NEW JERSEY LAWYER

December 2024

No. 351

DOMESTIC VIOLENCE

NJSBA

JOIN A SECTION

CONNECT. LEAD. LEARN. INFLUENCE.

Explore 36 practice-oriented sections covering dispute resolution, workers' compensation, child welfare law, and more. Our diverse spectrum of legal areas offers members valuable career-building opportunities and resources.

Discover your legal niche and network with like-minded professionals in specialized sections at NJSBA.

Deepen your legal expertise and access exclusive resources through specialized sections at NJSBA, enhancing your professional growth.

Participate in the legislative process by reviewing pending legislation and assisting the leadership in recommending new laws or changing existing laws.

JOIN A SECTION TODAY

Learn more by visiting njsba.com

LawPay

AN AFFINIPAY SOLUTION

+

Member Benefit Provider

"**I love LawPay!** I'm not sure why I waited so long to get it set up."

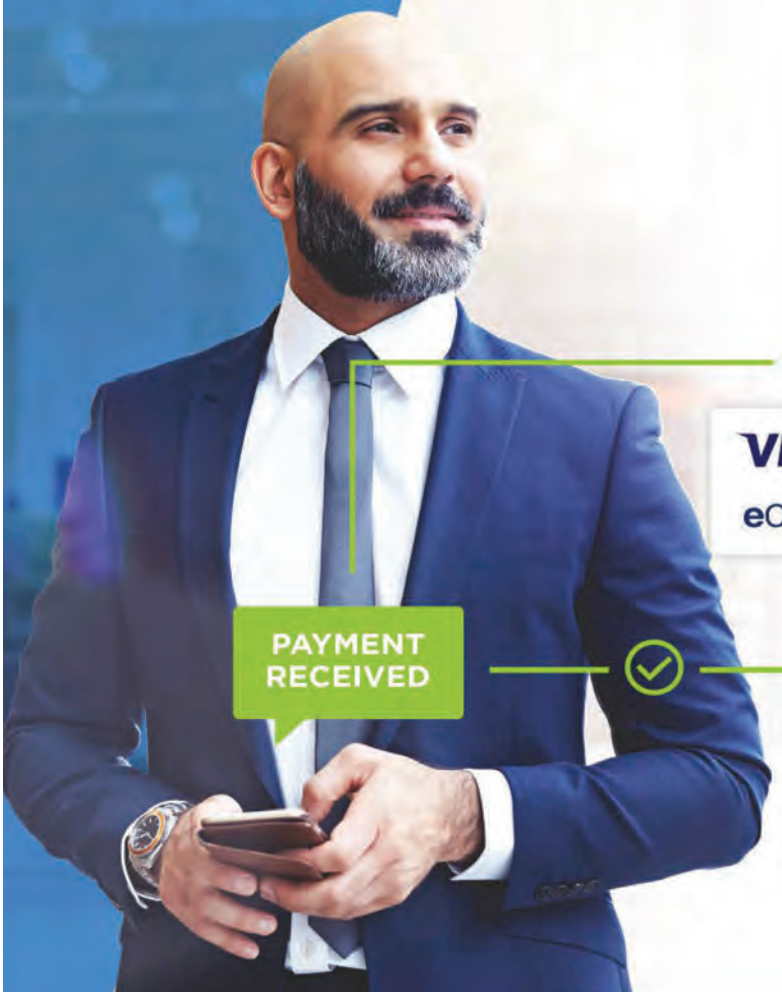
– Law Firm in Ohio

Trusted by 50,000 law firms, LawPay is a simple, secure solution that allows you to easily accept credit and eCheck payments online, in person, or through your favorite practice management tools.

22% increase in cash flow with online payments

Vetted and approved by all 50 state bars, 70+ local and specialty bars, the ABA, and the ALA

62% of bills sent online are paid in 24 hours



YOUR FIRM LOGO HERE

Trust Payment
IOLTA Deposit

New Case Reference

**** **** **** 9995 ***

TOTAL: $1,500.00

VISA MasterCard AMEX POWERED BY LawPay

eCheck DISCOVER PAY ATTORNEY

Get started at
lawpay.com/njsba
866-730-4140

Data based on an average of firm accounts receivables increases using online billing solutions.

LawPay is a registered agent of Synovus Bank, Columbus, GA., and Fifth Third Bank, N.A., Cincinnati, OH.

The NJSBA is Here to Help

The NJSBA Member Assistance Program connects our members—and anyone else in their household—to trained, experienced mental health professionals and resources.

At the heart of the program, provided through industry leader Charles Nechtem Associates, is 24/7 access to a mental health professional with at least seven years of experience. The professional will counsel callers and help them find resources. If needed, they will help people find an accessible clinician who is accepting patients. Members are eligible for **up to three** in-person counseling sessions per issue. They can also access **unlimited text, phone and email support** and search an extensive Wellness Library with 25,000 interactive resourses to improve their personal and professional lives.

Contact MAP Counselors Anytime

1-800-531-0200
Phone counseling services are available 24 hours a day, 7 days a week, 365 days a year with immediate access to clinicians. Access to English and Spanish speaking therapists, with other languages upon request.

Text via the CNA app
Available from the Apple App Store and Google Play.

Connect via the website, charlesnechtem.com
Click "Member Login" and log in as a new user.
The employer is NJSBA.

Email
Reach out to inquiries@charlesnechtem.com

The Member Assistance Program is a benefit of membership.

NJSBA

CNAssociates Inc.
A Charles Nechtem Company

NEW JERSEY LAWYER

December 2024 No. 351

© ISTOCKPHOTO

In this Issue: **Domestic Violence**

Page 16

Page 29

Page 32

Page 42

Continued

NEW JERSEY LAWYER

December 2024 No. 351

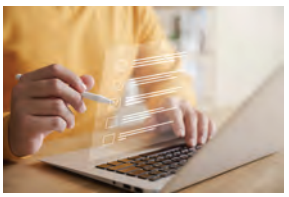
Continued from page 3

DEPARTMENTS

Page 46

Page 52

Page 8



Page 11

WILLIAM H. MERGNER JR.

Amicus advocacy is a pillar of the NJSBA's mission

When the New Jersey State Bar Association acts as *amicus curiae* before the state and federal courts, it harnesses the limitless expertise in the Association's membership to address the most pressing issues facing our profession and the justice system. We owe our thanks to the attorney volunteers who prepare the briefs and present oral arguments, all on a *pro bono* basis, for performing one of the NJSBA's most vital functions—to advance the rule of law and serve as the voice of New Jersey attorneys.

Amicus advocacy is a pillar of the Association's mission. Even with the high standard set over the years by numerous volunteers, the recent advocacy has been exceptional.

In a previous column I described the importance of the NJSBA combating Opinion 745 by the Advisory Committee on Professional Ethics (ACPE), a rule that prohibited certified attorneys in New Jersey from paying referral fees to out-of-state lawyers. I warned of the harm this opinion would inflict on attorneys in practice, their clients and the public. It has the potential to upend fee arrangements and place attorneys in a quandary between an ethics violation for honoring a referral fee agreement or a lawsuit for breaking it. The public faced even worse consequences, with attorneys across state lines less inclined to send knowledgeable New Jersey attorneys to clients.

In October, the Association had its day in court. I was proud to watch NJSBA Treasurer Diana C. Manning argue to the state Supreme Court that the ACPE erroneously considered referral payments a fee for legal services rendered in violation of the Rule of Professional Conduct 1.5(e). The opinion was a solution in search of a problem, as Manning put it. For many years attorneys interpreted the plain language of the rule to permit payment of referral fees, without regard for services performed or responsibility assumed by the referring attorney. Referral fees, in this construct, are distinguished from the general rule prohibiting the division of a fee by and between lawyers who are not in the same firm, Manning argued. NJSBA members Christina Vassiliou Harvey and Kyle A. Valente contributed to the brief.

Several entities joined the NJSBA in challenging Opinion 745, including the New Jersey Association for Justice; the Trial Attorneys of New Jersey; the American Board of Trial Advocates; Blume, Forte, Fried, Zerres & Molinari; and Bergen, Essex, Hudson and Middlesex county bar associations. Fortunately, the Court stayed Opinion 745 pending disposition. The NJSBA awaits the Court's decision.

In another important effort to protect the livelihood and reputation of attorneys, the NJSBA urged the Court to reject an additional ACPE decision, Opinion 735, which allows attorneys to purchase the names of other attorneys as keyword searches to redirect web traffic to their own sites for a competitive edge. NJSBA member Bonnie C. Frost argued before the Court in September that the that the practice is unethical, deceptive, misleading and allows someone to profit from another attorney's reputation. NJSBA Assistant Executive Director/General Counsel Sharon A. Balsamo joined Frost in writing the brief. Andrew J. Cevasco made similar arguments on behalf of the Bergen County Bar Association.

The ACPE issued a finding in 2019 that the practice is not deceptive because these keyword-purchase websites are marked as paid or sponsored. The NJSBA noted that the issue is ripe given the pace of technology advancements in the profession and unsettled nature of the issue. Special Adjudicator and Appellate Division Judge Jeffrey R. Jablonski found, after three days of hearings, that users often cannot differentiate between paid ads and regular, or organic, search results. Notably, a majority of other states examining the practice have found it to be misleading and unethical. We hope New Jersey will follow their lead.

It's not often the NJSBA's advocacy reaches the U.S. Supreme Court. In October, the Supreme Court heard arguments in *Lackey v. Stinnie*, a case on whether prevailing party

Continued on page 7

NEW JERSEY LAWYER

October 2024 No. 350

New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Printed in U.S.A. • Official Headquarters: New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 732-565-7560.

FROM THE SPECIAL EDITORS

Voices for Victims
Legal Perspectives and Practical Solutions in Domestic Violence Cases

By Rita M. Aquilio, Albertina Webb and Matheu D. Nunn

Domestic violence has been, and will always be, an important issue. Adequately addressing domestic violence is vital as it impacts everyone, not "just" people of color, not "just" women or a certain group, and statistically because domestic violence occurs at astronomically high percentage rates of victims across every spectrum imaginable.

The state Prevention of Domestic Violence Act (PDVA) is specifically written to protect everyone, at all times. There are no carve outs, other than the limited age and relational restrictions It is this important legislative intent—and the deleterious effects of domestic violence—that require constant vigilance to be certain that victims are protected, physically, emotionally and financially, and further, that those that abuse the system, are not rewarded. It is for this very reason alone that this special edition is necessary to inform and protect victims and alleged abusers alike.

The history of the PDVA has expanded upon the predicate acts of domestic violence and expanded upon who the courts can consider victims. The catch-all under the PDVA that "any crime involving the risk of death or serious bodily injury to a person protected under the Prevention of Domestic Violence Act" shows how important PDVA is and should be in every community in our state. New Jersey is fortunate that the entry of a final restraining order is in place "forever." No other state affords such a protection to their victims.

RITA M. AQUILIO *is a member of Lawrence Law. She focuses her practice on matrimonial and family law matters exclusively, in the areas of divorce, support, custody, and related matters. Rita is a family law mediator and has also been trained as a divorce arbitrator.*

ALBERTINA "ABBY" WEBB *is a partner in Sarno da Costa D'Aniello Maceri LLC's Family Law practice group. Abby concentrates her practice on family law issues, including divorce, custody, support, post-judgment and domestic violence cases from inception through resolution, either by mediation, arbitration or trial.*

MATHEU D. NUNN, *a partner and board member of Einhorn, Barbarito, Frost, Botwinick, Nunn & Musmanno, PC, co-chairs the firm's family/matrimonial practice and co-chairs its general appellate practice. Mat also serves as an arbitrator of family law matters for attorneys throughout the state.*

The contributors to this special edition are staunch supporters of victims of domestic violence and for protections against abuse of the PDVA. The special co-editors, Albertina Webb, Rita M. Aquilio and Matheu D. Nunn, are all family law practitioners whose daily practice is impacted by these issues and are tasked with ensuring that the application of the PDVA is that of a shield, not a sword, as the case law tells us. We extend our special thanks to NJSBA Past President, Jeralyn L. Lawrence, who submitted our lead-off column. It is very personal and gives a frank perspective of domestic violence, again, making herself and her history bare to the reader. It is our hope that this will resonate with other victims of domestic violence so they can be empowered to break the cycle of violence.

Articles featured in this special edition include:

- Awareness, Hope and Strength in the Face of Domestic Violence by Lawrence
- Home Horrors: When Technology Becomes a Nightmare by Melissa E. Cohen, Christine C. Fitzgerald and Jenna N. Shapiro
- How AI and Deepfakes Can Impact Domestic Violence Cases by Stacey A. Cozewith
- Coercive Control: Recognizing the Invisible Chains that Constitute Domestic Abuse by Alissa D. Hascup
- Legal Implications of Coercive Control in Religious Contexts by Nunn, Eliana Baer, and LaDonna Cousins
- Balancing Justice: Ethical Examination of Unwilling Victim Prosecution by Chad Pace
- Effective Examinations of the Parties in Domestic Violence Cases by Daniel Burton
- Finding Fairness in the TRO Process: The Delicate Balancing Act of Protecting Victims While Recognizing the Rights of Defendants by Thomas J. DeCataldo
- A Lawyer's Personal Behavior in Person and on the Internet is Not Immune From Discipline by Bonnie C. Frost

The breadth and depth of the articles contained in this edition are as varied as the stories and the history of the Prevention of Domestic Violence Act. We offer practical "nuts and bolts" perspectives, articles about the impacts of artificial intelligence and technology, and prosecutorial and criminal law views of the topic. In all, we believe that while this complement of articles may never tell every story and every perspective, it is the gateway to bridging the gap to begin the journey.

We thank you for this opportunity, as family law practitioners, to address this powerful and always pertinent topic. ■

President's Perspective

Continued from page 5

status, and therefore attorney's fees, are available in cases rendered moot by a legislative change. The Association did not participate in oral argument, though retired state Supreme Court Justice Gary S. Stein contributed a brief with assistance from NJSBA Past-President Robert B. Hille and Association members Dominique Kilmartin, Peter J. Gallagher and James A. Lewis, V.

The NJSBA joined the Virginia case to advocate for clarity in the law so NJSBA's member attorneys can advise and provide effective representation to their clients. The case involves a group of individuals who challenged a state law that suspended their driver's licenses without a hearing or due process. When Virginia repealed the law following the issuance of a preliminary injunction, plaintiffs declared they were eligible for fees as the prevailing party in the litigation. In its briefs, the Association asked the Court to affirm lower court rulings awarding fees in certain circumstances where no final relief was obtained, but to establish uniform criteria to determine those circumstances. The Association pointed to previous Supreme Court precedent in urging the Court to require court-ordered, enduring relief to establish prevailing party status.

I would feel remiss not to acknowledge a long-running *amicus* effort that started under NJSBA Past-Presidents Jeralyn L. Lawrence and Timothy F. McGoughran and concluded in October. At long last, the state Supreme Court ended New Jersey's uncompromising approach to disbarment and established a pathway back to the law for some disbarred attorneys. The NJSBA advocated that the Court reconsider disbarment in *In re Wade*, a case Hille argued before the Court and contributed a brief with Abdus-Sami M. Jameel. The Association was also a critical contributor to the exhaustive work by the Wade Commission, created to study the disbarment process in New Jersey.

The steps to readmission are rigorous but fair. They protect the public while holding attorneys to the highest ethical standards. Thanks to the collaborative work by the bench and bar, attorneys whose conduct was caused by addiction, illness or personal struggle will have a chance at redemption.

I urge you to read about the Association's vigorous advocacy program on the NJSBA's website. As always, we encourage members to bring potential *amicus* issues to our attention. Submissions are always welcome on issues for the benefit of New Jersey attorneys, the profession and the public. ■

PRACTICE TIPS

WORKING WELL

New Jersey Bar is Paving the Way for a Healthier Legal Community

By Katie Ann Insinga and Lori Buza
KSBranigan Law P.C.

The Supreme Court of New Jersey made noteworthy progress toward attorney well-being by modifying the New Jersey Character and Fitness Questionnaire of the New Jersey Bar application, effective Oct. 1, 2023. Specifically, the Court modified and revised question 12B of the questionnaire to exclude bar candidates from having to disclose any conditions or impairments that they have been diagnosed with, and have been or are currently being treated for such as substance abuse, or mental, emotional, or nervous system disorders or conditions.

Now, question 12B asks candidates to instead disclose recent conduct or behavior that may affect their ability to practice law in accordance with the Rules of Professional Conduct, the Rules of Court, and other applicable authorities, as well as disclose whether any condition or impairment, in the past five years, has been asserted as a defense, in mitigation, or used as an explanation for any conduct in the course of any inquiry, investigation, or administrative or judicial proceeding. This modification essentially narrows the scope of inquiry by the New Jersey Bar Examiners into a candidate's mental health information.

This change is meaningful because it encourages candidates to seek treatment for such conditions or impairments without being stigmatized or fearing potential career setbacks. Previously, question 12B deterred new lawyers from seeking the necessary help for fear that it would harm their chances of becoming a lawyer. Recent law school graduates who are applying to the Bar are already under tremendous stress, so this change may help alleviate at least some of that stress by addressing a candidate's worries that disclosing a treatment or diagnosis will be flagged for questioning, or worse, become a barrier to Bar admission. These modifications are consistent with the more open and mindful views that younger generations usually possess regarding talking about and dealing with stigmas.

The legal field has a troubling and chronic history of substance abuse and mental health challenges often due to the rigor of an attorney's work and the high demands and pressure an attorney faces daily. Targeting change at the Bar applicant level sends new lawyers a message that the New Jersey legal field is changing for the better, and that ignoring or hiding conditions and impairments is no longer the norm.

Editor's note: The NJSBA vigorously advocated for the elimination of question 12B on the application for bar admission and promoted a focus on actual past conduct, as recommended by the NJSBA's Putting Lawyers First Task Force. The NJSBA commended the Supreme Court for taking action on the recommendation.

TECHNOLOGY

Don't Get Held Up by Ransomware

By Danielle DavisRoe
For Practice HQ

2023 was a big year for law firm ransomware attacks. Three top 50 firms suffered breaches: Kirkland & Ellis, K&L Gates, and Proskauer Rose. All were attacked by the same ransomware organization, Clop (or "Cl0p"). Between the three firms, the criminals walked away with information on more than 50 global companies and 16 million people. For Kirkland & Ellis, the "other shoe" dropped in June 2024, when a class action suit was filed against them. Kirkland had access to individual customers information as

part of ongoing work for a health care company merger, and those exposed individuals comprise the prospective class.

Big firms weren't the only targets, either of criminal hackers or of follow-on class action lawsuits. As the security experts at Sensei Enterprises note, "There has been a 154% increase in the last year in federal data breach class actions."[1] The ransomware gangs continue to consider law firms attractive targets, with "one out of every 40 attacks targeted a law firm or an insurance provider."[2]

Most ransomware gains its foothold through malicious emails. The malicious emails typically contain attachments with malware or links to malicious websites. Attachments are frequently PDF files, zip files, or Microsoft files that do not include "x" at the end of the file extension (such as .docx and .xlsx files). Once you open the attachment or click on the link, the malware starts spreading across your system, encrypting files as it goes.

Most people know not to open attachments or links from people they don't know. The bad guys know this, they are getting smarter, and their attacks are getting more sophisticated. Many ransomware attacks start with phishing emails. Phishing emails request information from the recipient. They often appear to come from legitimate companies and request a variety of data, including passwords. With legitimate-looking emails and login pages, many people fall for phishing attempts. The recipient then uses that information to make the emails delivering ransomware appear legitimate and increase the likelihood that you will open the attachment.

No firm is too large or too small to escape the barrage of ransomware attacks.

Cybersecurity Ventures, a cybersecurity research firm, predicts that there will be a ransomware attack on businesses every two seconds by 2031, up from one every 11 seconds in 2021.[3] While you are reading this article, ransomware is beating on the defenses of businesses all around you. There is no end in sight and no place to hide. Not even Macs are safe from the onslaught of ransomware.

Ransomware is a malicious application that holds files or the entire system for ransom – preventing the files or systems from being accessed until the ransom is paid. More recent ransomware attacks go a step further, publishing "samples" of the ransomed data on the internet. The ransomware threatens to continue publishing additional samples until the ransom is paid (typically in cryptocurrency or by credit card). Once infected, paying the ransom does not guarantee the malicious party will restore access or stop releasing data.

With no place to hide, you must build defenses to protect yourself from the ransomware attacks. You need to build strong walls to keep ransomware out. Building strong walls requires an understanding of how most ransomware sneaks into your system.

Ransomware is ever-evolving as malicious parties exploit newly discovered security vulnerabilities or known vulnerabilities on unpatched systems. Therefore, you must update software and firmware as soon as security updates are made available. Patching the potential gaps as soon as possible minimizes the amount of time that the bad guys have to exploit the gaps and infect your system with ransomware. Ensure that you keep your virus protection up to date as well. Fortunately, with modern operating systems like Windows 10 or 11 and macOS, nearly all of this can be automated and invisible to the user. You can "set it and forget it."

Further, you must take advantage of software settings designed to protect you. Microsoft Word, for example, opens

email attachments and documents originating from the internet in Protected View. Protected View offers a degree of shielding against malware. However, those protections vanish as soon as you click to allow editing. Disabling macros in Microsoft Word will also help provide some protection. In Outlook, do not download pictures automatically and view attachments in Protected View.

Arm all people at your organization with the knowledge of when to click a link or attachment and when to stop and verify. When in doubt, verify the authenticity of an email by picking up the phone and calling the sender. If the suspicious email contains the sender's phone number, be sure to verify that phone number against your contact records before calling.

Whenever you receive an email with an attachment or link, ask yourself whether you were expecting to receive this from this person. If not, immediately stop and independently verify the authenticity of the email. If you were expecting it, you should still investigate further.

Malicious emails often appear to come from a familiar sender—hover over the sender's name and verify that you are familiar with the email address. Be careful to catch small changes in spelling—there may be only one character out of place to alert you. Hover over any links to see where the link will actually take you. Again, be careful to catch small changes in spelling or unfamiliar extensions.

While most ransomware breaches your defenses through email, some sneaks into your system when you use public Wi-Fi and USB charging ports. When using public Wi-Fi, select that the network is public when your computer prompts. Use a VPN (a virtual private network) to protect your data. When in doubt, use your cellphone as a hotspot and avoid public Wi-Fi altogether.

USB charging ports, such as those found in airports and hotel rooms, can be loaded with malware. When you plug in your device, the malware installs itself on your device. These are the computer/iPhone equivalent of credit card skimmers we've heard about on ATMs or gas pumps, except that the malware travels with you and can spread to other devices. Use a USB data blocker to prevent any data transfer when charging in a public location. USB data blockers are small adapters for your USB charging cable that are missing the data transfer pins. Without the data transfer pins, no data can be transferred to your device.

Alternatively, you can carry a portable charger that holds enough juice to charge your mobile devices. Portable chargers give you the freedom to charge on the go without being tethered to a wall. Throw your phone plugged into the charger in your bag as you walk through the airport, and you're good to go. Portable chargers are both secure and convenient.

