

Intimate Partner Sexual Abuse:

DISCUSSION GUIDE FOR FACULTY

SHANNON PHELAN V. LEWIS TATE

Q1.

What does Ms. Phelan's demeanor suggest to you?

[Choose all that apply]

- **She is angry and vindictive**
 - A victim of domestic violence may be so numbed, defensive, or otherwise adversely affected by the abuse she has endured that, in contrast to a batterer, her demeanor can be off-putting and difficult to comprehend. The abuser, in contrast, will often present as sincere, respectful, open and energized. It is important to remember that the ability, or intent, to manipulate those around him is one of the salient characteristics of an abuser.
- **She is emotionally affected by being in close proximity to Tate**
 - The difficulty of appearing in court in the presence of one's abuser and making allegations against him to a judge cannot be overstated. The physiological and emotional effects of the anxiety many women feel under such circumstances can have a serious impact on her demeanor, as can the effort to keep overwhelming emotion at bay.
- **She is not open to hearing points of view other than her own**
 - An abuser will often characterize the victim as unwilling to see things from his point of view. In fact, the victim may indeed be very resistant to adopting the abuser's point of view. This may, however, be the result of her knowledge that extending sympathy to or dropping her defenses with the abuser can lead to manipulation and further entanglement.
- **She is overwhelmed by hearing her Mr. Tate defend his conduct in court**
 - The victim may experience emotional "shutting down" from being in close proximity to the abuser and hearing him present a distorted version of events.
- **She cannot defend against his assertions that she willingly had him "in her bed."**
 - Unwillingness or emotional inability to respond vigorously should not be presumed to indicate that the victim does not stand by her allegations. Every effort should be made to create a safe environment in the courtroom for the victim to make her case. An abuser may be able to threaten the victim through subtle clues, including body language and facial expression that may not appear immediately significant to the court and other observers.

This is especially so when intimate partner sexual abuse is involved, as may be the case here, based on Mr. Tate's claim about sexual encounters with Ms. Phelan after he "surprised" her in her car and by waiting in her garage, which he claims was consensual. Note Ms. Phelan's language: "Your Honor, he's twisting everything around. I never wanted to be with him. He attacked me. Look at him! He's twice my size. What could I do? The only help I need is help getting him away from me." "Be with him" is likely a way to say "have sex with him." The use of such euphemisms or circumlocutions when describing intimate partner sexual abuse is commonplace.

Q2.

At this point you may:

[Choose all that apply]

- **Admonish petitioner that the order of protection was issued by the Court, and she is without authority to let respondent near her so long as that order is in effect**
 - When a party has obtained an order of protection, the onus is on the restrained party to abide by its terms. Admonishing the party who procured the restraining order, particularly in front of the abuser, sends a signal that the order can be violated with impunity to the offender, and that the order can be manipulated.
 - Moreover, contrary to the abuser's assertions, the petitioner here stated that the respondent's contact was unwelcome and that he attacked her. Even when a petitioner fails to object to or seeks out contact with an abuser, however, admonishment of the petitioner is not constructive. Ambivalence is common when a person commences seeking assistance with relief from domestic violence. A court may not yet have the entire picture of the dynamics that are leading to recurrence of contact. A petitioner may be aware of increasing risk as a result of her efforts to separate, or there may be unresolved issues such as child support and visitation that lead to renewed contact.
 - It can be very difficult, especially at the early stages of a case, for a victim to describe her circumstances fully to the court while in the presence of the abuser. Her life may still be intertwined with his in innumerable ways (children, property, common relatives, etc.) and she cannot feel confident that the abuser may not try to retaliate against her for whatever she says in court.
- **Ask petitioner whether she would agree to counseling with respondent**
 - Joint counseling is inappropriate, and perhaps dangerous, in domestic violence situations because a victim may be not able to respond candidly in front of the abuser, and the abuser may use the situation retaliate against her for any disclosures, increasing her risk.

- Likewise, mediation and other alternative dispute resolution methods that require parties to negotiate resolutions are inappropriate when domestic violence is in the picture. An abuser, by definition, asserts power and control over the victim, which can introduce subtle or overt coercion into any effort at negotiation, in addition to increasing risk.
- **Advise petitioner again that the Women’s Legal Aid office is available to assist her**
 - Pro se litigants pose special challenges for courts. When, as in this case, an abuser is stalking a victim, risk of sexual assault is increased. Assistance from an experienced advocate, whether an attorney or victim services counselor, can provide a litigant with access to safety planning and community resources. Every state has a coalition against domestic violence. Even if a litigant chooses to proceed pro se, the court can assure that she has access to non-legal help that will help her through the process.
- **Ask Child Protective Services to visit petitioner’s home to assess the security of her child**
 - While the safety of a child in a home plagued by violence is always of concern, in this instance the petitioner-mother has already asked the court for assistance in keeping respondent away from their home. The most effective judicial response is to support the efforts of the mother to secure safety for herself and her children and hold the abuser accountable for the instability he has brought to the home.
 - It is crucial for the court to be aware of the policies that the child welfare agency in its jurisdiction has adopted toward domestic violence. In some jurisdictions, such agencies adopted the unfortunate practice of removing children from their mother if she had been the victim of domestic violence. That is not the preferred approach, and the trauma to the children of such a removal can far exceed the trauma experienced in their home. Moreover, a victim may be aware of such policies and avoid seeking help out of fear that her children will be taken from her.
 - Removal of the abuser from the home, whether through restraining order or arrest, or assistance to the mother and children in seeking secure shelter, are far more humane, effective, and lawful responses.
 - One of the alleged assaults occurred during return of the child after court-ordered visitation. The court should consider suspending all unsupervised visitation until the allegations underlying the restraining order application can be resolved. The court may want to appoint a law guardian to assess the child’s interaction with her parents and whether she has been affected by her father’s violent conduct.

