



BEST PRACTICES for LITIGATING CUSTODY AND
ABUSE CASES
in order to
PRESERVE APPEALS
to
STATE COURTS and the
SUPREME COURT

Guidelines Compiled from DV LEAP'S 2007
Symposium on Custody and Abuse Cases in the Supreme
Court

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Best Practices for Bringing a Custody & Abuse Case to the
 United States Supreme Court:
 From DV LEAP’s Symposium on
 Custody and Abuse Cases in the Supreme Court

TABLE OF CONTENTS

PRACTITIONER’S CHECKLIST.....i

INTRODUCTION..... 5

DAY 1: DEFINING THE DUE PROCESS PROBLEMS IN FAMILY COURT 6

 I. ONE MOTHER’S ORDEAL - WENDY TITELMAN 6

 II. SCOPE OF THE PROBLEM AND STRUCTURAL CONTRIBUTORS 6

Speakers: Irene Weiser, Richard Ducote, Joyanna Silberg 6

 A. *Examples of procedural due process violations:..... 7*

 III. SOCIOHISTORICAL PERSPECTIVE AND LEGAL STRATEGIES FOR CHANGE 10

Speaker: Professor Joan Meier..... 10

DAY 2: BRINGING A CUSTODY AND ABUSE CASE TO THE 12

UNITED STATES SUPREME COURT..... 12

 I. SUPREME COURT 101 - GETTING A CASE ACCEPTED FOR REVIEW 12

Panelists: John Duffy, Barbara McDowell, Seth Galanter, Patricia Millet, Paul Smith,
 and Gregory Jacob..... 12

 A. *Properly Preparing and Framing the Legal Issue..... 13*

 B. *Showing Conflict among Legal Authorities..... 13*

 C. *The Particular Challenge of Getting Supreme Court Review in Custody and Abuse*
 Cases: Inadequate Records 14

 D. *Creative Approaches to Increasing the Chances of a Grant of Cert 15*

 E. *Unusual “Splits of Authority” 15*

 F. *Enlisting Allies to Support a Grant of Cert 16*

 G. *Media Involvement 16*

 H. *Other strategies..... 17*

 II. RISK/BENEFIT ASSESSMENT..... 17

 III. WORKING GROUP DISCUSSIONS..... 17

 A. *Working Group 1: Best Practices for State Court Litigants..... 18*

 B. *Working Group 2: Creative Ways to Get Cert Granted 21*

 C. *Working Group 3: Best Practices for Cert Petitions..... 22*

Best Practices for Taking Appeals in Custody and Abuse Cases:
Practitioner's Checklist

I. FOR STATE COURT APPEALS:

A. Build the record

1. Identify and raise on the record federal constitutional issues, such as due process. (But don't forget state constitutional or legal claims.)
2. Make oral and written objections in a timely fashion.
3. Request that the judge provide clear reasoning for adverse rulings.
4. Do not engage in "off-the-record" commentary; put exchanges "on the record."
5. Use a court reporter (or at least a court recording) at all times.
6. Be especially mindful of the due process issues of ex parte communications and rights to notice and a hearing. Challenge violations/troubling procedures clearly.

B. Educate the court

1. Cite to caselaw and other legal authorities frequently.
2. Use expert witnesses to refute unsound theories or other faulty data, such as parental alienation claims.
3. File "Brandeis" briefs at the trial level to enhance the court's knowledge of your issues. Seek amici to assist in this.

C. Consider filing post-trial motions to correct the outcome or improve the record for appeal.

1. Post-trial motions (for clarification, reconsideration, to alter/amend judgment) can capture legal objections or arguments that might not have been preserved at trial
2. Remember filing deadlines for post-trial motions! In many cases, the deadline is only 10 days after the entry of judgment.
3. Consider filing motions for a stay in trial court and appellate court to prevent the adverse decision from going into effect.

D. Remember rules for appellate jurisdiction

1. File notices of appeal on time (often 30 days but not always).
2. Research final judgment rule and mootness in your jurisdiction.
3. Stay motions may be require in both trial and appellate court.

- E. Litigate the federal issue throughout the entire state court system in order to assure a full record is made on the federal issues which are the only ones the Supreme Court addresses.**

II. FOR THE SUPREME COURT

Only 1% of all cert petitions are granted.

A. When Drafting the Cert Petition:

1. The cert petition must articulate to the Supreme Court why it needs to take *(1) this issue, (2) in this case, (3) now.*
2. The Supreme Court seeks to maintain uniformity over federal law across the country.
3. KEY: Present a compelling conflict of authorities or unsettled question of federal law that the Supreme Court needs to decide. *Show conflict in legal authority!* Such conflicting legal authorities are traditionally state or federal courts, but could also extend to settled principles embodied in treatises or other respected authorities.
4. Educate the court about the national importance of the question presented and the fundamental interests at stake in custody and abuse cases.
5. Persuasively argue *that this particular case* is a good vehicle for deciding the legal issue because the record is strong, the issue is clearly presented, and (hopefully) the state courts had ample opportunity to address it and did so.

B. Increase National Attention to Your Case

1. Reach out to advocacy and research organizations, such as DV LEAP, the National Council on Juvenile and Family Court Judges, etc., for amicus briefs supporting cert.
2. Partner with law schools and bar associations to get the word out in the legal community.
3. Think strategically about reaching out to important governmental bodies for support, such as the U.S. Solicitor General's Office, the Department of Justice, and state Attorneys General.
4. Think about enlisting highly reputable, nationally known organizations to file amicus briefs in support of cert. These organizations should represent a broad base of support. Reach out to diverse organizations with a shared interest in due process – poverty, human rights, etc.

III. THROUGHOUT THE PROCESS, AND LONGTERM:

A. Remember the client.

1. Listen to the client, while also educating her about the pros and cons of the options.
2. Consider jointly the safety implications for the client of filing an appeal.
3. Respect the client's decision to move forward or not.

B. Consider developing a media narrative and implement cautiously. (Remember that the media can be a double-edged sword).

C. Consider the impact of your case on the larger domestic violence community and the risks of making bad law if you lose.

