a domestic violence writer and advocate. She has helped me through health crisis, personal disappointments, and the occasional year when the Yankees did not win the World Series. Best of all, she is with me to share the good times and important accomplishments. I do not believe my books get written and I do not believe I am living without Sharon's help. I know my life is richer and happier because of Sharon. When protective mothers thank me for my work, I know I could not do it without Sharon.

Elizabeth Liu would like to thank the following:

I would like to thank Chain Kuo Richard Liu whose never-ending faith in my abilities and encouragement has guided me throughout this project and my entire life. I would also like to thank Chia Yung Angela Liu for her wisdom and support. I am so very grateful that I was able to grow up in a home full of love and laughter.

I would like to thank Barry Goldstein for bringing me aboard this project. It has been such a privilege to work with, and learn from, him. I would like to thank Joan Meier whose example and mentorship have been key to my development as a domestic violence advocate.

Finally, I would also like to thank Christopher Kang whose love, support, patience, integrity, and humor inspire me on a daily basis. I could not do this work without him. The world is a much better place because of men like him.

Foreword

Chances are every fourth female client of every law office in America needs to be advised of her legal rights concerning domestic violence. Some male clients need the same help. And chances are, most lawyers lack the professional skills to recognize this and are unprepared to advise those clients even if they did. That is why this is a book lawyers need.

Three decades of practicing law, judging, writing, and teaching on domestic violence has convinced me that few lawyers and even fewer judges are equipped to identify most domestic violence issues, let alone competently handle them when they do. It is a professional fault on par with the documented neglect of doctors to wash their hands, and it produces a similar trail of carnage, similarly preventable.

Forty years after the explosion of domestic violence laws across the nation, it is unfathomable that the bar should remain so uninformed about the single most lethal type of case most lawyers and judges are likely to encounter in their careers. In no other legal arena—not gang wars, not organized crime, not the drug trade—is it more likely that someone will get injured or killed while the case is still pending. In criminal cases, basically bad people appear on their very best behavior. Domestic violence perpetrators, and usually this means violent fathers, show no such respect for the courts and, in fact, blame the law for impeding their coercive agenda. They do not hesitate to injure or murder complainants, witnesses, and children while their cases are pending. They will even attempt to bring their violence into the courtroom.

This frequent demonstration of contempt for the justice system gives rise to such courthouse drivel as “protection orders are just a piece of paper; they won’t stop a bullet.” This could equally be said of homicide laws, the difference being that every single representative of the justice system, from the rookie cop to the senior justice, is deadly serious about their sworn oath to enforce homicide laws. If all were equally committed to their oath to enforce domestic violence laws, this book would not be necessary.

Domestic violence cases are uniquely complex and damnably counterintuitive. Coupled with the judiciary’s wild discretion and the states’ contemptible failure to require specialized judicial education for this most lethal variety of litigation, these factors often turn the law from a tool for relief to a toxic threat for domestic violence victims and their children.

This departure from skilled standards is strange. Legal professionals will routinely go to extraordinary lengths to educate themselves in unfamiliar realms when professional duty requires; I have known lawyers who could probably remove their own appendix if the situation arose; they have so prepared themselves for some piece of litigation. I have known judges in mental health courts and drug courts whose topical study easily qualifies them as experts in these disciplines. Yet many lawyers and judges will blunder through the minefield of domestic violence cases unprepared.

Those who read these pages, of course, are not the ones most in need of its content, which is why so many chapters emphasize the necessity of educating opposing counsel, educating the judiciary, and even educating the *experts* that they will encounter in domestic violence cases. As valuable as this volume will be in developing your own competence, its lessons will be even more critical in helping you deal with the professional incompetence you will often find standing between your clients and the relief to which they are legally entitled.

If you undertake representation of domestic violence victims, you will face challenges that are as prevalent in domestic violence cases as they are rare elsewhere in the litigation field. The chance that you will be the only one in the room who has a clue what these cases are all about is just the first challenge.

Your second challenge is to refocus everyone's priorities in domestic violence cases onto *safety*. If uninformed prosecutors concentrate solely on convictions rather than victim safety, they may do stupid things like jail victims who decline to testify. If uninformed custody evaluators prioritize visitation over victim safety, they may do stupid things like recommend extensive custody rights to verifiably violent parents. If uninformed judges prioritize fatherhood rights over victim safety, they may do stupid things like grant unsupervised visitation to criminally violent men. Your challenge is to persuade all those to make the law keep its promise and make the safety of victims and their children the highest priority in all decisions.

Your third challenge is to seek economic justice for your domestic violence clients. While society often blames domestic violence victims for failing to leave a violent relationship, the simple reality is that leaving costs money, especially if there are children to be supported. The abused is often the economically disadvantaged partner and subjected to nonsupport by the abuser. Without comprehensive financial support orders strongly enforced, most victims cannot avoid reuniting with their abusers. Many state domestic violence laws allow for financial support orders. Unaccountably, in a perverse misapplication of judicial discretion, judges are notoriously hostile to making and enforcing the economic orders to which domestic violence victims are entitled by law. Both justice and *safety* demand adequate support orders, but you will have to fight for it.

