



claiming he was the father not only of that daughter but also of her older daughter.<sup>3</sup> The older daughter, however, had been fathered by another man, as Virginia was already pregnant when she met Robert.<sup>4</sup> Robert knew this, but sought joint custody of both children and child support from Virginia.<sup>5</sup>

The Family Court Services (FCS) worker in the case, who recommended that Robert be given joint legal custody and visitation with both children, claimed that she was an expert on domestic violence issues. She testified that her expertise was based in part on her having been a guest speaker one time in my Domestic Violence Law class. Virginia asked if I could testify on her behalf regarding the inadvisability of awarding custody to an abuser. She stated that if the FCS worker's expertise included speaking in my class, then surely I was at least as qualified to testify on domestic violence issues.

Having never testified as an expert before, I was apprehensive as to whether I would qualify. I agreed, however, to try. When I was sworn in and took the stand, Virginia's attorney started to ask me about my credentials and work history. After a few minutes the judge interrupted, asking if the attorney was trying to qualify me as an expert on domestic violence. She replied in the affirmative. The judge then stated, "Well everyone knows Nancy Lemon is an expert on domestic violence! I'll stipulate to that!" I breathed a huge sigh of relief and went on to testify about the issues in the case, including the fact that perpetrating domestic violence is relevant to a determination of parental fitness. Robert's attorney, who had apparently never heard of me, was taken aback by the judge's stipulation but had to accept me as an expert.

Though the judge awarded Robert visitation with both children over Virginia's objection, this award was reversed on appeal with regard to Virginia's older daughter, since technically there was no relationship between Robert and this child.<sup>6</sup> I saw that my expertise could potentially be useful to survivors of domestic violence who were caught up in the legal system, and found testifying anxiety-producing but exciting. There is nothing like testifying in court, especially being subjected to rigorous cross-examination, to sharpen one's wits. I learned a great deal from that first expert experience, and realized I would like to do more expert work in the future.

This comment will cover the statutes and reported cases in California related to domestic violence expert testimony, the development of standards of practice for this new profession, and some of the challenges we experts face. I will discuss of some of the cases I have worked on over the course of my thirty

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3. *Id.* at 169.

4. *Id.* at 167.

5. *See id.* at 169.

6. *Id.* at 169, 170-71. Another domestic violence attorney and I worked with the California Alliance Against Domestic Violence, now the California Partnership to End Domestic Violence, to codify this decision. *See CAL. FAM. CODE* § 6323 (West 2004) (providing in part that an action under the Domestic Violence Prevention Act cannot be a basis for the restrained party to be awarded custody if that party has no parental relationship to the child).

years of work with domestic violence survivors and insights I have gleaned from this line of work.

### STATUTORY BASIS FOR EXPERT TESTIMONY ON DOMESTIC VIOLENCE

There are two main code sections in the California Evidence Code under which domestic violence experts testify. The first, section 801, took effect in 1967 and pertains to expert testimony generally.<sup>7</sup> Subsection (a) permits the introduction of testimony by an expert when it is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.”<sup>8</sup>

The other statute, section 1107, took effect in 1992 and deals specifically with testimony on domestic violence issues.<sup>9</sup> In its original form, subsection (a) provided:

In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women’s syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.<sup>10</sup>

Section 1107 was enacted in order to resolve the issue of whether such testimony was scientifically reliable, so that the reliability issue would not have to be litigated each time a party sought to introduce it.<sup>11</sup> In 2005, the term “battered women’s syndrome” (BWS) was replaced by “intimate partner battering and its effects.”<sup>12</sup> This bill was supported by the California Alliance Against Domestic Violence (now the California Partnership to End Domestic Violence, or CPEDV), as the term “battered women’s syndrome” was problematic and confusing to juries and judges.<sup>13</sup>

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7. CAL. EVID. CODE § 801 (West 2009).

8. *Id.* § 801(a). Subsection (b) of section 801 further states that the testimony must be:

Based on matter (including his [sic] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him [sic] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [sic] testimony relates, unless an expert is precluded by law from using such matter as a basis for his [sic] opinion.

*Id.* § 801(b).

9. CAL. EVID. CODE § 1107 (West 2009). *See generally* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN’S STUD. 219 (1992) (providing a history of the statute).

10. 1991 Cal. Stat. 812 (codified as amended at CAL. EVID. CODE § 1107(a) (West 2009)).

11. Bowman, *supra* note 9, at 225-26.

12. 2004 Cal. Stat. 609 (codified as amended at CAL. EVID. CODE § 1107 (West 2009)); CAL. PENAL CODE § 1473.5 (West 2009).

13. *See People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996). In *Humphrey*, the court stated:



existence of imminent danger at the time of the killing.<sup>21</sup> The court further held that it was “not reasonably probable” that expert testimony would convince the jury that the defendant honestly perceived an imminent danger.<sup>22</sup>

Conversely, in *People v. Day*, the Fifth District Court of Appeal ruled that a defense attorney’s failure to call an expert witness on BWS was ineffective assistance of counsel.<sup>23</sup> While this decision was rendered five days after section 1107 took effect, the court did not mention either section 801 or section 1107 in its opinion.<sup>24</sup> The defendant stabbed her abusive boyfriend during a fight and killed him, then claimed self-defense.<sup>25</sup> The court reversed the manslaughter conviction due to the defense attorney’s failure to present expert witness testimony.<sup>26</sup> The court stated that while such testimony was inadmissible to show the objective reasonableness of the defendant’s use of deadly force, it was relevant to establish that her belief in the need for such force was honest and “to explain a behavior pattern that might otherwise appear unreasonable to the average person.”<sup>27</sup>

The first California Supreme Court case dealing with domestic violence expert testimony was *People v. Humphrey*, in which the Court found that expert testimony was relevant and admissible.<sup>28</sup> The defendant fatally shot her abuser during a face-to-face confrontation and claimed self-defense.<sup>29</sup> Her manslaughter conviction was reversed by the high court, which held that expert testimony under section 1107 was relevant to both whether the battered defendant acted reasonably and the victim’s credibility because it would assist the jury “by dispelling many of the commonly held misconceptions about battered women.”<sup>30</sup> The court thus overruled the appellate court decisions in both *Aris* and *Day* to the extent that they were inconsistent with its judgment.<sup>31</sup>

Use of a domestic violence expert by the prosecution, as opposed to the defense, was first addressed by the California Court of Appeal in 1997.<sup>32</sup> In *People v. Morgan*, the First District Court of Appeal held that generic expert testimony on BWS was admissible under section 1107 because it was relevant to

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21. *Id.*

22. *Id.*

23. 2 Cal. Rptr. 2d 916, 925 (Ct. App. 1992).

24. *See id.*

25. *Id.* at 917, 921.

26. *Id.* at 925.

27. *Id.* at 924-25. *See also People v. Romero*, 883 P.2d 388 (1994). In this case the defendant was convicted of robbery but claimed she participated in the robbery with her abuser due to duress. *Id.* at 389. She contended that her trial attorney incompetently failed to investigate a defense based on BWS. *Id.* The high court did not address this issue, but decided the case based on procedural requirements in habeas corpus proceedings. *Id.* at 396.

28. 921 P.2d 1, 9 (Cal. 1996).

29. *Id.* at 3.

30. *Id.* at 9 (quoting *Day*, 2 Cal. Rptr. 2d at 922).

31. *Id.* at 10.