D. Be patient! Remember that all social justice movements take time, creativity and collaboration.

Best Practices for Bringing a Custody & Abuse Case to the United States Supreme Court: From DV LEAP's Symposium on Custody and Abuse Cases in the Supreme Court

Introduction

Throughout the country, battered mothers¹ and their children have been subjected to due process violations that should be unthinkable. Many battered mothers have had their children taken away by courts with little or no notice or opportunity to be heard and have been punished for trying to protect their children by raising child abuse concerns.

Recently the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) and George Washington University Law School convened a two-day symposium entitled “Domestic Violence Law & Policy: Custody & Abuse Litigation and the Supreme Court” to address the growing recognition that the procedural due process rights of mothers who have been abused (or whose children have been abused) are routinely ignored in family courts across the country, contributing to the troubling trend toward granting custody to abusive fathers. Because the problems in state family courts are so widespread and state appellate courts fail to rectify them, domestic violence and child advocates and litigators have concluded that bringing a case to the U.S. Supreme Court (hereinafter “the Supreme Court”) is an important step toward changing the lawless culture of family courts.

Because the Supreme Court is the final arbiter of federal constitutional due process rights, the authority of a Supreme Court ruling is needed to send a clear message to family courts that federal procedural due process rights *can and do* apply to custody litigation. One decision from the Supreme Court about due process rights for parents battling custody would be binding on all courts in the country with respect to that issue. Moreover, placing these procedural issues before the United States Supreme Court would send a powerful message that constitutional protections apply in family courts as much as other courts.

The purposes of the Symposium were to (1) bring domestic violence and custody attorneys and advocates together with Supreme Court litigators to educate each other, (2) educate participants about the challenges in appealing custody and abuse cases to both state courts and the Supreme Court, and (3) brainstorm ways to overcome these obstacles. Included in this effort were expert domestic violence and family law attorneys as well as litigators experienced in state-level appellate and Supreme Court litigation. United States Senator Amy Klobuchar (D-MN) and D.C. Councilmember Mary Cheh also shared their thoughts.

¹ While DV LEAP recognizes that men may also be victims of domestic violence or protective parents, the majority of these cases involve male perpetrators and female victims or protective parents, and therefore protective parents will be referred to as “she” throughout this document.

The symposium was organized into two days of panel discussions, followed by three working groups. The first day's panels focused on identifying the problems victims of domestic violence face in custody and abuse cases and discussing the nationwide scope of these problems, while the second day's panels focused practitioners on the difficult task of overcoming legal obstacles in state appellate courts and in accessing the Supreme Court. The three working groups provided a forum for participants to engage in-depth discussion and exploration about best practices for state court litigants, traditional and creative avenues for increasing chances of review before the Supreme Court, and best practices for petitions for certiorari (cert) (review) to the Supreme Court.

Day 1: Defining the Due Process Problems in Family Court

I. One Mother's Ordeal - Wendy Titelman

The first day opened with Ms. Wendy Titelman speaking powerfully about her own personal nightmare in the Georgia family courts as she struggled to regain custody of her children from their sexually abusive father. Ms. Titelman recounted how she pled with the courts to protect her children after they reported to her that their father had been abusing them. Instead, the Georgia court awarded full custody of her children to their father and ultimately allowed her no visitation, claiming that Ms. Titelman was "alienating" the children. Throughout the case, the court held hearings without giving her notice or a full and fair hearing. Ms. Titelman has not seen or heard from her children since September 2000. Ms. Titelman ultimately filed a petition for certiorari in the Supreme Court, but her petition was denied. Ms. Titelman's story illustrates how an injustice in family court, no matter how tragic and wrong, is not automatically entitled to Supreme Court review, and highlights the need for careful strategizing and coordination to find a case which has a decent chance of being accepted by the Supreme Court.

II. Scope of the Problem and Structural Contributors **Speakers: Irene Weiser, Richard Ducote, Joyanna Silberg**

Irene Weiser – Stop Family Violence²

Ms. Weiser discussed the broader scope of these problems and structural contributors to both substantive and procedural due process problems in family court. Specifically, she noted that many family courts prioritize maintaining father-child contact over protecting children's safety, and family courts do not react well when women bring allegations of sexual abuse and domestic violence because the system is built around a paradigm of parental cooperation. Women who try to protect themselves and their children by limiting the abusive parent's access

² For more information about Stop Family Violence, please visit their website www.stopfamilyviolence.org

are labeled as uncooperative or vengeful. Evaluators and judges often describe these women as attempting to “alienate” their children from their father by fabricating allegations of abuse and brainwashing their children into believing these allegations, often termed “parental alienation syndrome (PAS)” or “parental alienation.” (While PAS is now largely discredited as having no scientific basis³, the same thinking has been accepted by many family courts and profoundly shapes their views of mothers’ claims of abuse.)⁴ This privileging of paternal relationships over children’s and mothers’ safety is further reflected in state “friendly parent” and “joint custody” statutes.

According to Ms. Weiser, so-called “therapeutic jurisprudence” and extra-legal decision makers such as custody evaluators are key structural contributors to these problems. Substantively, poorly trained custody evaluators and other professionals often lack the necessary expertise in domestic violence and child abuse and may make recommendations to judges about custody without adequately addressing these concerns. Procedurally, judges may rely on ex parte (i.e. one side only) meetings with these professionals or on reports that victims of domestic violence are not permitted to review, possess, or cross-examine to determine custody. This means that parents are often unaware of, or unable to defend themselves against false or distorted allegations in these reports.⁵

Richard Ducote

The fact that a majority of family court litigants are unrepresented exacerbates due process violations in family court. According to the next panelist, litigator Richard Ducote, Esq., legal arguments in family court are often minimal, and family judges’ own perceptions often supplant statutes and case law in their decision-making. (Research conducted by DV LEAP has revealed that nationwide, there were less than one hundred published appellate opinions touching on due process in family courts.⁶)

A. Examples of procedural due process violations:

Mr. Ducote discussed common procedural due process violations which occur in family court, e.g.:

- protective mothers receive inadequate notice of hearings and are denied full and fair opportunities to be heard,

³ See “Scientific and Professional Rejections of PAS,”

<http://www.dvleap.org/LinkClick.aspx?fileticket=kQAngavEi6E%3d&tabid=173>

⁴ For more information on the discrediting of parental alienation syndrome and parental alienation, see Joan Meier, “Getting Real about Abuse and Alienation: A Critique of Drozd and Olesen’s Decision Tree,” *Journal of Child Custody* 7:219-252 (2010), available at

<http://www.dvleap.org/LinkClick.aspx?fileticket=N7xShOEuk2w%3d&tabid=181>; Joan Meier, “A Historical Perspective on Parental Alienation Syndrome and Parental Alienation,” *Journal of Child Custody* 6:232-257 (2009), available at <http://www.dvleap.org/LinkClick.aspx?fileticket=dUauj0V-0Fs%3d&tabid=181>

⁵ Schroth, Sara, “Due Process and Custody Investigation Reports; A Parent’s Right to Read and Challenge.”