The last challenge I will mention is to prevent litigation abuse. Expect opposing counsel to focus on keeping the perpetrator out of jail and winning property rights by exploiting your client's weaknesses and fears, especially fears over custody issues. And expect the opposing party to focus on using the litigation system to continue his abuse of your client. Litigation is a powerful weapon of exploitation in our society, especially when one party is significantly advantaged economically; this is never truer than in domestic violence cases. Preventing litigation abuse will consume much of your time and energy. Repeated motions to reduce support and expand visitation, withholding support, attempting to win property rights in exchange for indefensible custody claims, demands for expensive psychological exams, repeated continuances, abusive discovery requests, contempt motions, manipulation of the children, all can be part of a litigation war to extend the domestic violence control and abuse by using the very legal system that promises to protect the weak from the strong. Unfortunately, you can expect little help from the judiciary. In fact, your client is likely to be blamed for simply raising the issue of abuse. Every day judges can be heard to complain that "women are lying to me just to get a leg up in their custody case." Even absent such prejudice, most judges assume both parties are motivated only by personal best interests and resist recognizing malevolent misuse of the court. The lessons of these chapters may help you persuade the courts that domestic violence cases are not like vanilla civil court cases and that active intervention is required to curb litigation abuse.

To help you meet these challenges, perhaps the most valuable assistance you will find in this volume starts with chapter 5. There begins the introduction to the wealth of scientific research and professional scholarship that can educate trial and appellate courts about domestic violence and its impact on victims and children.

When, for example, a judge raises the common courthouse prattle that no rational person would stay in a violent home, you can be prepared with evidence that staying is, in fact, the *only* rational choice for many women since they are almost twice as likely to be injured or killed when they leave a violent relationship. Or, when judges accuse your client of endangering children by remaining in a violent home, you may point out that the blame is with the overwhelming prejudice of judges to grant provably violent fathers unsupervised visitation time with children, which forces mothers to remain in the home so they can be in a position to risk their own safety to intervene for the safety of the children. Or, perhaps the judge who is reluctant to grant relief to domestic violence victims may be moved to action by the research that found one-fifth of all deaths in domestic violence cases involves innocent bystanders—children, cops, neighbors, co-workers. Getting relevant research in front of the courts should have persuasive impact and lays the groundwork for powerful appellate arguments.

And appellate arguments there should be. In my early career, the two biggest mistakes I witnessed (and committed) in the representation of domestic violence victims were a failure to aggressively appeal trial judges, who abuse victims from behind the shield of judicial discretion, and a failure to aggressively challenge the experts.

We will return to appeals in a moment, but first, let us talk about experts. A stunning discovery for lawyers is that psychologists and other so-called custody experts are usually as ill trained in domestic violence dynamics as lawyers and judges. Even if you grant judges the benefit of the doubt, assuming that they believe they do not need any specialized knowledge of domestic violence because they make extensive (and expensive) use of custody experts, you are letting two levels of professionals compound ignorance on ignorance. Your first clue that they are clueless will be when the custody expert and the judge swoon over *aspirational parenting*. If the expert and judge enthusiastically tout the imaginary future parenting skills promised by a historically abusive and deadbeat father, and are willing to bet children's safety on that fantasy, your best education and litigation skills are demanded.

It took some years on the bench for me to discover how minimal is the formal education on domestic violence supporting the opinions of the custody experts my court relied on. Worse was the recognition that those opinions tended to favor fathers, and tended to be paid for by fathers, who tended to be the financially advantaged parent. Then, when those experts started advocating for violent fathers based on *syndromes* that their own professional standards did not recognize, it was alarming, almost as alarming as the unpreparedness of many lawyers to challenge such vapor opinions in court. Lawyers representing domestic violence victims and their children must be thoroughly prepared to deal with a variety of custody *experts*, and this book will help.

Second on my personal book of errors is appeals. *Plan* to appeal. When a lawyer at last recognizes how poorly other lawyers, judges, law enforcement officers, psychologists, children services workers, and other custody *experts* comprehend the realities of domestic violence, the first course of action is to try to educate them. Failing that, prepare every case to give appellate courts the opportunity to educate them. All the injustices suffered daily by domestic violence victims and their children will not change unless the lawyers dedicated to finding justice and safety for them file appeals, writs, recusals, and disciplinary complaints, and carry the demand for justice and safety to legislatures, news media, and the political arena. This is not a job for the faint of heart.

The lessons of this book have been bitterly learned over the past four decades, at the cost of over 50,000 dead domestic violence victims, a small city's worth. And that is just our mothers, sisters, and daughters. Men, children, and innocent bystanders

raise the body count. The legal system has not only failed them, so far it has failed to even slow the *rate* of that carnage, despite hundreds of laws and billions of dollars. It is a professional failure of scandalous proportions.