Ransomware is coming for lawyers everywhere, but you don't have to be a sitting duck. Arm yourself with the knowledge to prevent attacks and the technology required to keep the bad guys out. Don't let ransomware happen to you.

The New Jersey State Bar Association's Practice HQ is a free member resource designed to help you build and maintain a successful, thriving legal practice. Learn more at njsba.com/practice-hq.

Endnotes

1. Nelson, Sharon D., Simek, John W., and Maschke, Michael C. "Law Firm Data Breaches Surge In 2023." Above the Law. Aug 1, 2023, abovethelaw.com/2023/08/law-firm-data-breaches-surge-in-2023/.
2. Ibid.
3. Morgan, Steve. "Ransomware Will Strike Every 2 Seconds By 2031." Cybercrime Magazine. Jun 28, 2023, cybersecurityventures.com/ransomware-will-strike-every-2-seconds-by-2031/.

DIVERSITY, EQUITY AND INCLUSION

How to Become an Anti-racist Lawyer

By The Hon. Marcia L. Silva (Ret.)
Silva & Stahl, LLC

Racial justice and racial equity lawyering are important concepts nationally and especially in New Jersey. The New Jersey State Bar Association has taken concerted efforts on improving diversity, equity and inclusion through committees, education and trainings statewide. As a diversity committee member of the NJSBA, I am often asked how to apply these concepts into our day-to-day practice when representing people from various backgrounds and communities. As an association director of legal representation projects at the American Bar Association, I have been tasked this past year to work along with national partners to create an anti-racist lawyering initiative that can be used by attorneys along with other members of a multidisciplinary team, like social workers, to represent families in the child welfare docket. Although the initiative is focused on child welfare, it provides useful guides and toolkits for advocates in any legal area or docket.

This initiative is designed to translate theory into practice and

is meant to offer practical tips, advice, and guidance regarding emerging and/or evolving, as well as well-established legal processes and practices. The initiative can also create efficiencies, so attorneys and interdisciplinary teams do not have to recreate the wheel when other law firms and child welfare legal organizations have already implemented effective practices. Instead, we created tools that leverage resources already available and fill in gaps for what was not available. The initiative is organized with the following features in mind:

- Easy to navigate
- Defines key terms and terminology that will be used throughout the document
- Is organized by topic as well as by level of practice and aptitude (competency, proficiency, skill) regarding race equity issues
- Written in a tone and language that respects the voice of parents, children, families, and the community
- Creates discussion opportunities for a greater understanding and commitment to address issues of racial equity
- Creates ways to keep us accountable to each other and support each other as we continue this work

This initiative, available at familyjusticeinitiative.org/race-equity-tool-kit, provides guidance and actual examples of what practitioners and organizations of any size can use to apply an equity lens to their operations and practices.

WRITER'S CORNER

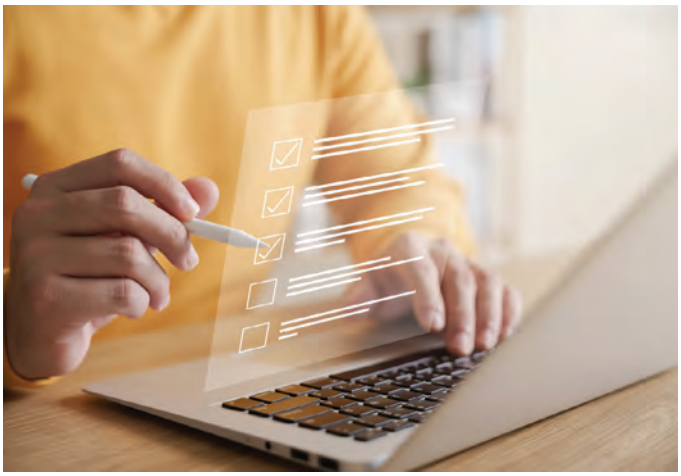
Giving Effective Feedback on Writing

By Veronica Finkelstein
Litigative Consultant, U.S. Attorney's Office
Eastern District of Pennsylvania

"Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime" is an oft quoted saying, but how often do supervisors and attorneys take it to heart when we review the written work product of developing attorneys? How do you transform ordinary redlines and edits into high-quality feedback? Here is one suggested way to improve your legal writing feedback.

Give developing attorneys opportunities to stretch their skills

One of the most important steps to giving effective feedback is having sufficient work product to review. This requires giving developing attorneys opportunities to flex their legal writing skills. However, there is value in having developing attorneys shadow or work alongside more experienced ones; at some point all attorneys need to take the lead in drafting various documents. This can mean assigning a developing attorney to tackle the first draft of an appellate brief, rather than simply conducting the legal research and then handing it off to a more experienced member of the team. It can mean asking a developing attorney to draft the motion for summary judgment rather than just a memo to file outlining arguments that could be made in the motion.



Supervisory attorneys can be apprehensive about letting developing attorneys take the lead, fearing how it will impact the outcome. Rather than using "safety nets," we deprive these developing attorneys of the chance to perform and make mistakes. Yet those mistakes can be some of the best learning experiences. If you wait until all your developing attorneys are master fishermen before you give them a fishing line, you've failed your duty as a supervisory attorney.

When those attorneys stretch their skills, make sure to capture their efforts.

Allowing your developing attorneys to engage in a multitude of legal writing tasks is the first step of the process, but you can only give great feedback if you capture their skills so you can provide useful feedback. This can be difficult. As supervisors, many of us balance our supervisory duties alongside a caseload of our own. Even those who perform a purely supervisory role must balance the needs of the various employees we supervise.

One way to observe skills as they develop is to ask to see outlines or drafts. Often you can learn more about a developing attorney's thought process and writing style from reviewing a series of intermediate drafts than you can from reviewing the final work product, which may have undergone substantial review by others before it hits your desk.

If you don't capture the skills of your developing attorneys, it is impossible to give the most fruitful feedback. If you oversee a team of fishermen, surely, you'd check the logbooks showing

their daily catch. So too should you find ways to observe and record your staff's performances so you can help them use that performance to improve.

Structure your feedback to teach rather than criticize

Once you have a work product from a developing attorney, you are then able to provide feedback. Great feedback is not an accident. It requires a deliberate process. The first step of the process is to take copious notes. If you do not, you will likely miss something worth addressing.

But taking notes is not enough. Too often feedback is given spontaneously, without the benefit of the supervisor organizing and structuring that feedback. This type of feedback tends to be unhelpful for developing attorneys. Because the feedback is significant and unstructured, it can feel like drinking from a firehose.

Before you give feedback, take time to reflect and organize your thoughts. If you have reviewed a deposition outline prepared by a developing attorney and taken notes on the outline, take out a separate piece of paper and organize those notes topically before you meet to discuss the draft.

In structuring your feedback, try to avoid negatives. Telling developing attorneys, "Avoid unintentional passive voice" does not explain what passive voice is, how to identify it, and why it's ineffective. Explaining is the key to allowing developing attorneys to improve their writing going forward. If they understand why you've suggested a change, they can apply that rationale to future writing. By explaining the "why" of your critique, you allow the listener to better critique themself in the future. Rather than simply telling your staff to fish when the skies are cloudy, explain why that weather draws out the fish.

Remain involved

The final step of great feedback is to follow up. It often takes many tries before a developing attorney blossoms into an excellent writer. It may not be possible for you to immediately assign the same type of brief or motion, but you can follow up to ensure the developing attorney has the chance to repeat some of the skills on which you provided feedback.

Ask whether there are other tools the developing attorney needs or other skills the attorney wishes to develop. Look for opportunities to make that growth possible. If a developing attorney is ready to try ice fishing, do what you can to make that opportunity available.

As supervising attorneys, too often we view giving feedback as an afterthought. We do not use a reliable method nor hold ourselves to a high standard when helping others develop their writing. While by no means the only method for giving feedback, the method discussed here is one way to elevate the quality of your feedback. As a supervisor, your job is to teach your staff to fish—and giving good feedback can do just that. ■

NJICLE

NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION

A Division of the New Jersey State Bar Association

Voted New Jersey's Top CLE Provider.

Trending CLE On-Demand Videos

Order, watch, and earn credits from just about anywhere.

High Conflict Child Custody: The Good, The Bad and The Ugly Earn up to 3.3 credits.	**$240/$192***
Impact of Culture and Religion on Divorce and DV Earn up to 2.4 credits, including 1.0 in Diversity.	**$225/$180***
Motion Practice in Family Law: Tips and Techniques Earn up to 2.4 credits.	$230/$184*
Multi-State Divorce: Untangling Legal Complexities Earn up to 2.4 credits.	$230/$184*
Navigating Domestic Violence Cases Earn up to 4.5 credits.	$260/$208*
New Jersey Search and Seizure Law Earn up to 3.0 credits.	$250/$200*
Scorched Earth Fallout: Unintended Family Law Consequences Earn up to 3.3 credits, including 0.6 in Ethics.	$250/$200*
The Crumbley Case and Parental Liability Earn up to 2.0 credits.	$175/$140*

*NJSBA Member Price

Looking for something else? Try NJICLE's CLE On-Demand programs featuring over 200 video versions of our award-winning CLE programs. Streaming *nation*wide. Available 24/7 worldwide.

CLE On-Demand programs are available in these areas of law:

- Animal Law
- Banking Law
- Bankruptcy Law
- Business and Commercial Litigation
- Business Law
- Civil Trial Law
- Construction Law
- Criminal Law
- Dispute Resolution
- Diversity
- Elder and Disability Law
- Election Law
- Environmental Law
- Estate Law
- Ethics
- Family Law
- Federal Practice & Procedure
- General Law
- Health Law
- Immigration Law
- Insurance Law
- Labor and Employment Law
- Land Use Law
- Law Office Management
- Local Government Law
- Municipal Court Practice
- Patent and Trademark Law
- Real Estate
- Renewable Energy
- School Law
- Taxation Law
- Workers Compensation

Available Now. Viewable Anywhere, Anytime from Any Device.

Video On-Demand versions of NJICLE's award-winning portfolio of CLE programs, presented online and in person, streaming nationwide. Available 24/7 worldwide.

Visit NJICLE.com to order your on-demand today.

A spotlight on some 2025 programs...

Discovery Issues (ESI) in Labor & Employment
Thursday, Jan. 9, 2025
2 – 5 p.m.
Online Only
Earn up to 3.3 credits.

Specialized Parenting Coordinator Training
Monday, Jan. 13 *and* Tuesday, Jan. 14, 2025
8:30 a.m. – 5:30 p.m.
New Jersey Law Center, New Brunswick
Earn up to 18.9 credits, including 1.2 in Ethics and 0.9 in Diversity.

What Taylor Swift and Tom Cruise Teach about Attorney Ethics
Wednesday, Jan. 22, 2025
9 a.m. – 12 p.m.
New Jersey Law Center, New Brunswick and Online
Earn up to 3.3 credits, including 3.3 in Ethics!

Children and Educational Advocacy
Friday, Jan. 24, 2025
6 – 8 p.m.
Hyatt Regency, New Brunswick
Earn up to 2.4 credits.

2025 Redevelopment Law Symposium
Friday, Jan. 24, 2025
9 a.m. – 4 p.m.
New Jersey Law Center, New Brunswick and Online
Earn up to 6.7 credits.

2025 Family Law Symposium
Saturday, Jan. 25, 2025
9 a.m. – 4:30 p.m.
Hyatt Regency, New Brunswick
Earn up to 7.3 credits.

2025 School Law Conference
Wednesday, Feb. 5, 2025
9 a.m. – 3:30 p.m.
Pines Manor, Edison
Earn up to 6.2 credits, including 1.0 in Ethics and 1.2 in Diversity.

2025 Labor and Employment Law Forum
Wednesday, March 5, 2025
9 a.m. – 4p.m.
New Jersey Law Center, New Brunswick
Also Available Online
Earn up to 6.7 credits.

Mastering the Art of Storytelling: A Workshop for Lawyers
Friday, March 7, 2025
9 a.m. – 12:35 p.m.
New Jersey Law Center, New Brunswick
Also Available Online
Earn up to 4.0 credits!

A Day on Evidence
Friday, March 21, 2025
9 a.m. – 4 p.m.
New Jersey Law Center, New Brunswick
Also Available Online
Earn up to 6.7 credits, including 1.2 in Ethics.

2025 Federal Practice Bench-Bar Symposium
Thursday, April 10, 2025
9 a.m. – 4 p.m.
New Jersey Law Center, New Brunswick
Also Available Online
Earn up to 6.7 credits.

Litigating Special Education Disputes
Wednesday, May 7, 2025
9 a.m. – 12:35 p.m.
Online Only
Earn up to 4.0 credits.

New Programs are added daily. Check NJICLE.com for additional programming.

SCAN ME

Visit NJICLE.com to register today.

Awareness, Hope and Strength in the Face of Domestic Violence

JERALYN L. LAWRENCE *is the managing member and founder of Lawrence Law. Jeralyn devotes her litigation practice to matrimonial, divorce, and family law, and is a trained collaborative lawyer, divorce mediator, and arbitrator. She is a Past President of the New Jersey State Bar Association.*

By Jeralyn L. Lawrence

Domestic violence can afflict anyone—the affluent, impoverished, and every status in between. It is a monster that preys on no particular race, age, gender, ethnicity or religion. It can be latent, wearing one of its many disguises in the form of protection, affection—even love; or it can be more obvious, having weaved itself into a relationship for so long it becomes the norm. The only constant is the fact that domestic violence will change your life forever.

I was fortunate enough to grow up in a household where domestic violence did not exist. It was a home consumed with love and respect, and I witnessed my parents treat one another with kindness, both in their conversation and conduct. My parents have been married for over 50 years and are ridiculously in love to this day. Both in their 80s, they have spent more of their lives with each other than without. Their love runs deep, and they have been the consummate example of a happily married couple.

I knew nothing about domestic violence until I watched the movie, "The Burning Bed," when I was a teenager. Starring Farah Fawcett, this movie was based on a real-life story of a victim of domestic violence who killed her abuser to spare her life, as well as the lives of her children. Prior to watching "The Burning Bed," I, admittedly, had no idea that domestic violence was occurring in this country, let alone in the most unsuspecting households. It is incredible how something could be so hidden yet so preva-

lent in our world. With this awareness, I was inspired to learn more.

I was shocked by the information I would uncover in law school, when writing a paper on Battered Women's Syndrome in my family law class. The statistics were daunting. I became more familiar with the prevalence of domestic violence in our world, and how domestic violence has evolved over the past several hundred years. I read about Dr. Lenore Walker, a leading author who developed the cycle of abuse theory and is now a renowned educator on the hell endured by survivors of domestic violence. I immersed myself in a topic that was once so foreign to me. I read about domestic violence often. I saw pictures, conducted research, and memorized statistics. Yet, nothing would prepare me for falling victim to abuse by someone I thought loved and adored me.

Shortly after law school, I found myself in a relationship with someone who assured me he loved me but treated me worse than anyone ever had. I was called every disgusting name in the book. I was pushed around, physically restrained, and my wrists were twisted and turned until I acquiesced. My abuser would feel the warmth of my car hood to determine how long I had been home just in case he believed I was lying about when I came and went. He tried to convince me every single one of my family members and friends were flawed and were not worthy of our time. He made every attempt to isolate me from those I loved the most, and those who showed me what real love felt and looked like. The greatest irony is that when we first started dating, my abuser praised me for my relationship with those very family members and friends and told me how attractive of a quality it was to be so close with them. In truth, he hated those bonds because they were stronger than my bond to him and they offered me security. He wanted so badly to isolate me, and anything that took my attention from him, he despised.

I lived on the domestic violence roller coaster and cycle of violence for years. The tension building stage, the acute battering stage, and then the "honeymoon" stage would cycle through just as Dr. Walker said they would. Walking on eggshells was a daily occurrence; I would often think if I just changed my behavior, he would be happy and would not lash out. It did not work out that way. The honeymoon phase was always blissful, and I was manipulated into thinking the relationship would remain this happy and fulfilling—that is until one trigger would bring about the tension building stage, the battering stage, the honeymoon stage, and the cycle would repeat.

It was not until I gave birth to my daughter that I had the strength to leave this toxic relationship. One night, I endured some of the most appalling and intense abuse while I clutched my 8-week-old daughter in my arms, and it would change my life forever. That evening I felt my abuser's breath as he stood over me, screaming within inches of my face and calling me the vilest names I had heard. I knew I had to get away from this person and stay away. In my heart, I knew his words did not define me, and they were not words I would ever let someone utter near my daughter again. Every pore in my body perspired as I mustered up the strength to call the police and obtain a restraining order from the person who assured me, he loved me the most.

We were divorced a short time later, but the wounds and scars that relationship caused remain. People have told me they are shocked by my experience, and I am asked, "How on earth could that have happened to you?" The truth is, I really do not know. Initially, I mistook his jealousy and possessiveness as traits that were cute and endearing. I was incredibly attracted to my abuser as well, which added to the complexity of ending the relationship.

As I am writing this, I am asking myself, what is the point of this article? Other than bearing my soul, the intention is to bring awareness and, perhaps the necessary hope and strength to just one reader. If you are a victim of domestic violence, you are not alone. People will understand your plight and they will believe you. You are not defined by the names you have been called, or the abuse you have endured, and no one has the right to make you feel unworthy. There are people who love you, care about you, and want to help you.

You are at your most vulnerable and in the most dangerous position during the time in which you decide to leave the relationship, so build your village and have a safety plan in place as you break free from this incredibly harmful relationship. Fortunately, there are resources available to you.

My presidential initiative of *Putting Lawyers First* focused on a host of areas in our profession that needed improvement. One enormous area was attorney wellness. As a result, the NJSBA allocated financial reserves to partner with a therapeutic provider for its members and their immediate family to provide resources to address mental health and wellness. We are now in our second year offering this most consequential member benefit with Charles Nechtem Associates. If you are a survivor of domestic violence or enduring it now, please do not hesitate to reach out to CNA. You are entitled to free sessions with your NJSBA membership as part of the Association's Member Assistance Program. These sessions can be the start of your journey to freedom from abuse and help create a new path forward as you claim your life back. Help is available at 1-800-531-0200 or charlesnechtem.com. My hope for anyone experiencing domestic violence is that you find the strength within yourself to leave and begin the next step of what I am sure will be a new beginning of a wonderful and worthy journey. ■

HOME HORRORS
When Technology Becomes a Nightmare
How Technology Can Affect a Domestic Violence Matter

By Melissa E. Cohen, Christine C. Fitzgerald and Jenna N. Shapiro

Technology encompasses more than recordings, photographs, images, and cell phones. Electronic devices have tracking abilities through applications that you may not even realize have location services. Home automation allows you to turn on the lights at your house from your office or change the temperature on the thermostat from your vacation. You can see who is at your door from your phone with Ring cameras and other video devices and even talk to the person. Nest cameras in your home allow you to interact with your children, watch your nanny with your children, and even check to see that your home is empty.

For every benefit there is with new technology, there is often a negative way to use that same new technology. That is, the same technologies that can be used to keep us safe, also can be used to spy, stalk, and harass another person. According to the National Domestic Violence Hotline, an average of 24 people per minute are the victims of rape, physical violence, or stalking by an intimate partner.[1] Tracking devices, locations services, and remote access to cameras can be used to stalk. One in six women and one in 19 men have been the victims of stalking in their lifetimes and 66.2% of female stalking victims were stalked by a current or former intimate partner.[2] This growing trend has been noted in studies analyzing technology-facilitated abuse (TFA),[3] which is one form of intimate partner violence.[4] Although there is a lack of an agreed upon framework of what constitutes TFA, the expansion of digital technology has created a greater ease to commit acts of abuse regardless of proximity in digital spaces.[5] Concerns as to the increased ability to abuse through technology is well-reasoned. The Economist Intelligence Unit conducted a study of women in 45 countries and the findings are astounding.[6] "38% of women have personally experienced online violence; and 85% of women have witnessed online violence being perpetrated against another woman."[7] A survey of United Kingdom survivors and victims, reported that 45% experienced TFA in their relationship and 48% had experienced some form of post-separation TFA.[8] Clearly, TFA has a great significance in our society and as family law practitioners, we must recognize this type of abuse so that we can assist litigants with avoiding further abuse.

On the other hand, the concept of TFA can also be used against litigants who unintentionally commit TFA. As our society relies more frequently on technology and applications on our phones, with the mere slip of the hand or finger, a litigant can inadvertently connect to remote devices. For example, an alert from a Ring doorbell is accidentally checked out of habit while a temporary restraining order is pending; or a "like" of a post to your spouse while scrolling through your Instagram feed. It is important for family law practitioners to warn our clients of these unintended or perhaps simply unknown potential for allegations of domestic violence.

Our article intends to alert family law practitioners to the issues surrounding TFA and domestic violence, guide practitioners to protect both victims and unintended alleged perpetrators of TFA, and guide attorneys on the use of evidence in TFA cases.

History of TFA in Domestic Violence Cases

As technological advances continue to emerge, the use of technology to commit abuse or domestic violence will also develop. Although unrelated to technology used to commit domestic violence, New Jersey Supreme Court Justice Barry T. Albin opined in a concurring opinion to *State v. Hubbard* that "[t]he law must adapt to technological advances."[9] A brief history of the case law evidences that technology has been used to commit abuse or domestic violence for decades; yet as these advances continue, the prevalence of abuse increases. As discussed above,

Tracking devices, locations services, and remote access to cameras can be used to stalk. One in six women and one in 19 men have been the victims of stalking in their lifetimes and 66.2% of female stalking victims were stalked by a current or former intimate partner. This growing trend has been noted in studies analyzing technology-facilitated abuse (TFA), which is one form of intimate partner violence.

MELISSA E. COHEN *and* **CHRISTINE C. FITZGERALD** *are partners with the firm of Seiden Family Law, LLC., located in Cranford.* **JENNA N. SHAPIRO** *is a partner with the firm of Szaferman Lakind, located in Lawrenceville and Summit.*

In *H.E.S.*, the plaintiff testified that she located a "microchip" that had video and audio capabilities in her bedroom. The plaintiff further testified that this is how the defendant knew her daily activities. The trial court found that the act of placing the microchip in the plaintiff's bedroom constituted harassment because it was used to alarm or annoy the plaintiff and that it also constituted stalking because it was a pattern of acts that was instilling fear of harm to the plaintiff.

technology-facilitated abuse or domestic violence can include a variety of different technologies. The cases below specifically deal with the use of cameras, tracking devices, and remote access to devices.