<http://www.dvleap.org/LinkClick.aspx?fileticket=NUfOfVyaOHA%3d&tabid=173>

⁶ Curry, Christopher, “Memoranda About Due Process in Custody Cases”

<http://www.dvleap.org/LinkClick.aspx?fileticket=FTpVskTXXMM%3d&tabid=181>

- ex parte contacts between judges and the abuser’s attorney, and
- lack of oversight and standards for guardians ad litem (GALs).⁷

NB: According to DV LEAP’s research, there is disagreement across states as to what constitutes adequate notice in family courts, as well as to what constitutes a full and fair hearing of the issues.⁸ DV LEAP found that judges often apply unarticulated standards to decide whether there has been adequate notice or hearing. Appeals of these cases have thus far met with uneven success because of the lack of clear standards for due process and there inherently fact-specific nature of these cases.⁹

Mr. Ducote pointed out that judges also frequently improperly rely on ex parte communications with parties and GALs. GALs (like forensic evaluators) have the aura of reliability and courts often defer to them, even allowing in hearsay reports. However, GALs are often not brought to the witness stand, not placed under oath, and not allowed to be cross-examined. Thus, GALs frequently have an outsized influence on custody and abuse cases with very little recourse for attorneys or litigants to challenge their findings.

Most importantly, Mr. Ducote urged attorneys to be brave in standing up to judges, difficult though it may be. He stressed that family law practitioners should keep the U.S. Constitution close at hand and bear in mind the importance of what is at stake in custody and abuse cases.

Dr. Joyanna Silberg

Dr. Silberg of the Leadership Council on Child Abuse and Interpersonal Violence talked briefly about her experiences as a clinical psychologist and child advocate in determining the validity of abuse allegations. Dr. Silberg, an expert in treating child sexual abuse, also receives approximately 3-4 emails a week from desperate parents whose children are being abused due to family courts refusals to restrict paternal access.

She discussed how mothers who enter into the Kafka-esque world of family court believing that courts will uphold society’s values of protecting children and adult victims are often shocked and disappointed. As she noted, many custody evaluators are under a misapprehension that they can tell whether or not a batterer has committed abuse based on psychological tests that were never meant to assess this question. Dr. Silberg pointed out that in order to determine whether a criminal defendant who was alleged to have committed a bank robbery, we, as a society, would never send him to an evaluator to determine if he has a propensity to commit bank robberies. Rather, we would look at the evidence of the crime.

⁷ See Richard Ducote, *Guardian Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy. J. Pub. Int. L. 106, 142 (2002).

⁸ See n.5, supra.

⁹ Id.

Her presentation also focused on ways to assess the validity of abuse allegations. She stressed that a core myth that professionals cannot tell if children have been victims of abuse has been promulgated by custody evaluators who do not have training or expertise in this area. Child abuse professionals DO have this expertise. Nonetheless, she discussed first the factors making discerning the validity of child sexual abuse allegations appear difficult:

- Young age of the child is considered;
- Physical evidence is rarely available in these types of cases;
- Lack of training and resources;
- Weight given to batterers' denials both by courts and social services departments;
- The erroneous belief that allegations that occur in the midst of custody disputes should not be taken seriously. Dr. Silberg pointed out the many reasons that valid disclosures of abuse would happen during a recent separation or divorce: children who have less contact with an abusive parent during separation feel less threatened or inhibited about revealing secrets; the abusive parent may not have been abusive before because the other parent was hyper-vigilant, etc;
- Reliance on an inappropriately high (criminal) evidentiary standard to prove abuse in (civil) family courts. As Dr. Silberg pointed out, when a prosecutor is unable to overcome the criminal reasonable doubt standard, many family court players take their cue from that finding and also find that the abuse did not occur. But social services and family courts should not be relying on the criminal standard of proof, which is intended to protect the accused from jail, but should be looking at ensuring children's safety – jail is not at issue here;

Dr. Silberg then discussed techniques and procedures that can help assess child abuse allegations, while emphasizing that this is not a checklist:

- First, she stated that it is important to give the child an opportunity for free narrative so that the psychologist can assess the child's language ability and determine if they know about time and number. Psychologists need to ask non-leading questions such as: "[w]hat do you mean? What happened next? Can you explain that to me?"
- Children's ability to know what is true and isn't can be assessed through various games and tests.
- She also stressed that psychologists need to teach children that it's OK to say "I don't know."
- Psychologists also need to know the children's names for body parts.
- In response to the common assertion that young children are unable to provide credible evidence, Dr. Silberg pointed out that there is a test called the Trauma Symptom Inventory for Young Children, which requires the psychologist to list the symptoms of the child. The list can then be validated against symptoms of severely abused children.

Dr. Silberg also discussed behaviors that psychologists should be aware of in assessing child abuse allegations. She indicated it is difficult for parental coaching to lead to intimate details of abuse or acting out or PTSD symptoms. She gave the example of one 4 year old child who screamed every time a toilet was flushed, an act the judge found especially credible. She also mentioned that it is fairly common for children to disclose more details about abuse over time. Children often disclose generally and then add specifics over time. Depending on whether the child has more or less contact with the perpetrator, a psychologist may also see changes in symptoms over time. Symptoms she has commonly observed in child abuse victims include dissociation (extreme avoidance of talking about perpetrator); use of imaginary friends and stuffed animals to talk about abuse and feelings; sleep problems, and projection of pain onto imaginary friends.