Domestic violence victims need competent representation. Their children need protection. The legal system needs lawyers who will reform its scandalous failures. This book provides valuable tools for those efforts. An alternate title for the book might be "What They Never Taught You." A debt of gratitude is owed by lawyers and their domestic violence clients to the work of two seasoned legal experts to bring this wealth of knowledge together here. Attorneys Barry Goldstein and Elizabeth Liu are well respected for their decades of toil in one of the most difficult vineyards of the law, trying to win justice for some of our most endangered citizens and their innocent children. This commendable work encapsulates the lessons they have learned and brings decades of relevant research to the hands of those who will carry on this work.

Mike Brigner, J.D.
Dayton, Ohio
July 15, 2012

Introduction

BACKGROUND

When domestic violence (DV) became a public issue in the mid to late 1970s, there was virtually no research available. The court system, like any institution, had to develop practices to respond to DV cases based on the assumptions that were prevalent at the time. The courts relied on the belief that DV was caused by mental illness, substance abuse, and the actions of the victim.¹ They believed children were unaffected by the abuse of their mothers unless the children were directly assaulted; that only physical abuse mattered; and that the danger ended, or at least was significantly reduced, once the parties separated.² All of these assumptions have proven to be wrong, but the custody courts continue to rely on practices based on outdated and discredited beliefs.

Note: Throughout this book, we will often use the male pronoun for abuser and the female pronoun for survivor because, in heterosexual relationships, a very large majority of controlling and coercive behaviors are perpetrated by men (or fathers) against women (or mothers). We understand there are some exceptions in which women seek to coerce and intimidate their male partners. We also recognize that DV occurs in same-sex relationships as well. However, we choose to use these pronouns because they are consistent with our personal experiences.

Published in 2010, the book *Domestic Violence, Abuse, and Child Custody*³ was designed to bring together the leading DV and custody experts in the United States and Canada. The intention was to provide viewpoints from a wide variety of academic and practicing fields on the issue of DV custody cases, based on the specialized body of scientific research and information presently available. Although the experts brought to their work different experiences and perspectives, there was remarkable agreement among them that the courts' present response to DV custody cases is failing to protect the children under its control.

The literature establishes not only that the courts are getting these cases spectacularly wrong, but they are routinely favoring abusive fathers and placing protective mothers and their children in jeopardy. Accordingly, attorneys representing battered women or their children are at a severe disadvantage and must learn how to navigate a flawed system in order to protect their clients. The strong consensus among leading experts familiar with the latest scientific research should mean that the custody courts are now in a transition period, moving from the failed practices adopted over thirty years ago to new approaches based on current research. In fairness to judges,

¹ Barry Goldstein, *DV Cases Require DV Experts: Duh!* <http://timesupblog.blogspot.com/2011/08/dv-cases-require-dv-experts-duh.html>.

² Barry Goldstein, *Crisis in the Custody Court System: State Legislative Reform Proposals*, <http://domesticviolenceabuseandchildcustody.com/>.

³ Mo Therese Hannah & Barry Goldstein eds., *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues* (2010) [hereinafter DVAC].

some of the mistakes that place children in jeopardy are caused by protective mothers' attorneys failing to present needed information to courts. This is usually caused by a lack of education and training in DV and, in too many cases, hostility to their clients' positions. We believe it is important for attorneys to obtain education and training in best practices for DV cases in order to more effectively represent their clients.

This book is based on our belief that a multidisciplinary approach based on current scientific research can help courts make better decisions in DV cases. We have not used research that is based on personal biases, such as the Richard Gardner material about parental alienation, or information based on flawed practices, such as studies that claim women abuse men as often as men abuse women, based on counting the hits and ignoring the context. Writing a book like this supports good practices because the publisher and editor require us to justify anything we want to say with good research. We are confident of the validity of the research used because our conclusions are reinforced from so many valid sources.

The recently released U.S. Department of Justice study by Dr. Daniel Saunders and colleagues contains interviews with twenty-four mothers as part of their research. The mothers describe the kinds of extreme outcomes in which abusive fathers receive custody, and children are denied any meaningful relationship with safe, protective mothers who are the children's primary attachment figures.⁴ The investigation of these cases helps understand what goes wrong to create these outcomes, which are always harmful to children because the harm of separating children from their primary attachment figure is greater than whatever benefit the court believes it is creating.

Throughout the book, we often refer to the *Shockome* case from Dutchess County, New York, to illustrate a variety of important points.⁵ *Shockome* involved the same kinds of extreme and flawed practices as the cases described in the Saunders' study. We use *Shockome* because that case contains a strong record that demonstrates many common errors that are seen in the courts' responses to DV custody cases and an inexperienced evaluator who spoke more candidly about her mistakes than more seasoned evaluators would do. Barry Goldstein was the attorney for the mother during the custody trial and appeal, and so he has personal knowledge of the facts and

⁴ Daniel G. Saunders et al., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations*, Final Technical Report Submitted to the National Institute of Justice, U.S. Department of Justice, Oct. 31, 2011, <http://ssw.umich.edu/about/profiles/saunddan/Custody-Evaluators-Beliefs-About-Domestic-Abuse-Allegations-Final-Tech-Report-to-NIJ-10-31-11.pdf>.