In 2002, the Supreme Court of New Jersey addressed the then "novel issue of whether video surveillance by one spouse of the other spouse's bedroom can constitute one of the predicated offenses of domestic violence" in addition to other substantive and procedural issues.[10] In *H.E.S.*, the plaintiff testified that she located a "microchip" that had video and audio capabilities in her bedroom. The plaintiff further testified that this is how the defendant knew her daily activities.[11] The trial court found that the act of placing the microchip in the plaintiff's bedroom constituted harassment because it was used to alarm or annoy the plaintiff and that it also constituted stalking because it was a pattern of acts that was instilling fear of harm to the plaintiff.[12] The final restraining order was granted.[13] The defendant appealed and the Appellate Division found that the defendant had committed stalking but not harassment. The reason for this determination was because the defendant did not intend to cause the plaintiff alarm or annoyance as he intended the camera to remain hidden and unknown to the plaintiff.[14] The defendant filed a petition for certification which was granted. [15]

The Supreme Court held that the defendant's conduct constituted both harassment and stalking. In its decision, the Supreme Court held that Appellate Division failed to consider that the defendant did not merely observe the plaintiff, but instead used the information he learned from surveillance in his communications with the plaintiff.[16] Based on procedural grounds, the matter was remanded for further proceedings.[17] It is relevant to note that the defendant also raised whether an unfavorable inference would be taken against him if he testified due to a potential violation of Wiretapping and Electronic Surveillance Control Act which may subject him to criminal liability. The Supreme Court commented that an unfavorable inference should not be drawn if he elects not to testify.[18]

Similar to the surveillance in *H.E.S.*, the Appellate Division tackled the issue of GPS tracking devices as a means of surveillance in *K.E.Z. v. J.H.*[19] There, the defendant placed a GPS tracking device on his former girlfriend's vehicle, which was discovered when her vehicle was being serviced. The plaintiff testified that following their breakup, the defendant began sending hundreds of text messages and became "clingy" and "would overstep boundaries."[20] The defendant admitted that he installed the GPS device on the plaintiff's vehicle and monitored her location from his cell phone, but he also promised to remove himself from any interaction with the plaintiff.[21] The trial court held that placing a tracking device on a car to surveil a party is domestic violence and further held that the plaintiff satisfied the second prong of *Silver v. Silver*[22] given the efforts that the defendant undertook to place the GPS tracking device on her vehicle and his willingness to allow it to remain there for him to track her for two months.[23] The judge noted that the concern was that the defendant could have another lapse in judgment.[24]

The defendant appealed and the Appellate Division affirmed finding that the final restraining order was supported by the evidence that defendant placed the GPS tracking device on the plaintiff's car which "allow[sic] him to know where she was at all hours of the day just before and after their breakup."[25] The Appellate Division was not persuaded by the defendant's apology and promise not to further stalk her as they noted that the GPS device was hidden and would not have ever been discovered if the plaintiff had not had her car serviced.[26]

The next two published decision center around the use of remote access to home devices, specifically Nest devices. The first one is a criminal contempt matter that arose after a temporary restraining order was issued.[27] In this case, the defendant was given supervised parenting time with the parties' child and he consented to install Nest cameras in his home to allow the plaintiff to remotely view the parenting time as the defendant had not seen the child in some time.[28] During one of the defendant's visits with their daughter, the defendant looked directly at the Nest camera and stated "'Oh I'm sorry I wasn't nice to you. Good reason to keep my daughter from me for three months, because I wasn't nice to

you."[29] The plaintiff further reported that the defendant made a lewd gesture at the camera.[30] Although the defendant admitted to the conduct and admitted that he should have in hindsight recognized that the communication was prohibited in the temporary restraining over, the trial court did not accept his guilty plea and instead dismissed the complaint for contempt.[31] The trial court reasoned that because the order allowed parenting time and ordered the Nest camera to remain on at all times, the defendant's speech and conduct were not prohibited by the temporary restraining order (TRO) under "freedom of speech" principles.[32] The state appealed.[33]

On appeal, the Appellate Division noted Justice Albin's statement in his concurring opinion in *State v. Hubbard* that the "law must adapt to technological advances."[34] In acknowledging that premise, the Appellate Division found that the defendant acknowledged the Nest camera was working, that he acted as the plaintiff testified, and that he knew her virtual presence was expressly permitted in the temporary restraining order.[35] The Appellate Division held that the medium of the defendant's chosen communication was of no consequence and is not unlike sending a text message or email.[36] As such, the Appellate Division concluded that the defendant knowingly communicated with the plaintiff in violation of the temporary restraining order and remanded the proceeding to another judge.[37]

The second Nest camera unpublished case, *A.S.G. v. D.T.G.*, arises from remote access to a housing system.[38] There, the plaintiff testified about a series of domestic violence, which included an allegation that defendant entered the marital residence while she was showering and removed the Honeywell thermostats that controlled the temperature in the house, leaving her with no heat in the house. The plaintiff further alleged that the defendant returned that afternoon and installed a Nest thermostat, which required internet access to control. Since the defendant was the only person with the passcode to gain access to the internet in the house, she was unable to control the device. The plaintiff had the original thermostats reinstalled the following day.[39]

During the defendant's testimony, the defendant admitted to removing the Honeywell thermostats and installing the Nest thermostat so that he could control the temperature as a result of the high utility bills that he had been incurring.[40] The trial court issued a final restraining order against the defendant finding the act of removing the Honeywell thermostat and replacing it with one that only he could access was intended to harass the plaintiff and that there was no legitimate purpose for the conduct. The judge noted that the defendant could have handled the issues in many ways that would not have constituted harassment.[41] For example, both parties were represented by counsel and could have discussed the utility bills with his counsel.[42] The defendant appealed claiming that the act of replacing the thermostats did not constitute harassment and that there was no need for the continuing restraints under the second prong of *Silver*.[43]

The Appellate Division affirmed the finding of harassment stating that the trial judge correctly found that the deliberate act of the defendant in changing the thermostat to make the plaintiff unable to control the temperature was harassment as the defendant could have as the trial court noted handled the issue in a different manner instead of sneaking into the home when he thought the plaintiff was not home.[44] As for the need for the continuation of a restraining order, the Appellate Division noted that there was history of domestic violence that included "coercive control" by the defendant that satisfied the second prong of *Silver*.[45]

Finally, the Appellate Division reviewed a case in which the defendant was accused of hacking into the plaintiff's devices in the matter of *A.R.R. v. H.E.C.*[46] In *A.R.R.*, the parties had known each other for many years and defendant was a mechanical engineer that was commissioned to ensure that the electrical grids at hospital and data center were up to par.[47] The parties' relationship ended due in part to the defendant's domestic violence and control. After the parties broke up, the plaintiff testified that she began to receive notifications that someone was trying to access her Instagram from another device and that her iCloud was logged onto the defendant's computer and another phone that he owned. The plaintiff testified that she tried to reset passwords, but the problems persisted. The plaintiff then purchased a new laptop, but the mouse would move on its own and the defendant's information would auto fill in at times; she learned that the laptop was being remotely accessed and that her passwords were being changed using a keylogger. She was often locked out of accounts. The plaintiff claimed that her iCloud, Spotify, Facebook, Instagram, Microsoft, and Google Drive had all been hacked and that she never regained access to them. The plaintiff further claimed that her college account was hacked, and it prevented her from attending classes during the COVID-19 pandemic.[48] The plaintiff believed that the defendant hacked her computer and accounts as he had access to her accounts through their shared computer and he set up her iPhone. The defendant denied being responsible for the hacking and computer issues.[49]

The trial court held that the defendant harassed plaintiff by accessing her computer with the intent to annoy and/or alarm her based on the circumstantial evidence that the defendant had access to the plaintiff's computer, her phone, and by connection, her social media accounts, school accounts etc. Given these acts of harassment, the trial

court granted the final restraining order and the defendant appealed.[50] In affirming the trial court's decision, the Appellate Division noted that the defendant's access to the parties' shared computer and the plaintiff's phone, his technical abilities, his knowledge of her passwords, the timing and extent of the hacking, and the absence of any problems with the plaintiff's accounts and devices before the separation, supported the trial court's finding that the defendant had committed these acts and manipulated the plaintiff's online accounts with the intent to alarm and annoy the plaintiff. [51]

they can be used to abuse or commit domestic violence – both to protect our clients that are victims or could become victims and our clients that may be accused of domestic violence for their unintentional conduct.

Considerations for Representing Victims

There are many considerations when representing a plaintiff in a domestic violence matter. These new technologies pose new challenges. As has been well stated, "The law must adapt to technological advances."[52] As in all domestic violence representation, the first priority is to review the TRO your client obtained to determine if it needs to be amended. Often these TROs are obtained via the police, late at night, and contain minimal information. A TRO must have all allegations contained in the complaint or your client cannot testify to the facts at trial. Correspondingly, thorough practice means ensuring that all possible predicate acts are included on the amended TRO.

As in all domestic violence representation, the first priority is to review the TRO your client obtained to determine if it needs to be amended. Often these TROs are obtained via the police, late at night, and contain minimal information. A TRO must have all allegations contained in the complaint or your client cannot testify to the facts at trial. Correspondingly, thorough practice means ensuring that all possible predicate acts are included on the amended TRO.

As these cases illustrate, the methods by which a person can use technology to harass, stalk, or otherwise abuse and commit domestic violence against another individual widely differs. A sophisticated person can use technology to such an advantage that it can cause the victim to be unable to attend classes, affect their work, lock them out of their personal accounts, keep them from accessing important documents and special photographs and videos. A person with less technical knowledge would still be able to hide a recording device, an AirTag, or a GPS tracker with relative ease. Victims with less knowledge may not even remember sharing their locations or passwords with their former significant others. Given these issues, it is imperative that as family law practitioners, attorneys remain up to date on the latest technological advances and how

violence representation, the first priority is to review the TRO your client obtained to determine if it needs to be amended. Often these TROs are obtained via the police, late at night, and contain minimal information. A TRO must have all allegations contained in the complaint or your client cannot testify to the facts at trial. Correspondingly, thorough practice means ensuring that all possible predicate acts are included on the amended TRO. When conduct uses some type of temporary family assistance (TFA), it is often hard to discern the difference if the alleged conduct the defendant has committed constitutes stalking[53] or harassment.[54] Due to where a device was placed, or how it was placed, or how information was intercepted (or used), consider with your client whether the defendant may have engaged in criminal mischief[55] (for example, tampering with personal property to place a hidden camera), or depending on how they accessed the victim's property to place a device, criminal trespass[56] as well (for example, surreptitiously entering property to place a GPS device on a car). Then, review all of the steps of the defendant's conduct with the plaintiff to ensure that the specific details of the predicate act are included in the TRO, and ensure your client is as thorough as possible. By way of example, if the plaintiff was home alone and the defendant remotely increased the temperature in the home on hot day,[57] or blasted music

into the plaintiff's home in the middle of the night via remote access, make sure the TRO specifies the *device(s)* used, the hours this was done (in the event you can argue they were inconvenient per the harassment statute), and any specifics about the technological device. This is important because you should assume that the device and/or the technology is unknown to the court and you will want your client to testify as to the particulars of it during trial.

The same rule applies to the history of domestic violence in the TRO. If the events are not included on the TRO, the victim will be unable to testify to it at trial, as the defendant will not have had notice nor the opportunity to prepare a defense. Some incidences of abuse using digital forms of communication or other technologies to consider: constantly having to share location as a form of con-

trol, a partner demanding passwords (and then reading all of the account holder's texts and emails), reposting of intimate photographs, and following location on remote car applications. Including this information, with as much detail as possible, will provide the highest likelihood of success that the court can find by a preponderance of the evidence that one of the predicate acts occurred, as the court only has to find one in order to enter a final restraining order.

When representing the plaintiff, during the time between granting the TRO and the final hearing, there are important considerations for counsel to consider for the victim's protection. We have to balance preservation of evidence for trial (discussed further herein below) with protecting the victim. If the victim is the party who had passwords in their possession or were the party who controlled the accounts associated with potentially problematic technology, we should guide them to change the passwords to all devices (Nest, Alexa, cameras, Wi-Fi, routers, etc.), to which the defendant also has access. Oftentimes, the victim is overwhelmed, with a lot happening at once, so you can start by having them write a list of all apps and devices they used in the house, and all shared accounts they maintained with the defendant. They can search their phone and computer to see if they are the party with controlling access. By way of example, when the parties are married, they may be on a family phone plan. If so, the defendant could be accessing the plaintiff's phone records to see who she is communicating with or could make changes to the plan. The carrier should be contacted to see how access can be prevented. They should check their Alexa device and recall if the defendant had remote access. If so, you need to deal with that problematic access. A client may not even remember until they see unusual things happening in their house like lights being turned on or off, or them being unable to control the temperature in their own home.

As practitioners, we should be guiding domestic violence victims to be changing passwords to *everything* immediately upon entry of a TRO. However, most of the time, it is not that simple. If the defendant also has the log in information, they may be able to also remotely change the pins and passwords back. If this is the case, and the defendant's conduct is very intrusive (for example, defendant has the Wi-Fi password and remotely changes it so that plaintiff cannot use the Wi-Fi in the house), you may have to obtain a court order for control of the devices or systems. Oftentimes, you may have to guide the plaintiff to unplug the systems (this may be easy in the case of Alexa or similar devices) or have a professional remove them all together. By way of example, we have experience with clients who have complicated alarm systems and camera systems, and in that event, consult an electrician or other similar expert to determine how to disarm the system during the TRO pendency.

In the case of a client who believes that they are being followed, their car may have to be swept for devices. The same can occur with clients who believe that their whereabouts are being monitored from inside their house but there are no cameras or sound monitoring devices visible. In the circumstances where the stalking is related to a vehicle, there have been instances where we have had a police department willing to sweep a vehicle for devices, particularly when a victim is at the police department to obtain a TRO already. If affordability is not a consideration, best practices would include hiring a private investigator to sweep the home and vehicles for all devices. This is extremely helpful from an evidence perspective because the private investigator can preserve all evidence for trial and write a report confirming what was collected. There are other devices on the market that the victim can order to use on their own to sweep for devices that are connected to Wi-Fi (search hidden camera detector or hidden device detector). If the surveillance is something akin to spyware installed on the victim's phone or computer (victims are often suspicious of

When representing all defendants in a domestic violence matter...we should be engaging in best practices to ensure there are no contempt charges pending trial. Best practices incudes advising every defendant to no longer access any and every shared account or previously shared tech device as described herein. A defendant could accidentally violate a TRO by accessing a shared account during the pendency of a TRO, so we should advise them from the outset to use an abundance of caution.

this), you may need a computer or electronics expert to run a search on these devices. This evidence, if found, should also be preserved for trial.

If a device like an AirTag, GPS, audio recorder, or the like is located, a client should photograph it where it was placed before removing it, then save the device for evidence at trial. Physical evidence can be very persuasive. The police can also be called before the items are removed to make a report where the police can make note of the location of the device before it is removed.

Considerations in Representing Defendants

When representing all defendants in a domestic violence matter, even if they are not accused of stalking or surveilling the victim, we should be engaging in best practices to ensure there are no contempt charges pending trial. Best practices incudes advising every defendant to no longer access any and every shared account or previously shared tech device as described herein. A defendant could accidentally violate a TRO by accessing a shared account during the pendency of a TRO, so we should advise them from the outset to use an abundance of caution. Tell your defendants to stop monitoring shared accounts. Examples of caution would be not to access Ring cameras for a house they are restrained from, terminate access to a Nest camera, stop monitoring who is accessing the front door keyless entry and when, and the like. Defendants should not be tracking their children's locations when they are solely in the custody of the plaintiff, as this will be argued that this is really being used to track the location of the plaintiff. This may be a very innocent act which the defendant can and should argue was not made with the *intent* to harass or stalk the plaintiff but rather to monitor the safety of the child. However, it will be to the court to determine whether this was appropriate.

If you represent the defendant, and the plaintiff's counsel contacts you before the FRO hearing to address one of these technological issues, or requests that your client turn over passwords or other access codes because the defendant always maintained them and the plaintiff never had them, you should encourage the defendant to turn them over in writing. If the defendant can lock their access to apps, then instruct them to do so—this may even make a record they did so, which will create some good will. If the defendant is asked to turn off access, or turn over passwords and they will not do so, then they can expect the plaintiff's counsel to raise this with the court. The plaintiff will argue that they do not feel protected or safe because the defendant still has access to their home via technological devices. Assume, for example, that the plaintiff has filed a TRO based upon the predicate act of stalking, and the plaintiff's counsel makes a request that defendant terminate access to a remote door lock, such as a Yale device that monitors keyless entry. If the defendant will not terminate their access to knowing who is coming and going from the plaintiff's home during the pendency of the TRO, this will be portrayed against them very negatively because the plaintiff will argue they are still being stalked. As the defendant's counsel, your position will be that the defendant did not act with the requisite intent to stalk or harass the plaintiff just by knowing the passwords; however, cooperative conduct will go a long way to mitigate that before a judge has to make a decision.

Otherwise, access to technology as discussed herein during the pendency of a TRO may lead to a violation. If that occurs, not only will the plaintiff likely call the police to report the violation, it is likely that the plaintiff will amend the TRO to add the predicate act of contempt of a DV order.[58] This is the type of situation that the defendant should be trying to avoid. This is a predicate act on its own.

As occurred in *State v. E.J.H.*, the defendant was charged with contempt. During the pendency of a TRO, he had supervised parenting time, and was required to have Nest cameras on that the plaintiff could observe. During his parenting time, he spoke to her and said "Oh I'm sorry I wasn't nice to you. Good reason to keep my daughter from me for three months, because I wasn't nice to you." He then made a lewd gesture at the camera. Initially, the contempt charge was dismissed, with the trial court indicating that even though the defendant consented to the Nest cameras being present during his parenting time, he had not given up his right to free speech. During the appeal, the dismissal was reversed. The Appellate Division held that it was highly likely that since the cameras were in place so that the plaintiff could observe parenting time, that she would hear the comments and see the gesture. [59] The defendant had essentially admitted his conduct and was aware that if the plaintiff had been present, his conduct would have violated the TRO. Therefore, because defendant acted knowingly, the matter was remanded.

Use of Evidence in Technology-Faciliated Domestic Violence Cases

In domestic violence cases, evidence rules are crucial for ensuring justice while safeguarding the rights of all parties involved. These rules determine what evidence can be admitted in court and how it can be used, balancing the need to protect victims and hold offenders accountable, with the need to ensure fair trial standards.

In New Jersey, the landscape of domestic violence cases has evolved significantly due to advancements in technology. The integration of digital communications and electronic records into legal proceedings presents unique challenges and opportunities. In domestic violence cases, much evidence is often obtained by use of technology, whether

that be presenting the "harassing" text messages to the court or providing the GPS tracker or AirTag found by your client. This section addresses some key evidence rules to familiarize yourself with for the FRO hearing.

Admissibility of Evidence

Digital evidence, including text messages, emails, social media posts, and other electronic records, plays a crucial role in modern domestic violence cases. The following rules of evidence are critical to understand, from the outset, in using the evidence obtained for your hearing, whether you represent the plaintiff or the defendant:

1. **Relevance (N.J.R.E 401):** For evidence to be admitted, it must be relevant to the case. This means it should help prove or disprove a fact that is significant to the case. For instance, a series of threatening messages sent by the alleged abuser could directly support claims of harassment or intimidation. New Jersey courts evaluate the relevance of digital evidence based on how it relates to the elements of the crime or the context of the alleged abuse.
2. **Authenticity (N.J.R.E 901):** The party presenting digital evidence must prove that it is genuine and not altered. In domestic violence cases, this often involves establishing that the electronic communications or records were indeed created or sent by the alleged perpetrator. This can be achieved through various means, including testimony from witnesses who can attest to the creation or receipt of the evidence, and technical analyses that demonstrate the evidence's integrity. For example, metadata associated with digital files can provide information about the file's origin and history, helping to establish authenticity.
3. **Probative Value vs. Prejudicial Impact (N.J.R.E 403):** Even if digital evidence is both relevant and authentic, it must also pass the balancing test to ensure that its probative value outweighs its potential to unfairly prejudice the trier of fact. For example, while evidence of a history of threatening messages can be highly relevant, the court must ensure that its introduction does not lead to unfair bias against the defendant. The evidence should be used to illuminate the case's facts rather than to inflame emotions.

Hearsay and Digital Communications

There are exceptions to hearsay that can be particularly relevant in domestic violence cases involving digital evidence.

1. **Excited Utterance (N.J.R.E 803 (c)(2)):** Statements made under the stress of excitement caused by a startling event can be admitted under the excited utterance exception. In domestic violence cases, a victim's spontaneous text message or social media post made immediately after an abusive incident might fall under this exception, as it reflects the victim's immediate reaction to the trauma.
2. **Statements Made for Medical Diagnosis (N.J.R.E 803 (c)(4)):** Communications made for the purpose of medical diagnosis or treatment can also be admitted. For instance, if a victim sends messages to a health care provider describing the abuse to receive medical attention, these statements might be admissible to show the nature and extent of the injuries sustained. Also think about this exception to the hearsay rule when using medical records for statements contained within those records.
3. **Present Sense Impression (N.J.R.E. 803(a)):** This exception applies to statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Statements made by the victim describing the ongoing or immediately following events of abuse can be admissible under this exception. This can be helpful when attempting to admit text messages or recordings made both during or directly after an act of domestic violence.
4. **Statements Against Interest (N.J.R.E. 804(b)(3)):** A statement made by a declarant that was against their own interest at the time it was made can be admissible. In domestic violence cases, if the accused made a statement that implicates themselves or admits to abusive behavior, it may be admitted as a statement against interest.

Recorded Statements and Video Evidence

The New Jersey Wiretap Act,[60] formally known as the New Jersey Wiretapping and Electronic Surveillance Control Act, is a crucial piece of legislation designed to regulate the interception of communications and safeguard privacy rights in New Jersey. It sets forth the legal framework for intercepting and recording private communications, including telephone conversations and electronic communications, including emails, text messages, and online messaging. When analyzing the evidence you need to present at trial, it is imperative to review the provisions of the act to ensure the admissibility of the evidence on behalf of your client:

Key Provisions of the Act

Authorization Requirements

Consent: Under the act, it is generally illegal to intercept or record a conversation or communication without the consent of at least one party involved in the conversation. This means that if one participant consents to the recording, it is typically lawful to do so. However, recording without any consent is prohibited. If your client is a participant of the conversation, the recording can be used, as they have "consented" to the recording.

Exceptions and Special Circumstances

There are certain exceptions to the consent requirement. For example, law enforcement may be permitted to intercept communications without consent in specific circumstances, such as during investigations of serious crimes where obtaining consent would jeopardize the investigation.

Electronic Tracking Devices in Domestic Violence Cases

Tracking devices, such as GPS units, can be instrumental in domestic violence cases. They can provide crucial information about the whereabouts of an individual, potentially corroborating claims of harassment, stalking, or unauthorized monitoring. However, the data from these devices must meet specific evidentiary standards before admission into evidence.

Relevance and Admissibility

Under New Jersey Rule of Evidence 401, evidence must be relevant to be admissible. This means it must have a tendency to make a fact of consequence more or less probable than it would be without the evidence. In domestic violence cases, tracking device data can be relevant to establish patterns of behavior, show the proximity of the accused to the victim, or corroborate the victim's testimony.