32. *See People v. Morgan*, 68 Cal. Rptr. 2d 772 (Ct. App. 1997).

explain why the victim would recant her story.<sup>33</sup> The defendant was prosecuted for assaulting his girlfriend.<sup>34</sup> She had originally told a sheriff's deputy that the defendant had beaten her, but testified at trial that she had hallucinated about this, that he had merely restrained her, and that she had fallen and hit her face.<sup>35</sup> The court held that expert testimony on BWS was admissible.<sup>36</sup>

The Fifth District Court of Appeal decided *People v. Erickson* that same year, upholding the murder conviction of a woman claiming to have been battered by the victim, her boyfriend.<sup>37</sup> The court held that section 1107, which explicitly permits evidence of the effects of BWS on victims, codifies the existing rules generally allowing expert testimony on BWS but precludes the expert from predicting the defendant's state of mind when the crime was committed.<sup>38</sup>

In 1999, the California Court of Appeal, Second District, Division 3, decided *People v. Gomez*, in which the defendant was convicted of assault with a deadly weapon and infliction of great bodily injury on his live-in girlfriend.<sup>39</sup> The issue in this case was whether expert testimony regarding recantation was admissible when there was one reported incident of violence but no other evidence of abuse.<sup>40</sup> The girlfriend initially told officers her boyfriend had assaulted and threatened her but recanted at trial, testifying that her wounds came from grabbing the knife he was holding.<sup>41</sup> An expert testified that recantation is typical in domestic violence cases and that, depending on the severity of the abuse it can be "more likely to occur after a first incident."<sup>42</sup> The appellate court, however, reversed the conviction, holding that expert testimony under section 1107 was inadmissible because a "single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered women's syndrome."<sup>43</sup>

The following year, Division 4 of the Second District Court of Appeal examined the same issue but came to the opposite conclusion regarding the admissibility of expert testimony in *People v. Williams*, where a husband was convicted of severely beating his wife.<sup>44</sup> The wife told her mother that her injuries were caused by an accident and allowed her husband to return to their residence one month after the incident.<sup>45</sup> An expert testified regarding the

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33. *Id.* at 774.

34. *Id.* at 772-73.

35. *Id.* at 772.

36. *Id.* at 774.

37. 67 Cal. Rptr. 2d 740, 747 (Ct. App. 1997).

38. *Id.* at 746.

39. 85 Cal. Rptr. 2d 101, 102 (Ct. App. 1999).

40. *Id.* at 108.

41. *Id.* at 103-04.

42. *Id.* at 105.

43. *Id.* at 108.

44. 93 Cal. Rptr. 2d 356, 358, 363-64 (Ct. App. 2000).

45. *Id.* at 359-60.

reasons why the victim may have lied or may not have been forthcoming about the abuse.<sup>46</sup> In contrast to the *Gomez* decision, the court in *Williams* held that nothing in section 1107 indicated the legislature intended “that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator.”<sup>47</sup> The court ruled that expert testimony was admissible.<sup>48</sup>

In *People v. Gadlin*, also decided in 2000, Division 5 of the Second District Court of Appeal held that expert testimony on BWS was admissible under section 1107 even when the victim was not recanting at trial.<sup>49</sup> In *Gadlin*, the court upheld the defendant’s conviction for severely assaulting his live-in girlfriend.<sup>50</sup> The girlfriend’s credibility was at issue not because she was recanting in the present case but because she had recanted a prior incident of abuse and had resumed a relationship with the defendant before the charged incident.<sup>51</sup> The court held that expert testimony on BWS was admissible to establish the victim’s credibility.<sup>52</sup> Notably, the court also held that such testimony could include typical abuser behaviors, and not only testimony about victims.<sup>53</sup>

In order to resolve the split between the divisions of the Second District regarding the issue of whether more than one instance of prior abuse must exist before expert testimony can be admitted, the California Supreme Court agreed to review the conviction of Cornell Brown in 2004.<sup>54</sup> Brown had been convicted for abusing his live-in girlfriend, who recanted at trial.<sup>55</sup> In *People v. Brown*, the only state Supreme Court decision to date regarding the prosecution’s use of expert testimony in domestic violence cases, the court held that testimony concerning the behavior of victims of domestic violence is admissible even if the evidence established only one violent incident.<sup>56</sup> In so holding, it expressly disapproved of *Gomez*.<sup>57</sup>

Expert testimony is also relevant in cases where battered women

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46. *Id.* at 359.

47. *Id.* at 363.

48. *Id.* at 364.

49. 92 Cal. Rptr. 2d 890, 892 (Ct. App. 2000) (partially depublished).

50. *Id.* at 892, 896.

51. *Id.* at 893-94.

52. *Id.* at 895-96.

53. *Id.* at 896.

54. *People v. Brown*, 94 P.3d 574 (Cal. 2004). Erin Smith, a student in the Domestic Violence Practicum, and I co-authored an amicus brief in the *Brown* case. See Berkeley Law Student Writing, <http://www.law.berkeley.edu/4151.htm#brown> (last visited Nov. 24, 2009) (discussing our work on the case and providing a copy of the brief). The court repeated some of the arguments in the amicus brief favorably, and referred favorably to some of the sources cited in the brief.

55. *Brown*, 94 P.3d at 576-77.

56. *Id.* at 583-84.

57. *Id.* at 584.

participate in or commit crimes due to duress. The first case in which a California appellate court dealt with this issue was *People v. Callahan*, decided by Division 6 of the Second District in 2004.<sup>58</sup> In this case, the trial court granted defendant's motion for a new trial due to ineffective assistance of counsel after she was convicted of first-degree murder under the felony-murder rule.<sup>59</sup> One of the bases for this was the trial attorney's failure to call an expert under section 1107 to explain that the defendant was acting under duress when she participated in the underlying felony, during which she did not stop a male friend of hers from killing another woman who had seen him commit a crime.<sup>60</sup> The appellate court affirmed this order.<sup>61</sup>

In the only habeas case dealing with domestic violence expert testimony to date, Division 7 of the Second District granted relief under section 1473.5 of the California Penal Code to Hudie Joyce Walker, a battered woman who had spent many years in prison for murdering her abusive husband.<sup>62</sup> The court also cited section 1107 in its 2007 decision, as part of the basis for the relief was that at her trial the defendant had not had the benefit of expert testimony about intimate partner battering and its effects.<sup>63</sup> The court held that, had such evidence been presented, there was a reasonable probability that the jury would have found Walker guilty of the lesser offense of voluntary manslaughter.<sup>64</sup>

In the most recent case dealing with the issue of expert testimony on domestic violence, *People v. Riggs*, the California Supreme Court cited to section 1107 and upheld the admission of expert testimony on "BWS" by the prosecution.<sup>65</sup> This was a robbery/murder case similar to *Callahan*; in *Riggs*, the co-defendant/girlfriend of the male defendant did not prevent the murder and stayed with her boyfriend afterward because of the abuse.<sup>66</sup> The court found that expert witness testimony on domestic violence was relevant even when the defendant did not explicitly challenge the co-defendant's credibility on a basis that might be explained by BWS evidence.<sup>67</sup>

While the appellate courts have sometimes disagreed about the proper use of expert testimony in domestic violence cases, the California Supreme Court has clarified that such testimony is admissible by the defense when defendants are charged with killing their abusers, to show both the honesty and the

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58. 21 Cal. Rptr. 3d 226 (Ct. App. 2004).

59. *Id.* at 228, 231.

60. *Id.* at 228-31.

61. *Id.* at 239.

62. *In re Walker*, 54 Cal. Rptr. 3d 411, 413-14 (Ct. App. 2007).

63. *Id.* at 421, 426.

64. *Id.* at 416.

65. 187 P.3d 363, 396-97 (Cal. 2008). Note that even though the term BWS had been deleted from the Evidence Code in 2005, the Supreme Court persisted in using the old term. *Id.* at 376. In many of the cases I work on, I explain to the attorney who has called me that California no longer has the term BWS in its statutes, and the reasons therefore.

66. *Id.* at 396.

67. *Id.*

reasonableness of the defendant's belief that the killing was committed in self-defense.<sup>68</sup> In fact, failure to investigate the use of expert testimony as evidence when the defendant seems to have been abused by the victim has been held to be ineffective assistance of counsel.<sup>69</sup> Such testimony has also been held admissible in cases where victims of domestic violence claim they were involved in criminal activity due to duress from their abusers.<sup>70</sup> Finally, expert testimony on battering and its effects is admissible by the prosecution when victims of abuse recant, reunite, or stay with their abusers, even if there is no evidence of prior abuse in the relationship.<sup>71</sup>

### DEVELOPMENT OF STANDARDS OF PRACTICE FOR EXPERT WITNESSES ON DOMESTIC VIOLENCE

As domestic violence expert witnesses are used more widely in California courts, it has become necessary to develop standards of practice for this new profession.