⁵ The citation for the *Shockome* case is *Shockome v. Shockome*, 30 A.D.3d 528 (2d Dep't 2006). Unfortunately, the court failed to discuss any of the legal and factual issues involved, so it does not help the reader understand the case. Accordingly, the following additional sources of information are included for anyone who wants more information. An amicus brief filed by Justice for Children can be found at <http://www.justiceforchildren.org/amicus-briefs/AmicusCuriaeBrief.pdf>; Sarah Childress, "Fighting Over the Kids: Battered Spouses Take Aim at a Controversial Custody Strategy," *Newsweek*, Sept. 25, 2006, available at <http://www.leadershipcouncil.org/1/med/nw2.html>; Tim Shockome, Feb. 18, 2011, <http://timshockome.blogspot.com/>; Trish Wilson comp. *Crisis in the Family Courts: Genia Shockome* (2005), <http://abatteredmother.wordpress.com/2011/04/14/genia-shockome/>; *Dutchess County Legislature Citizens' Advisory Committee on Domestic Violence* (Oct. 2010) on file with authors. Sometime after this case, the New York Appellate Division Second Department, in an unprincipled decision, suspended Mr. Goldstein's law license in retaliation for pointing out the problematic responses of one of its colleagues to his zealous advocacy for a client. Accordingly, Barry Goldstein is not presently practicing law. The purpose of this book is not to teach anyone how to practice law but to provide information about the best ways for attorneys to incorporate DV expertise to inform their practices. This conforms with our perspective of the value of a multidisciplinary approach to DV cases.

circumstances. The *Shockome* case took place in a county that had a strong “fathers’ rights” influence and a pattern of favoring abusive fathers in custody disputes. The result was that Dutchess County suffered a series of DV homicides resulting in nine deaths in less than one year, including five battered women and a police officer who was shot by an abusive father after rescuing a young child. A committee appointed by the county legislature to investigate the county’s response to DV found that battered women were often refusing to seek assistance from the custody and criminal courts because of the belief that the courts favored abusers.

The frequency with which custody courts mishandle DV cases is itself quite unusual. The American court system is highly admired around the world, and protective mothers, many originally from other countries, initiate their cases confident the court will protect them and their children. It is hard to think of any other example in which the court system routinely gets a majority of a class of cases wrong. Civil rights cases in the South during the Jim Crow era seem to be the only other obvious example.

Unfortunately, the court system has not been eager to examine its practices in DV cases. The doctrine of *stare decisis* requires the courts to assume the issues are settled between the parties once a decision is made. This does not provide opportunities or encouragement to consider the possibility that the decisions were wrong. The New York court system established a Matrimonial Commission in 2004 to study contested divorce cases that obviously included custody. This was not cosponsored with the New York State Office for the Prevention of Domestic Violence or the Coalition Against Domestic Violence, and its membership provided little expertise in DV. The commission was filled with judges and attorneys who concentrated on “high-conflict” instead of DV issues.⁶ It never focused on the specialized body of research concerning DV and made recommendations that would have little effect on the crisis in the custody courts or the frequency with which the courts get these cases wrong.

One of the problems in understanding DV is that it is often counterintuitive. The most common question about DV is why does the battered woman stay? The question is based on common sense and assumes women have a choice between staying while suffering physical and other abuse or leaving and enjoying a safe, peaceful life. But the reality for women is very different. Leaving is often the most dangerous option. First, most DV homicide is committed by men after the women have left. Additionally, leaving subjects them to possible homelessness, financial deprivation, and loss of friends and family. Like court professionals, women have often heard about the importance for children to have fathers in their lives. There are many more factors, of course, but the point is that victims of DV do not have a choice between something good and something horrible; rather, they must choose between the lesser of evils. The difficulty is compounded by the frequency with which custody courts help abusers maintain their control and place the mothers and children at risk.

It makes perfect sense that batterers would tend to deny and minimize their abusive behavior, but it is counterintuitive that their victims would also tend to minimize both the severity and responsibility of their abuse. Victims’ attorneys may misunderstand the reasons behind their clients claiming some of the responsibility for their partners’ abuse. Court professionals are often surprised when abused children continue to express love for their fathers and often think this disproves the allegations of abuse or suggests that it could not have been too severe.

⁶ Information about the Matrimonial Commission and its report can be found at <http://www.courts.state.ny.us/ip/matrimonial-commission/index.shtml>.

Most people and most court professionals have had some connection with DV in their personal or professional lives. They may themselves be victims or perpetrators, or they may have a friend or relative who is with an abusive partner. It is normal to try to draw conclusions from these kinds of personal experiences. However, this approach works particularly poorly in DV cases. Someone directly involved in an incident will have trouble being objective, and someone who hears the story is usually hearing only one side. Clearly, a great deal can be learned from looking at patterns based on hundreds and thousands of cases, but most court professionals are not used to looking to scientific research to understand their cases. Instead, they *confidently* make recommendations based on a few personal experiences.

