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Defending the Indefensible to Further a Later Case: Sanctioning Respondents in Illinois Domestic Violence Cases

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INTRODUCTION

When an act of domestic violence occurs in Illinois, as in most other jurisdictions, both criminal charges and a civil Domestic Violence Order of Protection may follow.¹ The order of protection may be commenced in conjunction with a criminal charge or may be commenced as an independent action.² Because of the exigencies of the domestic violence situation, the legislature has enacted a statutory scheme that expedites the civil proceeding, so that the civil order of protection proceeding takes place in a period of twenty-one days from initial filing to final hearing.³ In other contexts, an act of intentional injury could give rise to both a civil personal injury matter and a criminal prosecution. But in these situations, it would be anticipated that the criminal case would be resolved prior to the civil matter. Therefore, the domestic violence situation is somewhat unique in that

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1. *See generally*, The Domestic Violence Act of 1986, 750 ILL. COMP. STAT. 60/101-60/401 (2002). The precise criminal charge is dependent upon the nature of the act of violence, possibly ranging from Domestic Battery, 720 ILL. COMP. STAT. 5/12-3.2 (2002), to Aggravated Domestic Battery, 720 ILL. COMP. STAT. 5/12-3.3 (2002). Murder of a person who is the subject of an order of protection is an aggravating factor for First Degree Murder, 720 ILL. COMP. STAT. 5/9-1(b)(19) (2002), though a petition for an order of protection would obviously not be filed in regard to abuse that resulted in death.

2. A petition for an order of protection can be commenced as an independent civil action, 750 ILL. COMP. STAT. 60/202(a)(1) (2002), or in conjunction with a criminal action, 725 ILL. COMP. STAT. 5/112A-2 (2002), and 750 ILL. COMP. STAT. 60/202(a)(3) (2002). In either event, the action is considered a civil matter in which rules of civil procedure are applicable, 750 ILL. COMP. STAT. 60/205 (2002), and 725 ILL. COMP. STAT. 5/112A-6 (2002).

3. *See infra* notes 28-33 and accompanying text (generally outlining the procedure and timing of petitions and hearings involved in actions seeking an order of protection).

the civil case proceeds prior to the resolution of the criminal matter.⁴ This creates an opportunity for the respondent to use the order of protection proceeding for two improper purposes related to the defense of a subsequent criminal charge.⁵ First, during the civil proceeding, the respondent may seek to use cross examination of the abuse victim for purposes of intimidation so that she may wish not to be a witness in the later criminal prosecution.⁶ Second, the cross examination might be conducted to gain the equivalent of a discovery deposition that would not be available in the criminal matter.⁷ In this article, I will discuss that when either or both occurs, the respondent should be subject to sanctions pursuant to both Supreme Court Rule 137⁸ and the specific sanction provision of the Illinois Domestic Violence Act.⁹ The most difficult question involved is how to draw the line between a legitimate defense of the civil matter and a defense for either of the improper purposes.¹⁰

In this article, I will seek to draw that line. I will first discuss that separating legitimate defenses from improper defenses would be aided by requiring respondents to file answers to petitions for orders of protection. I will argue that such is required by applicable statute, though not often required in practice. I will then address the Fifth Amendment problem presented when a party facing concurrent civil and

4. A similar situation can occur where a civil forfeiture proceedings is filed against a defendant charged with drug possession with intent to sell, or with juvenile abuse and neglect petitions where a criminal charge is also filed. In each, the civil matter will come to hearing and resolution prior to the resolution of the criminal matter.

5. I have not gathered empirical data to support this hypothesis. It is based upon anecdotal evidence from my experiences in the Zeke Giorgi Legal Clinic at the Northern Illinois University College of Law as well as conversations with attorneys who represent victims of domestic violence as well those practicing criminal defense.

6. Throughout the article I have used the pronoun "she" in reference to victims of domestic violence. There are, of course, male victims as well. Nevertheless, because abuse of females by males is most prevalent, I have used the female pronouns.

7. See WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, *CRIMINAL PROCEDURE*, § 20.2(d), at 838, § 20.2 n.64 (2d ed. 1999) (discussing that though the deposition is a "major discovery device" in civil cases, its availability is "much more restricted" in criminal cases and allowed in only ten states, not including Illinois).

8. ILL. SUP. CT. R. 137.

9. 750 ILL. COMP. STAT. 60/226 (2002) (providing mandatory sanctions for untrue allegations and denials made without reasonable cause).

10. See ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT, R. 3.1 cmt. (2002) ("These [Model Rules of Professional Conduct, Rule 3.1 and Federal Rules of Civil Procedure, Rule 11] seek to achieve a balance between effective curtailment of frivolous and abusive claims without chilling the tenets of zealous advocacy . . .").

criminal actions is required to answer the civil case before resolution of the criminal matter. I will propose an amendment to the Illinois Domestic Violence Act that prevents the pleadings or testimony from an order of protection action from use in a subsequent criminal action. I will argue that so doing aids both the petitioner and respondent, and comports with the legislature's expressed intention to provide prompt relief and protection to victims of domestic violence.¹¹

I. PETITIONS FOR ORDERS OF PROTECTION: A BRIEF OVERVIEW

An overview of the procedure for petitions for orders of protection may be helpful in examining the question of sanctions for a respondent who defends the action in order to gain discovery for use in a later criminal charge or intimidate a potential adverse witness. This description is intended for those unfamiliar with the Illinois Domestic Violence Act ("DVA").¹² The reader who practices in this area may wish to proceed to Part II.

A person protected by the DVA who has been abused may file a petition to obtain an order of protection.¹³ Generally speaking, abuse within the meaning of the DVA ranges from harassment to physical abuse.¹⁴ If the court finds that the petitioner has been abused, a wide range of remedies can be ordered,¹⁵ including: prohibition of abuse,¹⁶ exclusive possession of a shared residence,¹⁷ an order to stay away from petitioner,¹⁸ an order to undergo counseling,¹⁹ temporary custody of minor children,²⁰ prohibition of concealment or removal of minor

11. 750 ILL. COMP. STAT. 60/102(4) (2002) (stating as one of the purposes of the Domestic Violence Act, "[to] [s]upport the efforts of victims of domestic violence to avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse . . .").

12. 750 ILL. COMP. STAT. 60/101 (2002).

13. Protected persons are delineated at 750 ILL. COMP. STAT. 60/201 (2002) and further defined at 750 ILL. COMP. STAT. 60/103 (2002).

14. Abuse is defined at 750 ILL. COMP. STAT. 60/103(1) (2002), and further definitions of the terms utilized in the definition of abuse are found throughout Section 103.