Most California courts have become familiar with the use of domestic violence experts, who now routinely appear in domestic violence criminal cases for both the prosecution and defense. In prosecution cases, the issue being disputed is often why victims recant,<sup>72</sup> or do not appear at trial. In defense cases, the issue being disputed is often whether the person arrested was in fact the victim rather than the perpetrator and was acting in response to abuse by the other party.<sup>73</sup> Duress can be used as a defense in homicide cases,<sup>74</sup> as well as in cases where the defendant survivor of domestic violence was forced by the abuser to commit crimes such as robbery.<sup>75</sup>

While section 1107 refers only to criminal cases, the use of domestic violence experts is not limited to such cases.<sup>76</sup> Other cases that may involve domestic violence experts include restraining order matters,<sup>77</sup> custody and

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68. *See People v. Humphrey*, 921 P.2d 1, 9 (Cal. 1996).

69. *People v. Day*, 2 Cal. Rptr. 2d 916, 925 (Ct. App. 1992).

70. *E.g.*, *People v. Callahan*, 21 Cal. Rptr. 3d 228, 228 (Ct. App. 2004).

71. *See People v. Brown*, 94 P.3d 574, 583-84 (Cal. 2004).

72. *See, e.g.*, *People v. Gomez*, 85 Cal. Rptr. 2d 101, 108 (Ct. App. 1999); *People v. Morgan*, 68 Cal. Rptr. 2d 772, 774 (Ct. App. 1997); *see also Bowman, supra* note 9, at 248.

73. *See, e.g.*, *In re Walker*, 54 Cal. Rptr. 3d 411, 426-27 (Ct. App. 2007).

74. *See, e.g.*, *Callahan*, 21 Cal. Rptr. 3d at 231 (where defendant was convicted of first degree murder under the felony-murder rule).

75. *See, e.g.*, *People v. Romero*, 883 P.2d 388, 389 (Cal. 1994) (where defendant claimed to have participated in a robbery due to duress).

76. *See generally Bowman, supra* note 9, at 228, 230 (discussing that the intent of section 1107 sponsors was to include civil cases and not to preclude use of section 1107 in other cases). I discuss several non-criminal cases that I have worked on in this article. Note that many of the cases I have worked on, civil and criminal, are state trial cases that are unreported or settle before trial. In such cases there is often no public record to cite.

77. For example, some of the family law cases I have worked on have involved the issue of whether a court should grant a restraining order for a victim of domestic violence whose credibility was being attacked. *See generally* Domestic Violence Prevention Act, CAL. FAM.

visitation cases,<sup>78</sup> tort cases (both inter-spousal suits<sup>79</sup> and suits against third parties for failure to protect victims of domestic violence<sup>80</sup>), asylum cases,<sup>81</sup> public benefits cases,<sup>82</sup> and public housing cases.<sup>83</sup> My experience with such cases is discussed in further detail in the following section.

The first issue that arises regarding standards of practice is the issue of who qualifies as a domestic violence expert. While judges may assume that mental health professionals are qualified to testify on this subject, many mental health professionals such as social workers, therapists, and psychologists have little or no formal training on the topic in graduate school or after starting their practices.<sup>84</sup> In contrast, workers in domestic violence agencies and attorneys

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CODE §§ 6200, 6300 (West 2009).

78. Virginia's case, discussed *supra* notes 2-6 and accompanying text, is one such case that I have worked on. *See generally* CAL. FAM. CODE § 3011 (West 2009) (stating that abuse is a consideration in determining best interest of child in custody and visitation cases); CAL. FAM. CODE § 3020 (West 2009) (discussing legislative findings and declaring that "perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child"); CAL. FAM. CODE § 3044 (West 2009) (stating a presumption against domestic violence perpetrators in decisions to award sole or joint custody).
79. *See, e.g.*, Pugliese v. Superior Court, 53 Cal. Rptr. 3d 681 (Ct. App. 2007) (holding that a battered wife could recover damages for acts of domestic abuse occurring more than three years before she filed suit due to continuing tort theory); Papenthien v. Papenthien, 120 F.3d 1025 (9th Cir. 1997) (holding that a claim by an abused wife was timely under section 340.15(a) of the California Code of Civil Procedure). *See generally* CAL. CIV. CODE § 1708.6 (West 2009) (granting a right to sue civilly for domestic abuse); CAL. CIV. CODE § 52.4 (West 2009) (granting a civil action for damages arising from gender violence); CAL. CIV. PROC. CODE § 340.15 (West 2009) (stating the statute of limitations in domestic violence civil actions).
80. *See, e.g.*, Estate of Macias v. Ihde, 219 F.3d 1018 (9th Cir. 2000) (involving a wrongful death case against law enforcement officers and the county for not arresting an abuser who repeatedly violated his restraining order); *see also* Nancy K. D. Lemon, *Sonoma County, California, Sheriff's Department Settles Domestic Violence Murder Case for One Million Dollars*, 8 DOMESTIC VIOLENCE REP. 1 (2002) (describing the story of Maria Teresa Macias).
81. *See, e.g.*, Affidavit of Nancy K. D. Lemon in Rodi Alvarado Case, on file with the Center for Gender and Refugee Studies, Hastings College of Law, <http://cgrs.uchastings.edu/>; LEMON, NANCY K. D., DOMESTIC VIOLENCE LAW 1323 (3d ed., West 2009) (reprinting an excerpt from an amicus curiae brief in the asylum case of Rodi Alvarado).
82. For example, I have testified in an administrative hearing for a battered woman whose welfare benefits were being denied. *See generally* CAL. WELF. & INST. CODE § 11495 (West 2009).
83. *See generally* 42 U.S.C. § 1437(f) (West 2009) (discussing protections for domestic violence victims in low-income housing).
84. *See* Bowman, *supra* note 9, at 250 ("Case law focuses on the expert's research and professional training. However, professional programs simply do not provide course material on battered women and, until recently, very little training has been available outside the university setting regarding the issues of domestic violence and battered women."); *see also* INST. OF MED., CONFRONTING CHRONIC NEGLECT: THE EDUCATION AND TRAINING OF HEALTH PROFESSIONALS ON FAMILY VIOLENCE 43 (Felicia Conn et al. eds., 2002) (discussing how only three of the 258 bachelor of social work programs which the authors reviewed had courses on intimate partner violence and 18 had a course covering all aspects of family violence, while only five of the 74 masters of social work programs reviewed had courses on intimate partner violence and 17 had a course on all aspects of family violence); Joan Zorza, *Health Watch*, 7 DOMESTIC VIOLENCE REP. 25 (2002) ("Training [on family violence] is still very spotty in professional schools. For example, roughly 40% of mental

such as myself have dealt with hundreds of survivors and have seen the patterns and dynamics at work in these cases.<sup>85</sup> Attorneys seeking to use experts whose expertise derives from working with survivors of domestic violence sometimes encounter difficulty in establishing that these experts are qualified to testify because they are not mental health professionals. Just before section 1107 was enacted, the California Supreme Court decided a child sexual abuse case in which a police officer was qualified to testify as an expert witness based on extensive training and experience, even though he was not a certified mental health professional.<sup>86</sup> Attorneys seeking to use such experts could rely on this case to successfully argue that these witnesses are qualified, at least in criminal cases.

Another issue that arises is the permissible content of the expert's testimony, which can differ in criminal cases depending on whether the expert is testifying for the prosecution or the defense. In California, domestic violence expert witness practice has developed a different approach in prosecution cases than that used when the expert is testifying for a criminal defendant. When the expert is testifying for the prosecution, the testimony must be generic and the expert must not give an opinion as to whether the particular case is in fact a domestic violence case.<sup>87</sup> The role of the expert is to educate the jury, as most members of the public hold a number of misconceptions about domestic violence generally.<sup>88</sup> For example, the jury may believe that if a victim of domestic violence recants and testifies that the abuse did not happen or was not that bad,

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health workers have still had no training in [intimate partner violence] . . . ."); AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 13 (1996) (discussing how service providers fail to recognize family violence because they have not been trained to look for or assess signs of abuse, and how many are unwilling to report it).