Assessing the Abuser: In Dr. Silberg's experience, even though there are no tests to assess whether or not an individual is an abuser, she has observed certain behavioral traits among them. She stated that batterers often use anger as weapon to silence critics; blame, attack, and/or diagnose the character of the mother; use lawyers to mask their position; and refuse to meet with the child abuse therapist. In contrast, falsely accused parents often want to find out what happened and who abused the child, seek out child abuse experts, do *not* hide behind lawyers, continue to focus on the child's best interest, are open to therapy sessions with the child, and do not minimize the child's need for the mother even if they don't like the mother.

III. Sociohistorical Perspective and Legal Strategies for Change **Speaker: Professor Joan Meier**

The final panelist of the first day was Joan Meier, Executive Director of DV LEAP and Professor of Clinical Law, George Washington University School of Law, who spoke about the importance of locating our advocacy in custody and abuse cases in a larger social justice movement. Professor Meier provided a historical and psychosocial perspective on why family courts award custody to child abusers. She quoted Judith Herman, author of Trauma and Recovery in explaining the deeply held reluctance of judges to believe allegations of child abuse:

[t]he ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word *unspeakable*. (1) Denial, repression, and dissociation operate on a social as well as an individual level.... To hold traumatic reality in consciousness requires a social context that affirms and protects the victim and that joins victim and witness in a common alliance...

Professor Meier also discussed how this denial and repression takes hold through the idea that abuse of women and children by husbands and fathers is rare and aberrational.

Despite the fact that the *majority* of contested custody litigation appears to have a history of family violence, the reality that abuse is more common than not in contested custody cases has not penetrated the judicial system. In fact, many judges and evaluators still believe that the common dv and child abuse allegations they hear in custody litigation are the fabricated product of vengeful and mudslinging wives.

These complicated realities have significant implications for the anti-domestic violence movement and custody and abuse cases. As Professor Meier noted, at least some of the judges and evaluators who are doing terrible things are *doing what they think is right* and they are doing their best to cope with hearing horrific information on a daily basis. It is important not to underestimate this challenge, because, along with taking on outrageous practices and outcomes directly, activists and attorneys who seek to make change need to deepen our understanding of how these decisions are made so they can find ways to connect with the decision-makers at all levels – including both the policy level and the individual trial court level.

As Judith Herman eloquently articulates, without a broader social justice movement that raises awareness about the existence of domestic violence and child abuse, it is hard for individuals, including judges and evaluators, to believe the horrific stories of domestic violence and child abuse that appear before them. Therefore, in addition to excellent lawyering in family court, making the record and bringing appeals and ultimately winning a custody and abuse case at the Supreme Court level, lawyers and advocates need to work together to create social awareness and a call for change. One avenue for this would be developing strong state and federal legislation on the issue.¹⁰

¹⁰ Legislative changes can have a powerful impact on custody and abuse cases. For example, one valuable and under-utilized federal initiative is a Sense of the Congress Resolution, such as the Joint Congressional Resolution 172 on the issue of custody and abuse in 1990, which powerfully enhanced advocates' efforts at the local level to get new statutes adopted requiring consideration of dv in custody, and in many cases, a presumption against custody to batterers. A similar Resolution today regarding, e.g., (i) PAS, (ii) the right to due process in custody litigation (e.g. no custody switches without notice and hearing), etc, could be a powerful support in advocacy before both local legislatures and courts. Other bolder federal initiatives may also be possible, including mandated standards to be applied in state courts, or targeted and conditioned federal grant funding to courts and legal providers. Equally important is a national deliberate media and public education campaign. As of 2011, DV LEAP has begun developing a consortium of groups to develop a nationwide educational and reform movement. This initiative is called "Take A Leap for Kids ("TALK")." For more information see "TALK Initiative" at www.dvleap.org under "Programs".

At the local level, there is also much that can be done legislatively, as well as through litigating appeals. Local legislatures can outlaw reliance on PAS in family courts and adopt the recognition that all responsible scientific and professional bodies have already adopted: that PAS is not valid science. They can hold oversight hearings on how custody courts are handling cases concerning abuse, and can review the quality of forensic evaluation in these cases. They

Day 2: Bringing a Custody and Abuse Case to the United States Supreme Court

Having identified the many procedural due process problems in the family courts and set forth some strategies for change on the first day of the Symposium, the second day focused on the challenges associated with bringing such a case to the United States Supreme Court, and potential strategies for overcoming these problems. Expert Supreme Court litigators donated their time to help educate the participants and audience about this somewhat rarefied area of legal practice.

I. SUPREME COURT 101 - GETTING A CASE ACCEPTED FOR REVIEW **Panelists: John Duffy, Barbara McDowell, Seth Galanter, Patricia Millet, Paul Smith, and Gregory Jacob**

The first discussion focused on the process by which the Supreme Court decides to accept cases for review. Litigants who want their cases to be heard by the Supreme Court must file a *petition for certiorari* (“*cert petition*”), which is a formal written request articulating why the Supreme Court should review that particular case. This request must be filed within 90 days after the highest state court’s final decision. The Supreme Court’s power to choose the cases it will review is almost completely discretionary (with rare exceptions) and the Court is extremely selective, choosing to grant *less than 1% of the approximately 9,000 cert petitions it receives a year*. The “cert pool” (i.e. review) process requires law clerks to review up to 20-30 cert petitions a day. One law clerk reads each case and writes a memo on the case. For cert to be granted, at least one Justice has to vote to put it on the Court’s “discuss” list and four Justices have to vote to take the case.

Because the cert petition and any amicus briefs are the only documents the Supreme Court will review in determining whether or not to accept a case for review, this brief is extremely important. The panelists agreed that a successful cert petition must meet three requirements: It must show the Supreme Court why they need to take 1) this issue 2) in this case 3) now. More specifically, the cert petition should (1) present a compelling federal legal conflict or question of unsettled *federal or constitutional* law among the states, (2), educate the court about the national importance of the issue, and (3) argue that this particular case is a good vehicle for addressing the issue. It cannot be over-stated that *the Supreme Court will only review a federal or constitutional issue. Issues of state law will not be reviewed by the U.S. Supreme Court.*

can refine and strengthen their custody statutes, to more clearly outlaw custody to abusers and to ensure protection of children at risk.