Q3.

What do you infer from Ms. Phelan’s initial failure to make any claim based on the “surprise” sexual encounters with Mr. Tate, and his boasts about them?

[Choose all that apply]

- **She is embarrassed about violating the order of protection**
 - The abuser characterized the encounters as voluntary, not the victim. The court should not adopt that view unquestioningly. Here, upon closer questioning, the victim stated that these were assaults, not consensual encounters.
 - Even when a victim has “permitted” the subject of an order of protection to contact her, she may feel confused about whether she has somehow nullified the force of the order. The court ought to make clear that it remains the respondent’s full responsibility to abide by the terms of the order of protection
- **She is ambivalent about separation**
 - Even if true, such ambivalence is not uncommon, and there could be many reasons behind it. Separation is the most dangerous time for domestic violence victims, and she may sense that taking court action may put her or her family at greater risk of harm.
 - It is also emotionally trying for women to take decisive legal action against a person whom they have loved and who may not have always been unpleasant. Many women cling to the hope that forgiveness, love and a positive outlook will bring about change in their abuser.
 - Pragmatic concerns, such as immigration status, financial needs, and family pressure may also influence her. Just as many people will tolerate a boss who is unpleasant because they need the job, many women will attempt to hold their homes together because the alternative may seem so devastating to their family’s security.
- **She is using the court system to manipulate respondent**
- **She does not identify herself as a “rape” victim**
 - Many women are confused about the legal significance of forced sex by an intimate partner, although nearly all recognize that it does not “feel” right.
- **She is embarrassed by the incidents**
 - The difficulty of reporting intimate partner sexual abuse cannot be overstated. Failure to mention the occurrence does not mean that it was not significant to the petitioner; it may mean just the opposite: that the event was so overwhelming and upsetting she finds it difficult to speak of.
- **She is fearful of losing custody of her children**
 - There have been many instances of women seeking help for domestic abuse and then losing custody of their children to child protective services or to the abuser. A court ought to make clear that support is available, and focus efforts on keeping the abuser out of the home rather than removing children from the home.
- **The sexual encounters were probably consensual**
 - In the complex dynamics present in intimate partner sexual abuse, that would not be an appropriate assumption. Apparent submission to a sexual assault may in fact be a strategy aimed at avoiding more serious injury, based on knowledge of the abuser’s capabilities.

Protection Order Violation:

Shannon Phelan returns to your Court with a petition alleging violation of the order of protection previously issued. She asserts that Mr. Tate, when returning their daughter after court-ordered visitation, presses her to engage in sex in exchange for child support money. She asks that visits be suspended.

No prior order for child support has been entered by any court. Mr. Tate admits to engaging in sexual relations but asserts that the encounters have been consensual. He shakes his head and says, “Your Honor, I tell her there’s an order of protection, but she can’t keep her hands off me.”

Q4.

At this point you may:

[Choose all that apply]

- **Order a temporary order of child support based on income guidelines**
 - Addressing in detail issues that require communication between the parties, such as child support and, where appropriate, visitation, will reduce the likelihood that the parties themselves may feel required to approach each other over unresolved matters.
- **Admonish both parties that the order of protection is the Court’s, and that neither party has power to change its conditions**
 - This is an appropriate warning and reminds the parties that the court is now overseeing communications between them, so that it is clear where the parties should turn if any issues arise.
- **Admonish Mr. Tate that he is violating the order of protection even if he is approached by his wife**
 - This is an especially necessary admonishment in a situation such as these, where the abuser blames his violation of the order on the actions of the victim.
- **Consider changing visitation to a supervised setting**
 - If visitation is sought and awarded, it should be set up in a way that prevents the abuser from using the visitation exchanges as an opportunity to harass, assault or rape the victim. Where a supervised visitation center is not available, a court might order exchange to take place at the police precinct, or in a public venue such as a fast-food restaurant. The presence other people reduces the probability that a party will engage in misconduct.

- **Modify the order of protection to a full stay-away order with no provision for visitation pending a hearing on the allegations**
 - Because of the heightened risk to a victim in cases involving intimate partner sexual assault, the court ought to take great care to determine the actual situation in the home. The safer course is to suspend visitation where such allegations are raised, but resolve them expeditiously with a fact-finding hearing.
- **Refer Ms. Phelan to the District Attorney's office**
 - An allegation of sexual assault is criminal in nature. A victim may or may not want to press criminal charges against the abuser. In most jurisdictions a victim has a right to elect whether to proceed in criminal or family courts. Insisting that a matter be pursued criminally could result in losing the cooperation of a victim if that is not her wish. On the other hand, impressing upon her that she is alleging a serious criminal offense will reinforce that the court takes these allegations seriously and that what has occurred is not simply a "private" matter.
- **Set the matter down for a factual trial**
 - Conflicting factual allegations are best resolved through fact-finding. Peremptory, negotiated resolutions that sweep underlying issues under the rug may seem expedient in the short term, but too often lead to new matters arising from unresolved issues, and may leave unaddressed significant risk.