Authentication and Reliability

Before tracking device data can be admitted, it must be authenticated to establish its credibility. N.J.R.E. 901 requires that evidence must be shown to be what its proponent claims it to be. For tracking device data, this typically involves demonstrating that the device was functioning correctly, and that the data has not been manipulated. This can be achieved through testimony from the person who installed or maintained the device, or by presenting the device's operational records.

In addition to authentication, N.J.R.E. 702 requires that the evidence be reliable. This means the data from the tracking device must be obtained through methods that are generally accepted within the relevant field. Experts may need to testify about the technology used, the accuracy of the device, and the procedures followed in collecting and interpreting the data.

Chain of Custody

Maintaining a proper chain of custody is critical in preserving the integrity of evidence. N.J.R.E. 901 requires that the proponent of the evidence prove that it has not been altered or tampered with from the time it was collected to its presentation in court. This involves documenting each person who handled the evidence and how it was stored. This testimony may be elicited from your client, as well as testimony from any expert who is engaged to gather the necessary evidence from the tracking unit.

Expert Testimony

Expert testimony may be necessary to explain the technical aspects of tracking device data. Under N.J.R.E. 702, experts can provide opinions on whether the data is reliable, how it was obtained, and what it signifies. In domestic violence cases, an expert may explain how the data supports claims of stalking or harassment and interpret the significance of the data in relation to the case. Experts in digital forensics can examine computers, smartphones, and other electronic devices to recover and analyze data. Their analyses can establish timelines, confirm the source of communications, and detect tampering. This technical insight is crucial for presenting a clear and accurate picture of the evidence.

Conclusion

Technology plays a transformative role in domestic violence cases, providing critical tools for evidence collection and victim protection. From tracking devices being used to harass and stalk victims, to digital communications that document threats and abuse, or provide evidence for defendants to defend against the allegations made, these technological advancements are necessary to use and present the court with evidence to support a client's claims. However, the use of such technology must be balanced with respect for privacy rights and adherence to legal standards. Ensuring that technological evidence is handled appropriately through the presentation to the court—through proper authentication, adherence to hearsay rules, and expert testimony—upholds the rights of all parties involved. As technology continues to evolve, its integration into domestic violence cases will undoubtedly become more sophisticated, further shaping the landscape of legal proceedings and victim advocacy. ■

Endnotes

1. National Domestic Violence Hotline website, thehotline.org/stakeholders/domestic-violence-statistics/
2. *Id.*
3. Michaela M. Rogers, et al., *Technology-Facilitated abuse in Intimate Relationship: A Scoping Review*, 24(4) J. Trauma, Violence & Abuse 2210. (2023).
4. *Id.* at 2211.
5. *Id. citing* Delanie Woodlock, *The Abuse of Technology in Domestic Violence and Stalking, Violence Against Women*, 23(5) J. Violence Against Women 584. (2017).
6. *Id. citing* Economist Intelligence Unit, *Measuring the Prevalence of Online Violence Against Women*, 2021, onlineviolencewomen.eiu.com/.
7. *Id.*
8. *Id. citing* Clare Laxton, *Virtual World, Real Fear: Women's Aid Report into Online Abuse*, Women's Aid, 2014, womensaid.org.uk/wp-content/uploads/2015/11/Women_s

_Aid_Virtual_World_Real_Fear_Feb_2014-3.pdf

9. *State v. E.J.H.*, 466 N.J. Super. 32, 39. (App. Div. 2021) (quoting *State v. Hubbard*, 222 N.J. 249, 276 (2015) (Albin, J., concurring)).
10. *H.E.S. v. J.C.S.*, 175 N.J. 309, 314 (2003).
11. *Id.* at 317.
12. *Id*. at 318-319.
13. *Id*. at 319.
14. *Id*. at 320-321.
15. *Id*. at 321.
16. *Id*. at 326-327.
17. *Id*. at 332.
18. *Id*. at 331.
19. *K.E.Z. v. J.H.,* A-3172-21, 2023. WL 5028927. (App. Div. Aug. 8, 2023).
20. *Id.* at *1.
21. *Id.* at *2.
22. *Silver v. Silver*, 387. N.J. Super. 112 (App. Div. 2006).
23. *K.E.Z.*, 2023 WL 5028927. at *2.
24. *Id.*
25. *Id.* at *3.
26. *Id.*
27. *E.J.H.*, 466. N.J. Super. at 32.
28. *Id.* at 35.
29. *Id.*
30. *Id.*
31. *Id.* at 35-36.
32. *Id.* at 37.
33. *Id.*
34. *Id.* at 39. (quoting *Hubbard*, 222 N.J. at 276).
35. *Id.* at 38–39.
36. *Id.* at 39.
37. *Id.*
38. *A.S.G. v. D.T.G.,* A-2560-22, 2024. WL 336526. (App. Div. Jan. 30, 2024).
39. *Id.* at *1-2.
40. *Id.* at *2.
41. *Id.*
42. *Id.* at *3.
43. *Id.* at *3.
44. *Id.* at *4.
45. *Id.* at *5.
46. *A.R.R. v. H.E.C.,* A-3606-20, 2022 WL 3711503. (App. Div. Aug. 29, 2022).
47. *Id.* at *1.
48. *Id.* at *3.
49. *Id.* at *1-3.
50. *Id.* at *3-4.
51. *Id.* at *4.
52. *Hubbard*, 222. N.J. at 276.
53. N.J.S.A. 2C:12:10.
54. N.J.S.A. 2C:33-4.
55. N.J.S.A. 2C:17-3.
56. N.J.S.A. 2C:18-3.
57. For an example, although an unpublished decision, in *A.S.G.*, 2024 WL 336526, the court held that the Husband harassed the wife when he removed the standard "Honeywell" thermostats in the home during the divorce in favor of "Nest" thermostats.
58. N.J.S.A. 2C:25-19(3)(a)(17), which added "Contempt of a domestic violence order pursuant to subsection b. of N.J.S.A. 2C:29-9 that constitutes a crime or disorderly persons offense."
59. *E.J.H.*, 446 N.J. Super. at 32.
60. N.J.S.A. 2A:156A-1 to -37.

USI Affinity

Protect your practice with precision.

We specialize in insurance *like you specialize in a specific area of practice.* As the endorsed insurance program of the NJSBA, USI Affinity offers a proprietary, comprehensive Lawyers' Professional Liability program specifically designed to mitigate risks and close gaps in coverage.

Providing comprehensive solutions:

- Settlement Control
- Loss of Earnings
- Subponea Assistance
- Cyber Breach Expenses
- License Protection
- Reputation Coverage
- Fee Suit Avoidance

1.855.USI.0100

Call today for more information on the insurance products available to New York State Bar Association members, including a NJSBA professional membership credit.

**********.njsbainsurance.com/

USI AFFINITY

How AI and Deepfakes Can Impact Domestic Violence Cases

By Stacey A. Cozewith

Artificial intelligence is a form of technology that allows machines, particularly computers, to perform human tasks. Generative AI is a form of artificial intelligence which can create new content such as text, images, music, audio, and videos. One of the most common examples of generative AI is the program called ChatGPT, which can answer questions, write text, create images, and more, based on a prompt that is input by the user.

As many family law practitioners know, domestic violence is a pattern of abusive behavior that is used to gain or maintain power and control over a person within a relationship. It is codified in New Jersey under the Prevention of Domestic Violence Act of 1991 and permits the entry of a final restraining order upon the occurrence of certain criminal offenses between two people having a relationship as set forth in the act.

In a domestic violence FRO hearing, the evidence presented at trial is often comprised of phone records, video recordings, email records, text, and other communication "proofs." What happens when one party uses AI to create false communications or videos that show harassing contact or an assault? How do we, as attorneys, combat

STACEY A. COZEWITH *is a partner at Sarno da Costa D'Aniello Maceri LLC and concentrates her practice on matters related to family law. Stacey strongly advocates for her clients, offering her expertise through a unique balance of compassion and tenacity.*

potential false evidence created with AI in the domestic violence context? This article addresses these difficult questions.

Deepfakes

Deepfake technology uses AI to create synthesized or false images or videos. A deepfake is an artificial or falsified image, video, or recording that has been altered so that it appears to be either a person who was not actually present, or someone doing something or perhaps wearing something that they were not wearing. Many people may recall the incident in March of 2023 when a deepfake photo of Pope Francis was widely circulated, while

This deepfake photo of what appears to be Pope Francis in a puffy white jacket is an example of how AI can generate a false image, making it appear that a person was doing or wearing something that they never did.

wearing a white modern puffy coat and a large jeweled crucifix as he took a walk in St. Peter's Square. This photo was a rude awakening for many across the internet who realized that AI could generate an image that looked so authentic.

There are a wide range of deepfake technologies. Deepfakes can be used to spread misinformation—providing false information from what appears to be trusted sources. For example, a deepfake could be used to alter or create a message from the government. In 2018, actor and director Jordan Peele circulated a video where he used deepfake technology to transfer his own facial movements onto former President Barack Obama to produce a falsified public service announcement.

In the domestic violence context, then, a trusted source could be telephone company records, records that appear to be text messages between the parties, or email correspondence. Normally, as attorneys proffering telephone records at a hearing, for example, we typically trust in the veracity of these documents. However, with the advances in AI, these too can be augmented and falsified.

Deepfakes can be used to create more than just harassing or false communications, since they can be used to create videos such as pornography, without consent. There are applications that "nudify" an image—creating a fake pornographic image. AI can also be used to create a pornographic video using an image of a person who was not actually present for the filming. There are several celebrities who have been victims of deepfake pornographic images, but you do not have to be a celebrity to be a target of such a practice.

Deepfakes can be used to create more than just harassing or false communications, since they can be used to create videos such as pornography, without consent. There are applications that "nudify" an image—creating a fake pornographic image. AI can also be used to create a pornographic video using an image of a person who was not actually present for the filming.

As many family law practitioners will attest, it is not uncommon for perpetrators of domestic violence to threaten victims saying that they will send images or communications to the victims' employers or family members. The advent of deepfake pornography makes this threat even easier to follow through with.

Not all deepfakes are bad, however. In the context of entertainment and fun, you can put your face on an elf that dances to holiday music, or your teenager can be excited to see their sports superhero appear in their favorite video game. Deepfakes can be used for entertainment or even to insert the cousin who missed the family wedding photos.

In terms of accessibility, the technology used to create deepfakes are highly available to everyone. There are programs and applications that can be downloaded that allow those without a technical background or programming experience to create deepfakes. The quality of the final products may vary. However, the more photos and videos that a person provides of their target and the more practice they receive in using this technology, the more accurate the products will become. With the popularity of social media, there are usually a plethora of videos and photographs easily available to a perpetrator to create a deepfake.

So What Can We Do About It?

As of this writing, New Jersey does not have any laws in place that regulate deepfakes. However, there is a bill in the state Assembly and Senate that aims to limit the use of AI to create deceptive digital content. The bill, S976, "prohibits deepfake pornography and imposes criminal and civil penalties for non-consensual disclosure." If passed, this bill would amend Section 1 of P.L.2003, c.206, New Jersey's invasion of privacy law, and *N.J.S.C.* 2C:24-4, New Jersey's child endangerment law, to include disseminating or creating "deceptive audio or visual media" as punishable crimes. This

bill has been introduced and is pending in the Judiciary Committees.

It was always common for perpetrators of domestic violence to disseminate, or threaten to disseminate, explicit videos, photos, or texts to a victim's family, friends, employers, and coworkers. However, with the availability of deepfake technology, perpetrators could easily generate fake pornographic media of their victim to use as blackmail. Moreover, the alleged perpetrators of domestic violence can sometimes really be the victims as the "evidence" of harassment of domestic violence victims that is most commonly provided to a court, can be manipulated and manufactured in a very realistic matter. So, how do we prove that the evidence is false?

In FRO trials, both parties have the right to enter evidence to support their case. However, as a domestic violence trial is a summary action, or a hearing that is meant to be "short, concise and immediate," discovery is limited.[1] Thus, other than the incidents set forth in the temporary restraining order, there may not be any notice as to what evidence the other party is planning to present. This means that an alleged victim could seek to introduce a manipulated voicemail as evidence in the trial, and the other party would be seeing or hearing it for the first time in court. The party not introducing the evidence would likely need to seek an adjournment of the trial, so that they could prepare an argument proving that the evidence the abuser entered has been falsified.

This poses its own set of hardships. Under Rule 5:7A(e), the FRO hearing is to take place within 10 days of the entry of the TRO. Thus, under Court Rule, domestic violence matters are to be speedy and expeditious. This does not mean that all other safeguards are thrown out the window, however. The New Jersey Supreme Court has held that the short time frame of domestic violence trials should not impinge on the parties' due process rights.

"Our courts have broad discretion to reject a request for an adjournment that is ill founded or designed only to create delay, but they should liberally grant one that is based on an expansion of factual assertions that form the heart of the complaint for relief."[2] Moreover, when it is the defendant seeking an adjournment, granting same is seen as posing "no risk to plaintiff...[as] courts are empowered to continue temporary restraints during the pendency of an adjournment, thus fully protecting the putative victim while ensuring that defendant's due process rights are safeguarded as well."[3]

In addition, "even in summary actions, the trial court has the discretion to authorize discovery for good cause shown."[4] Moreover, the Supreme Court held that "the ten-day provision does not preclude a continuance where fundamental fairness dictates allowing a defendant additional time. Indeed, to the extent that compliance with the ten-day provision precludes meaningful notice and an opportunity to defend, the provision must yield to due process requirements."[5]

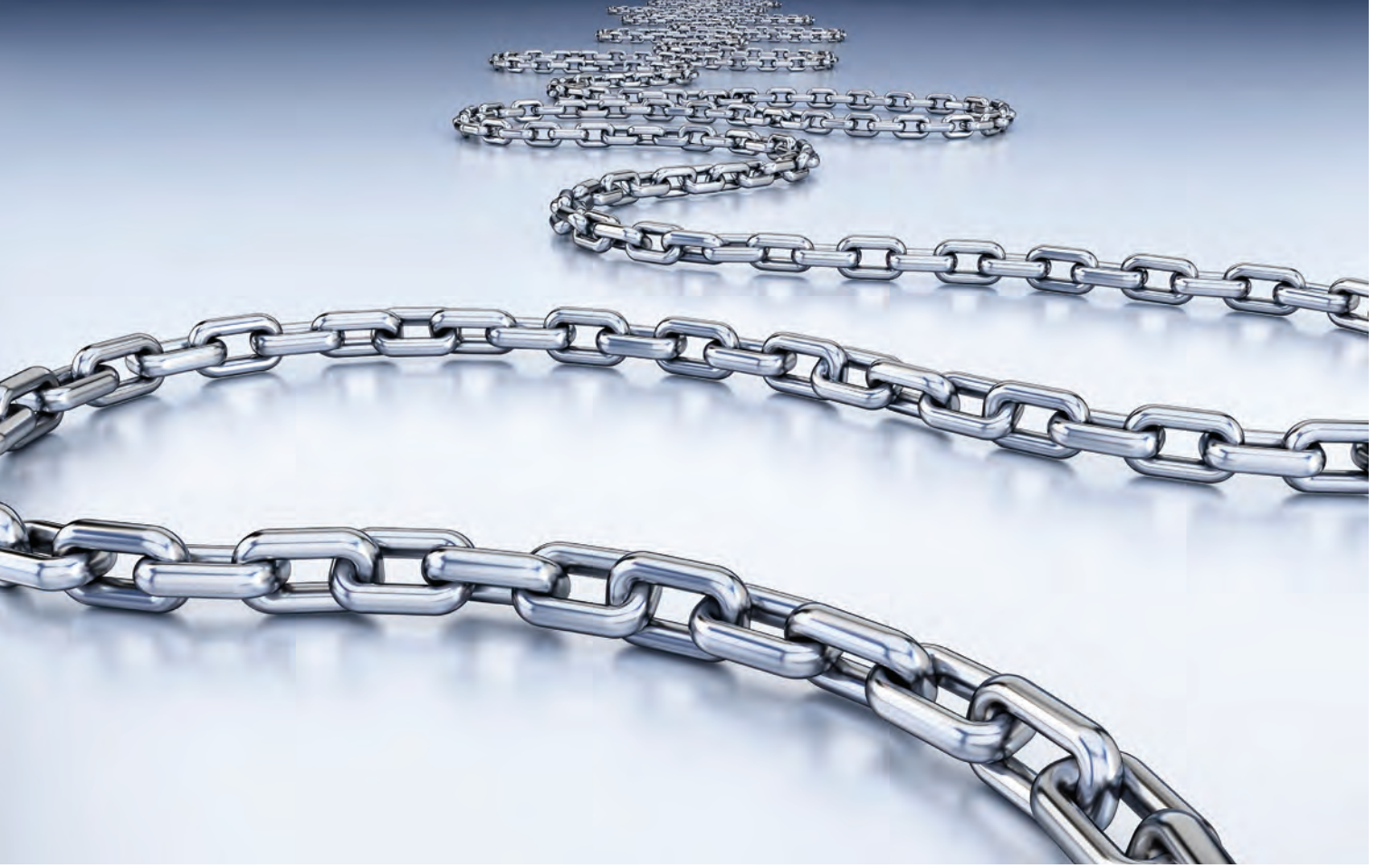
As Judge Thomas H. Dilts determined in the *Depos* case, discovery is only permitted in a summary action such as a domestic violence hearing, upon a showing of good cause.[6] In fact, the Appellate Division indicated their agreement with Judge Dilts in *Crespo v. Crespo*[7] when they stated that "in compelling circumstances, where a party's ability to adequately present evidence during a domestic violence action may be significantly impaired, a trial judge may, in the exercise of sound discretion, permit limited discovery in order to prevent an injustice. Judges are not required to be oblivious to a party's claim for discovery in compelling circumstances even though the court rules do not expressly authorize relief."

Accordingly, while there are no reported decisions (*yet*) where an adjournment request was made to obtain an expert opinion on the veracity of evidence, a brief adjournment to obtain said expert should be requested and granted. When presented with two competing sets of call logs for example, when the predicate act of domestic violence is harassment by way of repeated telephone calls at odd and inconvenient hours—how would a court be able to determine which is accurate without an expert assisting in said determination? A court would partly rely on credibility and testimony of the parties. However, when it comes down to two competing versions of what occurred during the incident in question, a court must be able to rely on documentation and the veracity of same.

In conclusion, at the very least, when presented with evidence from an alleged victim, that your client claims never happened or is falsified, an adjournment must be requested. This adjournment would be to formulate an argument and potentially retain an expert to analyze the evidence being presented. Researchers are developing new methods to determine if an image, video, or document is a deepfake. Of course, they are using AI models to look for color, sounds, or image abnormalities, digital watermarks, and other indicia of falsification or manipulation. AI is both the problem and the potential answer in these scenarios. ■

Endnotes

1. *Depos v. Depos*, 307 *N.J. Super*. 396, 399 (Ch. Div. 1997).
2. *D. v. M.D.F.*, 207 *N.J.* 458, 480 (2011).
3. *Id.*
4. *R.K. v. D.L.*, 434 *N.J. Super.*113, 133 (App. Div. 2014).
5. *H.E.S. v. J.C.S.,* 175 *N.J.* 309, 323 (2003).
6. *Depos, supra* at 400.
7. 408 *N.J. Super*. 25, 44-45 (App. Div. 2009)



COERCIVE CONTROL

Recognizing the Invisible Chains that Constitute Domestic Abuse

ALISSA D. HASCUP *is an attorney with Einhorn, Barbarito, Frost, Botwinick, Nunn & Musmanno, PC's criminal practice group. She represents adult and juvenile clients who have been charged with criminal offenses throughout New Jersey, offering zealous advocacy to protect their rights and striving to achieve a positive outcome based upon the facts and circumstances of each case.*

By Alissa D. Hascup

"Domestic violence" is a term of art that is commonly used, yet often misunderstood.

The definition of domestic violence is a pattern of abusive behavior in a relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, psychological, or technological actions or threats of actions or other patterns of coercive behavior that influence another person within an intimate partner relationship. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.[1]

At the core of most abusive relationships are two themes: power and control. The most commonly used tool to assist in explaining these themes to victims of domestic violence is the Power and Control Wheel.

The Power and Control Wheel (aka the "Duluth Model") was created by the Domestic Abuse Intervention Project in Duluth, Minn.[2] In the 1980s, DAIP interviewed domestic violence survivors about their experiences. During the interviews, DAIP documented what the survivors indicated were the most used behaviors or tactics employed by abusers in domestic violence situations. The eight behaviors or tactics chosen for the Power and Control Wheel were the most universally experienced.

The Power and Control Wheel (a slightly modified version of which is used in New Jersey)[3] is replete with references to coercion, intimidation, isolation, and control. However, until recently, New Jersey did not consider coercive control to be "domestic violence."

That consideration changed in January 2024. According to Assembly Bill 1475, which has now been signed into law by Gov. Phil Murphy, New Jersey expanded the form of conduct to include coercive control that the Court may consider when deciding whether to enter a final restraining order (FRO). In particular, the court can now consider any "pattern of coercive control against a person that in purpose or effect unreasonably interferes with, threatens, or exploits a person's liberty, freedom, bodily integrity, or human rights with the court specifically considering evidence of the need for protection from immediate danger or the prevention of further abuse."[4] Coercive control may include, but is not limited to:

- Isolating the person from friends, relatives, transportation, medical care, or other source of support;
- Depriving the person of basic necessities;
- Monitoring the person's movements, communications, daily behavior, finances, economic resources or access to services;
- Compelling the person by force, threat or intimidation, including but not limited to, threats based on actual or suspected immigration status;
- Threatening to make or making baseless reports to the police, courts, the Division of Child Protection and Permanency (DCPP) within the Department of Children and Families, the Board of Social Services, Immigration and Customs Enforcement (ICE), or other parties;
- Threatening to harm or kill the person's relative or pet;
- Threatening to deny or interfere with an individual's custody or parenting time, other than through enforcement of a valid custody arrangement or court order pursuant to current law; and/or
- Any other factors or circumstances that the court deems relevant or material.[5]

Following Suit

New Jersey joined a select number of states that have passed coercive control laws in the last few years. Other states, as well as the District of Columbia, have laws which cover coercively controlling behavior. These laws usually relate to protective orders and/or family law (including laws that exist in the context of a "best interest of the child" issue).

Since 2019, coercion has been an enumerated act that constitutes "domestic violence" in Nevada.[6] Nevada also criminalizes coercion when there is "an intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing."[7]

Also since 2019, New York has defined a "victim of domestic violence" as "any person over the age of sixteen, any married person or ay parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting...coercion."[8] However, because coercive control has not yet been expanded to include non-physical tactics, it has a limited application in the context of domestic violence protective orders. New York has since introduced legislation to criminalize coercive control. It has yet to become law.