A. Properly Preparing and Framing the Legal Issue

The cert petitions that stand out¹¹ are the ones that immediately highlight the “question presented” (or issue for review) to the Court in a clear and compelling way. This question presented must describe the federal legal issue that was decided incorrectly. If the case does not present a question of federal or constitutional law, it is not cert-worthy, no matter how egregious the injustice. In custody and abuse litigation, the federal issue will most likely involve federal due process or equal protection. One question - rather than multiple “questions presented” - is best because a single question provides the most clarity and affords the most simplicity for the Court. Attorneys must take care to define the issues at the right level of specificity—somewhere between too broad (e.g. “right to notice”) and too specific to the particular case’s facts.¹²

A properly articulated federal legal issue is just the beginning. The issue must have been fully raised at appropriate points in the lower court process, and the lower courts must have addressed the issue. The issue must have been pursued through the state courts of appeal (including the state supreme court) in an effort to right the legal wrong. Furthermore, even if the court below addressed a federal issue, there cannot be an “independent and adequate state law ground” for the decision, or the Supreme Court will reject the case as determined by state, not federal law.¹³

Next, petitioners must clearly state the constitutional rights at stake and the impact of the violation on future litigants (as well as themselves) should the lower court ruling stand. The panelists took care to emphasize that a case injustice alone is not enough to have certiorari granted; the cert petition must demonstrate how the Supreme Court’s intervention will also help other cases in the future. For the Supreme Court to take a case, there must be either a conflict regarding legal authority between states on an important constitutional issue, or of federal authorities on a matter of federal law, or an important federal question that needs resolution.

B. Showing Conflict among Legal Authorities

Attorneys must also demonstrate that the conflict between legal authorities necessitates Supreme Court intervention. This can be shown through a conflict between different state courts about a federal issue, conflicts between decisions in state courts and a prior Supreme Court decision, or some other reason that makes the issue an unsettled federal question affecting a significant portion of the country. Moreover, the conflict has to be present in the *legal reasoning, holding, or rule* espoused by the lower courts. It is not sufficient if two state

¹¹ For a sample cert petition, please see sample “Example of a Good Petition for Certiorari.” <http://www.dvleap.org/LinkClick.aspx?fileticket=vTBBdzMIIO0%3d&tabid=943>

¹² For sample “questions presented”, see sample cert petition at the above link.

¹³ For instance, where a state appellate court rejects an appeal based on technical or procedural violations in the appellant’s brief that constitutes an “independent and adequate state law ground” and renders the case untenable for cert.

supreme courts have the same legal rule, but different case outcomes. Petitioners are encouraged to think about splits in authority creatively, and to try to show conflicting patterns across the country. However, they must also be mindful that if other factors mean that the Petitioner would still lose the case regardless of the decision on the federal constitutional issue, then the case will not be accepted. Finally, a petition should avoid the suggestion that it is seeking merely to correct a state court's error.

C. The Particular Challenge of Getting Supreme Court Review in Custody and Abuse Cases: Inadequate Records

There are *particular* challenges facing Supreme Court review of custody and abuse cases. Custody cases are rarely taken by the U.S. Supreme Court. In fact, federal courts have a doctrinal presumption against becoming involved in the area of family law because family law is seen as intrinsically a state law issue. But in addition, even if the Supreme Court were more receptive to these cases, appeals often fail because of inadequate records in the lower court proceedings.

The importance of the state court record cannot be stressed enough. Without adequate records, appellate courts cannot effectively review what happened at trial, determine whether due process rights were violated, or understand what the trial judge's ruling was based on. *Attorneys must treat every trial court case as if it is going to be appealed; it is too late to prepare the case for appeal after the case is already lost.*

Accordingly, attorneys must make sure to build clear and complete records at trial court proceedings. In the normal course of litigation, family court judges often do not articulate the reasoning for their rulings, and lawyers and pro se litigants generally do not push them to do so from fear of alienating the judge. Trial courts may also lack court reporters and transcripts are frequently unavailable. To develop the best possible record for appeal, (1) litigators must reject the family court conventional wisdom of cooperation and "going along to get along" and be mindful that their clients' rights are at stake; (2) they must act quickly to preserve issues, by making either oral or written objections, (3) they must be willing to stand up to judges to ensure clarity on rulings, (4) they must be prepared to cite to caselaw and other legal authorities in their arguments, which is rare in family litigation, and (6) they must be prepared to call expert witnesses or submit briefs to refute faulty social science theories, such as parental alienation.

Furthermore, practitioners should strive to raise federal constitutional issues where appropriate; ideally they should cite case law and other legal authorities to make these issues clear. For example, rulings that effectively terminate parental rights e.g. by cutting off all contact, implicate the parent's constitutional right to parent her child. However, litigators should not ignore state law and state constitutional claims, as some states' constitutions may provide greater protection than the federal constitution.

D. Creative Approaches to Increasing the Chances of a Grant of Cert

The final panel of the day focused on creative strategies for increasing the likelihood of the Supreme Court accepting a custody and abuse case for review. Practitioners must convince the Court that clear rulings are now needed to establish national standards for due process in the family court system.

Showing conflict among lower court authority is key to the success of a cert petition. However, given the particular challenges in custody and abuse cases -- such as the fact that cases are usually decided in fact-specific ways and courts rarely *explicitly* reject a constitutional claim-- it is important to also *think creatively* about how to articulate a split in authority or federal issue. These cases do not implicate a traditional “conflict” among state courts, because any due process ruling in one court is likely to be fact specific and hard to compare to another case. Moreover, state courts rarely *discuss* due process: more often they *ignore* the due process rights of litigants altogether. Further, custody and abuse cases often present very different fact patterns, which can complicate the argument that the nation’s state courts confront common legal issues the Supreme Court should address. For these reasons, advocates in this field need to find different ways to present a “conflict of legal authorities” in these cases.

E. Unusual “Splits of Authority”

On this point, GW Law School Professor John Duffy discussed instances when cert has been granted despite the lack of a traditional split between the lower courts. First, he described a patent case in which there was no traditional lower court split. But two governmental studies had said negative things about a widely used doctrine in lower courts and dozens of leading academics had critiqued this doctrine. A leading government official made a public statement in favor of cert while the cert petition was pending and submitted a supplemental brief. Cert was granted.