DV crimes are different from other common crimes because society has only recently started to treat these actions as criminal. Virtually no one would try to make an argument to justify or tolerate arson, assault, or bank robbery. Even rape would only be justified by a small fraction of males. In custody cases, however, it is common not only for abusers, but also for professionals to make arguments justifying or minimizing the abusers' DV.

Just a generation ago, the media offered sympathetic portrayals of husbands abusing their wives. In the TV series the *Honeymooners*, Jackie Gleason often threatened to punch his wife; the climactic scene in the movie *McLintock* showed John Wayne spanking his wife, Maureen O'Hara, in front of an amused and sympathetic townspeople. Although today the media would be less likely to encourage direct assaults by men against their partners, the media continues to promote exploitation of women and stereotypes suggesting women are only good for housework and sex. As with the general public, the players in the court system are influenced by these depictions and the culture of male privilege.

The media's contribution to the crisis in the custody court system also includes its failure to inform the public about the harm to children in the present system. Many leading DV experts have participated in lengthy interviews with major national media outlets only to have the stories killed at the last moment. While the media also delayed covering the sexual abuse scandals in the Catholic Church and at, for example, Penn State and Syracuse University, its failure to expose a pattern of mistakes in a government entity like the custody court system that jeopardizes thousands of children every year is particularly shocking and disturbing. The media's failure to report is an important reason why the courts have avoided accountability for the harm they are causing.⁷

The good news for attorneys representing battered women is that aside from minimizing their partner's actions, the women's accounts tend to be accurate and reliable. These women pay close attention to the behavior of their partners because their safety and the safety of their children depend on it. They particularly need to know which gestures, tones of voice, body language, or other signs indicate danger so they can take steps to defuse the situation. This is one of the reasons experts tell us the batterer's partner is the best source of information about him and what his responses are likely to be.⁸

⁷ For a discussion of the media's role, see Garland Waller, "The Yuck Factor, the Oprah Factor, and the 'Stickiness' Factor: Why the Mainstream Media Has Failed to Expose the Custody Court Scandal," in DVAC, *supra* note 3, ch. 15.

⁸ Lundy Bancroft, Jay G. Silverman, & Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 237 (2d ed. 2011).

RESEARCH AND INFORMATION AVAILABLE

DV became a public issue when women started speaking to each other and finding out they were not the only ones being abused by their husbands. Knowledge of the secret had been limited for centuries by the practice of hiding abuse by considering it a private family matter. This worked well for abusers but poorly for victims and their children. Only when discussed more openly could the crime of DV become a public issue and lead to demands for its prevention.

Similarly, the widespread failure of the custody courts to protect battered mothers and their children was long hidden by secrecy rules in the courts and practices that demonized and discredited protective mothers. For many years, and even until today, women complaining about mistreatment in the custody courts were dismissed as *disgruntled litigants*. Only when they started searching for help and speaking to each other did protective mothers learn this is a widespread problem.

These efforts led to the start of the Battered Mothers Custody Conference in 2004. At first the conference consisted of two groups: a small group of protective moms so happy to find each other and an even smaller group of professionals trying to help them. The most common response from mothers to the book *Scared to Leave, Afraid to Stay*⁹ was to thank the author for letting them know they are not crazy. This summed up the experience of being at the Battered Mothers Custody Conference because, after years of attacks, the women could see that the same thing was being done to other mothers who were easy to admire.

Since the first conference in 2004, the protective mothers' movement has grown, and knowledge of the crisis in the custody court system is more widely available. The DV movement, led by the National Coalition Against Domestic Violence (NCADV), is fully committed to reforming court proceedings and helping protective moms. We have also seen wider recognition of the problem by government agencies, particularly on the national level, and academic institutions. The scientific research discussed throughout this book establishes that custody courts are getting a large percentage of DV cases wrong because they use flawed practices.

This progress means that protective mothers no longer have to reinvent the wheel to access research and information to help their cases. This information is also available to attorneys representing protective mothers or their children. Appendix A in this volume contains a long list of organizations that provide help and information for protective mothers. Attorneys looking for information to help their clients should look at web sites for the Battered Mothers Custody Conference (<http://www.battered-motherscustodyconference.org/>), NCADV (<http://www.ncadv.org/>), the Leadership Council on Child Abuse and Interpersonal Violence (<http://www.leadershipcouncil.org/>), Liz Library (<http://www.thelizlibrary.org/>), Office on Violence Against Women (Department of Justice; <http://www.ovw.usdoj.gov/>), the American Bar Association Commission on Domestic Violence (http://www.americanbar.org/groups/domestic_violence.html), and the Domestic Violence Legal Empowerment and Appeals Project (<http://www.dvleap.org/>). These sites in turn have links to many other useful sources of information.

Research about DV and custody is an active and growing field. Two of the most authoritative and important sources of information are *The Batterer as Parent* and the U.S. Department of Justice study led by Dr. Daniel Saunders. During the preparation

⁹ Barry Goldstein, *Scared to Leave, Afraid to Stay: Paths From Family Violence to Safety* (2002).

of this book, we worked from the first edition of *The Batterer as Parent*.¹⁰ We relied also on information from a presentation by Dr. Saunders and his colleagues and their handout material from the NCADV Conference in August of 2010.