In September 2020, California Gov. Gavin Newsom signed Senate Bill 1141 into law, which took effect in January 2021. The law[9] did not criminalize coercive control. Rather, it amended the Family Code to expand the definition of

"disturbing the peace" to include coercive control, which the law defined as "a pattern of behavior that unreasonably interferes with a person's free will and personal liberty."

Hawaii House Bill 2425 was also signed into law in September 2020.[10] It amended the definition of "domestic abuse" in the context of restraining orders to include coercive control between family or household members.

Also in 2020, Mississippi passed a law[11] that expanded the definition of domestic violence to include "any pattern of behavior or control resulting in physical, emotional or psychological harm to a victim committed by a spouse or former spouse of the victim, a person with whom the victim lives or lived as a spouse, a person related as parent, child, grandparent, grandchild, or someone similarly situated to the victim, a person having a child in common with the victim, or a person with whom the victim has or had a dating relationship."

In the 2021 legislative session, the Connecticut legislature passed a domestic violence-related law (PA 21-78) that established a general definition of domestic violence that includes coercive control as a form of domestic violence. The law[12], which was coined "Jennifer's Law," defines coercive control as "a pattern of behavior that unreasonably interferes with a person's free will and personal liberty." It allows victims that have been subjected to coercive control by a family or household member to apply for civil restraining orders. It also criminalizes violations of protective orders for certain "family violence" crimes.

Also in 2021, Washington expanded its laws pertaining to Civil Protection Orders to include "coercive control." In Washington, coercive control is defined as "a pattern of behavior that is used to cause another to suffer physical, emotional, or psychological harm, and in purpose or effect unreasonably interferes with a person's free will and personal liberty."[13]

Practical Use

For practitioners that represent clients involved in "domestic violence" matters, the question now becomes, how will the expanded conduct which includes coercive control be used? *Silver v. Silver*[14] sets forth the two-part analysis that courts must employ in the context of domestic violence hearings to determine whether the plaintiff has sustained their burden of proof to justify the entry of an FRO. In determining whether to issue an FRO, courts will consider, among other things, the following factors:

- The previous history of domestic violence between the plaintiff and the defendant, including threats, harassment, and physical abuse;
- The existence of immediate danger to person or property;
- The best interests of the plaintiff and any child; and
- The existence of a verifiable order of protection from another jurisdiction.

To that end, coercive control will now arise in the context of the prior history of domestic violence that is alleged by the plaintiff in support of the request for the issuance of a restraining order.

For practitioners, it is important to bear in mind that alleged acts of coercive control (i.e., the invisible / silent abuse that occurs behind closed doors) may be difficult to prove. Practitioners should prepare their clients to discuss—in detail—the alleged acts that may constitute coercive control and should investigate the existence of any corroborating evidence, including but not limited to text messages, emails, voicemails, and the like. In addition, practitioners should investigate whether there may be additional witnesses who can provide testimony to corroborate that of the victim. For example, if the victim is alleging that they were isolated from family members and friends, corroborating testimony from such family members and/or friends could prove helpful. This may also be the case with threats involving a victim's immigration status (such as threats to report a victim's immigration status to ICE or the withholding of immigration documents).

In short, New Jersey's decision to expand the forms of conduct that the court may consider when deciding to enter a final restraining order to include coercive control was critically important. It provides victims with an additional means through which to hold their abusers accountable for non-physical violence. It provides the courts with the ability to consider a broader spectrum of behaviors when determining whether "domestic violence" has occurred. And it sends a vital message to both victims and their abusers—controlling behavior should not and will not be tolerated. ■

Endnotes

1. United States Department of Justice, Office on Violence Against Women (justice.gov/ovw/domestic-violence)
2. theduluthmodel.org/
3. New Jersey's most recent modifications to the Power and Control Wheel neutralized gender-specific language that was included in the "Duluth Model." Notably, the New Jersey court system has been using some version of the Power and Control Wheel in domestic violence matters long before the enactment of the coercive control law.
4. N.J.S.A. 2C:25-19(3)(a)(20)
5. *Id.*
6. N.R.S. 33.018
7. N.R.S. 2017.190
8. N.Y. Soc. Serv. Law § 459-A
9. Cal. Fam. Code § 6320(c)
10. Haw. Rev. State. § 432D-27(e)
11. MS Code § 93-21-125
12. Conn. Gen. Stat. § 46b-1(b)
13. RCW 7.105.010(4)(a)
14. *Silver v. Silver*, 387 N.J. Super. 112 (App. Div. 2006)

Available Now

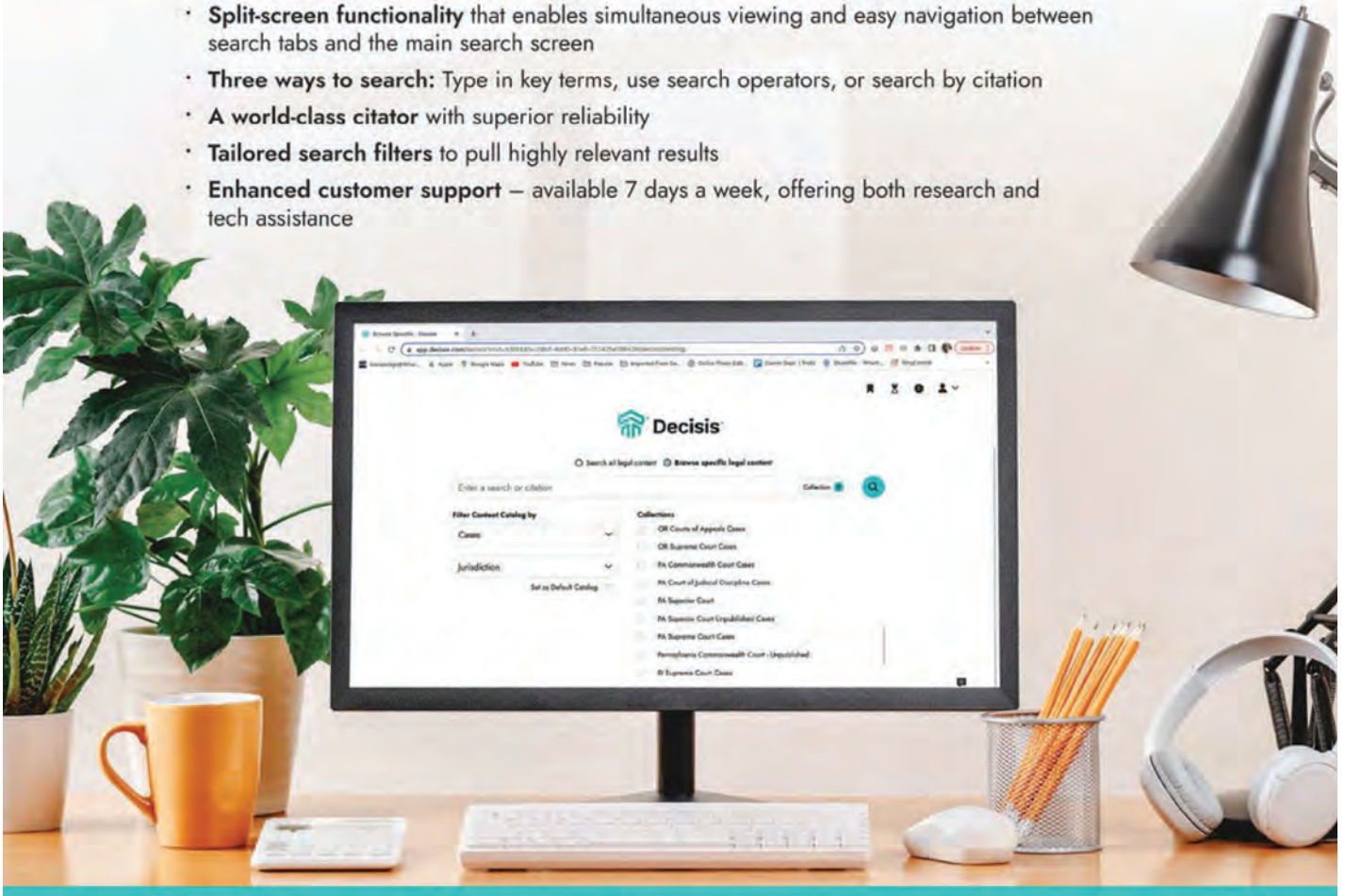
NJSBA

Decisis®

A fast, reliable legal research tool – free for New Jersey State Bar Association members – a $1788 value!) **Search all courts and jurisdictions (Need a case outside New Jersey? Find it with Decisis®.)**

How Decisis stands out from its competitors:

- **Intuitive Google-like interface** that allows you to seamlessly scan search results
- **Split-screen functionality** that enables simultaneous viewing and easy navigation between search tabs and the main search screen
- **Three ways to search:** Type in key terms, use search operators, or search by citation
- **A world-class citator** with superior reliability
- **Tailored search filters** to pull highly relevant results
- **Enhanced customer support** – available 7 days a week, offering both research and tech assistance



Learn more at NJSBA.com or email membership@njsba.com for more details.

Legal Implications in Religious Contexts: Navigating *Gets*

By Matheu D. Nunn, Eliana Baer, and LaDonna Cousins

First Amendment principles of non-interference with religious practices require courts to avoid substantive decisions between various religious rules, or between rules of secular law and religious law. Tensions between First Amendment[1] considerations and the enforceability of agreement by civil courts to discourage religious barriers to remarriage are often invoked in the context of a Jewish *get*.

Although the tension between religion and the jurisdiction of secular courts to resolve religious disputes has stemmed from the enforceability of divorce agreements that included reference to a *get*, this article explores that conflict through the prism of domestic violence and, more specifically, coercive control.[2] However, to fully understand how litigants may engage in domestic violence through religious-based conduct, a general background of the interplay between religious-based issues and civil courts is appropriate.

New Jersey Case Law

In accordance with Jewish law, no divorce is valid unless the husband delivers the wife a *get*, a process that only a husband can initiate.[3] The origin of Jewish divorce via *get* is rooted in the following biblical passage:

> A man takes a wife and he possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorce, hands it to her, and sends her away from his house.[4]

The imbalance of the Jewish divorce process may give rise to abuse. A rabbinically-created remedy designed to mitigate the harmful effects of the *get* process on women is called the *ketubah*, a Jewish marriage contract. The *ketubah* entitled a wife to marital rights from the husband—including financial support, clothing, food, among other basic necessities—during the marriage and in the event of a separation.[5] The only means by which the husband may seek to absolve himself of his marital obligations is to deliver his wife a *get*. While this financial penalty incentivized some men to agree to deliver a *get* to their wives, it did not completely eliminate abuses. Indeed, to this day, under Jewish law, husbands remain empowered to use the *get* to maintain control and keep their wives religiously wedded to them as an *agunah*, or as a "chained woman."[6]

New Jersey courts first addressed the interplay between Jewish law and constitutional law in *Minkin v. Minkin,*[7] which held that compelling a husband to issue a *get* was a proper enforcement of the *ketubah*. *Minkin* ruled that under establishment clause principles "the acquisition of a G*et* is not a religious act," and compelling a husband to submit to a Rabbinical Court for that purpose would neither "advance nor inhibit religion."[8] In other words, the court treated the *get* as a severance document terminating the contractual relationship set forth in the *ketubah*.

Several years later, in *Burns v. Burns*[9], the court expanded upon *Minkin*. There, the court confronted a situation wherein the husband demanded $25,000 from his wife in exchange for his agreement to grant the wife a *get.* In response to the husband's position that a compelled *get* grant violated his religious mandate to do so voluntarily, the *Burns* court noted:

> An offer to secure a "get" for $25,000 makes this a question of money and not religious belief. This "offer," which is not denied by the plaintiff, takes this outside the First Amendment. This so-called offer is akin to extortion.[10]

Interestingly, the *Burns* court declined to compel the acquisition of the *get* itself, but rather compelled the husband to submit to the jurisdiction of the Rabbinical Court "and initiate the procedure to secure a '*get*,'" which left the ultimate decision of whether to grant the *get* to the Rabbinical Court itself.

Then, in *Aflalo,*[11] a trial court again confronted the constitutional issue of a compulsory *get* and rejected *Minkin*. Instead of analyzing the issue under the Establishment Clause, the *Aflalo* court held, under the Free Exercise Clause, a court order that compels a husband to give his wife a *get* amounts to a religious act that violates the husband's right to free exercise of religion:

> [*Minkin*] fails to recognize that coercing the husband to provide the "*get*" would not have the effect sought[...] What value is a "*get*" when it is ordered by a civil court and when it places the husband at risk of being held in contempt should he follow his conscience and fail to comply?[12]

The *Aflalo* court also noted an establishment clause concern in cited in the dissent in *Avitzur v. Avitzur:*[13]

> Even the limited relief which the majority of four approved required inquiry into and resolution of questions of Jewish religious law and tradition and thus inappropriately entangled the civil court in the wife's attempts to obtain a religious divorce.

Notably, the *Avitzur* majority reached a different conclusion than *Aflalo*—and the United States Supreme Court denied *certiorari*.

MATHEU D. NUNN *is a partner at Einhorn, Barbarito, Frost, Botwinick, Nunn & Musmanno, P.C., where he chairs both the family law department and general appellate practice; he is also a certified matrimonial attorney, fellow of the American Academy of Matrimonial Lawyers (AAML), vice-chair of the NJSBA Amicus Committee, and a member of NJSBA Family Law Executive Committee.*

ELIANA BAER *is a partner in Fox Rothschild's family law department; she is also a member of the NJSBA Family Law Executive Committee and a frequent author regarding issues impacting Jewish divorces.*

LADONNA COUSINS *is a partner at Williams Law Group; she is also a member of the NJSBA Family Law Executive Committee and is a frequent lecturer and author regarding family law subjects.*

In *Odatalla v. Odatalla,*[14] a 2002 trial court case, the court faced this issue (enforceability of a religious agreement) within the context of an Islamic *Mahr* Agreement entered into, in connection with an Islamic marriage during which an Imam witnessed both parties' signatures. The *Mahr* required "one golden coin" and "Ten Thousand U.S. dollars" as a Dower; the defendant-husband only provided the plaintiff-wife with the gold coin during the marriage ceremony.[15] Eventually, the parties became ensconced in divorce proceeding and wife sought enforcement of the *Mahr*. The defendant argued that the First Amendment to the Constitution precluded the court's authority to review the *Mahr* Agreement under the separation of Church and State Doctrine.[16] After considering other courts' decisions regarding the constitutional issues, the court concluded that the agreement was enforceable, holding "[c]learly, the *Mahr* Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the *Mahr* Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals."[17]

One year after *Odatalla*, in *Mayer-Kolker v. Kolker,*[18] the Appellate Division faced another dispute involving a *get* but declined to offer a substantive resolution. The court explained that to the extent that the decision in *Minkin* was based on the validity of the *Ketubah*, the trial court was unable to rule on the issue until it made a finding as to the particular requirements of the *Ketubah* in question. Arguably, based on the divergent holdings of *Minkin* and *Aflalo*, and the *Mayer-Kolker* court's analysis, it appears that the panel was more inclined to adopt *Minkin*'s rationale. That is, if the *Mayer-Kolker* court had believed that *Aflalo* reached the correct decision as a matter of law, the *Mayer-Kolker* court would have ended the dispute based on *Aflalo*'s legal reasoning; instead, it remanded the matter for further proceedings.

It took 20 years before the next published case from the Appellate Division regarding these issues. In 2023, the court decided *Satz v. Satz,*[19] a case involving a *get*. There, the parties' Marital Settlement Agreement provided:

> Both parties agree to respond to any summons from a [b]eis [d]in regarding the [g]et which shall be decided in accordance with Jewish [l]aw. By virtue of this agreement the parties are not waiving any religious beliefs, rights or remedies they each may have under Jewish law in the [b]eis [d]in process (except with respect to the process of identifying a choice of [b]eis [d]in by the [defendant] now, as provided in the next to last sentence of this paragraph). The parties have freely and voluntarily entered into the custodial and financial terms of their legal settlement. Neither party shall seek to alter any provisions of the custody and financial aspects of their legal settlement before the [b]eis [d]in. Nothing herein, however, shall prevent either party from seeking whatever other relief that may be available to either party including damages. By way of example, neither party may seek to change a term of the agreement however, they both have the right to assert any financial claims for relief that they may have before the [b]eis [d]in. Both parties shall timely participate in the [b]eis [d]in proceeding. Both parties will answer any summons in a prompt manner. [Defendant] represents that he may be opposing the [plaintiff]'s request for a [g]et. The parties agree that their submission to the [b]eis [d]in shall constitute an agreement to be bound by the [b]eis [d]in [d]ecision on any issue the [b]eis [d]in addresses, and the [b]eis [d]in shall have the authority to order monetary awards relating to the Jewish law matters before it, which awards may be confirmed in a court of law. Both parties shall participate in this process freely and voluntarily. Both parties shall abide by the recommendations of the [b]eis [d]in. *Any violation of this section will result in sanctions to be ordered by the court, including but not limited to monetary sanctions, arrest and the [parties] shall be permitted to seek any relief available to her/him in the [c]ourt with regard to this issue*. The [defendant] agrees that he has freely and voluntarily chosen to select as a [b]eis [d]in for this process, which selection he makes shall be at his sole option, which will be either the Rabbinical Court of New City or Mechon Lihoyra'ah. *This paragraph was an essential term of this Agreement, without which this term sheet would not have been agreed upon*.[20]

Thereafter, the husband testified at the divorce hearing that he was not coerced into signing the MSA.[21] The husband subsequently refused to appear at the *beis din* and the wife moved for enforcement, which the trial court ordered in accordance with the MSA.[22] The husband appealed the trial court order. While the matter remained pending on appeal, the hearing before the *beis din* occurred, at which the "decision explained that defendant had signed an arbitration agreement in which he agreed to a hearing and to accept the *beis din*'s rules and procedures, allowing the rabbinical court to arbitrate in his absence. The decision also sets forth sanctions that can be assessed for his failure to comply with the ruling."[23]

The *Satz* court first cited, among other cases, *Quinn v. Quinn*[24] and *Weishaus v. Weishaus*[25] for the proposition of law that marital settlement agreements should be enforced unless born of fraud, undue influence, or unconscionability. It then acknowledged the differing opinions of *Mayer-Kolker*, *Minkin*, *Burns*, and *Aflalo*, but, citing *Ran-Dav's Cnty. Kosher v. State*,[26] held that the trial court ordered served as an appropriate use of discretion:

> Defendant agreed in the MSA to abide by the *beis din* ruling, whatever that might be. In enforcing that agreement, the trial court in no way interpreted religious doctrine. The orders entered in this case scrupulously avoid entanglement with religion because the trial court applied well-established principles of civil contract law, not rabbinical law.

Accordingly, following *Satz*, it appears that where a litigant agrees in a marital settlement agreement to appear at an agreed-upon *beis din* and accept the *beis din*'s ruling, our courts will order enforcement of that agreement and may impose any agreed-upon sanction. Although *Satz* was a much-needed decision and provides precedent regarding enforceability of *agreements* that provide for a *get*, it does not address the use of a *get* by a "get-refuser" to coercively control their former spouse.[27] Fortunately, our Legislature has provided additional relief.

Prevention of Domestic Violence Act (PDVA)

Under the New Jersey Prevention of Domestic Violence Act (PDVA), the Legislature expanded the forms of conduct that a court may consider when deciding whether to enter a final restraining order (FRO):

> (7) Any pattern of coercive control against a person that in purpose or effect unreasonably interferes with, threatens, or exploits a person's liberty, freedom, bodily integrity, or human rights with the court specifically considering evidence of the need for protection from immediate danger or the prevention of further abuse. If the court finds that one or more factors of coercive control are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. Coercive control may include, but shall not be limited to:
>
> a. isolating the person from friends, relatives, transportation, medical care, or other source of support;
> b. depriving the person of basic necessities;
> c. monitoring the person's movements, communications, daily behavior, finances, economic resources, or access to services;
> d. compelling the person by force, threat, or intimidation, including, but not limited to, threats based on actual or suspected immigration status;
> e. threatening to make or making baseless reports to the police, courts, the Division of Child Protection and Permanency (DCPP) within the Department of Children and Families, the Board of Social Services, Immigration and Customs Enforcement (ICE), or other parties;
> f. threatening to harm or kill the individual's relative or pet;
> g. threatening to deny or interfere with an individual's custody or parenting time, other than through enforcement of a valid custody arrangement or court order pursuant to current law including, but not limited to, an order issued pursuant to Title 9 of the Revised Statutes; or
> h. any other factors or circumstances that the court deems relevant or material.[28]

When determining whether to grant a FRO under the PDVA, the court must undertake the two-part analysis set forth in *Silver v. Silver.*[29] As noted above, coercive control is not categorized as a predicate act under the PDVA. The court has the authority, however, to address it under the second prong of *Silver*. While the second prong inquiry "is most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29[(a)](1) to -29[(a)](6), to protect the victim from an immediate danger or to prevent further abuse,"[30] which factors now include any pattern of coercive control against a person as defined therein.

The passage of coercive control amendments to domestic violence statutes has raised critical questions for practitioners working with faith-based communities as to whether these statutes offer a potential avenue of relief to *agunot*.[31] The Jewish community increasingly recognizes *get* refusal as a form of spiritual abuse.[32] Spiritual abuse, a subtle yet profound form of coercive control, involves the manipulation of religious beliefs and practices to exert power over individuals.[33] This type of abuse can manifest in various ways, such as using religious texts to justify controlling behavior, isolating individuals from their faith communities, or dictating religious practices to maintain dominance.[34]

Further Efforts to Combat Coercive Control

In the context of coercive control, spiritual abuse undermines a person's autonomy and spiritual well-being, often leaving them feeling trapped and powerless. *Get* refusal oftentimes represents only a component of the coercive control the *agunah* experiences both during a marriage and after its legal termination, with approximately 95% of *agunot* reporting that they experienced numerous other forms of abuse throughout their marriage.[35] "The *get* is often the last vestige of control an abuser has over his victim, and the husband's refusal to issue a *get* is the final act in a long series of abusive behaviors."[36]

Despite growing awareness within the Jewish community that *get* refusal constitutes domestic abuse, in judicial and legislative arenas, the behavior has yet to be defined as such.[37] This ambiguity complicates the application of the coercive control amendment because, without clear statutory guidance, judges may hesitate to identify an elementally religiously-based behavior as coercive control.[38] Indeed, a *get* refuser may assert he is

denying his wife a get on purely religious grounds, which could be mistaken for a valid defense, implicating the same type of First Amendment concerns that prevent a Court from ordering a *get* as an initial matter. [39]

Categorizing *get* refusal as a form of spiritual abuse is critically important to the prevention of domestic violence. A bright line categorization of *get* refusal in this manner removes any preconception that the religious components of the divorce are tied to its legal conclusion; a theory that posits that *get* refusal only transcends conscientious religious objection to become abuse following a civil divorce.[40] This is not so. A Jewish divorce can and should be given as soon as the marriage is irretrievably broken and has no bearing on the adjudication of the remaining aspects of the case, including financial issues or custodial disputes.[41] Tethering the religious components of a Jewish divorce to its civil counterpart can and does lead to the very type of extortive use of a *get* as described in *Segal v. Segal*.[42] It is further important to note that this type of apologetics would not be tolerated in any other context where a husband is abusing his wife. Moreover, classifying *get* refusal as abuse conveys to secular courts that adjudication of such issues in domestic abuse contexts would not trigger religious entanglement concerns.[43] In fact, an unambiguous characterization of *get* refusal as abuse removes any notion that the issue is too wrapped up in religious doctrine to address in a civil proceeding. Until practitioners and judges receive further legislative guidance, however, courts must apply the coercive control amendments on a case-by-case basis.