Professor Duffy also discussed an administrative law case in which a leading commentator in administrative law had written that courts routinely ignore the particular issue in that case all the time, and argued that this decades-long common practice was wrong. Moreover, the statute focused on in the cert petition was not even mentioned in the lower court’s opinion. Despite all of this, the Supreme Court granted cert, presumably out of respect for the academic’s critique. These two examples suggest that we need to think creatively and work with respected academics and other leaders to get the federal aspects of custody/abuse injustices into the public arena and academic literature.

Because the Supreme Court often grants cert in order to clarify or expand on areas of the law that it has recently addressed, it is also important to think creatively about linking our concerns with existing areas of interest for the Court. Such issue areas might include parents’ rights in third-party custody cases, defendants’ rights in criminal prosecution of domestic violence and child abuse, overt racial, gender, or religious discrimination, and possibly First

Amendment issues, such as rulings requiring a parent to cease expressing her belief that her child is being abused.

There was also a brief discussion between the panelists and the audience about other cert petition strategies. One member of the audience raised the possibility of citing other cert petitions. The panelists' reaction was that while this lets the Court know that the problem is ongoing and that the case before it is not unique, there is a risk that the Court may then summarily deny the petition based on previous denials. Another suggestion was that litigants should look at Justice Blackmun's cert pool memos, which are now available to the public, to see if any other successful strategies appear.¹⁴

F. Enlisting Allies to Support a Grant of Cert

The panelists also discussed the importance of enlisting allies in our attempts to get cert granted. Specifically, Professor Duffy presented an example of a leading government official making a public statement that they hoped cert got granted, and submitting a supplemental brief in a case, ultimately leading to the grant of cert. The panelists noted that we should think about working with various governmental agencies, including the U.S. Solicitor General's Office (litigants can meet with the SG's office when a cert petition is pending) and various Department of Justice offices. According to the panelists, having the federal government articulate that there is an important federal interest at issue can be extremely powerful.¹⁵ State Attorneys General may also be important. Important non-governmental allies may include the American Bar Association and other Bar Associations.

Strong allies should also be encouraged to submit amicus briefs as a means of demonstrating wide support for the Petitioner's positions. Briefs should be limited to a small number of highly reputable, nationally known organizations and should represent a broad base of support. Litigants should consider obtaining the support of "other side" organizations when possible, such as defense organizations when appropriate, as well as governmental agencies, such as state Attorney Generals' offices. Potential amici should make sure they follow the Supreme Court rules re: filing deadlines and notice to the parties.

G. Media Involvement

The panelists also discussed the potential benefits of media involvement. In addition to amicus briefs, media involvement in the form of exclusive interviews with major newspapers (i.e. the New York Times or the Washington Post) can help raise the profile of a case and may encourage the Supreme Court to look more closely at a particular case. However, if petitioners

¹⁴ DV LEAP would welcome volunteer assistance by lawyer with sufficient Supreme Court experience to productively analyze these materials.

¹⁵ As of the time of this writing, both the White House Advisor on Violence Against Women and the Office on Violence Against Women in the Department of Justice are focusing on custody and abuse, in response to persistent outreach by the protective parent community and its advocates.

decide to contact the media regarding the case, they must do so cautiously as the strategy can backfire by creating polarization around an issue.

Another avenue for potentially garnering the attention of Supreme Court clerks can be well-timed posts by significant authorities to widely watched Supreme Court blogs, such as www.SCOTUSblog.com, www.confrontationright.blogspot.com, or www.orinkerr.com or www.volokh.com (the last three all law professors' blogs).

H. Other strategies

The panelists also urged petitioners to be cognizant of other cases pending in the Supreme Court, and of previous cases that can serve as templates. The Supreme Court will be convinced more readily to grant certiorari if it sees cases repeatedly dealing with the same issue. Therefore, petitioners should strive to provide a narrative consistent with current and previous cases that would highlight the recurring nature of the issue, or the ways this case builds on or extends a prior Supreme Court ruling. It was also suggested that we keep an eye open for other cases in which we may want to file amicus briefs that will help educate the court about the interests of domestic violence victims.

Finally, the panelists also noted that petitioners must remember that the process of establishing clear rules of law in the family courts through appellate litigation is long and arduous. Supreme Court justices are unlikely to be familiar with family court issues and practitioners will need to present many cases to the Court to educate them. Thus, failure, i.e., denials of cert, can pave the way for success. Though many petitions may not be granted at first, the Justices may come to understand the importance of the issues over time.

II. Risk/Benefit Assessment

The panelists also spent some time discussing the importance of bringing the right case before the Supreme Court, i.e., a case which we are likely to win. There is obviously no guarantee that we will win and the power and authority of the Supreme Court cuts both ways. Therefore it becomes extremely important to be strategic about which case to bring. Implicit in this is the need to have a sympathetic client to provide a sound backdrop for these issues. Furthermore, even if the right case presents itself, it is still possible for the petitioner to lose. Thus, practitioners need to think through the implications of this and be sure that the community will not be worse off for having brought the case, should the ultimate ruling be unfavorable.

III. Working Group Discussions

After the panelists' presentations, the Symposium attendees broke up into three different working groups: (i) Best Practices for State Court Litigants, (ii) Creative Ways to Get

Cert., and (iii) Best Practices for Cert Petitions. The following summarizes the groups' recommendations, including, where appropriate, additional information from DV LEAP and symposium presenters.

A. Working Group 1: Best Practices for State Court Litigants

This working group focused primarily on developing the record in trial court for a successful appeal to the higher state courts and eventually the United States Supreme Court. As a preliminary matter, contrary to common misconceptions, several settled legal doctrines prohibit bringing state court family litigation to federal court, so it is unlikely we can get our cases to the Supreme Court by filing in *federal court*. Instead, since custody and abuse cases originate in state family courts, a strong and complete record must be made at trial. Then a litigant can take the case to the state appellate court and the state supreme court, if there is one. Finally, from the state's highest court, the case can be appealed to the United States Supreme Court.