After the manuscript for this book was submitted, but before the final editing process, The Saunders' report was released to the public,¹¹ and the second edition of *The Batterer as Parent*¹² was published. The importance of current scientific research is a fundamental premise of this book, so we believe it was important to incorporate this material. Dan Saunders and Lundy Bancroft generously made themselves accessible to us, so we could discuss their research. We took the unusual step of modifying some of the substance of our writing during the editing process as well as updating citations.

The Batterer as Parent was a breakthrough work when it was published in 2002. The new book updates the information but does not change the thrust of its perspective. We believe it is significant that the experts who wrote chapters for DVAC¹³ cited *The Batterer as Parent* more than any other source. The release of the study by Saunders and colleagues created tremendous excitement in the DV and protective mothers' community, not only because of the value of the new research, but also because of the source being the U.S. Department of Justice.¹⁴ The study is likely to be viewed as neutral and authoritative, and may result in steps by the Justice Department to create financial incentives to encourage courts to adopt the best practices described in the study.

The Department of Justice study found that there is a specialized body of scientific research that professionals need in order to make informed decisions in DV cases. Significantly, the present training, including required training, does not provide evaluators, attorneys, or judges with the training they need to recognize and respond effectively to DV allegations.¹⁵ This necessarily means that there is a need for additional training, and indeed retraining, to counter common false beliefs; court professionals would benefit from consultation and testimony from DV experts; and a large percentage of decisions in DV cases are not meeting children's needs.

Rather than generalized training in DV, which could mean very different topics to different people, the Department of Justice study found that evaluators and other court professionals should be required to obtain training in very specific topics such as screening for DV, risk assessment, and postseparation violence.¹⁶ Many of the evaluators in the study who claimed to screen for DV were, in reality, using general psychological tests that do not provide the necessary screening. This is the worst possible situation because no valid screening is taking place, but the court professionals are unaware of this omission.

The Department of Justice study found that evaluators and other court professionals who do not have the specific DV training needed are more likely to have false and harmful beliefs that women frequently make false allegations, that attempts by

¹⁰ Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).

¹¹ Saunders et al., *supra* note 4.

¹² Bancroft, Silverman, & Ritchie, *supra* note 8.

¹³ Hannah and Goldstein eds., *supra* note 3.

¹⁴ Saunders et al., *supra* note 4.

¹⁵ Id.

¹⁶ Id.

mothers to protect children from abusers are harmful, and that alienation by alleged victims should be a high priority.¹⁷ This encourages courts to focus on less significant and often false issues, and distracts attention from the safety of children.

Responses to Domestic Violence Outside Custody Courts

Barry Goldstein was hired by the Canadian Institute of Health to review grant proposals concerning violence, gender, and health. The twenty-five to thirty hired experts came largely from academic fields or organizations that utilized the research in their work. Although the experts involved rarely participate in custody cases, and were paid a small fraction of the fees normally charged by evaluators, the discussions about the merits of the various grant proposals were far more knowledgeable of DV research and dynamics than those usually heard in custody courtrooms. The common practice of relying on the same small group of mental health professionals helps create an insular atmosphere that actually discourages courts from hearing about the full array of current scientific research that could make the work of judges easier and more effective. This would be particularly valuable in light of the U.S. Department of Justice study that the present training does not provide court professionals with the DV expertise they need.¹⁸

Domestic Violence Attorneys' Qualifications

The most common question received from women across the country (and internationally) is how to find an attorney for a DV case. Few attorneys are experts in DV because of the amount of time necessary to obtain such expertise, and most attorneys have too many other demands on their time. Attorneys, however, do not need to be experts in DV in order to represent protective mothers or others involved in DV cases. They do need to have enough knowledge and understanding to recognize what questions to ask and where to seek information, including sources custody courts have not traditionally looked to. Familiarity with the information in this book and a willingness to use the advocated approaches would qualify attorneys to represent survivors in DV cases.

DV shelters are the community resources for DV expertise. They are the ones the rest of the community should turn to for DV training and to lead the community in the work to end DV. Accordingly, it makes sense for attorneys representing DV survivors to seek assistance from these agencies in order to help their clients. The agencies can provide an advocate to support and assist the clients and an understanding of the DV aspects of the case to help the attorneys understand the issues. DV advocates should serve as expert witnesses in court and would provide a better understanding of DV issues than the mental health professionals usually relied on by the courts.¹⁹

At the same time, attorneys must be aware that courts have not yet abandoned the old failed practices and often give more credibility to professionals with mental health degrees. Accordingly, it would be beneficial to develop a relationship with mental health professionals who also have expertise in DV. Attorneys who frequently represent abusers

¹⁷ Id.

¹⁸ Id.