California's application of its coercive control statute to get refusal offers a potential blueprint for other jurisdictions, including New Jersey. Enacted in 2021, California's statute, which is largely similar to the amendment to New Jersey's PDVA, recognizes coercive control as a pattern of behavior that unreasonably interferes with a person's free will and personal liberty.[44] This includes tactics such as isolation, intimidation, and manipulation, which can be as damaging as physical violence. A California Court found that a husband's refusal to grant a *get* is a form of domestic violence under the coercive control framework, establishing a critical legal precedent.[45] Judge Bruce G. Iwasaki found that a respondent father's refusal to grant the petitioner mother a *get* constituted a component of coercive control, concluding that the petitioner mother met the burden of showing acts of abuse by the respondent father. The court further applied the Family Code section 3044 presumption, which states that awarding custody to a party that has perpetrated domestic violence is not in the children's best interests and determined that the respondent did not rebut this presumption. [46]Additionally, the respondent's failure to pay child support was noted as indicative of an unwillingness to comply with court orders.

Conclusion

Spiritual abuse in the form of coercive control can instill fear even in the absence of physical violence and may continue after the relationship ends.[47] It may often be tolerated, excused, and unreported in light of certain religious tenets, including those centering the husband as the head of the household and the belief that women and children are subordinate and must submit.[48] While not classified as an act of violence itself, coercive control has been shown to lie at the core of violent relationships and can actively predict violent relational events.[49] The use of faith to control behavior may be compounded by the victim's belief that "seeking a divorce is against a higher power's will or that 'because of their religious beliefs, they must impart forgiveness for [the person causing harm] and endure the abuse due to religious obligations under Christian, Muslim, and other faith doctrines.'"[50] Fortunately, New Jersey has taken a step in the right direction through its enactment of the amendments to the PDVA, which now permit a court to consider coercive control when determining whether to issue a final restraining order. ■

Endnotes

1. U.S. Const. Amend. 1.
2. N.J.S.A. 2C:25-29.
3. 295 N.J. Super. 527, 534 (Ch. Div. 1996) (citing Wigoder, *The Encyclopedia of Judaism* (1989) 210).
4. *Deuteronomy* 24:1–4.
5. 295 N.J. Super. at 535-36 (citations omitted).
6. *S.B.B. v. L.B.B.*, 476 N.J. Super. 575, 585 (App. Div. 2023), *cert. denied*, 256 N.J. 434 (2024).
7. 180 N.J. Super. 260 (Ch. Div. 1981).
8. *Id.* at 262-63.
9. 223 N.J. Super. 219 (1987).
10. *Id.* at 224.
11. 295 N.J. Super. at 527.
12. *Id.* at 532.
13. 446 N.E.2d 136 (N.Y. Ct. App. 1983) (emphasis added), *cert. denied* 464 U.S. 817 (1983).
14. *Odatalla v. Odatalla*, 355 N.J. Super. 305 (Ch. Div. 2002).
15. *Id.* at 308-09.
16. *Id.* at 309.
17. *Id.* at 314.
18. 359 N.J. Super. 98 (App. Div. 2003).
19. 476 N.J. Super. 536, 545 (App. Div. 2023), *cert. denied*, 256 N.J. 352 (2024).
20. *Id.* at 544-45 (emphasis added).
21. *Id.*
22. *Id.* at 545-46.
23. *Id.* at 547.
24. 225 N.J. 34, 44 (2016)(citation omitted).
25. 180 N.J. 131, 143-44 (2004).
26. 129 N.J. 141, 162 (1992)(holding that "[n]eutral principles may be particularly suited for adjudications

of…civil contract actions," so long as the dispute does not "involve interpretations of religious doctrine itself.").

27. Some of these principles are addressed in *S.B.B.*, 476 N.J. Super. at 575, albeit with a different procedural milieu. There, the husband obtained a Final Restraining Order (FRO) against his wife based on his contention that his wife had wrongly labeled him as Get refuser, which, he argued, resulted in harassment and threats of violence against him. On appeal, the court vacated the FRO, holding that the video created and disseminated by his wife did not constitute a true threat or an imminent danger to satisfy incitement exception to free speech protections under the First Amendment and that the judge's finding that wife's implicit belief that Jewish community was prone to violence against get refusers was not supported by the record.
28. N.J.S.A. 2C:25-29.
29. *Silver v. Silver*, 387 N.J. Super. 112 at 125-27 (App. Div. 2006).
30. *Id.* at 127.
31. In the Orthodox Jewish tradition, a married woman cannot obtain a religious divorce until her husband provides her with a "get". "A woman who attempts to leave her husband without obtaining a get becomes an 'agunah' (pluralized as 'agunot'), which subjects her to severe social ostracism within the Orthodox Jewish community." *United States v. Stimler*, 864 F.3d 253, 259 (3d Cir. 2017), *reh'g granted, opinion vacated in part sub nom. United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018), *and on reh'g sub nom. United States v. Goldstein*, 914 F.3d 200 (3d Cir. 2019).
32. Adetokunbo Arowojolu, *How Jewish Get Law Can Be Used as a Tool of Spiritual Abuse in the Orthodox Jewish Community*, 16 U. Md. L.J. Race, Religion, Gender & Class 66, 72 (2016) ("Spiritual abuse is defined … as 'any attempt to impair the woman's spiritual life, spiritual self, or spiritual wellbeing."') (internal citation omitted); Starr, *supra* note 68, at 47-48 (noting how *get* refusal is a form of spiritual abuse because it prevents a woman from carrying out acts of spirituality by keeping her separated from the traditional Jewish family structure and because husbands manipulate Jewish concepts to justify their view).
33. Oakley, L., Kinmond, K., & Blundell, P. (2024). Responding well to Spiritual Abuse: practice implications for counselling and psychotherapy. *British Journal of Guidance & Counselling*, *52*(2), 189–206. doi.org/10.1080/03069885.2023.2283883
34. *Ibid.*
35. Ariel J. Adler, *New Get Laws, Prenups, and Social Media Shaming: A Grassroots Social Media Movement's Proposals to Assist Women in Jewish Divorce*, 23 Rutgers J.L. & Religion 1, 24 (2025).
36. Keshet Starr, *GET REFUSAL: When There's Only One Side to the Story*, Times of Israel (Nov. 25, 2014, 7:44 AM), blogs.timesofisrael.com/get-refusal-when-theres-only-one-side-to-the-story.
37. Keshet Starr. *Scars of the Soul: Get Refusal and Spiritual Abuse in Orthodox Jewish Communities*. Nashim: A Journal of Jewish Women's Studies & Gender Issues, no. 31, 2017, pp. 37–60. JSTOR, doi.org/10.2979/nashim.31.1.03.
38. *See* Domestic Abuse Act 2021, c. 17 (UK), legislation.gov.uk/ukpga/2021/17/section/84#section-84-1-b-i (ordering statutory guidance for domestic abuse laws); Home Office, Domestic Abuse: Draft Statutory Guidance Framework (Oct. 19, 2021), gov.uk/government/consultations/domestic-abuse-act-statutory-guidance/domestic-abuse-draft-statutory-guidance-framework (*agunah* case study of defining spiritual abuse as part of guidance for coercive control law).
39. Starr, supra, note 37.
40. Starr, supra, note 38.
41. Young Israel of Brookline, Keshet Starr, Esq. - "Get Refusal in the Time of Covid: The Issues Today", YOUTUBE (Aug. 27, 2020), youtube.com/watch?v=Fz09u-5eNL0, 22:10-23:23.
42. 278 N.J. Super. 218 (App. Div. 1994) (invalidating a Marital Settlement Agreement wherein the husband withheld a *Get* until the Wife conveyed a Lakewood property to him in the divorce).
43. Starr, *supra*, note 38, at 23:23-44.
44. CA Fam. Code § 6320 (2023).
45. *Hazani v. Hazani*, No. 19STFL10023 (Cal. Sup. Ct., Feb. 7, 2022).
46. *Id*. (citing Cal. Fam. Code § 3044).
47. *Crossman, Hardesty, & Raffaelli, (2016). Coercive Control in Intimate Partner Violence: Relationship with Women's Experience of Violence, Use of Violence, and Danger - PMC (nih.gov).*
48. Ephesians 5:23; Colossians 3:18-24.
49. *Trauma Care | Free Full-Text | The Model of Systemic Relational Violence: Conceptualizing IPV as a Method of Continual and Enforced Domination (mdpi.com).*
50. jbws.org/dv-and-the-black-community/#:~:text=This%20is%20where%20faith%20leaders%20can%20transform,death%20for%20a%20victim%20of%20domestic%20violence.

CHAD A. PACE *is an associate at MOBO law. A skilled litigator and experienced trial attorney, he has built a reputation for courtroom advocacy. Chad was a prosecutor from 2016 to 2021 and has tried more than 100 cases through decision. He is admitted to practice law in New Jersey, Pennsylvania, California and Nevada.*

Balancing Justice

Ethical Examination of Unwilling Victim Prosecution

By Chad Pace

On Nov. 6, 2017, Bill Maher's editorial besmirched political correctness, punchline, "You can't be madder than the victim. Not everything has to be a federal case." But when should county prosecutors make it a state case? Should the state be angrier than the victim?

Tremendous progress has been made in the last 20 years in providing services and legal remedies for battered women.[1] The clear trend has been toward more aggressive prosecution, but the domestic violence advocacy community has not reached consensus about whether the prosecutor should compel victims to help prosecute their batterers.[2] Much has been made of compulsory prosecution in terms of social impact. This article will examine whether the Rules of Professional Conduct provide guidance to prosecutors.

Counterintuitive Victim Behavior

Surprisingly for the uninitiated, many victims of violent crime do not want their batterers to be prosecuted. Courts have recognized inconsistent statements, recantation, and delayed reporting as "counterintuitive" behaviors.[3] Victims' actions or statements may appear illogical or contrast public expectations of how victims "should" behave, and this behavior is coined "counterintuitive victim behavior." Victims often stay with their abusers, minimize abuse, recant, request the dismissal of charges, refuse to testify, or testify on behalf of their batterers.[4] The public perceives a counterintuitive victim behavior as a lack of compelling evidence or victims' lacking credibility.[5] A victim is "imperfect" if they do not look or act the way a "real" victim would.[6]

Despite popular conception, this "counterintuitive" victim behavior is all too often only rational. For example, although some victims may stay with their abuser because they don't believe they can escape, others might fear a reprisal if they leave.[7] "Some victims may not be able to afford to pay their rents or mortgages or feed their children without their abuser's salary. Other victims may be isolated from friends and family and thus feel they have nowhere to turn; still others may be pressured by friends and family to stay with the abuser."[8] Sometimes they change their stories to protect their batterers or to shield themselves and their families from outside intervention.[9] Victims can worry that domestic violence within the home may spawn child welfare service to interject or even remove the victim's children from them. For many victims, the real issues in domestic violence cases are, "If I leave, where will I go? What about money? What about my kids? It's getting worse every time but I'm afraid to leave...."[10] With these concerns front of mind, victims may counterintuitively seek dismissal of their batterers' prosecution.

When, then, should the state move to prosecute a batterer in the face of the victim's concerns about housing, children, and retribution? Prosecution notwithstanding victim objection is intended to protect the protesting victim from undue influence and intimidation, typically at the hands of the abuser or their agents. On the other hand, dismissing the victim's objectives effectively diminishes their autonomy and infantizes the victim. Progressive scholars criticize mandatory prosecution and interventions in domestic violence ignore the priorities of abuse survivors[11]—the very person whom prosecution would avenge. Much of scholarship addressed "correct" resolution of this tension as a matter of social policy. This article will apply the canons of legal ethics and professional responsibility to assess when and whether the state must prosecute domestic violence.

Who Decides to Prosecute?

Historically, victims themselves were responsible for prosecuting their offenders. Private prosecution of domestic assault persisted during the early nineteenth century.[12] Victims or other private citizens, such as neighbors who witnessed a husband beating his wife, could bring cases to city aldermen.[13]

Current New Jersey law leaves no doubt that "it is the fundamental responsibility of the prosecutor to decide whom to prosecute." Federal courts have likewise consistently held that private parties may not file criminal complaints before federal magistrates.[14] Further still, the state Attorney General requires law enforcement arrest at the culmination of a domestic violence investigation if there is probable cause and one of several codified aggravating factors exist.[15] Arrest is discretionary in the absence of an aggregating factor,[16] but the attorney general does not direct law enforcement to consider victim's input.[17] In modern American justice system, victims have no role in the decision to prosecute offenders.

Codified Victims' Rights

The New Jersey Constitution and statute codify victims' rights during the prosecution of their offenders. In November 1991, the New Jersey Constitution was amended and promised, "A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature."[18] The Amendment also rein-

forced the Crime Victim's Bill of Rights (N.J.S.A. 52:4B–34 to –38) which was originally enacted in 1985.[19]

The Legislature also directed the Attorney General to "promulgate standards for law enforcement agencies to ensure that the rights of crime victims are enforced," and the Attorney General complied. Notably, one standard requires the agency to notify crime victims of any "[n]egotiated plea on all charges."[20] Further, the Attorney General directed that when appropriate, the views of victims of violent crime should be brought to the attention of the court on plea agreements sentencing.[21] The comment to that provision explained in more detail that it is recommended that prosecutors consult with every victim of violent crime, explaining how the plea negotiations process operates, what negotiating posture the prosecution has adopted and why that posture was chosen.

Thus, prosecutors should always consider the victim's views before reaching a final decision because the New Jersey Constitution and statute guarantee the victim's right to consult and be heard. A victim then has the right to tell the prosecutor whether they wish their offender to be prosecuted, but that right must yield to the prosecutor's authority resolve domestic violence at the prosecutor's sole discretion.[22] The victims bill of rights expressly provides, "nothing contained herein should be construed to alter or limit the authority or discretion of the prosecutor to enter into any plea agreement which the prosecutor deems appropriate."

Ethical Considerations

Although the Rules of Professional Responsibility do not address domestic violence directly,[23] an examination of ethical canons can help assess when the prosecutor should oblige a victim's input. The prosecutor must balance at least four professional responsibilities. First, victims' rights are codified and summarized above. These responsibilities sum to the prosecutor's affirmative duty to acknowledge the victim. This responsibility is expressly limited. The prosecutor's responsibility to his client, the state, is also self-evident. A lawyer shall provide competent representation to a client. The lawyer must be competent[24] and diligent.[25] These rules together form the basis of the lawyer's obligation to advocate zealous.[26] In criminal cases, the state is the plaintiff, and zeal is the pursuit of conviction.

The prosecutor's third consideration is their responsibility to society at large. Prosecutors play an eminent role in their communities, and the values expounded in the Model Rules of Professional Conduct require that "lawyers play a vital role in the preservation of society."[27] "Thus, lawyers have a special responsibility to not just provide representation when called upon, but to act affirmatively to address the recognized problems in our society. The rules governing our professional conduct underscore the idea that lawyers must engage in activities that improve the law, the legal system, and the profession.[28] This duty to society plays out in the hands of the prosecutor because the will and consensus of the people, as organized through their elected representatives, is the moral authority for criminalization. In the abstract, every crime is an offense against the social contract.

Uniquely, the prosecutor also owes a broad duty to uphold justice for their adversary. The prosecutor "has the responsibility of a minister of justice and not simply that of an advocate."[29] This responsibility is unique among lawyers because the prosecutor is the only lawyer with a responsibility to afford justice to the opposing party.[30] This final duty is the prosecutor's utmost responsibility. The duty to the defendant is the most critical because it encapsulates the ethical mandate that prosecutors seek justice, not just convictions. Fairness to the defendant ensures the integrity of the legal system and upholds due process. Any decision made must be in the interest of justice, ensuring that the defendant's rights are protected, even at the cost of a conviction. The prosecutor's responsibility to society is closely aligned because it concerns the broader implications of law enforcement and justice. By acting as a guardian of societal values and public safety, the prosecutor serves the community's interests while balancing the rights of the accused. Prosecutorial discretion must reflect both the need for justice and the need to maintain social order.

The duty to the state is important, but the obligation to zealously pursue convictions is secondary to the broader principle of justice. A conviction obtained at the expense of fairness or societal well-being would be a disservice to the prosecutor's ethical obligations. Thus, this duty must be executed with caution and a broader understanding of justice.

The duty to acknowledge victims is balanced against other equally critical responsibilities that take precedence in the pursuit of justice. Victims' wishes cannot override the prosecutor's primary responsibilities to justice and society because the prosecutor's role is not to act as an advocate for the victim but as a minister seeking justice.

Conclusion

Historically, victims themselves acted as prosecutors, but the justice system has evolved. The victim is effectively the complaining witness, and a prosecutorial system designed to avenge wrongs against them has advanced to serve a broader definition of justice—one designed to, first and foremost, protect the procedural rights.

Perhaps a more desirable or intuitive rule set would shift focus from defendants' procedural rights and the abstract notion of justice, to instead focus on the wrongs victims experience and aveng-

ing those injustices. But the Rules of Professional Conduct provide an ethical mandate for prosecutors that does not focus on delivering a desired result for victims. ■

Endnotes

1. *See* Developments in the Law—Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1515-18, 1535-43 (1993)], and Elizabeth M. Schneider, Legal Reform Efforts to Assist Battered Women: Past, Present and Future 25-29 (1990) (unpublished manuscript, on file with the Harvard Law School Library)
2. Humana, Cheryl, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849 (1996).
3. Long, Jennifer G., *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, Nat'l Dist. Att'ys Ass'n, Am. Prosecutors Rsch. Inst. n.47 (2007) (citing *State v. Searles*, 680 A.2d 612, 615 (N.H. 1996)).
4. Long, *supra* note 3
5. *Id.*
6. Lave, Tamara Rice, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 Tex. Tech L. Rev. 219, 230 (2016).
7. *See generally* Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 (1) VIOLENCE & VICTIMS (1993); Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (1999) (discussing the significance of a separation or attempt to separate by the female party in a domestic homicide); *see also* Allie Phillips, *The Dynamics Between Animal Abuse, Domestic Violence and Child Abuse: How Pets Can Help Abused Children*, Prosecutor, September/October (2004) (discussing the interrelationship between domestic violence and pet abuse).
8. Long, B*supra* note 3
9. *See* Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115, 148-49 (1991) (describing the use of the hostile witness rule in domestic violence prosecution when the victim is uncooperative).
10. Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 Rutgers L. Rec. 31 (2008).
11. Carolyn B. Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batterers*, 13 Cal. L. Rev. Online 45 (2022) (citing Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases* 37 Fla. St. U. L. Rev. 1, 1 (2009) [*hereinafter* Goodmark, *Autonomy Feminism*]; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. Rev. 741, 748 (2007); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 Am. U. J. Gender Soc. Pol'y & L. 427, 443-44 (2003).
12. Ramsey, *supra* note 11 at 52-53.
13. *Id.*
14. *See Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972) (in federal system, crimes are always prosecuted by federal government, not by private citizens).
15. New Jersey Domestic Violence Procedures Manual at pg. 96 (citing N.J.S.A. 2C:25-21(a)(1) (injury exists), N.J.S.A. 2C:25-21(a)(2) (outstanding warrant), N.J.S.A. 2C:25-21(a)(3 (restraining order in place), N.J.S.A. 2C:25-21(a)(4) (weapon).
16. N.J.S.A. 2C:25-21(b).
17. *See* New Jersey Domestic Violence Procedures Manual at p. 98.
18. N.J. Const. art. 1, para. 22.
19. *State v. Means*, 191 N.J. 610, 617 (2007) (citing *State v. Muhammad,* 145 N.J. 23, 33–35 (1996)).
20. *Means*, 191 N.J. at 617 (citing *Attorney General Standards to Ensure the Rights of Crime Victims,* p. 2, § I.B., at 12–13 (Apr. 28, 1993)).
21. *Means*, 191 N.J. at 617.
22. *State v. Lavrik*, 472 N.J. Super. 192, 210 (App. Div. 2022) (citing N.J.S.A. 52:4B-36(o)).
23. *See* Craig-Taylor, *supra* note 10 ("Generally, the Model Rules of Professional Conduct and the Model Code of Professional Responsibility do not provide practitioners with sufficient ethical and substantive guidance in domestic violence issues.")
24. R.P.C. 1.1.
25. R.P.C. 1.3.
26. *See* ABA Model Rules of Professional Conduct R. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").
27. ABA Model Rules of Professional Conduct Preamble (2003).
28. *See* Craig-Taylor, *supra* note 10.
29. *ABA Model Rule 3.8 cmt. [1].*
30. *Id.*

Effective Examinations of the Parties in Domestic Violence Cases

By Daniel Burton

An attorney at Lawrence Law, **DANIEL A. BURTON** *devotes his entire practice to matrimonial and family law matters in New Jersey. He represents clients in all aspects of matrimonial and family law, including all stages of divorce litigation, civil union and domestic partnership litigation, divorce mediation and arbitration, custody and parenting time issues, alimony and child support, pre-nuptial agreements, separation and matrimonial settlement agreements, post-judgment litigation, and domestic violence matters.*

Domestic violence is a pervasive problem throughout the United States and New Jersey is no exception to this fact. In New Jersey, the Prevention of Domestic Violence Act[1] ("the Act") was enacted to serve as a shield for domestic violence victims. Unfortunately, all too often there are times where litigants will attempt to use the Act as a "sword," whether to gain an advantage in custody and parenting time litigation, gain sole access to a marital home/residence, or some other improper purpose. In those cases in which a victim pursues a restraining order for the laudable purposes of the Act, an attorney's representation of a litigant through the domestic violence matter can be some of the most beneficial work we do as family law practitioners. The protections provided by the domestic violence statute to a victim and the ramifications of that statute to a defendant are both necessary and significant to prevent domestic violence. Accordingly, effective representation of counsel, which undoubtedly includes effective examinations of both parties, is vital to each and every domestic violence litigant.

Domestic violence is a term that has been defined in New Jersey as follows: the

occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor:

1. Homicide
2. Assault
3. Terroristic threats
4. Kidnapping
5. Criminal restraint
6. False imprisonment
7. Sexual assault
8. Criminal sexual contact
9. Lewdness
10. Criminal mischief
11. Burglary
13. Criminal trespass
14. Harassment
15. Stalking
15. Criminal coercion
16. Robbery
17. Contempt of a domestic violence order
18. Any other crime involving risk of death or serious bodily injury to a person protected under the Prevention of Domestic Violence Act of 1991.
19. Cyber-harassment

A victim of domestic violence is defined,[2] in New Jersey as follows:

> A person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member. "Victim of domestic violence" also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. "Victim of domestic violence" also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.