85. See Bowman, *supra* note 9, at 229 ("[S]helter workers who work with battered women everyday . . . usually do not have degrees of any kind, yet these advocates are clearly the experts on battered women's lives as measured by the amount and quality of their contact with battered women.").
86. People v. McAlpin, 812 P.2d 563, 567-68, 569-70 (Cal. 1991) (holding, under section 801, that a police officer who had received specialized training and investigated over 100 cases of child abuse or molestation qualified as an expert on reasons why a parent might refrain from reporting known child abuse or molestation).
87. See Bowman, *supra* note 9, at 224 (discussing how limitations established for the prosecution in domestic violence cases require the expert to testify about domestic violence victims in general); *see also* People v. Goode, No. A115906, 2009 WL 499183, at \*14 (Cal. Ct. App. Feb. 27, 2009) (holding that my own testimony in the case was valid partly because I did not know of or discuss the facts of the case); People v. Morgan, 68 Cal. Rptr. 2d 772, 775-76 (Ct. App. 1997) (holding that section 1107 allows admission of expert witness testimony regarding BWS in general that expresses no opinion as to the defendant's guilt).
88. See Bowman, *supra* note 9, at 235 (discussing how clinical research studies "document findings that most people maintain misinformation about domestic abuse, which is detrimental to their evaluation of the battering victim's credibility"); *see also* People v. Brown, 94 P.3d 574, 583 (Cal. 2004) (discussing common misconceptions that the jury might have about the domestic violence victim, including assuming that the victim is untruthful or unreliable if they recant).

which happens in four-fifths of these cases,<sup>89</sup> then this must be the case.<sup>90</sup> The role of the expert in such cases is to educate the jury that recantation in domestic violence cases is actually very typical, and thus that the fact that the victim is recanting does not necessarily mean the crime did not occur.<sup>91</sup>

In prosecution cases involving recantation, use of expert testimony that contradicts the testimony of the victim raises the question as to whether such testimony is ultimately empowering for the victim. Since many experts' backgrounds include working in the domestic violence movement, we usually share the belief that victims should be respected and empowered. While it would be useful to have studies evaluating this issue, there is extensive anecdotal data from prosecutors that recanting victims later thanked the prosecutor for going forward with the case, including for using an expert witness to explain victim recantation to the jury.<sup>92</sup> It is quite likely that use of an expert in such a situation takes some of the heat off the survivor, making him/her less vulnerable to retaliation by the abuser.

In other cases, however, victim recantation is not an issue and the expert testimony for the prosecution does not contradict that of the victim. Expert testimony may then help to explain why the victim stayed or went back to the abuser, and why these actions do not mean that the abuse did not occur.<sup>93</sup> It may help to explain why the victim may have told different versions of what happened at different points in time.<sup>94</sup> Or the expert may be helpful in rebutting the defense's argument that if the defendant had not beaten his current girlfriend, he was unlikely to have beaten a prior one.<sup>95</sup> Interestingly, a San Diego study found that when prosecutors did not put domestic violence victims on the witness stand but instead called a domestic violence expert, juries were more likely to convict than when the victim testified for the prosecution.<sup>96</sup>

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89. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) (“Recent evidence suggests that 80 to 85 percent of battered women will recant at some point.”).

90. See *Brown*, 94 P.3d at 583 (“[W]he the victim’s trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant’s favor.”).

91. See, e.g., *id.* at 574.

92. This is based on my conversations with domestic violence prosecutors over the years.

93. See, e.g., *People v. Gadlin*, 92 Cal. Rptr. 2d 890 (Ct. App. 2000) (partially depublished).

94. For example, in one case in which I testified for the prosecution, the victim had allegedly been beaten with a baseball bat and left for dead by her boyfriend, who was on parole. As usual, I did not know any of the facts of the case. However, from the questions I was asked by the prosecutor and the defense attorney, I realized that the victim first told the police that he beat her, later called the parole officer to say this had not happened, and at trial testified that it had happened. The prosecutor’s questions of me focused on why the victim may have changed her story at different points in time. I stated that it appeared that when she called the parole officer she may well have been afraid of the batterer, but by the time the case went to trial she felt safe enough to again tell the truth because he was in custody.

95. This was the defense theory in one case in which I testified for the prosecution.

96. See generally *Casey Gwinn*, Keynote Address for the National College of District Attorneys in Dallas, Texas: Outcomes of San Diego City Attorney Domestic Violence Trials in 1996-1997 (Oct. 21, 1998) (finding that thirty-three of thirty-seven domestic violence jury trials

In contrast to the generic testimony used when the prosecution calls a domestic violence expert, the testimony is usually case-specific when an expert testifies for the defense.<sup>97</sup> In defense cases, it is standard for the expert to interview the survivor for several hours and read all relevant documents, including police reports and witness statements generated by either prosecution or defense. The expert may write a report, which is given to the prosecution if the defense plans to call the expert to testify.<sup>98</sup> If the case does not resolve before trial, the expert typically testifies about the facts of the case and the history between the defendant and victim. The testimony can also examine whether the relationship between the defendant and the abuser fits the typical dynamics of domestic violence by comparing the behaviors of the parties with those of most abusers and most victims.<sup>99</sup> The expert is not allowed to state an opinion on whether the defendant had the requisite state of mind at the time of the commission of the alleged crime; in self-defense cases, for example, the expert cannot testify about whether the battered woman was in fact in fear for her life at the time she killed her partner.<sup>100</sup> The expert may also administer and testify about the Danger Assessment, which involves a twenty-question “yes or no” survey tool developed to predict which survivors of domestic violence are at risk of being killed by their abusers and the level of risk they face.<sup>101</sup>

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involving the San Diego City Attorney’s office in 1997 resulted in convictions; of these cases, the victim testified for the defense in 19, the victim testified for the prosecution but recanted her original statement to the police in six, and the victim did not testify in eight). Notably, the rates of victim participation with prosecution increased dramatically after the opening of the Family Justice Center in San Diego, which provides many services to victims of domestic violence. *See CASEY GWINN & GAIL STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA* 109 (2006).

97. *See, e.g.*, *People v. Humphrey*, 921 P.2d 1, 19 (Cal. 1996) (allowing the expert to discuss specifics relating to the defendant’s objective perception of imminent harm, and holding that the jury was allowed to consider such testimony in deciding the reasonableness of the defendant’s belief); *Bowman, supra* note 9, at 224 (discussing how the appellate court in *People v. Aris*, 264 Cal. Rptr. 167 (Ct. App. 1989), allowed the expert witness for the defense to testify about the defendant in particular in addition to victims in general). This distinction, however, may not apply in all states. When I helped create an expert witness curriculum for Nevada, several Nevada prosecutors from the Nevada Prosecutor’s Association told me that they believe they may be allowed to use case-specific expert testimony, so we wrote the curriculum accordingly.
98. *See CAL. PENAL CODE § 1054.3(a)* (West 2009).
99. Experts in such cases often rely in part on the Power and Control Wheel developed by the Domestic Abuse Intervention Programs in Duluth, Minnesota. *See Domestic Abuse Intervention Programs, Home of the Duluth Model*, <http://www.theduluthmodel.org/wheelgallery.php> (last visited Nov. 24, 2009). They may also rely on the Cycle of Violence developed by Dr. Lenore Walker. *See People v. Brown*, 94 P.3d 574, 583 (Cal. 2004); *People v. Patterson*, No. A099124, 2003 WL 22995272, at \*4 (Cal. Ct. App. Dec. 22, 2003). *See generally LENORE E. WALKER, THE BATTERED WOMAN* 55-70 (1971). While not all domestic violence relationships fit the Cycle of Violence, a great many do. This Cycle is particularly helpful in explaining typical patterns of victims leaving abusers and later reconciling, abusers sometimes showing remorse, the escalation of physical abuse over time, and victim recantation.
100. *See People v. Erickson*, 67 Cal. Rptr. 2d 740, 747 (Ct. App. 1997). However, the defendant can testify to this herself or himself if she or he takes the stand.
101. *See generally Danger Assessment Website*, <http://www.dangerassessment.com> (last visited

The role of the domestic violence expert is still a new one, involving no formal training or certification. Thus, we experts are developing standards of practice through our own and each other's experience. Given that experts may be attorneys, therapists, social workers, psychologists, or advocates, we may be held to different standards depending on our profession. Some questions arise as a result. For example, am I required to follow the rules of professional responsibility for attorneys when I am acting in the role of an expert witness, such as the duty of confidentiality? The answer would seem to be no, given that the person being interviewed is not consulting me as an attorney and thus is not my client, and given that if I am called to testify anything I write is automatically discoverable to the other side. Are my colleagues in the mental health field then required to follow their own professional rules when they act as expert witnesses? Perhaps not, since they are not acting as treating therapists for the client. As far as I am aware, there are no statutes or appellate decisions in California giving guidance on these issues.