Participants noted that appeals are most successful when attorneys squarely present the legal issues to the judges, judges rule on these issues, and the rulings are contrary to basic rules of law. Thus, attorneys must make their points directly on the record and let judges know that they are doing so in anticipation of appeal. Because higher courts will only review issues that have been raised below, developing the record on important legal issues at the trial stage is essential.

Making the Record – This is a reduction of materials DV LEAP has produced for live trainings and written materials for advocates.

Making the record means, at a minimum, the following:

1. *Identifying and objecting to state law violations and state or federal due process or other constitutional violations as they come up at the trial court level.* This is crucial because if an attorney does not raise and litigate the federal constitutional issues at the trial level, the state appellate court will not decide the issue. If the state courts do not decide the issue, the Supreme Court will not review it.
2. *Ensuring that conversations between the judge and lawyers or other important personnel do not occur "off the record."* Attorneys should ensure that a court reporter be present at all times during the proceedings. If an attorney cannot prevent a conversation from being held off the record, then the attorney should summarize the conversation for the record when the parties are back on the record.
3. *Ensuring that the roles of GALs and other extra-legal players in custody and abuse cases are adequately explained and clarified at the beginning of the case, and that any testimony or reports from these extra-legal players are subject to evidentiary and due*

process protections. Attorneys must make every effort to obtain GAL reports, to question adverse findings of GALs, and they must object to the due process violation when judges deny cross-examination or admission of relevant evidence or when courts admit damaging hearsay through the GAL (or evaluator) reports. Appellate courts occasionally reverse decisions where judges have violated a party's due process rights through ex parte communications or procedural violations with GALs. Issues like this, if adequately preserved, are good candidates for Supreme Court review, *if the case can be made that this type of law violation is widespread and requires rectification by the Supreme Court. An Amicus brief may be essential to make that case.*

4. *Being prepared to address the wrongful inclusion or exclusion of evidence.*
 - a. Where the evidence is wrongfully excluded, be prepared to make an offer of proof either through a witness, an oral summary of the excluded testimony or evidence or through a written summary. (Federal Rule of Evidence 103 and its state counterparts describe the means of making an offer of proof.)
 - b. Where damaging evidence is wrongfully admitted, make a specific objection and/or a motion to strike.
5. *Getting clarity in rulings and demanding that judges act fairly.*
 - a. Attorneys must be ready to challenge judges when they do not articulate the basis for their decisions. When a judge's analysis does not comport with the law, attorneys should present the judge with the controlling law and press for a written opinion.
 - b. Additionally, attorneys should move for a judge's recusal when they see good cause for doing so. These practices reduce judges' tendencies to act idiosyncratically and with bias.
 - c. However, attorneys must be strategic in confronting judges, and should assess risks to the client before engaging in such confrontations.
6. *Consider filing post-trial motions prior to an appeal.*
 - a. After carefully reviewing the order or judgment, consider whether a post-trial motion might further develop the record for appeal, or even resolve problems without an appeal. These motions may provide a more efficient route for changing the order than an appeal, and trial judges do sometimes change their minds with more thorough briefing. More importantly, *even if the judge does not change the order itself, filing post-trial motions can be a way of ensuring that issues are preserved for the appellate record, especially if the issues were not raised clearly or explicitly at trial.* The risk—which should always be weighed—is that the court could strengthen its negative ruling by further

developing its negative factual findings and legal analysis, thereby weakening the appellate case.

- b. If a litigant wants to appeal, it's likely that the litigant will also want to "stay" the order being appealed. Some courts require this motion to be filed with the trial court first, and may require a bond. If the motion for a stay is denied in the trial court, or is impractical, then the party can move for a stay in the appellate court.

7. *Keep in mind rules re: appellate jurisdiction*

- a. *Notice of Appeal:* It is extremely important to file the notice of appeal on time (usually within 30 days of the entry of the ruling sought to be appealed). This time period may be "mandatory and jurisdictional" and it is usually very difficult to overcome a late-filed notice of appeal.
- b. *Final Judgment Rule:* Most courts of appeal are limited by statute to review of "final orders or judgments" of the trial court. This usually means that the order must dispose of all issues in the case and be final as to all parties and causes of action. Thus, appealing temporary protection orders or orders relating to discovery may be constrained by the final judgment rule. It is important that attorneys research their state court rules and caselaw re: the final judgment rule and any exceptions to this rule. Attorneys should also research rules and caselaw on "interlocutory appeals," which are rare appeals that are permitted to occur before the trial court's final ruling on the entire case. Interlocutory appeals may involve legal points necessary to the determination of the case, or could address collateral orders that are separate from the merits of the action.
- c. *Mootness:* An issue can become "moot" if it is no longer affecting a litigant. If an issue is at risk of becoming moot as the appeal is pending, consider moving to expedite the appeal.

Additional concerns include counseling the client and considering the impact of an appeal on the domestic violence field.

Counseling the Client: Participants emphasized that the above best practices for state court litigants must be approached in the context of victims' best interests and wishes. At times, determining when issues should be decided entirely by the client or more by the attorney can be difficult. Therefore, practitioners must maintain high levels of communication with their clients and actively listen to them to ensure that the attorneys do not overstep their moral and ethical bounds.

Attorneys should be prepared to discuss strategic considerations with their clients. First and foremost, attorneys should discuss safety concerns with their clients: Will an appeal increase an abuser's aggression or rage towards the client? Will an appeal help the abuser find her? Will the appeal result in emotional trauma to the client given the length of time and uncertainty involved in an appeal as well as a continuing connection to the abuser?

Attorneys should also be prepared to do safety planning with their clients and to strategize with them about being prepared for the batterer's reactions to notice from the court, court appearances, or motions or briefs he may see. Attorneys should also be prepared to discuss the (far smaller) time commitment and client involvement at the appellate level, compared to the trial level. (Clients are often relieved when informed they will not have to testify, engage in discovery, etc. for an appellate case).

Impact on the DV Field: Attorneys should also consider the impact of appealing a case on the domestic violence community as a whole. Attorneys should carefully assess the risk of making bad law as well as the client's interest in law reform, and assess whether the client's interest will remain aligned with the attorney's and DV community's position on the issue. Consider consulting with the wider domestic violence community in making tough decisions.