Under *Silver,*[3] a two-prong analysis was set forth for the courts in New Jersey to follow when determining whether to convert a temporary restraining order (TRO) into a final restraining order (FRO). The first inquiry is whether the plaintiff/victim has proven beyond a preponderance of the evidence that a predicate act of domestic violence has occurred. The second inquiry, if the court finds that the first inquiry has been met, is whether a restraining order is necessary, upon evaluation of the factors set forth in the statute,[4] to protect the victim from an immediate danger or to prevent further abuse. These two prongs should guide the direct examination of the victim.

Effective Examination of the Parties by Plaintiff's Counsel

Direct examination of the plaintiff/victim by counsel needs to provide a compelling narrative that weaves into the fabric of the story all relevant pieces of evidence. Oftentimes, relevant evidence will include text messages or other like communications between the parties, video or audio recordings of the incident, or photographs depicting the incident's aftermath (specifically in terms of injuries sustained or property broken/destroyed). It is the plaintiff/victim that has the burden to prove, by a preponderance of the evidence, that a predicate occurred and that a restraining order is necessary. This is a much lesser standard of proof than the beyond a reasonable doubt standard used in the criminal division. It is much easier to meet the preponderance of the evidence standard required when there is tangible evidence of the incident beyond just the plaintiff's testimony. This standard should always be at the forefront when examining the plaintiff/victim during direct examination.

Direct examination of the plaintiff/victim by counsel needs to provide a compelling narrative that weaves into the fabric of the story all relevant pieces of evidence. Oftentimes, relevant evidence will include text messages or other like communications between the parties, video or audio recordings of the incident, or photographs depicting the incident's aftermath (specifically in terms of injuries sustained or property broken/destroyed).

As set forth in the Model Civil Jury Charges:[5]

> The term 'preponderance of the evidence' means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. If the evidence on a particular issue is equally balanced, that issue has not been proven by the preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

In order to commit harassment, the actor must act with purpose to harass another. Often, the simplest way to defend against the claim of harassment is to provide the court with an ulterior motive behind the defendant's words/actions. In other words, provide an explanation as to why the defendant said what was said or did what was done and how the intent of the defendant was not to harass the plaintiff/victim.

Prior to the hearing, counsel for the plaintiff/victim should ensure that the TRO complaint contains all relevant allegations as to the predicate act and the prior history between the parties. If there is additional information that needs to be added to the TRO complaint, the plaintiff/victim will need to amend the complaint in order to put the defendant on notice as to any and all allegations that they will be required to defend against at the time of trial. The plaintiff/victim will not be allowed to testify to or about allegations not contained therein as they are limited to the "four corners" of the complaint.

Once counsel for the plaintiff/victim has covered all aspects of the TRO complaint, successfully explaining to the court both steps of *Silver*[6] beyond the preponderance of the evidence, focus should shift to the cross examination of the defendant. This assumes that the defendant actually testifies, as there may be a basis for the defendant not testifying, especially if there is an ongoing criminal matter stemming from the same incident. During cross-examination of the defendant, the focus should be on bolstering the testimony from the plaintiff/victim by attacking the defendant's credibility, getting concessions from the defendant, and otherwise showing the various contradictions that may exist in the defendant's version of the story.

Effective Examination of the Parties by Defendant's Counsel

There are four primary areas of defense against the entry of a FRO:

1. Attacking the alleged predicate act (1st step of *Silver);*[7]
2. Attacking the alleged need for a FRO (2nd step of *Silver);*[8]
3. Using the argument of domestic contretemps; and
4. Using the argument of divorce/litigation planning.

The Predicate Act

The most common predicate act in TRO complaints is harassment. The legal definition[9] for harassment is:

A person, with purpose to harass another:

1. Communicates with that person either anonymously, at extremely inconvenient hours, or in offensively coarse language;
2. Strikes, kicks, shoves, or offensively touches that person; or
3. Engages in any other course of alarming conduct or repeatedly committed acts with purpose to alarm or seriously annoy that person.

In order to commit harassment, the actor must act with *purpose* to harass another. Often, the simplest way to defend against the claim of harassment is to provide the court with an ulterior motive behind the defendant's words/actions. In other words, provide an explanation as to why the defendant said what was said or did what was done and how the intent of the defendant was *not to harass* the plaintiff/victim. Direct examination of the defendant should set forth the basis for this type of defense by explaining what the purpose or intent of the defendant actually was. Similarly, cross-examination of the plaintiff/victim should attempt to "poke holes" in whatever the allegation of the predicate act may be. As an example, if the plaintiff/victim is relying on the portion of the harassment statute regarding offensively coarse language as the basis for establishing the predicate act of harassment, then examples should be given where plaintiff/victim uses similar language when communicating with the defendant.

Necessity of Final Restraining Order

In addition to the predicate act, the plaintiff/victim must also prove: (1) that they are fearful of the defendant; and (2) that there exists opportunity for domestic violence to continue/occur again without the entry of the FRO. An effective cross-examination can counter the fear argument by establishing a willingness by the plaintiff/victim to continue communicating with the defendant, failing to remove themself from the defendant's presence by remaining there willingly, or otherwise showing a lack of fear on the part of the plaintiff/victim. For example, if the plaintiff/victim provides a video/audio recording, attempts should be made to show that the recording proves that they were never fearful of the defendant because they remained calm, refused to leave, escalated the situation, or otherwise failed to demonstrate that the defendant's words or actions

had any impact upon them. If the plaintiff/victim presents themselves as fearful of the defendant because the defendant is the owner of firearms, a good counter during cross examination would be the presentation of evidence that establishes that the plaintiff/victim spent significant time with the defendant after the alleged domestic violence, had previously gone hunting with the defendant or spent time at the shooting range with the defendant or knew of the presence of those firearms in the residence for a considerable amount of time prior to the incident in question.

Domestic Contretemps

Domestic contretemps is a legal term used to describe ordinary arguments that occur between spouses or domestic partners that fall short of being considered domestic violence. This is oftentimes a successful defense to the claim of domestic violence, as the plaintiff/victim is simply trying to mislabel an otherwise routine argument between spouses as domestic violence. The courts must strive to remain vigilant in separating domestic contretemps from domestic violence as the lines can sometimes blur, but the outcomes for each should remain distinguished. During examination of the parties, this defense can be highlighted effectively by showing that there was nothing extraordinary about the argument that took place between the parties.

Divorce Planning

The Act[10] can oftentimes be misused, despite its intended purpose, by litigants that are currently engaged or about to be engaged in divorce litigation. In other words, it is commonplace for a litigant to use the Act[11] as a sword to inflict harm against the other party rather than its intended purpose of being a shield to protect against harm from the other party. Accordingly, it is common to see litigants file for TROs against their spouse/partner, in order to gain an advantage in parallel divorce or custody proceedings. This is especially true at the onset of litigation because it is often seen by a litigant as a way to (a) temporarily/permanently remove their spouse/partner from the former marital home, (b) temporarily remove their spouse/partner from custody and parenting time of their child(ren), and/or (c) create an unfair first impression of their spouse/partner before the court. Important things to consider include, but are not limited to, (1) the timing of filing of the divorce complaint, (2) the timing of filing of any TRO/amended TRO complaints, (3) the timing of the retention of counsel, (4) words/actions of the plaintiff/victim, and (5) language in the plaintiff/victim's pleadings.

As an example, it may be instrumental to a domestic violence case to establish the timeline of events may look like prior to the issuance of a TRO. For example, if a plaintiff/victim retains counsel, files a complaint for divorce, files a pendente lite application for support and/or custody of the minor children all prior to the issuance of a TRO, there is a strong possibility that the TRO was sought to gain an advantage in that divorce litigation, especially if the allegations allegedly occurred prior to the retention of counsel. In this particular instance, it would be prudent for defense counsel to walk the plaintiff/victim through the timeline to establish the likelihood that they had ulterior motives when filing for the TRO. The domestic violence statute was meant to serve as a shield to protect victims of domestic violence. However, it is often that the statute is used by litigants as a sword to inflict harm upon the defendant and/or gain an unfair advantage in future litigation. ■

Endnotes

1. N.J.S.A. 2C:25-19(a).
2. N.J.S.A. 2C:25-19(d).
3. *Silver v. Silver*, 387 N.J. Super. 112 (App. Div. 2006).
4. N.J.S.A. 2C:25-29(a) states: A hearing shall be held in the Family Part of the Chancery Division of the Superior Court within 10 days of the filing of a complaint pursuant to section 12 of P.L.1991, c.261 (C.2C:25-28) in the county where the ex-parte restraints were ordered, unless good cause is shown for the hearing to be held elsewhere. A copy of the complaint shall be served on the defendant in conformity with the Rules of Court. If a criminal complaint arising out of the same incident which is the subject matter of a complaint brought under P.L.1981, c.426 (C.2C:25-1 et seq.) or P.L.1991, c.261 (C.2C:25-17 et seq.) has been filed, testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant, other than domestic violence contempt matters and where it would otherwise be admissible hearsay under the rules of evidence that govern where a party is unavailable. At the hearing the standard for proving the allegations in the complaint shall be by a preponderance of the evidence. The court shall consider but not be limited to the following factors:
   (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
   (2) The existence of immediate danger to person or property;
   (3) The financial circumstances of the plaintiff and defendant;
   (4) The best interests of the victim and any child;
   (5) In determining custody and parenting time the protection of the victim's safety; and

(6) The existence of a verifiable order of protection from another jurisdiction.

(7) Any pattern of coercive control against a person that in purpose or effect unreasonably interferes with, threatens, or exploits a person's liberty, freedom, bodily integrity, or human rights with the court specifically considering evidence of the need for protection from immediate danger or the prevention of further abuse. If the court finds that one or more factors of coercive control are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. Coercive control may include, but shall not be limited to:

(a) isolating the person from friends, relatives, transportation, medical care, or other source of support;

(b) depriving the person of basic necessities;

(c) monitoring the person's movements, communications, daily behavior, finances, economic resources, or access to services;

(d) compelling the person by force, threat, or intimidation, including, but not limited to, threats based on actual or suspected immigration status;

(e) threatening to make or making baseless reports to the police, courts, the Division of Child Protection and Permanency (DCPP) within the Department of Children and Families, the Board of Social Services, Immigration and Customs Enforcement (ICE), or other parties;

(f) threatening to harm or kill the individual's relative or pet;

(g) threatening to deny or interfere with an individual's custody or parenting time, other than through enforcement of a valid custody arrangement or court order pursuant to current law including, but not limited to, an order issued pursuant to Title 9 of the Revised Statutes; or

(h) any other factors or circumstances that the court deems relevant or material.

An order issued under this act shall only restrain or provide damages payable from a person against whom a complaint has been filed under this act and only after a finding or an admission is made that an act of domestic violence was committed by that person. The issue of whether or not a violation of this act occurred, including an act of contempt under this act, shall not be subject to mediation or negotiation in any form. In addition, where a temporary or final order has been issued pursuant to this act, no party shall be ordered to participate in mediation on the issue of custody or parenting time.

5. Model Civil Jury Charges 1.12 General Provisions for Standard Charge H. Preponderance of the Evidence (short version).
6. *Silver*, 387 N.J. Super. at 112.
7. *Id.*
8. *Id.*
9. N.J.S.A. 2C:33-4.
10. N.J.S.A. 2C:25-19, et. al.
11. N.J.S.A. 2C:25-19, et. al.

Finding Fairness in the TRO Process

The Delicate Balancing Act of Protecting Victims While Recognizing the Rights of Defendants

By Thomas J. DeCataldo

Domestic violence is a serious problem impacting countless lives in New Jersey as well as on a national level. The horrible toll domestic abuse takes often remains with victims for their lifetime. Numerous published studies corroborate the detrimental impact on children raised in abusive households. In marital or family disputes, the emotion and angst around such conflict typically creates greater potential for incidents of abuse either to or in front of the children.

Family law practitioners routinely encounter domestic violence proceedings as a corollary to a divorce or custody dispute. The outcome of a domestic violence matter can be very serious. It can have significant impact in a divorce or family dispute as it pertains to adjudicating issues of custody, or even support when there is an impact of a person's parenting or employability. In severe situations, it could result in deportation or long-term imprisonment. In these instances, the stakes extend beyond the mere determination of whether to issue a final restraining order.

Preventing domestic violence and protecting the victims of abuse has long been an important legislative goal in our jurisdiction. The process to seek and obtain a restraining order requires a prospective victim to meet a burden of proof that a recognized predicate act of abuse occurred, and secondarily, that there is a need for protection with the entry of a final restraining order.[1] This protocol is set forth in New Jersey's Prevention of Domestic Violence Act.[2] In actual situations involving domestic violence, few, if any, would question the paramount importance our court system places on preventing such abuse and protecting victims and their children.

The protections available to victims of abuse are often broad and sweeping, such as no contact orders, sole possession of a previously shared residence, and often sole custody of any children at issue, at least on a temporary basis. Unlike certain sister states, restraining orders in New Jersey do not expire, and if a final restraining order is issued—it is generally permanent.[3] There are only limited and very narrow corridors to seek the dismissal of a FRO.[4]

The consequences imposed on the perpetuator of such abuse can be dramatic and at times life-altering. These consequences are largely necessary and justified when abuse is corroborated. These can include:

- A temporary or lasting disruption in the right to parenting time or access to children, which can also include missing life events that arise during the proceeding (i.e. graduations, school ceremonies, weddings);
- The loss of occupancy of a residence;
- Impacts on professional licensing or employment;
- An award of attorney's fees to the victim;
- Deportation;
- Surrender of firearms, often permanently.

The protective measures in place under NJDVA are important and completely necessary in appropriate circumstances. However, when misused or the TRO process is unfairly exploited, critically important legal rights can be easily abrogated.

The Potential for Misuse of the Domestic Violence Process

For anyone regularly practicing family law, most have encountered the problematic misuse of the domestic violence system. In the noble quest to ensure that adequate protections exist for actual victims of abuse, there are times when the rights of prospective defendants are substantially revoked under unwarranted circumstances. When this occurs without a meaningful basis, true injustices can arise. Currently, there are rarely any meaningful consequences to a person that intentionally or negligently avails themself to the protections available under the NJPDVA for inappropriate or strategic purposes.[5]

Beyond the rights of prospective defendants, the misuse of the domestic violence system in situations that do not rise to a legislatively recognized act of domestic violence protected by statute, also poses a danger to the actual victims of domestic violence. The cross-pollination of legitimate attempts to seek protection under the statute, interspersed with unjustified or unsupportable attempts to procure a restraining order, have the potential to dilute legitimate situations of abuse. For example, one can reasonably picture a family part judge trying to sift through a daily calendar with 15-20 cases listed for hearings. Some percentage of those matters present real instances of violence, while others may be unsupportable or inappropriately filed. Some interactions between the parties rise only to the level of domestic contretemps, not to the level of domestic violence and results in dismissal of the TRO.

Under NJPDVA, domestic violence matters are supposed to be concluded within 10 days receipt of the TRO.[6] The quantum of filings under the domestic violence docket places a great burden on almost every court not only in New Jersey but throughout the country. Coupled with widespread judicial shortages and backlog, this docket suffers from delays in the administration of justice, and it is difficult to provide trial time. This hurts victims and defendants, because a swift and fair proceeding often cannot occur in the time required by NJPDVA.

This creates an imbalanced situation where the court must weigh protecting a potential victim, while substantially impacting the alleged defendant's rights, often for a time period well in excess of month. In other words, a person may be

THOMAS DECATALDO *is a family law attorney and a partner at Manzi, Epstein, Lomurro, and DeCataldo in West Orange.* *The author extends his gratitude to Andrew Rhein for his assistance with this article.*

While not necessarily a pervasive problem or epidemic, there are occasions where the process is clearly weaponized where a plaintiff is not ultimately interested in a final restraining order, but rather simply wishes to use the system to procure sole possession of a residence to the defendant's exclusion, or sole custody of children at issue in a custody dispute.

restrained from entering their home, have substantial restrictions on accessing their children, and endure a host of other restraints, all while the process plays out for well longer than legislatively contemplated. For victims, they may have to take multiple days off work, travel to the Courthouse various times, and muster enormous personal courage to stand trial in an inefficient and mostly public setting. These problems all flow from the sheer volume of filings, at least a percentage of which are unlikely to be justified or supportable.

Most family law practitioners would concede that the ability to procure a TRO is generally a low bar. At times, there is seemingly no bar at all, as TROs are occasionally issued with minimal to no allegations of recognized and required predicate acts of domestic violence. under the NJPDVA.

While not necessarily a pervasive problem or epidemic, there are occasions where the process is clearly weaponized where a plaintiff is not ultimately interested in a final restraining order, but rather simply wishes to use the system to procure sole possession of a residence to the defendant's exclusion, or sole custody of children at issue in a custody dispute. This is an anathema in our practice, but notably occurs more often than it should.

When misuse of this system occurs, a "defendant's" basic rights to due process become substantially trampled, with no meaningful avenue to correct course because of the propensity of our courts to err on the side of caution and avoid a chilling effect to victims.

To be clear, this article makes no attempt to discourage the very valid and important need to protect actual victims of domestic violence. It does not suggest or condone making it more difficult for actual victims of abuse to obtain protection. Rather, the sole intention of this article is to highlight the potential for misuse of our current system and to suggest mechanisms that may better assist the court or family law attorneys in establishing balance between the need to protect victims, while recognizing the rights of prospective defendants must be sufficiently protected.

The Current Domestic Violence System

Under New Jersey's existing domestic violence paradigm, a plaintiff may apply for a restraining order by petitioning a municipal court judge, or a Superior Court judge for the issuance of a temporary restraining order (TRO). Once such an order is issued, the matter is listed for a final hearing before a Superior Court Judge. Generally, the TRO will restrain and enjoin the defendant from having any contact with the plaintiff and may impose various other restraints. Typically, this can restrain the defendant from the plaintiff's residence (often a previously shared residence), and the TRO will also address custody if there are children involved. Once the defendant is served with the restraining order, certain legal avenues exist to advocate for their rights.

The Right to a Final Hearing

The defendant has the right to proceed to a trial before the Superior Court. That cannot be taken away from the defendant. However, one must recognize there is minimal upside in this setting. The final hearing is only a forum to determine whether the TRO should be dismissed or made final. The plaintiff may be entitled to broad and related relief, such as attorney's fees, mental health services for the defendant such as anger management or counseling, and a determination as to custody and parenting time if there are children involved.

The defendant may not seek such relief. In very narrow circumstances, a defendant may be entitled to attorney's fees if there is bad faith by the plaintiff, but this is a very high burden to prove. In other family law disputes, counsel fees are frequently requested by both parties and governed by a series of factors, with the good faith/bad faith inquiry serving as just one factor.[7]

As noted above, the final hearing is *supposed* to occur by statute within 10 days, but in practice, this is not occurring in most New Jersey counties or because one of the parties seeks to retain counsel for the FRO hearing. As a consequence, the restraints remain in place and the defendant faces many challenges as they may be without their children or meaningful parenting time for the pendency of this process. If civil restraints are being explored or negotiated, one party has substantially greater leverage in that negotiation, and these agreements often touch upon substantive issues that are outside the scope of the domestic violence realm. These can include custody, parenting time, mental or substance

abuse treatment, interim or final support, attorney's fees, and where each party is going to reside going forward. In practice, it is not uncommon that a condition of such settlements is that the dDefendant agree not to return to the previously shared residence. While passing no judgment on the appropriateness of such relief in individual situations, these are massively important determinations being made under the pressure and duress of a pending domestic violence matter.

The Right to Appeal a TRO

To counterbalance the burden facing defendants, our law also authorizes defendants to appeal a TRO *de novo,* since they are not participants in the initial application process by the plaintiff.[8] This is a useful tool in situations where a predicate act is not alleged, or on its face, a TRO does not seem to support the possible issuance of an FRO. In many ways, this draws an analogy to civil litigation where a party fails to state a claim upon which relief can be granted.[9] In other words, if a requisite predicate act is not alleged, there should be a cogent basis to seek an appeal and that the TRO be vacated.

Generally, seeking to appeal a TRO is substantially faster than awaiting trial. However, in practice, TRO appeals are rarely successful because the court generally sees a trial date in the near future and is typically reluctant to vacate a TRO without a full hearing. However, the same process can also be an avenue to modify the TRO, even if vacating the TRO is not likely to be attainable. Instances where this can be justified include seeking parenting time or a restoration of custodial rights, seeking an opportunity to retrieve belongings from a formerly shared residence, or addressing living arrangements between the parties.

Again, even in these settings, courts are not treating these proceedings as anything other than a short-term triage, as a final hearing date is scheduled and there are often corollary proceedings in the divorce or non-dissolution docket. To that end, it is not uncommon to see defendants receive parenting time well beneath a prior arrangement. In situations that do not rise to the level of domestic violence or are peripheral at best, the abrogation of the defendant's rights can be substantial and the impact on children very meaningful.

As a final word on this paradigm, practitioners can enter a "Chicken or the Egg" conundrum when appealing a TRO. In the event a defendant files an appeal of a TRO, the plaintiff still may amend the initial TRO to clarify the allegations or expand on the history of alleged abuse. This can result in an ever-perpetuating cycle of filings, where a defendant appeals, only for a plaintiff to amend and correct the deficiencies noted in the appeal. This creates a challenge on the family part judges, and typically results in deferring any decision until final hearing.

Overall, in situations that appropriately rise to the level of actual domestic violence, the defendant's rights justifiably pale in comparison to protecting the victim. However, when the system is misused or exploited, protecting a defendant's rights is a meaningful and important part of the Court's role to ensure a balanced system prevails.

Proposed Emphasis on Creating Better Balance of Both Parties' Rights

It is respectfully suggested that our law currently provides greater balance than is actually occurring in practice. There are a number of suggested approaches within our existing system of jurisprudence that could be better employed to ensure fairness. The following are suggested manners in which this could occur to better promote balance in the domestic violence system.

More Permissive Awarding of Counsel Fees

In most family disputes, litigants are routinely admonished that the Court has broad power to allocate the cost of attorney's fees pursuant to *R.* 5:3-5. This is done to ensure parties go through the process fairly, reasonably, and in good faith. While the rule includes financial factors, it also requires the court to consider the reasonableness and good faith of the parties, the merits of a party's position and which party prevailed, and the degree to which court orders were being enforced.