Furthermore, given that I am an attorney and law professor with many years of experience, there is often a need for me to educate the attorney who has asked for my help regarding domestic violence dynamics, studies, statutes, and case law. We sometimes discuss trial strategy as well.<sup>102</sup> While of course I am not co-counsel with these attorneys, this process raises important questions about our respective roles.

Defining the role of the domestic violence expert witness also arises in other ways. In defense cases, I am sometimes asked by the attorney I am working with to interview other witnesses besides the survivor of domestic violence or to otherwise assist with investigating the case. While this may be appropriate at times, it may also be very problematic. It can create evidentiary problems if the witness tells me something even slightly different than what she or he told the defense investigator. The domestic violence expert's assistance in the investigation of the case may also be confusing to the jury, muddying the definition of the role of the expert. Thus, my usual policy is not to interview witnesses other than the defendant or otherwise assist with investigating the case, but to instead interview the defendant and read relevant documents, including the investigator's reports and police reports.

In order to help develop appropriate standards of practice, as well as to connect those of us doing this work in California, we have created a listserv of domestic violence experts in this state who come out of the domestic violence movement.<sup>103</sup> This invitation-only group of about twenty people has been an

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Nov. 24, 2009); Jacquelyn C. Campbell et al., *Assessing Risk Factors For Intimate Partner Homicide*, NAT'L INST. OF JUST. J., Nov. 2003, at 14.

102. In defense cases, I will often refer the attorney to the National Clearinghouse for the Defense of Battered Women for free technical assistance. *See generally* National Clearinghouse for the Defense of Battered Women, <http://www.ncdbw.org> (last visited Nov. 24, 2009).
103. Development of the role of domestic violence expert witnesses is of course not confined to California. I served as the consultant to the Nevada Network Against Domestic Violence and

invaluable place to share ideas; ask questions; get emotional support; obtain citations for studies, statistics, and cases; and make referrals. Occasionally some of us work as a team on the same case. We have not formally agreed not to testify on opposite sides of the same case, but so far this situation has not arisen. The one time this almost happened in a criminal case, the other expert and I agreed that it would be fine to proceed, as we knew that whatever we said would actually be consistent.<sup>104</sup>

### MY OWN PRACTICE AS A DOMESTIC VIOLENCE EXPERT

At this point, I have consulted on close to one hundred cases and testified in another fifty. I have sometimes testified more than once in a case, which can occur when the matter was retried due to either a mistrial or reversal of the conviction by the appellate court. Most of my testimony has been in cases where the prosecution has called me to give generic testimony, as described above.<sup>105</sup> Typically the victim has recanted, although I am not always apprised of this ahead of time and thus may come to this realization from the direct examination.

In another prosecution case in which I testified, a three-strikes case, the defendant was charged with first degree murder of his girlfriend but convicted of second degree murder.<sup>106</sup> He stabbed her multiple times and set her body on fire, claiming he committed the crime in self-defense.<sup>107</sup> His counsel argued on

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the Nevada Advisory Council for Prosecuting Attorneys for several years starting in 2003, when we created a curriculum on the use of experts in prosecuting domestic violence cases. *See generally* Nevada Network Against Domestic Violence, <http://www.nnadv.org> (last visited Nov. 24, 2009). The National Center on Domestic and Sexual Violence in Austin, Texas conducts two-day trainings on how to establish expertise as an ethical domestic violence expert witness for attorneys, domestic violence service providers, and professionals who are interested in working as expert witnesses in court cases involving domestic violence. *See generally* National Center on Domestic and Sexual Violence, <http://www.ncdsv.org> (last visited Nov. 24, 2009). Additionally, the National Clearinghouse for the Defense of Battered Women in Philadelphia, Pennsylvania is a resource for domestic violence experts as well as attorneys defending battered women in criminal cases. *See generally* National Clearinghouse for the Defense of Battered Women, <http://www.ncdbw.org> (last visited Nov. 24, 2009). They plan to create a formal national network of domestic violence experts and to conduct trainings on how to become an expert witness in criminal defense cases. I also gave a presentation on the use of domestic violence experts at the Women's Worlds 1999 Conference in Tromso, Norway. *See* Women's Worlds 1999, <http://www.skk.uit.no/WW99/ww99.html> (last visited Nov. 24, 2009). This conference takes place every three years in various parts of the globe.

104. Since the other expert and I have worked together on cases and frequently engage in discussions about this work, we came to the conclusion that even if she testified for the defense while I testified for the prosecution in the same case, rather than being a "battle of the experts," what we said would undoubtably fit with each other's testimony.
105. *See, e.g.*, People v. Goode, No. A115906, 2009 WL 499183 (Cal. Ct. App. Feb. 27, 2009); People v. Wallace, No. A106129, 2005 WL 100844 (Cal. Ct. App. Jan. 18, 2005); People v. Patterson, No. A099124, 2003 WL 22995272 (Cal. Ct. App. Dec. 22, 2003). All of these cases are ones in which the defendant's conviction was upheld on appeal and my testimony for the prosecution was mentioned in the appellate decision. *See Goode*, 2009 WL 499183, at \*1, \*8; *Wallace*, 2005 WL 100844, at \*1, \*3; *Patterson*, 2003 WL 22995272, at \*1, \*4.
106. *Goode*, 2009 WL 499183, at \*1.
107. *Id.* at \*1, \*6.

appeal that admission of my testimony on intimate partner battering and its effects was prejudicial error.<sup>108</sup> The appellate court carefully reviewed my testimony and concluded that its admission was not erroneous, because it addressed the issue of why the decedent may have stayed with the defendant after prior abuse, why she let him enter her house the day of the murder, and why she had told a friend she was thinking of getting a restraining order but then did not follow through.<sup>109</sup> Her credibility was at issue in the case, since the defense argued in closing that the decedent had acted in a manner inconsistent with the way someone would act who had suffered the abuse she had claimed.<sup>110</sup> The court stated that my testimony “was probative of this issue because it tended to explain why someone in [decedent’s] position would act the way she did even though she had endured humiliation and abuse.”<sup>111</sup>

Most of the pre-trial criminal defense cases I have worked on have resolved before trial, including many in which my report or merely my oral opinion led to the prosecution moving to dismiss charges. In most of these, the defendant was a battered woman charged with assaulting her male abuser. In cases in which the abuser was killed, I have yet to see charges dismissed outright, although there have been cases in which the prosecution has offered a plea to manslaughter rather than murder after my testimony. In others, the prosecution continued to seek a murder conviction but the jury returned a conviction of manslaughter.<sup>112</sup>

In another case, I testified on behalf of a defendant who argued that she gave her husband a milkshake laced with insecticide in self-defense.<sup>113</sup> She was convicted of attempted murder.<sup>114</sup> The conviction was upheld, and my testimony was mentioned though was not at issue.<sup>115</sup> This woman and I sometimes correspond, and I send her a Christmas card that I hand-paint each year.