15. Available remedies are set out at 750 ILL. COMP. STAT. 60/214(b) (2002).

16. 750 ILL. COMP. STAT. 60/214(b)(1) (2002).

17. 750 ILL. COMP. STAT. 60/214(b)(2) (2002).

18. 750 ILL. COMP. STAT. 60/214(b)(3) (2002).

19. 750 ILL. COMP. STAT. 60/214(b)(4) (2002).

20. 750 ILL. COMP. STAT. 60/214(b)(6) (2002).

children,²¹ an order to appear in court with the children,²² possession of personal property,²³ payment of support,²⁴ prohibition of entry into the residence while under the influence of alcohol or drugs,²⁵ and prohibition of firearm possession.²⁶

Many, if not most, petitions for an order of protection are precipitated by an episode of recent abuse.²⁷ The petitioner customarily desires immediate relief to prevent recurrence of the abusive behavior and to keep the abuser away from the victim(s) and/or exclude the abuser from a shared residence. Therefore, the DVA provides for the issuance of an "emergency order of protection" which can be granted *ex parte* and without notice.²⁸ The emergency order is effective for up to twenty-one days.²⁹ If the respondent has been given notice of the hearing, the court may enter an "interim order of protection"³⁰ that is effective for up to thirty days.³¹ Within the effective time period of the emergency or interim order, and if service has been accomplished upon the respondent, the petitioner will seek to have a hearing held on the petition in order to obtain a "plenary order of protection."³² A plenary order of protection may be effective for a period up to two years.³³ Therefore, an action seeking an order of protection is usually commenced and brought to final hearing within a twenty-one day period, except for any necessary enforcement actions.

21. 750 ILL. COMP. STAT. 60/214(b)(8) (2002).

22. 750 ILL. COMP. STAT. 60/214(b)(9) (2002).

23. 750 ILL. COMP. STAT. 60/214(b)(10) (2002).

24. 750 ILL. COMP. STAT. 60/214(b)(12) (2002).

25. 750 ILL. COMP. STAT. 60/214(b)(14) (2002).

26. 750 ILL. COMP. STAT. 60/214(b)(14.5) (2002).

27. The DVA does not appear to set a time frame within which abuse has occurred in order for the abuse to meet the statutory definition. The definition of abuse does not contain a time reference. 750 ILL. COMP. STAT. 60/103(a) (2002). The provision delineating persons protected by the Act refers to "any person abused" without a temporal component. Whether the abuse was recent or not could come into play in terms of what remedies are available, but recent abuse does not seem to be a statutory prerequisite.

28. 750 ILL. COMP. STAT. 60/217 (2002).

29. 750 ILL. COMP. STAT. 60/220(a)(1) (2002).

30. 750 ILL. COMP. STAT. 60/218(a) (2002).

31. 750 ILL. COMP. STAT. 60/220(a)(2) (2002).

32. 750 ILL. COMP. STAT. 60/219 (2002).

33. 750 ILL. COMP. STAT. 60/220(b) (2002).

II. A COMPOUNDING CONFUSION: IS AN ANSWER REQUIRED?

At the heart of the matter, as previously mentioned, is a determination of when a respondent is defending a petition for an order of protection in good faith as opposed to when a respondent is defending for an improper purpose. It is a difficult line to draw. A significant contributing factor to drawing that line is that in Illinois, the customary practice, in my experience, is that it is rare for respondents to file an answer in response to the petition.³⁴ Therefore, the respondent appears on a return date and can contest the petition without having had to admit or deny the factual allegations of the petition or indicating what sought-after remedies they are contesting. Therefore, without an indication of the basis of the defense, it is much easier to defend for an improper purpose because the purpose of the defense has not been explicated and is simply not known. Additionally, of course, is the problem that the applicable sanction provisions in both the Domestic Violence Act³⁵ and Supreme Court Rules³⁶ are tied to signed documents.

34. Though having been involved directly or indirectly with a great number of cases as both the attorney of record or the faculty supervisor of a clinical course in domestic abuse, I have not ever had a respondent file an answer. I have asked attorneys I know who practice in the area and asked the question on an on-line discussion group. Generally speaking, the responses were that answers are rarely filed, though they are not unheard of.

35. 750 ILL. COMP. STAT. 60/226 (2002).

Untrue statements. Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal, as provided in Supreme Court Rule 137. The Court may direct that a copy of an order entered under this Section be provided to the State's Attorney so that he or she may determine whether to prosecute for perjury. This Section shall not apply to proceedings heard in Criminal Court or to criminal contempt of court proceedings, whether heard in Civil or Criminal Court.

750 ILL. COMP. STAT. 60/226 (2002).

36. ILL. SUP. CT. R. 137.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or

Without an answer, it is arguable whether either is applicable.³⁷ Nevertheless, custom of practice is that answers are not routinely filed in response to petitions for an order of protection, and when an answer is not filed, petitioners do not seek to have respondent answer.³⁸

Subject to a few exceptions, it is the practice in Illinois for a written response to follow the filing of a claim presented in writing.³⁹ Most notable among the exceptions to the requirement for a written

other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

All proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action. Motions brought pursuant to this rule must be filed within 30 days of the entry of final judgment, or if a timely post-judgment motion is filed, within 30 days of the ruling on the post-judgment motion.

This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

ILL. SUP. CT. R. 137.

37. *But see* Hernandez v. Williams, 632 N.E.2d 49, 52 (Ill. App. Ct. 1994) (finding that in a small claims case where an answer is not required that an appearance and jury demand served as a denial of the allegations of the complaint and hence subjected the attorney to sanctions for denying the complaint without a well grounded basis in fact).

38. *See supra* note 34.

39. *See* JEFFREY A. PARNES, ILLINOIS CIVIL PROCEDURE § 5-1 at 87 (1998) (stating, “[w]hen claims are so presented [in writing] defending parties usually must respond to them in some written fashion . . .”).

response are forcible detainer and small claims actions, each of which is subject to specific rules for summons and answer. In forcible detainer actions, the summons requires an appearance in court at a specified time and date.⁴⁰ No written answer is required unless ordered by the court.⁴¹ Similarly, in small claims cases the defendant must appear on a specified date at which time “the case shall be tried unless otherwise ordered.”⁴² A written response is not required unless ordered by the court.⁴³ In all other cases not specifically provided for, a twofold scheme applies, depending on whether the summons requires an appearance within thirty days after service pursuant to Supreme Court Rule 181(a), or requires appearance on a specified day pursuant to Supreme Court Rule 181(b). If defendant is required to appear within thirty days of service, the defendant must file an appearance and respond to the complaint with a written motion or answer.⁴⁴ If the

40. ILL. SUP. CT. R. 181(2):

Forcible Detainer Actions. In actions for forcible detainer (see Rule 101(b)), the defendant must appear at the time and place specified in the summons. If the defendant appears, he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.