Attorneys should also consider seeking *amicus* briefs. (Keep in mind that each state has its own rules on *amicus* briefs). These briefs may help put your issue in a broader policy context and also encourage the court to take your case seriously. *Amicus* briefs may also be able to say things party briefs cannot and can provide supportive research.

B. Working Group 2: Creative Ways to Get Cert Granted

Following up on Professor Duffy's presentation, the second working group focused on how to encourage the Supreme Court to grant cert if no split in legal authority can be found. Participants suggested that it would be necessary to create allies on many different levels and with a broad range of organizations to foster enduring support and to convince the Court to grant cert.

To increase chances of any given cert petition being successful, the petitioner needs powerful, high-profile allies to speak out—ideally, but not necessarily, through an *amicus* brief—to encourage the Court to grant cert. Ideal allies are those with a national constituency and with highly respected authority, e.g. the Department of Justice (Solicitor General's Office) or national associations or leading experts. Poverty law groups, women's law programs, pro bono lawyers, and human rights organizations also may share an interest in identifying, correcting, and preventing denial of women's due process rights and may be receptive to collaborating. It is important to show the issue in as broad a light as possible.

As noted above, public awareness is also important to educate both the public and the higher courts. Focusing on particular issues will help the public crystallize and understand the

problem. In media and public communications, focused narratives, such as the corrupted processes of the family courts that defeat litigants' ability to seek redress, might be effective. Particularly sympathetic or emblematic clients or stories can provide a showcase for these narratives. Attorneys should also consider consulting with public relations firms to develop the most effective messages and strategies. Law schools can also provide an important platform to raise awareness of these issues in the legal community. In partnering with schools and law professors, practitioners can "get the word out" through speeches, law review articles, and participation in additional research efforts.

C. Working Group 3: Best Practices for Cert Petitions

The third working group focused on drafting cert petitions. Supreme Court lawyer and panelist Paul Smith laid out an overview of a model cert petition. He stated that the very first page of a petition is the most important because it catches the eye of the Supreme Court law clerks assigned to review the cert petitions. The first page should contain only the question presented in a succinct fashion, and there should only be one question presented. The next part of the cert petition should be the factual and procedural scenario in which the petitioner should tell the Court how the federal issue was previously raised in state court. The last step is to articulate why the case is a good vehicle to resolve the federal issue and why the Court should grant cert in this case, as opposed to waiting for another. Petitioners should stress the fundamental and important interests involved in the case.

There was also a discussion about some of the types of due process issues that would likely come up for review. Such issues may include judges' refusal to hold hearings or hear evidence, hearings being held without notice to litigants, and GALs or other court professionals presenting evidence without being available for cross-examination.

Possible Procedural Due Process Violations

- Ex Parte hearings
- Court hearings without adequate notice to parties
- Denial of a right to a hearing or to present (significant) evidence
- Admission of a GAL report without the opportunity to cross-examine the GAL
- Admission of a custody evaluation without the opportunity to cross-examine the custody evaluator
- Denial of transcript for appeal because you cannot afford to pay for it
- Denial of access to the court as a sanction for nonpayment of fees/costs when the litigant could not pay them.
- *Possibly*, advocacy by a child's representative on behalf of child which contradicts the child's express wishes
- *Possibly*, the effective or functional termination of parental rights (e.g., by indefinite suspension of all contact) without meeting the clear and convincing standard required in *Stanley v. Illinois*, 405 U.S. 645 (1972) or in violation of due process rights

Possible Substantive Due Process Violations

- Functional deprivation of parental rights (i.e., complete cut-off of access to children) without a finding of unfitness as required under *Stanley v. Illinois* 405 U.S. 645 (1972)

Possible First Amendment Violations

- Conditioning parental access on a parent's abandonment of her beliefs (e.g., about abuse) or expression of her beliefs

Conclusion

The process of bringing (and winning) a case at the United States Supreme Court is a long one that requires collaboration, tenacity, creativity and patience, as all social justice movements do. We need a multi-pronged strategy to get a case up to the Supreme Court and to win. For attorneys, this means helping to train one another to litigate at the trial court level with appellate courts and the Supreme Court in mind. It also means drafting compelling and legally persuasive cert petitions, educating and enlisting allies in trying to get cert granted, and keeping perspective with respect to the cert process. Several of our Supreme Court experts agreed that failure can pave the way for success: If the Supreme Court sees the issue of battered mothers' procedural due process rights presented in a coordinated and strategic manner over and over, even when cert is denied, they will begin recognizing the important and national scope of this problem and eventually cert will be granted. Then the *real* work can begin...

APPENDIX I

Additional DV LEAP Resources:

- PAS Caselaw Survey: <http://www.dvleap.org/Resources/PASCaseSurvey.aspx>
- “Due Process In State Courts”:
<http://www.dvleap.org/LinkClick.aspx?fileticket=FTpVskTXXMM%3d&tabid=181>
- “Due Process and Custody Investigation Reports: A Parent’s Right to Read and Challenge”:
<http://www.dvleap.org/LinkClick.aspx?fileticket=NUfOfVyaOHA%3d&tabid=173>
- Research on “Use of Sanctions to Bar Mothers’ Access to Courts”:
<http://www.dvleap.org/LinkClick.aspx?fileticket=f4Bcgn-1OX8%3d&tabid=181>
- Sample Cert Petition (from *Walliser v. May*):
<http://www.dvleap.org/LinkClick.aspx?fileticket=vTBBdzMIO0%3d&tabid=943>

● APPENDIX II

List of Symposium Presenters

Day 1 – Domestic Violence in Family Courts (in order of presentation)

Wendy Titelman

Irene Weiser, Stop Family Violence

Richard Ducote, Esq.

Joyanna Silberg, PhD

Professor Joan Meier, Director, DV LEAP at GWLS

GWLS Professor and DC Councilmember Mary Cheh

Senator Amy Klobuchar, (D-MN)

Day 2 – Supreme Court 101 (in order of presentation)

Seth Galanter, Esq.

Paul Smith, Esq.

Patricia Millett, Esq.

Barbara McDowell, Esq.

Professor John Duffy, GWLS

Professor Phyllis Goldfarb, GWLS

Professor Catherine Ross, GWLS

Gregory Jacob, Esq.