I have also worked on several cases involving duress, because batterers frequently force their partners to commit many types of crimes. At times the robbery victim is killed, creating criminal liability for the battered woman under the felony-murder rule.<sup>116</sup> In another case I worked on, a battered woman was

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108. *Id.* at \*1.

109. *Id.* at \*11-12.

110. *Id.* at \*12.

111. *Id.*

112. See, e.g., *People v. Hudnall-Johnson*, No. A119004, 2009 WL 499151, at \*9, \*17 (Cal. Ct. App. Feb. 27, 2009) (upholding defendant’s conviction of manslaughter where she was charged with first degree murder). My testimony for the defense in support of the defendant’s self-defense argument was mentioned but was not at issue. *Id.* at \*8.

113. *People v. Fuentes-Ortiz*, No. A099120, 2004 WL 639850, at \*1-3 (Cal. Ct. App. Mar. 30, 2004).

114. *Id.* at \*1.

115. *Id.* at \*1-2.

116. In one case in which I wrote a report, the victim of abuse helped her abusive boyfriend burglarize and rob the victim’s stepmother. The way the abuser tied the stepmother up resulted in the stepmother’s death. The victim has been in prison for many years for her part in this crime, even though her boyfriend pressured her into helping him commit it.

forced to sign papers to buy expensive vehicles on credit after which the batterer absconded with the vehicles, leaving the woman to pay for them or go to prison. Sometimes actors in the criminal justice system do not see the relevance of duress; in one case, the defense attorney agreed to my speaking to the prosecutor before trial, and the prosecutor stated in our conversation that she could not understand how a duress defense could arise in a domestic violence situation. I explained this as best as I could, but she continued to maintain this position throughout the trial.

I have also seen cases where battered women falsely confessed to crimes, including homicide. These false confessions appeared to be due to aggressive police interrogation, triggering old fears originating in similar behavior by the batterer, as well as a mixture of fear of retaliation if the survivor told the truth and love for the abuser.

One of these false confession cases also led to the most dramatic courtroom moment I have experienced as an expert. I was testifying for the defense in a homicide case, where the defendant confessed to stabbing her abusive ex-boyfriend when first questioned by the police. I interviewed the defendant on three different occasions for many hours, as what she told me was different from what she had told the police, and I needed to ascertain why this was the case and what in fact had happened the night of the homicide. The defense attorney did not tell the prosecutor what the actual defense theory was, merely that the defendant was a battered woman. His direct examination of me was purposely vague; as I recall, he asked me about dynamics in domestic violence cases and why battered women might tell different versions of what happened at different times. Cross-examination followed. The prosecutor assumed that the defendant was claiming she had killed the decedent in self-defense. He asked me if she told me that she was afraid for her life at the time of the homicide, and I replied, "No, she said she was not." He was so stunned by this answer that he stopped speaking or moving. You could have heard a pin drop in the crowded courtroom as everyone present realized that the prosecutor had no idea what to do next. He then asked me the same question, and I gave the same answer. He finally asked me the question one is not supposed to ask on cross-examination, namely a question one does not know the answer to: "Well, what did she tell you then?" I explained that she said it was her new boyfriend who had stabbed the ex-boyfriend and that she had merely followed along and hit the ex-boyfriend once after the stabbing, then ran away. For some reason the prosecutor called another domestic violence expert to the stand to ask her if in her opinion the defendant was afraid for her life at the time of the homicide, and she also said no—it seemed the prosecutor was still trying to rebut a self-defense theory, even though that was not what the defense had argued.

I learned from this experience that attorneys sometimes make inaccurate assumptions about the other side's theory as to the case, which can be fatal to their success. This case was charged as first degree murder but ended up with a manslaughter plea, because the jury found the defendant not guilty of first degree

murder and deadlocked on second degree. She had already served a long time awaiting trial, so went to prison for only a year or so and called me when she got out to say she was alright.

The post-conviction defense cases I have worked on have been brought under the domestic violence habeas section described above, section 1473.5 of the California Penal Code, in which the clients were battered women who had been in prison for many years. I have had the great pleasure of seeing two of those women released so far,<sup>117</sup> and several more cases are pending. Some of the advocates and attorneys in the post-conviction cases have used the media to help secure a release from prison through parole or habeas,<sup>118</sup> while others have deliberately kept a low profile.<sup>119</sup>

I have also testified in family law cases, including my first time on the witness stand as an expert in Virginia's case. I usually do not accept requests for testimony in family court, because most of the time what is really needed is someone trained as a child custody evaluator who can administer various standard mental health tests or critique an evaluation by another mental health professional. However, my testimony has been relevant in some family law cases. The issues involved in such cases have included whether the court should grant a restraining order for a victim of domestic violence whose credibility was being attacked, why a change of legal custody from joint to sole was needed where the father continued to be abusive and controlling of the mother and child post-separation, why a victim of abuse who had been wrongly arrested should be awarded joint physical and legal custody of the children, and why a mother who felt afraid of the father of her child was justified in moving two hours away by car and should not be forced to move back to the father's area so that he could have more frequent contact with their child.

In the most dangerous family law case I have worked on to date, the

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117. One of these was Flozelle Woodmore, who was released on parole after her habeas petition was denied. *See* Aliya Karmali, *Flozelle Woodmore Finally Freed*, NAT'L LAW. GUILD S.F. BAY AREA CHAPTER NEWSL., Sep. 2007, at 1; *see also* Editorial, *Flozelle-Free at Last*, S.F. CHRON., Aug. 3, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/03/ED3LRC5U71.DTL>. The other woman's case was not reported in the media so I will leave her unnamed; she was released under section 1473.5.

118. The San Francisco Chronicle covered Flozelle Woodmore's story numerous times, and on July 15, 2007 published an editorial calling for her release. *See* Editorial, *Free Flozelle*, S.F. CHRON., July 15, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/07/15/EDGU9R0PA11.DTL>. The attorneys and advocates for Deborah Peagler started a website and online petition petitioning the parole board and governor for parole, which generated over 1300 signatures in the summer of 2009. *See generally* FreeDebbie.org, <http://www.freedebbie.org> (last visited Nov. 24, 2009). These and many similar cases are often found on <http://www.freebatteredwomen.org>, where interested people can send free faxes to the governor, asking him not to reverse a finding of suitability by the parole board. One of my students and I wrote an amicus brief in the Peagler case. *See* Berkeley Law Student Writing, <http://www.law.berkeley.edu/4151.htm#peagler> (last visited Nov. 24, 2009) (discussing our work on the case and providing a copy of the brief).

119. I was told in one case that the Superior Court judge who granted habeas relief told the attorney for the battered woman to not talk to the media about this for fear of adverse public reaction in the next judicial election.

mother fled to the U.S. from another country with the children only to be followed by the father, who then petitioned under the Hague Convention on the Civil Aspects of International Child Abduction to have the children returned to the home country.<sup>120</sup> In addition to being extremely violent to the mother, the father had ties to organized crime in the home country—drug cartels that had shoot-outs with the government authorities—so his life as well as those of his wife and children were in danger if they returned. The mother’s attorney and I discussed whether the attorney should call the FBI to see if they wanted to arrest this man or turn him over to the government authorities in his home country. The mother divorced the father during the litigation, and he did not object.

Shockingly, in the custody matter the trial court ruled that the mother’s testimony regarding abuse was not credible. Nor did the court find the testimony of her family members, or the members of the father’s family who testified in favor of the mother, to be credible. The court stated that the witnesses were biased since they testified against the father. It also dismissed my testimony and that of the mother’s other expert, a clinical psychologist who had assessed the children. The court found only two minor incidents of domestic violence, stated that it believed the father’s denials regarding the abuse and his ties to organized crime, stated that the children’s post-traumatic stress disorder could be due to the mother’s abducting them, and concluded that there was no grave risk if the children were ordered to return to the home country. The mother’s writ to the appellate court was denied summarily, and the children were returned to the home country. I offered to testify by phone or even go there if necessary to testify.