ILL. SUP. CT. R. 181(2).

41. *Id.*

42. ILL. SUP. CT. R. 286(a):

Unless the “Notice to Defendant” (see Rule 101(b)) provides otherwise, the defendant in a small claim must appear at the time and place specified in the summons and the case shall be tried on the day set for appearance unless otherwise ordered. If the defendant appears, he need not file an answer unless ordered to do so by the court; and when no answer is ordered the allegations of the complaint will be considered denied and any defense may be proved as if it were specifically pleaded.

ILL. SUP. CT. R. 286(a).

43. *Id.*

44. ILL. SUP. CT. R. 181(a):

When Summons Requires Appearance Within 30 Days After Service. When the summons requires appearance within 30 days after service, exclusive of the day of service (see Rule 101(d)), the 30-day period shall be computed from the day the copy of the summons is left with the person designated by law and not from the day a copy is mailed, in case mailing is also required. The defendant may make his appearance by filing a motion within the 30-day period, in which instance an answer or another appropriate motion shall be filed within the time the court directs in the order disposing of the motion. If the defendant’s appearance is made in some other manner, nevertheless his answer or

summons requires an appearance on a specified day, the defendant must file a written appearance prior to, or appear in court on the day specified. In either case, the defendant is allowed ten days after the appearance date to file an answer or motion, unless otherwise directed by the court.⁴⁵ Domestic violence actions seeking an order of protection do not fit neatly into this scheme, and practice varies throughout the state.

An action for an order of protection can be commenced as an independent proceeding,⁴⁶ or in conjunction with a pending civil⁴⁷ or criminal matter.⁴⁸ In either event, including filing in conjunction with a criminal charge, the action is treated as a civil matter in terms of what procedures are applicable. The standard of proof is preponderance of the evidence and the statute looks to civil matters for applicable rules of procedure.⁴⁹ Whether filed as an independent action or in conjunction with another matter, a petition for an order of protection is considered a distinct cause of action requiring a separate summons.⁵⁰ Nevertheless, if the action has been filed in conjunction with a civil case in which “the defendant has filed a general appearance, a separate summons need not issue”, and notice may be provided in accordance with applicable

appropriate motion shall be filed on or before the last day on which he was required to appear.

ILL. SUP. CT. R. 181(a).

45. ILL. SUP. CT. R. 181(b):

When Summons Requires Appearance on Specified Day. (1) Actions for Money. Unless the “Notice to Defendant” (see Rule 101(b)) provides otherwise, an appearance in a civil action for money in which the summons requires appearance on a specified day may be made by appearing in person or by attorney at the time and place specified in the summons and making the appearance known to the court, or before the time specified for appearance by filing a written appearance, answer, or motion, in person or by attorney. The written appearance, answer, or motion shall state with particularity the address where service of notice or papers may be made upon the party or attorney so appearing. When a defendant appears in open court, the court shall require him to enter an appearance in writing. When an appearance is made in writing otherwise than by filing an answer or motion, the defendant shall be allowed 10 days after the day for appearance within which to file an answer or motion, unless the court, by rule or order, otherwise directs.

ILL. SUP. CT. R. 181(b).

46. 750 ILL. COMP. STAT. 60/202(a)(1) (2002).

47. 750 ILL. COMP. STAT. 60/202(a)(2) (2002).

48. 750 ILL. COMP. STAT. 60/202(a)(3) (2002).

49. 750 ILL. COMP. STAT. 60/205 (2002).

50. 750 ILL. COMP. STAT. 60/210(a) (2002).

Supreme Court Rules for service of papers other than summons, except if an emergency order of protection is sought on an *ex parte* application, in which case service of summons is then required.⁵¹ Whether notice is accomplished by summons or other notice, the form of any required answer or appearance is unclear.

If service of process is required, the summons is to be “in the form prescribed by Supreme Court Rule 101(d), except that it shall require respondent to answer or appear within 7 days.”⁵² What is not specified is whether an appearance by itself will suffice, as in a small claim or forcible detainer action,⁵³ or whether a written answer must follow, though Rule 101(d) references Supreme Court Rule 181(a), which requires an answer or written motion within the number of days specified in the summons.

The practice in some circuits is in conformity.⁵⁴ For example, in Cook County and LaSalle County, the summons available from the Circuit Clerks require an answer or appearance within seven days. Nevertheless, a written answer does not necessarily follow. In other counties, such as Kane and Winnebago, the summons requires an appearance on a specified date “to answer the complaint in this case.”⁵⁵ Usually, however, that date is not within seven days of service as specified in Section 60/210 of the Domestic Violence Act, but rather is the date set for the hearing for a plenary order, sometime within twenty-one days of the filing of the petition and the entry of an emergency *ex parte* order. Though such practice would seem to most closely follow that of Supreme Court Rule 181(b), the rules require a written answer to follow within ten days, unless otherwise ordered. As the date for appearance is the date for the plenary hearing, an answer ten days hence obviously cannot follow. Instead, courts and practitioners treat order of protection cases more like forcible detainer or small claims actions requiring a personal appearance at a specified date, but not requiring a

51. 750 ILL. COMP. STAT. 60/210.1(a) (2002).

52. 750 ILL. COMP. STAT. 60/210(a) (2002).

53. See *supra* notes 39-43 and accompanying text.

54. The Act provides that the office of the clerk of each court “shall provide . . . simplified forms and clerical assistance” for the benefit of pro se petitioners. The available forms are commonly utilized by practitioners, most often with the encouragement of the court.

55. To add to the confusion, the Winnebago County summons does not even contain a date to answer or appear but instead refers to a date “as indicated on the petition.” But the form petition does not contain a space to insert a date. Rather it is contained on the form order of protection.

written answer. Those practices, though, are authorized by rule specific to the type of action. A comparable provision for petitions for orders of protection has not been made.