¹⁹ For a more complete explanation of working with DV agencies, see chapter 6 in this volume.

usually have working relationships with sympathetic evaluators and convince courts to appoint these biased professionals with dangerous consequences. Judges will often ask attorneys for suggestions in the appointment of an evaluator or other professional, and it is useful to have someone to recommend. The local battered women's shelter is often a good source for referrals, as staff members often know professionals who have worked well with their clients. Articles found on the Internet and academic researchers can be other good sources for mental health professionals with an understanding of DV.

Learning From Extreme Outcomes

In many ways, the creation of the protective mothers' movement, severe criticism of custody courts, and much of the research demonstrating the frequent flawed approaches used by custody courts in DV cases come from extreme outcomes in which safe protective mothers lose custody to abusive fathers, and children are denied any meaningful relationship with mothers who are their primary attachment figures. In the U.S. Department of Justice study, Dr. Saunders interviewed twenty-four mothers who were involved in these kinds of extreme cases. The purpose was not to determine if the decisions were right but to understand the mistakes that caused outcomes that can never be in the best interests of children.²⁰ Such extreme outcomes could only benefit children if the mothers presented a genuine safety issue. Otherwise, the harm of separating children from their primary attachment figures is more harmful than any justification.

The Department of Justice study found that these outcomes are not a reflection of the circumstances of the case, but rather the inadequate training and flawed practices of evaluators and other court professionals. In many of these cases, the courts disbelieved valid allegations of DV and child abuse because they did not know how to screen for DV or understand the harm to children. Instead, the inadequately trained professionals focused on issues like alienation, pathologizing the victim, and high-conflict approaches that seek to have survivors *get over it* instead of abusers stopping their harmful behaviors.²¹ We believe this research should be used by judges to avoid creating these extreme outcomes when the alleged victim poses no safety risk, and appellate courts should apply strict scrutiny to these decisions because they are so often harmful to children. At the same time, the study found court professionals are far too reluctant to impose supervised visitation on DV abusers, despite the genuine safety risks they pose.²²

Importance of the Appearance of Propriety

We have practiced law for many years and have deep respect for our judicial system. We are distressed at how often we hear protective mothers and their supporters refer to *corruption* in the custody court system. There are cases like the one involving Judge Garson in Brooklyn, New York, that were decided based on payoffs, but more commonly, bad outcomes based on deeply flawed practices create the appearance of corruption.²³

²⁰ Saunders et al., *supra* note 4.

²¹ *Id.*

²² *Id.*

²³ Daniel Wise, "Ex-Judge Gets 3 to 10 Years for Bribery, Taking Favors," by Daniel Wise, *N.Y.L.J.*, June 6, 2007.

The U.S. Department of Justice study of the twenty-four mothers' cases demonstrates how easily court professionals acting in good faith but inadequate training can make spectacularly wrong decisions. Judges are ethically obligated not only to avoid bias, conflict of interest, and other similar mistakes, but to also avoid factors that create the appearance of undue influence on their decisions. In some cases, courts have sought to silence parties through gag orders or retaliation against battered women and professionals who support them for criticizing what they believe to be bad decisions. Judges may believe they are defending the integrity and reputation of the court system, but instead they are contributing to the appearance of corruption. We appreciate that it can be uncomfortable and even dangerous for attorneys to provide information that challenges a court's standard practices, but in doing so, attorneys are performing their ethical duties to represent clients zealously and serve as officers of the court. At the same time, we believe attorneys should consider how to provide this unwelcome information in a respectful manner that can best be heard by the judges.

PURPOSE OF THIS BOOK

This book is not designed to teach attorneys how to practice law. They already know how to file motions, present evidence, and cross-examine witnesses. This book will teach attorneys how to present their DV cases—whether civil protection cases, custody cases, or criminal cases—most effectively (and, in so doing, help the courts in the transition to practices that provide better protection for protective mothers and children). In particular, they will learn the following:

- How to effectively use the up-to-date research that is now available in their clients' behalf;
- How common practices used in custody and other courts, in response to DV, fail to protect or empower adult and child victims of DV—and how to counter these problematic practices;
- The importance of placing the evidence of abuse in context to help court professionals see the patterns of coercive and abusive behaviors;
- DV is a gendered crime, and there are important differences between men and women that can be missed by automatically treating parties the same despite very different circumstances; and
- How to improve their representation of DV survivors and become part of the solution in reforming a broken system.

ORGANIZATION OF THIS BOOK

This book seeks to provide the DV attorney with a comprehensive set of issues to consider and strategies to employ from the beginning of a DV case to the very end. Because DV is a topic that draws on both the legal and social science fields, and such cases often involve players from the mental health field, some of the chapters in this book are more research-and-policy oriented while others are more legal in nature.

Part 1, Getting Started: Preliminary Work With the Clients, sets forth issues to consider as soon as an attorney begins representing a DV survivor—even before any

pleadings are filed. This section sets forth a broad overview of how DV cases are different from other cases and the common pitfalls and misconceptions that DV attorneys are likely to encounter. Part 1 also provides strategies a DV attorney should employ in presenting a pattern of DV to a judge. This part will also help the attorney develop a trusting and empowering relationship with the client by providing concrete tools on how to most effectively interview a DV survivor and how to develop cultural competency skills. Finally, Part 1 includes important safety planning strategies a DV attorney should explore with the client as soon as legal action is contemplated.