The mother’s attorney tried unsuccessfully to find counsel for the mother in the home country, to represent her in a custody battle there. The mother was also unable to find anyone willing to represent her in the home country, as they were afraid of the father due to his drug cartel connections. Last week I was informed that the mother has come back to the U.S. as she is not safe in the home country. The professionals involved in this case here are looking into whether the mother could file for asylum, and we hope the children can be part of the same petition.

The torts cases in which I have been consulted and deposed have all settled before trial. Very few people file domestic violence tort cases in the first place, and almost no domestic violence tort cases are appealed.<sup>121</sup> Family law attorneys, who see many victims of domestic violence, seldom think to advise their clients of the option of filing a tort claim.<sup>122</sup> So in some cases I raise the

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120. See generally Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21).

121. I wrote about this phenomenon a few years ago. Garrett C. Dailey & Nancy K. D. Lemon, *Family Matters*, CAL. LAW., Dec. 1999, at 64.

122. See generally *id.* at 65-66; Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 16-18 (2005) (arguing that this failure could

issue, suggesting to the attorney that they discuss this option with the client.<sup>123</sup> In one of the tort suits I worked on, the battered woman sued the batterer in response to his having sued her first. When she told her friends that the reason she was wearing a Thompson collar around her neck was because he had beaten her, he sued her for defamation and slander. She counter-sued him for the assaults, convincing him to drop his suit in exchange for dropping hers.

Sometimes tort suits involve law enforcement's response or lack thereof to domestic violence. In one case in which I was deposed, the batterer repeatedly stalked his wife, then killed her and himself.<sup>124</sup> Their children sued the county and a local law enforcement officer, alleging a violation of their mother's equal protection rights on account of inferior police protection due to her status as a woman, a Latina, and a domestic violence victim.<sup>125</sup> This federal court case resulted in a published decision by the Ninth Circuit Court of Appeals, reversing the district court order for summary judgment and holding that the plaintiffs had stated a sufficient cause of action under the equal protection clause.<sup>126</sup> It settled during trial just before I took the stand. Conversely, sometimes the batterer has sued for false arrest when law enforcement does arrest an alleged batterer but the charges are later dismissed. I worked on one such case with a city attorney's office, preparing testimony regarding the appropriateness of the arrest. That case was resolved through summary judgment.

I also work on asylum cases involving battered women fleeing to the U.S. The first and most famous asylum case I have been involved with is that of Rodi Alvarado, a battered woman from Guatemala who fled to the U.S. to avoid severe physical abuse from her husband.<sup>127</sup> On October 28, 2009, the Department of Homeland Security filed a document stating that it found Ms. Alvarado "eligible for asylum and [meriting] a grant of asylum as a matter of discretion," effectively paving the way for her relief.<sup>128</sup> She has been in the U.S. for many years awaiting a ruling on her asylum petition.<sup>129</sup> In 2003, the Center for Gender and Refugee Studies at the University of California, Hastings College of the Law, who represented Ms. Alvarado, asked me to write an affidavit in which I described why I believed that domestic violence is largely caused by gender roles. They filed this in the Alvarado case and have made it available to other attorneys working on similar cases all over the country.<sup>130</sup> As a result, I

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constitute malpractice).

123. See Dailey, *supra* note 121, at 65-66.

124. Estate of Macias v. Ihde, 219 F.3d 1018, 1020-26 (9th Cir., 2000).

125. *Id.* at 1019.

126. *Id.* at 1019-20.

127. LEMON, *supra* note 81, at 1323 (reprinting an excerpt from the brief of amici curiae in support of the request for certification and reversal of the decision of the Board of Immigration Appeals in the case of Rodi Alvarado).

128. See Julia Preston, *U.S. May be Open to Asylum for Spouse Abuse*, N.Y. TIMES, Oct. 29, 2009, available at <http://www.nytimes.com/2009/10/30/us/30asylum.html>.

129. *Id.*

130. Affidavit of Nancy K. D. Lemon in Rodi Alvarado Case, on file with the Center for Gender

have been asked to write numerous supplemental declarations linking the generic Alvarado declaration to the facts of other women's cases. I have prepared to testify in several of these, but so far either the court has granted the request without my testimony or has continued the hearing for many months. Many of these cases are still pending. I have not actually testified in an asylum case so far. These cases are usually full of extreme violence, and may involve batterers who have been part of the police or military in their home countries, or have connections with those groups. The declarations of the clients in these cases, whom I never get to meet, are extreme with regard to the level of violence and the total lack of response or the ineffective response by law enforcement and courts in the women's home countries.

Recently, I testified in an administrative hearing for a battered woman whose welfare benefits were being denied. The federal Personal Responsibility and Work Opportunity Act limits welfare benefits to a lifetime total of 60 months for adults.<sup>131</sup> However, the Family Violence Option, which California has adopted, creates an exception for victims of domestic violence who are unable to work due to the effects of the abuse, and the 60-month clock stops "ticking" while they are unable to work.<sup>132</sup> After my testimony, the administrative law judge ruled in favor of the applicant. I have also testified in a case where a convicted batterer was fired from working at a day-care center and sued to try to keep his job.

Because of my twenty-six years of work on state legislation involving domestic violence, I have sometimes been asked to testify about the legislative history or intent of various code sections. In these cases, it is not necessary to interview the client, as the focus of my testimony is not on the facts of the case. If necessary, the survivor's attorney can weave the facts into the questions he or she asks me during my direct testimony, as short hypothetical questions.

Sometimes it can be difficult to decide whether to take on a case. The most difficult case I have worked on so far in terms of my decision to accept the case and in terms of repercussions from my colleagues was one in which I testified on behalf of a male defendant charged with raping, stalking, and burglarizing his female partner. At first I was extremely skeptical that he could in fact be the victim of domestic violence in the relationship, as he claimed to be. In my experience, as well as in the domestic violence literature, abusive men frequently see themselves or portray themselves as the victim. When my assistant and I interviewed him separately and each concluded that he was the victim, however, I decided to testify to this effect. We discovered that the defendant's partner had threatened his life and left injuries on him that he tried to hide from his co-workers.

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and Refugee Studies, Hastings College of Law, <http://cgrs.uchastings.edu/>.

131. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 408(a)(7)(A), 42 U.S.C. § 608(a)(7)(A) (2008).

132. CAL. WELF. & INST. CODE § 11495 (West 2009).

His partner admitted on cross-examination to forcing him to enter a small closet on many occasions and remain there, unable to stand, for hours at a time until she allowed him to come out. She also exhibited other abusive behaviors. The defendant acted very much like the female victims I had worked with. I knew that by testifying I might face negative consequences from my own colleagues in the domestic violence movement, who would find it hard to believe that the defendant was the victim and not the perpetrator. I decided, however, that I could not in good conscience refuse to testify in this case. As a result, although he had faced three strikes from the charges in this one case, the male defendant was convicted only of stalking. The conviction was based on his having left several threatening text messages on his partner's phone, although they were left in the midst of dozens of placating messages. Two of my long-time colleagues in the domestic violence community came to the trial and were obviously upset with my testimony, as they were convinced that the woman was the victim. Their impression was based in part on her having gone to a local domestic violence agency for help in obtaining a restraining order against the defendant prior to the trial. These colleagues are still angry with me for having testified in the trial.

Sometimes doing this work can be uplifting. In one case, the battered female defendant who was out of jail pending trial on her own recognizance, told my assistant and me that for the first time in a very long time she was happy, and was no longer interested in taking illegal drugs. She had been in and out of foster care since she was a toddler, having been raised by abusive, drug-addicted parents. She had been in a series of abusive relationships and had children at a young age. Her children were temporarily staying with their father, whom she left. Her new boyfriend took her on an interstate road trip, beating her when she said she wanted to go home. He committed crimes during the trip, which resulted in her being charged as his co-defendant. When I interviewed her, she was not allowed to leave the jurisdiction to be with her children because of the pending trial, nor could she work or go to school. She was, however, happy. She had ended her relationship with her boyfriend, who was in custody awaiting trial. Although she was homeless, she had acquired a big tent, a bed, a table, and a beautiful place to camp. She was able to eat and shower at the local homeless shelter. I realized that this was virtually the first time in her life when she was able to take a break. For the time being, she was free from abuse, neglect, parental responsibilities, and the need to work or go to school. She was able to focus on herself, her needs, her dreams, and her wishes. It was a pleasure being with her as she emerged like a butterfly before our very eyes, figuring out who she really was and what she wanted for her life. Ironically, by taking her away from her normal life and engaging her in his crimes, her boyfriend had potentially opened her up to a new lease on life.<sup>133</sup>

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133. She pled guilty to a minor misdemeanor and is probably back in her home state, near her children, at this point.