Consequently, in counties requiring an answer within seven days, an answer is called for, but is not often required by courts or demanded by petitioners. In counties requiring appearance on a specified date, an answer is not required. Nevertheless, language in the DVA indicates that a written answer is contemplated. Most significantly, the DVA provides that in order for a plenary order to issue, the petitioner must establish that a “general appearance was made or filed by the respondent”⁵⁶ and that the “[r]espondent has answered or is in default.”⁵⁷ Because a general appearance and answer are set out as two separate and distinct requirements, it follows that an appearance on a specified date as in forcible detainer and small claims actions does not alone suffice. A written answer should also be required.⁵⁸ This distinction between an answer and general appearance is contained elsewhere in the DVA. For example, in regard to hearings for both emergency and interim orders, the DVA uses language that refers to a physical appearance in court after which a respondent “may elect to file a general appearance and testify.”⁵⁹ Thereafter, the DVA contemplates an answer or a finding of default.⁶⁰

A written answer admitting or denying the allegations of the petition would accomplish several purposes. Applicable sanction provisions are invoked by a signature on a written document. Without an answer, there is no document and no signature. By admitting or denying allegations, the specific factual issues in question are identified, as well as the specific remedies that the respondent intends to contest.⁶¹ Consequently, an answer may make it an easier task to distinguish a good faith defense from one that does not seek actual relief but rather is

56. 750 ILL. COMP. STAT. 60/219(3) (2002).

57. 750 ILL. COMP. STAT. 60/219(4) (2002).

58. See 5 ILLINOIS CIVIL PROCEDURE FORMS 98:10 (2002) (containing a form “Answer to Petition for Order of Protection”).

59. 750 ILL. COMP. STAT. 60/217(b) (2002); 750 ILL. COMP. STAT. 60/218(b) (2002).

60. See 750 ILL. COMP. STAT. 60/219(4) (2002) (providing that a plenary order of protection shall issue if the requirements for the requested remedies are satisfied and the “Respondent has answered or is in default”).

61. See ILL. SUP. CT. R. 136 (allowing a denial to all allegations contained in a paragraph of an opposing party’s pleading only when the pleader can in good faith deny *all* the allegations in that paragraph) (emphasis added).

intended to serve as a discovery mechanism for use in a later trial on a criminal charge or to intimidate the victim/witness through aggressive cross examination. But, the specter of the criminal charge raises an obvious problem. How can the respondent be made to admit or deny allegations of abuse that are the basis of a criminal charge without running afoul of the Fifth Amendment?

One other point deserves mention. In order for the answer to be useful, it must be made in response to a well-stated complaint - factual allegations set forth in separate numbered paragraphs, each limited to a separate allegation.⁶² That is often not the practice in petitions for orders of protection. The form pleadings frequently utilized belie the pleading requirements of the Civil Practice Act.⁶³ Most contain a block of several blank lines in which the pleader is to insert their factual allegations. The result is often a narrative description of one or more instances of abuse, resulting in multiple allegations pleaded in one long paragraph. Practitioners would be well served by pleading the facts as they would in any other case. Therefore, the respondent would be forced to admit or deny specific allegations.⁶⁴ It would then be clear which, if any of the factual allegations are contested.⁶⁵ For instance, respondent may contest having engaged in any abusive behavior. Or, respondent may not have any basis for denying that a physical altercation took place and he may only be contesting having been the first aggressor, or the severity of what took place, or the requested remedies. An answer to a well-pleaded statement of facts set forth in separate numbered paragraphs limited to separate allegations would go far to clarify the basis of the defense.⁶⁶

62. 735 ILL. COMP. STAT. 5/2-603(b) (2002); *see also* JEFFREY A. PARNES, ILLINOIS CIVIL PROCEDURE § 5-4(b)(1) (1998).

63. Some courts by local rule direct that the form pleadings are to be utilized if "practicable". *See, e.g.*, Rules of the Circuit Court of the Eighteenth Judicial Circuit DuPage County, Rule 15.21 (providing that "[a]ctions arising under the Illinois Domestic Violence Act of 1986 . . . should, to the extent practicable, utilize the approved forms for such actions) (citations omitted).

64. *See generally* PARNES, *supra* note 62, at § 5-4(b)(1) (discussing the Illinois requirements for responsive pleadings).

65. 735 ILL. COMP. STAT. 5/2-610(a) (2002) (requiring specific denial to "each allegation of the pleading to which it relates.").

66. The requirement of an answer would also pose a potential difficulty for pro se respondents. Presumably small claims practice dispenses with an answer in part to simplify procedure in order to accommodate pro se litigants. But, as discussed, orders of protection are not small claims actions and the general rules of pleadings are applicable.

III. THE REQUIREMENT TO ANSWER AND THE FIFTH AMENDMENT

Requiring a respondent to answer a petition for a civil order of protection stemming from an incident of violence that could also give rise to a criminal charge raises a Fifth Amendment problem when the civil matter precedes the criminal prosecution.⁶⁷ An allegation in the petition that "Respondent struck petitioner on the right side of her face with his fist," if admitted, could subject the respondent to criminal liability. Therefore, the respondent may assert the Fifth Amendment privilege where the respondent reasonably believes his answer could be used in a later criminal prosecution.⁶⁸ This contrasts with a more typical civil action where there is not a question of self-incrimination and the respondent would have to admit or deny the allegation. If not specifically denied, the allegation is deemed admitted.⁶⁹ If denied when obviously true, respondent may be subject to sanctions.⁷⁰ The fact that admitting the allegation would subject the respondent to civil liability does not provide a basis for avoiding an answer.⁷¹

67. See U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); ILL. CONST. art. I § 10 ("No person shall be compelled in any criminal case to give evidence against himself . . ."). See also *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (stating the privilege against self-incrimination is not dependent upon the nature of the cause in which the testimony is sought or to be used "[i]t applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

68. See *In re Sterling-Harris Ford, Inc.*, 315 F.2d 277, 279 (7th Cir. 1963) (noting the Fifth Amendment applies to the pleading stage); *People v. English*, 201 N.E.2d 455, 457 (Ill. 1964) ("It is well established that the privilege against self incrimination protects against disclosure of facts involving criminal liability and not against civil liability.") (quoting 8 JOHN H. WIGMORE, EVIDENCE §§ 2253, 2254 (1961)); *People v. Lucas*, 243 N.E.2d 228, 231 (Ill. 1968) ("The privilege is not without qualification. 'It is confined to real danger . . .'" (quoting *Heike v. United States* 227 U.S. 131, 144 (1913))); 735 ILL. COMP. STAT. 5/2-610(a) (2002) (providing that every answer "shall contain an explicit admission or denial of each allegation of the pleading to which it relates.").

69. 735 ILL. COMP. STAT. 5/2-610(b) (2002) (providing that every allegation not explicitly denied is admitted).