The goal of Part 2, *Effective Preparation and Presentation of Domestic Violence Cases*, is to further develop a DV attorney's effectiveness in representing the client by exploring the best ways to advocate on the client's behalf before the judge and other professionals involved in cases such as evaluators, child protective services, expert witnesses, and guardians ad litem. These chapters offer strategies both on how to work with these professionals and also how to challenge them or minimize their impact if necessary. Part 2 also explores ways to best present research on DV, including working with DV agencies.

Part 3, *Responding to Specific Issues*, further amplifies the problems faced by DV attorneys. This part focuses on how to address commonly used constructs such as the friendly parent preference, shared parenting, and parental alienation syndrome. We consider how child abuse issues apply to DV cases. Part 3 also explores the use of criminal charges against both the victim and the abuser. Sexual abuse of children is one of the most painful and difficult issues for attorneys to work on. We provide tips on how to use current scientific research and best practices to improve the response to these often accurate allegations. Part 3 also includes a chapter on how to obtain protection orders and the effectiveness of such orders, and a chapter on how to explore and advocate for supervised visitation. Finally, this part includes a chapter on ways DV attorneys can cope with *vicarious trauma*, which are the effects working with DV survivors in such heart-wrenching cases often have on the attorney's own emotional and psychological well-being.

Part 4, *What to Do if Cases Have Gone Badly for the Clients*, provides the DV attorney with strategies to counter a negative court decision. This part includes chapters that are primarily focused on litigation and provides the legal steps the DV attorney should take to ensure that the client is in the best possible position to appeal or modify a bad court decision. We consider how attorneys can use recent scientific research to challenge outcomes that are likely to place children at risk. This part also explores the possibility of seeking publicity around a bad court decision and of ethical issues specific to DV cases, including the duty of zealous representation.

As a final note, throughout this book, we have included several examples of real-life cases we were either directly involved in or that were relayed to us by DV survivors or their advocates. We have chosen these particular examples because they exemplify the challenges survivors and their attorneys typically face in DV cases. We have omitted case names and other identifying details to protect the confidentiality and safety of the incredibly brave survivors and their children involved in these cases. We hope that we have adequately described the horrors they have faced as well as the tremendous courage and compassion they have exhibited.

About the Authors

Barry Goldstein, J.D., practiced law in New York for thirty years and frequently represented protective mothers. He served on the board of My Sisters' Place for fourteen years, including four years as chairperson. He has been an instructor and is now also a supervisor in the VCS Domestic Violence Program for Men, one of the New York Model Batterer Programs since 1999. Mr. Goldstein is the coeditor, with Mo Therese Hannah, of *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues* and is the author of *Scared to Leave Afraid to Stay: Paths From Family Violence to Safety* (2002). He has been qualified as an expert witness in domestic violence and the courts' response to domestic violence in New York, New Jersey, North Dakota, and California. Mr. Goldstein is the author of several articles, including "Custody-Visitation Scandal Cases," published in *The Voice by the National Coalition Against Domestic Violence* (Fall 2006). Barry Goldstein is a regular contributor to the Times-up blog. He has presented at numerous judicial trainings and workshops for the National Coalition Against Domestic Violence, Battered Mothers Custody Conference (BMCC), Office on Violence Against Women (U.S. Department of Justice) Roundtable, National Domestic Violence Hotline, Oklahoma Attorney General's Office, Louisiana Coalition Against Domestic Violence, Safespace (Tennessee), Rockland Family Shelter, Catholic Charities (Buffalo, New York), Fairleigh Dickinson University, Bergen Community College, and The Retreat. Mr. Goldstein served on the truth commission held at the Fourth Battered Mothers' Custody Conference (2007). Barry Goldstein is cochair of the National Organization for Men Against Sexism (NOMAS) Child Custody Task Force. He received the "Believer Award" from BMCC (2009) and the Brother Peace Award from NOMAS (2009). He received his B.A. (political science) from George Washington University (1974) and J.D. from New York Law School.

Elizabeth Liu, J.D., was most recently the Managing Attorney at the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) where she litigated domestic violence appellate cases and helped lead DV LEAP's various training, advocacy, public speaking, and outreach efforts. Prior to joining DV LEAP, Ms. Liu was a Women's Law and Public Policy Fellow at Georgetown University Law Center's Domestic Violence Clinic where she supervised law students litigating civil protection order cases and cotaught the clinic seminar. She previously worked as a staff attorney for NARAL Pro-Choice America. Ms. Liu has served as the president of the board of directors for the Asian Pacific Islander Domestic Violence Resource Project and is currently a member of their advisory board. She was also a member of the board of directors of the D.C. Coalition Against Domestic Violence. She received her LL.M. in Advocacy from Georgetown University Law Center, her J.D. from Harvard Law School and her B.A., with honors, from the University of Chicago.