It is humbly suggested that a broader analysis of attorney's fees should be permitted in domestic violence matters. For instance, a plaintiff may fall short of acting in bad faith but may have substantially abrogated the defendant's rights to a shared home, to custody and parenting time, and required a domestic violence

Generally, seeking to appeal a TRO is substantially faster than awaiting trial. However, in practice, TRO appeals are rarely successful because the court generally sees a trial date in the near future and is typically reluctant to vacate a TRO without a full hearing. However, the same process can also be an avenue to modify the TRO, even if vacating the TRO is not likely to be attainable.

proceeding for many months that suspended or disrupted the implementation of a prior court order. This could be a court order or agreement for custody and parenting time, a Marital Settlement Agreement, or any other enforceable legal document.

Respectfully, there is little danger to deputizing a domestic violence judge with broader authority to consider all such factors and render a fair outcome, if it appears the domestic violence system was used unfairly or inappropriately.

On the contrary, in instances where a plaintiff is appropriately seeking protection, counsel fees are appropriately considered and eligible to be awarded against a defendant.

Heightened Scrutiny of TRO applications by Municipal Court Judges

While there is no *per se* manner in which to effectuate a better adjudication of requests for a TRO, there is the notion that municipal court judges err on the side of caution and allow the Superior Court to make a final determination. By the very nature of domestic violence, these situations are frequently presented at night, over the weekend, or during holidays, no doubt creating pressure on the municipal judge fielding the hearing.

On common occasions, this dynamic can result in meritless, borderline, or peripheral allegations resulting in the issuance of TROs, with the Superior Court judge left to make a final determination. While understandable that there is a tendency to err on the side of caution, this again imposes dramatic impact on substantial rights for a defendant. If the application is unjustified, municipal court judges should effectuate greater scrutiny before issuing a TRO on sparse or unsupportable allegations. Over the course of this author's career in this field, I have encountered numerous TROs that result in the removal of a defendant from their home and children, when no cognizable predicate act is even alleged. This should not continue to occur.

On balance, we must also be sensitive that plaintiffs are seeking protection at a vulnerable time, on the heels of having been immersed in a potentially abusive and traumatic environment. They are generally not lawyers or experienced litigators, and it may be unreasonable to assume they can cogently set forth the requisite elements of a predicate act. This again highlights the importance of consulting counsel and appropriately amending.

While the task is not easy or enviable for municipal judges, some balancing of these competing dynamics should more routinely occur. Before a TRO is issued, there should be a clear and unequivocal determination that at the very least a predicate act is being alleged.

More Permissive Review of De Novo *Appeals*

Another mechanism to promote greater balance in the domestic violence system is for attorneys to use, and the courts to permit, a more permissive review of an appeal of a TRO. Pursuant to *N.J.S.A.* § 2C:25-28(i), a defendant has the right to appeal the issuance of a TRO to the Superior Court of New Jersey.[10] This review is *de novo*.[11] The same right exists for plaintiffs that are denied the issuance of a TRO.

In practice, this authorized filing is rarely used and even when used, rarely given a meaningful hearing by the Superior Court. Generally, the proximity of a final hearing date in a few weeks leads courts to conclude it is unnecessary to consider vacating a TRO, or substantially modifying same, because a final hearing will occur in the future. (*In many counties, practitioners again have a chicken-or-the-egg dilemma, because if a divorce or non-dissolution matter precedes the domestic violence matter, very often those matters are put on hold until the domestic violence situation is resolved or adjudicated, leaving no forum to seek relief on issues of custody, parenting time or economic issues).*

However, as noted above, the failure to allow meaningful appellate review of a TRO places a party in a tremendous deficit, where they are rendered without use of their home, without access to their children, and often scrambling to make interim arrangements. Again, this may be totally appropriate when faced with legitimate allegations of domestic abuse, but in situations where the TRO is unsupportable or misused, much greater scrutiny should exist to balance the interests of the two parties.

Authorizing a 'Mallamo' *Review in Divorce and Custody Disputes*

As a final suggestion, in the divorce realm, there is longstanding decisional law that recognizes family part judges often have to make snap judgments on important issues based on an incomplete record. These decisions are made *pendente lite* before a trial is conducted, and as a result, they are without prejudice and subject to adjustment once the court has a robust set of facts.[12]

Parties in a domestic violence matter do not exactly benefit from a parallel process. Generally speaking, the four corners of a domestic violence proceeding are confined to its own forum, and it is rare that a divorce matter or non-dissolution matter would provide a subsequent forum to consider the course of action taken in a domestic violence matter. However, the opposite is not true.

If domestic violence is corroborated and substantiated by way of a Final Restraining Order issuing, the history of domestic violence is a mandatory, and important, consideration in adjudicating custody and parenting time.[13]

Interestingly, the custody statute also requires the court to consider (i) the parents' ability to agree, communicate and cooperate in matters relating to the child, and (ii) any history of an unwillingness to

allow parenting time not based on substantiated abuse, among other factors.[14] Both of these factors would be impacted, in a meaningful manner, if a party misuses the domestic violence system to position oneself with sole custody or sole possession of a residence.

In these instances, the court adjudicating the divorce matter or non-dissolution matter should apply the line of thought in *Mallamo* and consider the full weight of each party's actions. Clearly, and without question, if corroborated abuse took place, it must be meaningfully factored into any custody determination. Similarly, if a party sought to misuse the ability to procure a TRO or chose to proceed on allegations that do not rise to the level of recognized domestic abuse, this evidence should reasonably be considered when applying the factors in *N.J.S.A.* § 9:2-4. Obviously, no two situations are alike, but in most instances, the underpinnings of a domestic violence action should have relevant impact on the custody factors being weighed.

Along similar lines, the incursion of professional fees becomes significant depending upon the course of action certain parties take. If a party causes a TRO to be initiated, requires the defendant to engage counsel and appear for domestic violence proceedings, only to dismiss an otherwise unsupportable application, this should be relevantly considered in a *R.* 5:3-5(c) analysis when the substantive issues are later addressed. To be clear, the Court is not required to award attorney's fees or to discourage anyone from seeking protection under the NJPDVA, but they should at least reserve the authority to consider such applications.

Conclusion

As an overall takeaway, it is clearly a well-justified priority to protect victims of domestic violence from ever experiencing such circumstances again. Whether it be in their lives or the lives of their children, it is imperative our court system be on the front lines of combatting abuse and protecting victims.

By the same token, our courts should be vigilant and mindful of creating a balance between protecting victims and ensuring the rights of defendants are not unjustifiably abrogated for months at a time. Courts should not take a cavalier or apathetic attitude to displacing a parent from their home, removing them from their children, as these are life-altering events When an initial request for a TRO enables a clear determination or adjudication on some of these issues, it should not be deferred to a final hearing if it is clear the TRO is unsupportable.

If greater emphasis is placed upon the protection of legitimate victims, counterbalancing the rights of defendants, overall fairness can be maintained in this process. ■

Endnotes

1 *Silver v. Silver*, 387 N.J. Super. 112 (App. Div. 2006).
2 NJ Rev Stat § 2C:25-19 (2023).
3 *N.J.S.A.* § 2C:25-17 et seq.
4 *Carfagno v. Carfagno*, 288 N.J. Super. 424 (Ch. Div. 1995).
5 *NJ Rev Stat* § 2C:25-19 (2023).
6 *N.J.S.A.* § 2C:25-29(a).
7 *R.* 5:3-5(c)
8 *N.J.S.A.* § 2C:25-28(i). *See also, Vendetti v. Meltz*, 359 N.J. Super. 63, 68 (Ch. Div. 2002).
9 *R.* 4:6-2.
10 *N.J.S.A.* § 2C:25-28(i). *See also, Vendetti v. Meltz*, 359 N.J. Super. 63, 68 (Ch. Div. 2002).
11 *Id.*
12 *Mallamo v. Mallamo*, 280 N.J. Super. 8 (App. Div. 1995).
13 *N.J.S.A.* § 9:2-4.
14 *Id.*

A Lawyer's Personal Behavior in Person and on the Internet is Not Immune From Discipline

By Bonnie C. Frost

Domestic violence can take many forms. It can be direct physical abuse upon a victim, it can be a verbal threat, involve sexual contact, and it can also be harassing conduct which occurs over a period of time. Under the Prevention of Domestic Violence Act, it can also include criminal mischief, kidnapping, assault, sexual assault, criminal sexual assault, stalking and cyber harassment. The statute now includes coercive control as behavior toward victims which would constitute domestic violence.

Coercive control is behavior which is designed to make a victim dependent and isolated, not only emotionally but financially, where one partner has exclusive control over the other's access to money or assets.[1] There are occasions that the aggressor who commits an act involving coercive control is an attorney.

That an attorney's conduct does not involve the practice of law or arise from an attorney-client relationship will not excuse an ethical transgression or lessen the degree of a disciplinary sanction.[2] The obligation of an attorney to maintain the high standard of conduct required by a member of the bar applies even to activities that may not directly involve the practice of law or affect their clients.[3]

The first two cases which addressed domestic violence committed by attorneys were *In re Magid*[4] and *In re Margrabia*.[5] In *Magid*, because the Court had previously not addressed the appropriate discipline for an act of domestic violence, the Court gave notice to the bar that in the future it would "ordinarily suspend an attorney who is convicted of an act of domestic violence."[6] In *Margrabia*, the Court imposed a three-month suspension on an attorney who engaged in the act of domestic violence.[7]

Since acts of domestic violence are defined by the commission of acts as defined in the criminal code, RPC 8.4 (b)[8] provides that it is misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer."

The domestic violence statute covers persons who are 18 years or older, have been married, living or have lived together, have a child together, or have a dating relationship. Also, by definition, therefore, one's personal behavior, outside any lawyer client relationship is usually at the crux of the factual scenarios presented.[9]

In ethics cases where domestic violence has occurred, lawyers will be disciplined even if no separate criminal complaint has been lodged.

In a 2021 case *In re Tobias*, Frank Tobias[10] pleaded guilty and was convicted of one count of third-degree aggravated assault. He was charged with violating RPC 8.4(b). In that case, Tobias became angry when his fiancée confronted him in a restaurant where he had been drinking with friends. Tobias and his fiancée drove in separate vehicles to a parking lot near his office and continued the argument. During the argument, Tobias grabbed his fiancée's head and "smashed it against the [vehicle] door frame." After his fiancée began screaming that she was bleeding,

---

A partner at Einhorn, Barbarito, Frost, Botwinick, Nunn & Musmanno, PC, **BONNIE FROST** *practices family law, handling various cases such as divorce, custody, domestic violence, and paternity issues. She also handles private mediation and arbitration. She is frequently called upon to handle family law and appellate arbitrations and to be an expert witness, or a consultant to lawyers who find themselves in ethical trouble.*

he got into his car and drove away.

At his allocution, the respondent admitted that he caused his fiancée to sustain a "gash to her head." This was not Tobias' first run in with the law, however. In 2017, he had a conditional discharge for misdemeanor assault. To make his ethical circumstances worse, he did not report his criminal conviction to the Office of Attorney Ethics as was required by R.1:20 – 13(a)(1)[11].

Tobias received a six-month suspension because "society has taken a stricter view of domestic violence and has become more cognizant of the serious and pervasive impact the perpetrators have on their victims, and our culture as a whole." In aggravation, Tobias attempted to pursue a collateral attack on his own guilty plea and conviction in his submissions to the Disciplinary Review Board. To be sure, his lack of remorse increased the quantum of discipline imposed.

Another recent domestic violence case (one which did not involve a physical assault), is *In Re Waldman*.[12] There, the respondent was accused and convicted of the fourth-degree crime of cyber stalking in New York.

The facts in this case are startling. Waldman had been in a four-month dating relationship with a woman and, after she broke it off, he engaged in a four-year campaign to destroy her life and make her "pay" for ending the relationship. During these four years, not only did he show up at her apartment and try to get in, he also texted her telling her he knew that she had changed her locks. He sent her hundreds of harassing and threatening texts and emails, created blogs defaming her, and made anti-Semitic and misogynistic remarks toward her. He contacted her employer multiple times and falsely alleged that she abused drugs. Even after his victim obtained an order of protection against him, he escalated his threats. He threatened to rape her with a butcher knife, to kidnap her, and to hold her in his own apartment bound and gagged. He repeatedly told her that he wished she was dead while at the same time demanding that she have sex with him. Even after he pleaded guilty to a charge of contempt and the victim obtained a second order of protection, the respondent continued the harassment but, in this round, he made untraceable threats by using pseudonyms in his messages and online posts. The court imposed a three-year suspension for the totality of his misconduct.

As bizarre as Waldman's behavior was, another case that raises concern occurred this year, where a Pennsylvania attorney John Toczydlowski,[13] who had been admitted *pro hac vice,* pleaded no contest to unlawful dissemination of intimate images and harassment of his wife. During their three-year divorce litigation, he secretly photographed his wife while she was nude or partially nude. He posted 44 of the photos to Angel's Wife Lovers website, adding graphic comments including invitations for other users to engage in sexual acts with her. He posted his wife's face, her whereabouts, and telephone area code, and he provided his own contact information on other social media platforms encouraging other users to contact him for additional photographs of his wife.

Pennsylvania suspended him from the practice of law for three years. When New Jersey analyzed the quantum of the discipline to be assessed, it relied on the crimes of stalking and cyber harassment-which are now part of the domestic violence statute.[14] In its decision, the state Supreme Court Disciplinary Review Board noted that:

> In the age of technology, by which an individual's private information, including her their home address, often can be located with a few keystrokes, the victim had every reason to be concerned for her safety. Further, the photographs of the victim will remain in cyberspace, in perpetuity subjecting her to a lifetime of re-victimization, each time the photographs are viewed by others.

New Jersey determined that no amount of mitigation, including his remorse, cooperation with Pennsylvania disciplinary authorities or his struggles with mental health served to spare him from the most severe disciplinary sanction. Toczydlowski is not admitted to the New Jersey Bar; however, New Jersey may discipline every attorney…"authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding…."[15] Therefore, the Supreme Court banned him from future plenary or *pro hac vice* admission in New Jersey.

As these cases demonstrate, the internet has now become another weapon an abuser can use to inflict harm on their victim, a weapon which many times cannot be curtailed (as noted by the DRB in *Tocyzdlowski*) but which the Supreme Court will not condone. ■

Endnotes

1. N.J.S.A. 2C:25-19(3)(a)(20)
2. *In re Hasbrouck*, 140 N.J. 162, 167 (1995)
3. *n re Schaffer*, 140 N.J. 148, 156 (1995)
4. *In re Magid*, 139 N.J. 449 (1995)
5. *In re Margrabia*, 150 N.J. 198 (1997)
6. *In re Magid*, 139 N.J. at 455
7. *In re Margrabia*, 150 N.J. at 203
8. RPC 8.4(b)
9. N.J.S.A. 2C:25-19(d)
10. *In re Tobias*, 249 N.J. 2 (2021)
11. R.1:20 – 13 (a)(1)
12. *In re Waldman*, 253 N.J. 4 (2023)
13. *In re John Toczydlowski*, 256 N.J. 508 (2024)
14. N.J.S.A. 2C:25-19(a)(14)(19)
15. R. 1:20-1(a)

New Jersey State Bar Foundation

Celebrate the New Jersey State Bar Association's 125th Anniversary

with a donation to the New Jersey State Bar Foundation*

$125 for 125 years

All donors receive a commemorative ceramic coaster.

Ceramic Coaster Example

Celebrate • Honor • Remember

with a personalized brick installed on the New Jersey Law Center portico.

Engraved Brick Size Options

4"x8"..... $250

8"x8"..... $500

12"x12"..... $1,000

All donors will be recognized on NJSBF's virtual Donor Wall for up to one year.

Scan the QR code to donate

or visit donate.njsbf.org

*Donations provide vital funding for NJSBF's law school scholarship program and helps NJSBF continue to offer and expand free civics and law-related programs and publications for the people of New Jersey.

Donations and brick orders are tax-deductible to the fullest extent of the law. Tax I.D. # 22-6074475

NJSBA

CAREERCENTER

The New Jersey State Bar Association, the state's largest organization of judges, lawyers and other legal professionals, is the go-to source for finding your next career opportunity.

ALL JOB POSTINGS ARE FREE

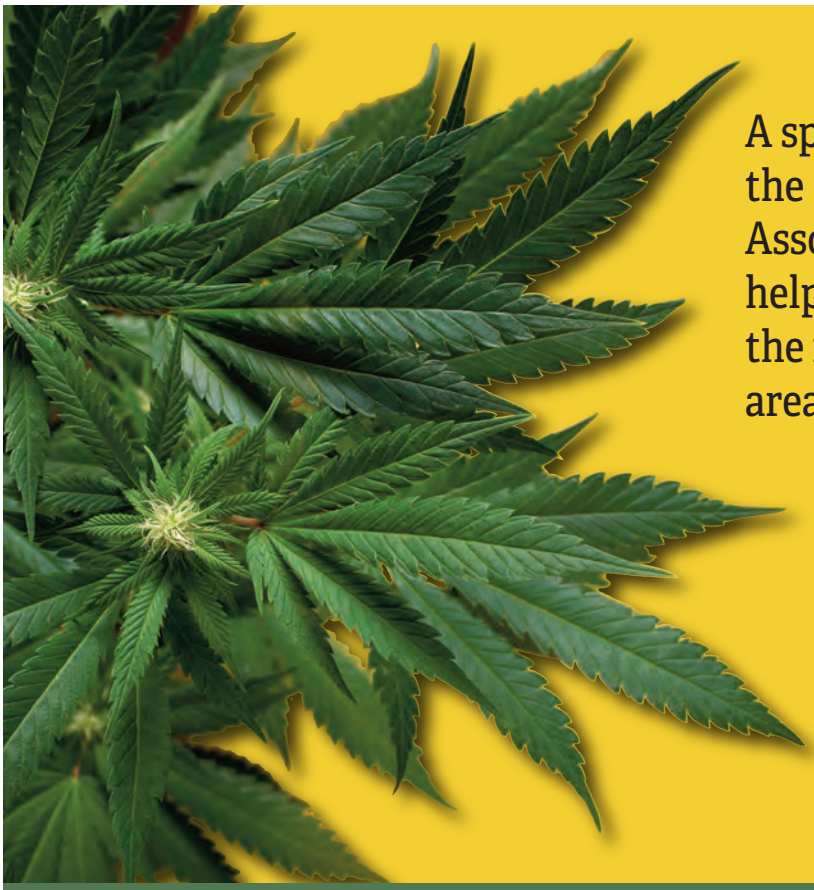
FIND A JOB

NJSBA members can apply for open positions for FREE.

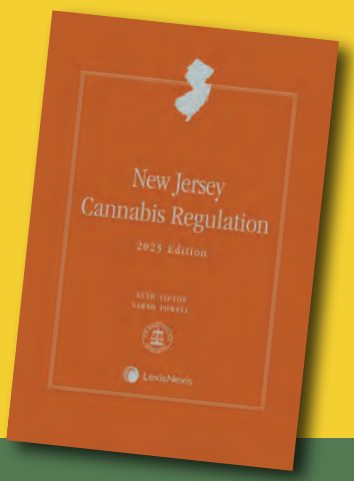
POST A JOB

Job openings are advertised to the NJSBA's 18,000+ members. All listings are for 30 days.

Visit **njsba.com** to find or post a job



A special collaboration between the New Jersey State Bar Association and Lexis Nexis to help lawyers learn about one of the fastest growing practice areas in the region.



New Jersey Cannabis Regulation

by Seth Tipton and Sarah Powell

New Jersey Cannabis Regulation is the only book of its kind focused on New Jersey law, written by lawyers who are active in the Cannabis Bar. Use the authors' first-hand experience to learn about medical and recreational marijuana laws and regulations as it is interpreted in New Jersey courts. It addresses common issues and analyzes the principles and applications of cannabis regulations in New Jersey. It is clearly written and offers expert insight on the licensing of both recreational and medical marijuana dispensaries, civil liability under New Jersey law, the impact of federal law, as well as workplace and other compliance issues for growers, retailers, and wholesalers.

It is available in print today and pre-orders are being accepted now for the ebook.

NJSBA members can get a 10% discount by using code NJCANNABIS

NJSBA

SORRENTO

ITALY

2025

ANNUAL MEETING
AND CONVENTION

May 14–16 | Borgata Hotel Casino & Spa | Atlantic City

Earn up to **16** **CLE credits**

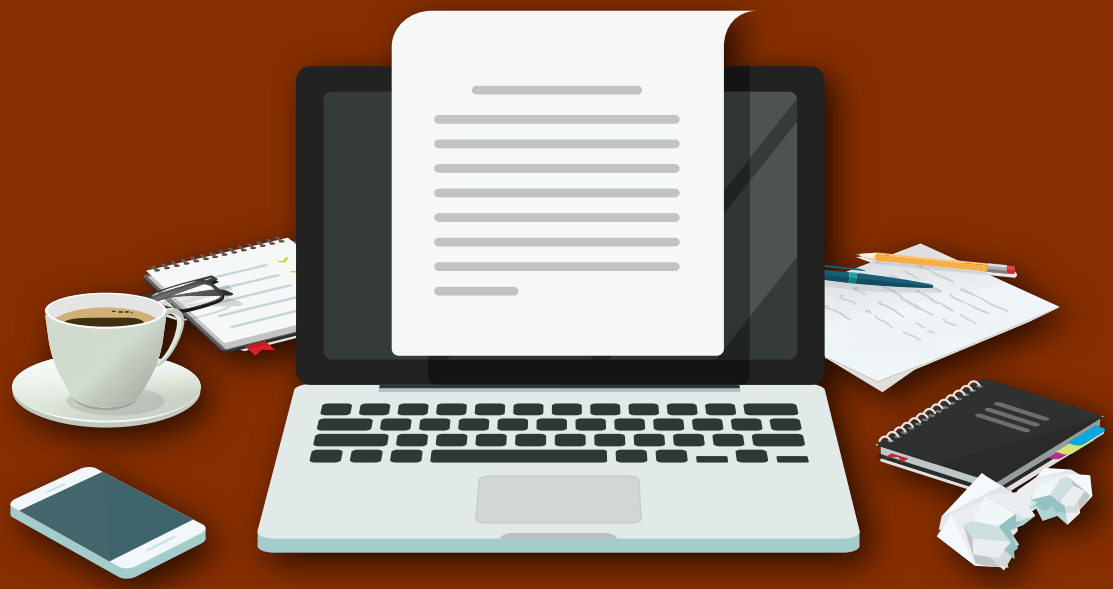
FEATURING

Spectacular CLE Programming
Installation of Officers and Trustees
Ticketed Events

Presented by the New Jersey State Bar Association and the New Jersey Institute for Continuing Legal Education

Visit njsba.com for registration updates

New Jersey Lawyer



Calling all Writers

Do you want to be an author?

The NJSBA invites members to submit subject area article ideas and practice tip submissions for *New Jersey Lawyer.*

Our award-winning magazine is published six times a year. Check out the njsba.com editorial calendar for topics identified for upcoming editions, or submit an article for consideration to appear in its regular columns on technology; ethics and professional responsibility; wellness; lessons learned from fellow attorneys; writing tips; practice management guidance; insights from the bench and diversity, equity and inclusion topics.

Reach out today at askthenjsba@njsba.com

NJSBA