70. ILL. SUP. CT. R. 137 (providing for sanctions imposed upon an attorney who has signed a pleading found not to be well grounded in fact); 750 ILL. COMP. STAT. 60/226 (2002) (providing that denials made without reasonable cause and found to be untrue "shall subject the party pleading them to the payment of reasonable expenses . . .").

71. See *Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 926-27 (7th Cir. 1983) ("[T]he Fifth Amendment does not privilege from disclosure facts which simply would tend to establish civil liability but does protect witnesses from being required to make disclosures, otherwise compellable in the trial court's contempt power, which could incriminate them in a later criminal prosecution.").

In civil order of protection cases where a criminal prosecution might follow, the respondent has the right not to incriminate himself by admitting the allegation.⁷² However, a false or wrongful denial could subject the respondent to sanction.⁷³ Therefore, the respondent should be able to plead the Fifth Amendment privilege against self-incrimination as his answer to the allegation. Nevertheless, so doing creates a tension between several competing, but equally valid concerns.⁷⁴ On one hand, the respondent's Fifth Amendment rights should not be violated in order to expedite the petition for order of protection. On the other hand, the order of protection proceeding should not be prolonged and petitioner should not have to put on proof and endure cross examination proving the incidence of abuse when it is undeniable that abuse occurred. Balancing these two interests creates a difficult dilemma.

It is clear that both the Fifth Amendment of the United States Constitution as applied to the states by way of the Fourteenth Amendment and the Illinois Constitution, Article I, Section 10, allow for invocation of the privilege against self incrimination in an answer to a civil lawsuit if there follows a reasonable risk of criminal prosecution as a result of the answer.⁷⁵ The respondent must answer non-

72. See, e.g., *id.*; *McCarthy*, 266 U.S. at 40.

73. See *supra* note 70.

74. See, e.g., *Bathalter*, 705 F.2d at 932 (“Inevitably, in civil cases where related criminal charges are involved, tension will arise between plaintiffs’ rights to a just and timely adjudication and defendants’ rights to refuse to answer under the Fifth Amendment upon a reasonable fear of prosecution.”).

75. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”); *Halpin v. Scotti*, 112 N.E.2d 91, 93 (Ill. 1953) (discussing that Article I, Section 10 of the Illinois Constitution, is not substantively different from the Fifth Amendment to the United States Constitution and stating that the provisions may be “construed alike and United States Supreme Court decisions construing the fifth amendment are authoritative in construing the similar provision of [the Illinois] constitution.”); Robert Heidt, *The Conjurer’s Circle – The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1065 (1982) (“The privilege may be used in a great range of civil cases. It may be used whenever information sufficiently relevant to civil liability to be discoverable provides even a clue that might point a hypothetical government investigator toward evidence of criminal conduct. . . . More obviously, the privilege may be used in civil actions where conduct giving rise to civil liability also constitutes an element of a crime. Examples include divorce actions involving adultery” (citations omitted)); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that the privilege protects not only answers which directly reveal

incriminating allegations in the petition, but may assert the privilege in response to each specific allegation that could cause self-incrimination in a later criminal prosecution if answered.⁷⁶

The dilemma is made more difficult by the fact that invoking the privilege operates as a denial of the allegation in regard to which it is invoked.⁷⁷ Unlike criminal prosecutions where no adverse inferences may be drawn from the assertion of the privilege,⁷⁸ an adverse inference

criminal activity, but also those that might furnish a link in the chain of evidence necessary to convict.). See generally ROBERT J. STEIGMANN, ILLINOIS EVIDENCE MANUAL § 20:01 (1995) (“[I]n order for the privilege to be invoked, the answer sought need only relate to a material circumstance or link in the chain of proof from which a crime may be inferred. It is not necessary that the answer, unconnected with other testimony, should be sufficient to convict.”); *People v. Conzo*, 23 N.E.2d 210, 215 (Ill. App. Ct. 1939) (discussing the privilege in a historical perspective and referencing significant Illinois case law to that time regarding application of the privilege).

76. See *Hoffman*, 341 U.S. at 486 (1951) (holding that the privilege must be asserted with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify); *Gabriel v. Columbia Nat’l Bank of Chi.*, 592 N.E.2d 556, 559 (Ill. App. Ct. 1992) (holding that the privilege against self-incrimination “must be made as to specific allegations in the complaint so the trial court may ascertain whether the privilege has been properly invoked.”) (citing *N. River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987) which stated “proper invocation of the privilege [does not] mean that a defendant is excused from the requirement to file a responsive pleading; he is obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest.”) (citing 5 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1280, at 360 (1969)).

77. See *Bathalter*, 705 F.2d at 929 (discussing Fed. R. Civ. P. 8(d), providing “that averments in a complaint are admitted when not denied,” but that a “defendant’s right against self-incrimination would be considerably watered down if failure to explicitly deny averments might result in summary judgment against him.”) (holding that a defendant’s claims of privilege in an answer to allegations in a complaint will be treated as specific denials):

[W]hen there has been a proper invocation of the privilege, the Constitution prevents a federal court from imposing any sanction that has the effect of forcing the person invoking the privilege to answer. . . . [T]he court must treat defendant’s claim of the privilege as equivalent to a specific denial. This has the dual effect of creating an implied qualification to the language of the first sentence in Rule 8(d) and putting the plaintiff to his proof of the matter covered by the ‘denial’.

Id. at 929 (quoting 5 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1280, at 360-61 (1969)); *Gabriel*, 592 N.E.2d at 562 (finding the Seventh Circuit’s ruling in *Bathalter* dispositive and noting similarities in the language of the Illinois Code of Civil Procedure, ILL. REV. STAT. 1989, ch. 110, par. 2-610 (current version at 735 ILL. COMP. STAT. 5/2-610 (2002)) covering pleading requirements and FED. R. CIV. P. 8, ILL. CONST. art. I, § 10 and the U.S. CONST. amend. V).

78. See, e.g., *Griffin v. California*, 380 U.S. 609, 613-14 (1965) (stating the court may not “solemnize[]” the silence of an accused into evidence against him by allowing an

may be drawn in a civil action,⁷⁹ but at the pleading stage, the inference is not sufficient in and of itself to support a judgment for petitioner.⁸⁰ Therefore, because the assertion of the Fifth Amendment operates as a denial the petitioner would still have to prove the allegations of abuse. Additionally, in order for petitioner to benefit from any adverse inference that can be drawn from the assertion of the privilege, the petitioner must put on other proof.⁸¹ In most circumstances this would require petitioner's testimony, which obviously subjects her to cross examination. It is through this cross examination that respondent would

inference from the failure to testify) (holding the Fifth Amendment prohibits comments on a defendant's silence during a criminal proceeding).