## INTERVIEWS AS TRANSFORMATIVE

At times, of course, even with my best efforts, the side I am on loses the case. This can be a very frustrating experience, especially when I believe that the judgment was in error. The first homicide case in which I testified resulted in a second-degree murder conviction for the battered woman defendant.<sup>134</sup> Based on my interactions with the defendant, during which she disclosed a long history of abuse by the husband, his threats to kill her with his bare hands, and her belief that he would have killed her if she had not shot him, I had been sure the jury would find her not guilty based on self-defense. Given our current criminal justice system, it is unlikely that she will ever be released on parole. She is not eligible for domestic violence habeas relief because two domestic violence experts testified at her trial.<sup>135</sup> She has exhausted all her avenues of appeal, both state and federal.<sup>136</sup> I have stayed in touch with this woman for years, and have often wondered if there was anything I could have done differently or better to help prevent this injustice. This was the first case in which I felt the legal system was truly unjust, though there have been many more since then. It is painful sometimes to be a participant in a legal system that, in my experience, is often far from perfect. I often spend time in my co-counseling sessions<sup>137</sup> reflecting on what it is like for me to do this work, and expressing the frustration and grief it brings up.

Over the years, I have come to realize that no matter what happens in the courtroom or in plea negotiations, and whether or not I even see a given person again, the interviews with the clients can be transformative in themselves.<sup>138</sup> Asking someone to relay their life story, for as many hours as is necessary while giving them undivided and supportive attention, can be a life-changing experience for them. Because I usually invite a therapist colleague who I am training to participate in the interviews, the client gets attention from two experienced listeners. The clients almost always cry at least once during the

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134. *People v. Angelo*, No. A086569, slip op. at 1 (Cal. Ct. App. July 31, 2000) (on file with the author). On appeal, she argued, *inter alia*, that the trial court erroneously restricted her BWS experts from testifying as to her state of mind at the time of the killing. *Id.* Her conviction was affirmed. *Id.* The California Supreme Court summarily denied her state habeas claim on July 30, 2003.

135. This relief is possible only when domestic violence expert testimony was not received in evidence during trial court proceedings. CAL. PENAL CODE § 1473.5(a) (West 2009).

136. Her petition for a writ of habeas corpus was denied by the Ninth Circuit in 2007. *Angelo v. Henry*, 238 Fed.Appx. 234, 2007 WL 1731118 (9th. Cir. 2007). The Court of Appeals stated that her federal constitutional right to present a complete defense “was not infringed by the state trial court’s refusal to admit expert testimony as to Angelo’s actual, if unreasonable, belief in the need to use self-defense and her corresponding lack of malice.” *Id.* at 234-35.

137. Co-counseling, or re-evaluation counseling, is an international peer counseling network with which I have been involved since 1975. *See generally* Re-Evaluation Counseling, <http://www.rc.org>.

138. Ann Freedman discusses the transformative power of listening well: “Adults experiencing domestic violence, either as perpetrators or as victims, can benefit significantly from receiving compassionate witnessing from professionals with whom they come in contact.” Freedman, *supra* note 1, at 628.

interview, which I see as a sign that they feel safe and heard. My over thirty years of experience with co-counseling has made me quite comfortable with the expression of emotions. I have found that although my role is not to provide therapy, my paying supportive attention to the survivors enables them to feel safe enough to tell me things that they have never told anyone else (for example, how bad the abuse really was). These revelations are often key to their legal cases.

An incident that illustrates how transformative interviews can be occurred a few months ago. In 1999, I interviewed a young woman who was awaiting trial for the homicide of her stepmother.<sup>139</sup> She had not intended the victim to die. Her abusive boyfriend, who was her co-defendant, had pressured her to participate in the crime leading to the death. I wrote a lengthy report in the case, but the case resolved before trial when she pled guilty. She has been in prison now for ten years. I send her Christmas cards. She wrote to me last year, asking for a copy of my report, as it could be helpful to her when she becomes eligible for parole. She referred in her letter to the "therapy sessions" with me, and said, "I've been evaluated by different psychologists but I feel that you spent enough time with me to have an accurate perception of who I am as a person and a patient/client." She asked if I would be willing to go see her. I am unable to go to visit or offer more sessions, as I was hired just to meet with her before trial, the prison is three hours by car from where I live, and the prison authorities may not allow me to see her since I am no longer officially connected to her case. I continue, however, to be in mail communication with her.

Similarly, a year or so ago, one of my expert witness colleagues, a therapist who conducts interviews with me, the client's attorney, and I were visiting a battered woman who had been in prison for over twenty years for killing a man who had taken advantage of her sexually. My colleague was the primary interviewer this time, and I was present as a legal consultant for the firm representing the woman. The woman related the many years of abuse she had endured from virtually every man in her life, including her stepfather, father, numerous boyfriends, and the decedent. Her memory, however, was sometimes spotty and she did not see the connections between all of this abuse, or its effect on her. After several hours of listening and asking questions, the interviewer described what she was hearing: that the cumulative effect of so much abuse over so many years led to the homicide, where the client experienced flashbacks of the men who had beaten and raped her as she stabbed the decedent. The client burst into deep sobs, and continued crying for a long time. She said this was the first time she had felt sane while thinking about the killing. Suddenly it all made sense to her. She was extremely grateful to all of us present that day for truly understanding what had happened to her, and helping her regain a sense of herself.

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139. This is the same case I discuss *supra* in note 116.

It is not only the clients who are transformed by these interactions; everyone involved in abuse cases is affected by the stories heard, whether we are judges, attorneys, social workers, expert witnesses, court employees, or in other roles. In response, some people become numb to this pain, while others are able to develop a sense of compassion for the victims or even the perpetrators.<sup>140</sup> It is important to develop this sense of compassion, and to practice compassion for ourselves and for our colleagues.<sup>141</sup> My goal is to connect with each survivor I work with, and to communicate to them that I know she or he did the best they could, often under horrific circumstances, which is an integral part of eliciting the information needed for their defense.

Doing this work has been challenging for me, both personally and professionally. It has also been extremely rewarding. I am constantly learning about new areas of law. Fears that I used to have of “criminals” and “murderers” are gone. As I stated in the Preface and Acknowledgments to the 2009 edition of my textbook, *Domestic Violence Law*:

I am . . . grateful to all the survivors of domestic violence whose stories I have had the honor of listening to as an expert witness. Many of these interviews last five or six hours, and people often share parts of their lives they have never spoken of to anyone else. I usually leave these interactions with a deeper sense of compassion, and admiration for the strength and resourcefulness of survivors. The more I do this work, the more clear it is to me that all of us are more alike than we are different, and that I am simply fortunate not to be struggling with abuse in my own life. It is not that I am somehow better, smarter, or more deserving than my clients, friends, colleagues, and family members who have been abused, but that I have been luckier.<sup>142</sup>

I look forward to a future where this work will no longer be necessary.

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140. See Freedman, *supra* note 1. As Freedman states:

In choosing whether to make these changes [to become more compassionate], it is helpful to remember that we have only two choices. The first is to become conscious of the impact of secondary traumatic stress on us, our reactions to our own experiences of victimhood and aggression, and the shared humanity that these commonalities reflect. The second is to deny that we are being affected, and be governed by our own unacknowledged reactivity.

*Id.* at 620.

141. See *id.* at 612-13 (“Our openheartedness allows us to recognize and understand the suffering of others, because it is similar to our own . . . . As a result, compassionate witnesses both experience and create a sense of commonality and shared purpose in addressing sources of trauma.”).

142. LEMON, *supra* note 81, at iv-v.