79. *People v. \$1,124,905 United States Currency*, 685 N.E.2d 1370, 1379 (Ill. 1997) (holding the "Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify . . .") (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) and quoting 8 JOHN H. WIGMORE, *EVIDENCE* 439 (1961), the Amendment "does not preclude the inference where the privilege is claimed by a party to a Civil Cause"); *Schaffner v. Chi. & N.W. Transp. Co.*, 541 N.E.2d 643, 652 (Ill. 1989) (stating the decision whether to use the instruction or permit the opponent to argue for adverse inference is reserved to the discretion of the court); *Cf. Uniform Interstate Family Support Act*, 750 ILL. COMP. STAT. 22/316(g) (2002) (providing the trier of fact may draw an adverse inference when a party called to testify at a civil hearing in accordance with the act refuses to testify by invoking the Fifth Amendment); ILL. PATTERN JURY INSTRUCTIONS CIVIL 2D, NO. 5.01, (permitting a jury to draw an adverse inference when parties fail to produce evidence within their control at trial).

80. *See Gabriel*, 592 N.E.2d at 562 (holding it is a violation of the Illinois constitutional privilege against self-incrimination to grant judgment on the pleadings based on a defendant's invocation of the privilege in answer to allegations contained in the complaint) (citing *Bathalter*, 705 F.2d at 930 (adverse inference is not available at the pleading stage)).

81. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977) (A party cannot be found liable solely because of reliance on the Fifth Amendment as this would constitute a penalty tied to the exercise of the privilege; therefore, it follows that adverse inference cannot be drawn from silence alone and must be considered as one of several factors.). *See also LaSalle Bank v. Sebugan*, 54 F.3d 387, 391 (7th Cir. 1995) ("[d]eeming an allegation of a complaint to be admitted based on the invocation of the Fifth Amendment privilege without requiring the complainant to produce evidence in support of its allegations would impose too great a cost and exceed the authorization of *Baxter*."); *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (stating that adverse inference is permissible only where independent evidence exists to corroborate the fact under inquiry; silence in response to an inquiry, in and of itself, is not sufficient to allow an adverse inference); *Bathalter*, 705 F.2d at 932 (stating "in a civil case . . . a judgment cannot rest solely upon a privileged refusal to admit or deny at the pleading stage.") (holding "defendant's claim of privilege should not have been deemed an admission, and that plaintiff should have been put to its proof, either by way of evidentiary support for a motion for summary judgment or at trial."); *Letourneau v. Dep't of Registration & Educ.*, 571 N.E.2d 783, 790 (Ill. App. Ct. 1991) (stating that a defendant's refusal to testify can lead to an adverse inference only in conjunction with other evidence) (citing *Giampa v. Ill. Civil Serv. Comm'n*, 411 N.E.2d 1110 (Ill. App. Ct. 1980)).

be able to both gain discovery otherwise unavailable in the later criminal prosecution, and attempt to use cross examination to intimidate and harass the petitioner.

As discussed, respondents should be required to file an answer in civil actions seeking an order of protection.⁸² Nevertheless, it would seem that an answer alone does little to expose a defense for an improper purpose. While an answer would ordinarily indicate what facts are contested, the assertion of the privilege leaves the allegations of abuse neither admitted nor denied, and leaves the petitioner having to prove what is in actuality not subject to legitimate contest, but what cannot be admitted without the respondent's self incrimination.

The respondent is also placed in a difficult position when the civil order of protection proceeding occurs prior to a criminal prosecution. Though the respondent may respond to the petition with assertions of privilege, he will have a difficult time defending himself at any hearing without risk of self-incrimination or waiver of privilege. If the respondent seeks to testify to defend himself, the privilege will be waived.⁸³ Though he may refuse to testify at the later criminal trial, his testimony at the prior order of protection hearing would be admissible against him.⁸⁴ While in some circumstances a waiver of the privilege may be limited to a particular issue, the issues in an order of protection largely overlap.⁸⁵ The issues of abuse would be those which are

82. See *supra* note 61 and accompanying text.

83. *United States v. Monia*, 317 U.S. 424, 427 (1943) (stating in order to have the benefit of the privilege it must be claimed or asserted otherwise the privilege is waived. "The [Fifth] [A]mendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."); *People v. Nachowicz*, 172 N.E. 812, 815 (Ill. 1930) (stating the privilege is deemed to be waived if a witness answers without claiming the privilege).

84. See *People v. Lamb*, 587 N.E.2d 61, 63 (Ill. App. Ct. 1992) ("A defendant who waives his or her privilege against self-incrimination may reassert the privilege and refuse to testify at a subsequent proceeding concerning the same matter. Defendant's reassertion of the privilege does not render defendant's testimony in the former proceeding inadmissible in the later proceeding, however.") (citation omitted); *People v. Peterson*, 439 N.E.2d 1103, 1107 (1982) ("The general rule is that an accused who elects to testify at a trial waives his privilege against self-incrimination through the use of that testimony at a subsequent trial.") (citing *Harrison v. United States*, 392 U.S. 219, 222, (1968) (stating "the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings.")). See generally STEIGMANN, *supra* note 75, at § 15:32; CHARLES T. MCCORMICK, EVIDENCE §§ 131, 230-235, 239 (1954).

85. See, e.g., *People v. Williams*, 185 N.E.2d 686, 687 (Ill. 1962) (finding

common to both the civil and criminal proceedings. But the order of protection proceeding could also involve issues of child custody, visitation and support, as well as exclusive possession of a shared residence. The issues of abuse have relevance to those issues as well.⁸⁶ Therefore, a respondent could not assert the privilege as to issues of abuse and still defend himself as to the other issues because the circumstances of abuse permeate the other issues as well.⁸⁷ The pro se respondent perhaps is in a more precarious position. For he cannot be expected to know to assert his privilege, and his attempts to represent himself in the order of protection could result in a waiver of the privilege.⁸⁸

Therefore, both petitioner and respondent would therefore benefit from a mechanism that allowed the respondent to participate in the order of protection proceeding without fear of self-incrimination. If respondent could be made to answer, petitioner may be able to avoid cross examination that is needless, if not conducted for an improper purpose. If respondent could participate in his defense without fear of self-incrimination, he may not be placed in the position of having to choose between self-incrimination and testifying in regard to child

testimony of defendant who waived privilege to testify regarding a motion to suppress could not be of effect on any issue other than the motion to suppress.) (citing CHARLES T. MCCORMICK, EVIDENCE, 276 (1954); 8 JOHN H. WIGMORE, EVIDENCE § 2276 (1961)).

86. See 750 ILL. COMP. STAT. 5/602(7) (2002) (providing that “the occurrence of ongoing abuse as defined by Section 103 of the Domestic Violence Act of 1986” shall be a factor to be considered by the court in determining the custody according to the best interest of the minor child); 750 ILL. COMP. STAT. 5/602(6) (2002) (providing that “physical violence of threat of physical violence by the child’s potential custodian” shall be considered by the court in determining custody according to the best interest standard); 750 ILL. COMP. STAT. 60/214(b)(6) (2002) (providing that abuse of the minor child by the respondent shall raise the rebuttable presumption that it is in the child’s best interest to not be in the custody of the respondent).

87. See, e.g., *Wirtz v. Wirtz*, 2000 Ohio App. LEXIS 4606 (Ohio Ct. App. 2000) (respondent in a domestic violence civil protection order hearing unsuccessfully argued for a continuance because the decision whether to testify therein forced him choose between protecting his parental rights and property interests and protecting his privilege against self-incrimination at the later criminal trial on domestic violence charges arising from the same occurrence).

88. Sandra Guerra, *Between a Rock and a Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases*, 15 GA. ST. U. L. REV. 555, 593 (1999) (noting the need to invoke the Fifth Amendment is not self-evident as “[T]he Supreme Court . . . expressed special concern regarding the lack of counsel in civil cases involving the Fifth Amendment issues because parties in such cases more than in others need guidance in understanding their rights and the ramifications of their decisions.”) (citing *United States v. Kordel*, 397 U.S. 1, 11-12 (1970)).

custody or visitation. Therefore, respondent is faced with a Hobson's Choice, a choice without an alternative, because if he testifies he risks self-incrimination; however, not testifying could result in loss of custody or visitation.⁸⁹

In circumstances where concurrent civil and criminal cases are pending or where a criminal charge is reasonably likely to follow the civil action, the respondent may seek a stay of the civil proceeding in order to avoid self-incrimination in defending the civil action.⁹⁰ The Fifth Amendment, however, does not require that a stay be granted.⁹¹

89. Cf. *In re Daniel D.*, 562 S.E.2d 147, 151-53 (W.Va. 2002). An analogous situation arises in cases regarding termination of parental rights where it appears the welfare of the child is seriously threatened. A parent facing criminal charges may elect to protect himself by not testifying in underlying abuse and neglect proceedings or participating in court-ordered counseling. In doing so, the parent loses the opportunity for reunification with the child and risks his silence will be an indication that he is not cooperating with the court order. Other states grant immunity for testimony at dependency hearings in order to encourage testimony that facilitates the goal of protecting the best interest of the child and promotes reunification of the family. These states grant statutory use immunity for testimony at dependency hearings that constitutes an admission to acts at issue in a criminal case. See, e.g., *In re Jessica B.*, 254 Cal. Rptr. 883 (Cal. Ct. App. 1989); *In re S.A.V.*, 392 N.W.2d 260 (Minn. Ct. App. 1986).

90. A stay is discussed in some detail because it is commonly used to accommodate a Fifth Amendment privilege in concurrent criminal and civil proceedings where the civil proceeding is subsequent to a criminal proceeding and there has been a criminal indictment. See *Jacksonville Sav. Bank v. Kovack*, 762 N.E.2d 1138, 1143 (Ill. App. Ct. 2002) ("a stay is not normally appropriate when a defendant has not been formally charged."). Other means of accommodating the Fifth Amendment privilege include a protective order, or seal, and immunity. Immunity is discussed *infra* at notes 97-100 and accompanying text. A protective order is applied most often to depositions and presents potential problems for the respondent who would waive his Fifth Amendment privilege. See, e.g., ILL. SUP. CT. R. 201(c) (providing broad discretion to the court at any time to make a protective order "as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or oppression."). But it is not certain that a protective order will accomplish the purpose of preventing use of the respondent's answer in a later criminal proceeding. See *United States v. A Certain Parcel of Land Moultonboro*, 781 F. Supp. 830, 834 (D. N.H. 1992) (stating that a protective order, no matter how broad, will not guarantee that evidence from civil discovery will not "somehow find its way into the government's hands for use in a . . . criminal prosecution.") (citing *Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2d Cir. 1989); *Heidt*, *supra* note 75, at 1095 (stating "[n]o protective order could provide . . . absolute protection . . . against direct or indirect use [of information in a subsequent proceeding]" and a protective order that would prevent the plaintiff from using the defendant's response would be illogical). Therefore, a case-by case determination of the need for a protective order would be an inefficient use of the court's time since it would not necessarily protect the respondent's answer and could hamper the petitioner's ability to pursue her complaint.

91. *Jacksonville Sav. Bank v. Kovack*, 762 N.E.2d 1138, 1141-42 (Ill. App. Ct.

Rather, the decision whether to grant the stay is committed to the discretion of the trial court.⁹² Several factors are considered by courts in determining whether to grant a stay. The factors include:

- (1) the plaintiff's interest in an expeditious resolution of the civil case and any prejudice to the plaintiff in not proceeding;
- (2) the interests of and burdens on the defendant, including the extent to which the defendant's fifth amendment rights are implicated;
- (3) the convenience to the court in managing its docket and efficiently using judicial resources;
- (4) the interests of persons who are not parties to the civil proceeding; and
- (5) the interests of the public in the pending civil and criminal actions.⁹³

When those factors are applied to orders of protection, it is apparent that stays are especially inappropriate. The petitioner has an overwhelmingly compelling interest in obtaining relief from domestic abuse and stabilizing her living situation. That interest should not be deterred simply because the abuse was of a severity warranting criminal charges. As noted by Justice Steigmann of the Fourth District Appellate Court, "it would be perverse if plaintiffs who claim to be the victims of criminal activity were relegated to receive slower justice than other plaintiffs simply because the behavior they allege is egregious enough to attract the attention of criminal authorities."⁹⁴ Though the Fifth Amendment rights of the respondent are implicated, that is only one of the factors to be considered and is not dispositive in and of itself.⁹⁵ Because Respondent is otherwise able to defend the action, though having invoked the privilege to not testify, respondent's interests are not without protection. Therefore, petitioner's interest in promptly

2002) ("[T]he Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings.") (citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). "[N]o direct [F]ifth [A]mendment violation results from a trial court's refusal to stay civil proceedings." *Kovak*, 762 N.E.2d at 1142 (referencing *International Business Machines Corp. v. Brown*, 857 F. Supp. 1384, 1389 (C.D. Cal. 1994)).

92. *Jacksonville Sav. Bank*, 762 N.E.2d at 1142 ("The decision whether to stay civil proceedings lies within the trial court's discretion.").

93. *Id.* at 1142.

94. *Id.* at 1142.

95. *Id.* at 1142 ("Whether a party's [F]ifth [A]mendment rights are implicated is a significant factor for the trial court to consider in deciding whether to stay civil proceedings, 'but is only one consideration to be weighed against others'.") (quoting *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989).

obtaining relief from further abuse outweighs respondent's interests, and the stay should not issue.⁹⁶

As has been discussed, the situation of the order of protection is somewhat unique in that both parties have an interest in respondent's ability to respond to the petition and participate in the case. Petitioner has an interest in having respondent admit or deny the allegations of abuse in the complaint, so as to avoid needless presentation of evidence and cross examination, as well as to be able to promptly obtain relief from further abuse. Though respondent would have an interest in not answering out of fear of self-incrimination, respondent's interest could change after the pleading stage. Respondent could be in the position of perhaps wanting to testify without fear of self-incrimination in order to either contest whether the abuse occurred or to address the relationship of the alleged abuse to a custody determination based upon the best interest of the child.⁹⁷ The interests of both parties could be accommodated by giving use immunity to respondent's answer and testimony in the order of protection. Therefore, respondent could be made to answer, clarifying whether he admitted or denied the allegation of abuse. He also could testify about the circumstances of abuse as they relate to issues of custody and visitation without fear of self-incrimination.⁹⁸

In Illinois, the power to confer immunity lies only with the legislature.⁹⁹ Consequently, both petitioners and respondents would be well served by legislative action granting immunity to respondents in actions seeking an order of protection. Such has been done in other states. For example, The Minnesota Domestic Abuse Act¹⁰⁰ provides at subdivision 15, "Any testimony offered by a respondent in a hearing

96. See 750 ILL. COMP. STAT. 60/102(4) (2002) (stating that "promptly" entering orders preventing further abuse is an underlying purpose of the Act).

97. See Guerra, *supra* note 88.

98. Telephone interview with Sandy Clark, Associate Director, N.J. Coalition for Battered Women (Jul. 17, 2003) (commenting that N.J. STAT. § 2C:25-29 providing immunity for testimony in domestic violence temporary restraining order hearings was implemented to avoid concerns about double jeopardy and to prevent respondents seeking to delay civil proceedings until resolution of criminal proceedings and result of statute is that most respondents answer complaints and testify).

99. See *People v. English*, 201 N.E.2d 455, 460 (Ill. 1964) ("We believe that the removal of the privilege by a grant of immunity must be left to the legislature."); *People v. Sanchez*, 546 N.E.2d 574, 579 (Ill. 1989) ("[a] trial court has no inherent power to grant immunity; that power belongs to the State.").

100. MINN. STAT. § 518B.01 (2002).

pursuant to this section is inadmissible in a criminal proceeding.”¹⁰¹ Similarly, New Jersey provides that “testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant.”¹⁰² The extension of the New Jersey provision to the plaintiff as well as the defendant helps create a disincentive for the defendant to needlessly cross examine the victim of abuse in order to attempt to harass the victim or to obtain statements that could be used for possible impeachment in the subsequent criminal prosecution. Illinois should follow suit with a comparable provision. Though it should include language clarifying several points. It should be made clear that immunity also extends to Respondent’s answer, and that use of the answer or testimony for impeachment is also prohibited. Also, in order to discourage subjecting petitioner to needless discovery, especially depositions, such testimony should also be excluded from use in later proceeding. I would therefore propose the following language be added to the Domestic Violence Act:

Neither the pleadings filed by petitioner or respondent, nor their testimony offered during discovery or at any hearing held to obtain a domestic violence order of protection shall be allowed to be used in a simultaneous or subsequent criminal proceeding for any purpose, including impeachment, provided that such testimony shall be allowed in actions seeking to enforce an existing order of protection, to punish the violation of an order of protection or where such statements would be otherwise admissible hearsay statements by an unavailable declarant.

IV. DEFENDING AN ACTION WHEN NO RELIEF IS DESIRED: AN IMPROPER PURPOSE?

The specter of sanctions is raised on two fronts when a respondent

101. MINN. STAT. § 518B.01(15) (2002). *See also* Steeves v. Campbell, 1994 Minn. App. Lexis 154 (1994) (stating that the trial court was in error in advising the respondent that his testimony in an order of protection hearing could be used against him in a subsequent criminal trial).

102. N.J. STAT. § 2C:25-29 (2003).

defends a petition for an order of protection for the purposes of intimidating the petitioner/witness or using the cross-examination of witnesses as a discovery tool for a corresponding criminal charge. First, an unwarranted or dishonest denial of factual allegations raises the issue of sanctions pursuant to both Supreme Court Rule 137 and Section 226 of the DVA. Second, when a respondent defends an action, not for the purpose of obtaining relief in that action, but for purposes of intimidation or obtaining discovery for a different action, the issue is raised whether the defense is for an “improper purpose” within the meaning of Rule 137. Both deserve discussion.

A. UNWARRANTED DENIALS

Though sanctions for a pleading found to not be well grounded in fact are most frequently associated with allegations in an affirmative pleading, most often plaintiff’s complaint, an unwarranted denial in an answer should also give rise to sanctions.¹⁰³ An answer that simply denies that which is obviously true is no more well grounded in fact than a complaint that makes allegations that are untrue.¹⁰⁴ Both are equally frivolous and cause needless delay and expense to the opposing party and the court. In the actuality of practice, actions seeking orders of protection are often treated by courts and practitioners as if they are in the nature of criminal prosecutions where a defendant can plead not guilty and put *the petitioner to her proof*.¹⁰⁵ But orders of protection are civil matters without the prospect of imprisonment. Therefore, as in any

103. See GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE, (3d ed. 2000) § 14(B)(1)(a) (discussing the “paucity of decisions analyzing the sanctionability of responsive pleadings” but stating that “responsive pleadings are equally subject to Rule 11 as all other pleadings”). See also GEORGENE M. VAIRO, RULE 11 SANCTIONS, CASE LAW AND PREVENTIVE MEASURES (2d ed. 1992) § 4.01[b][2][A] (discussing the reluctance of some courts to impose sanctions for frivolous answers but stating “Courts should be no less sparing of lawyers who file answers in violation of Rule 11 than they are of lawyers who file complaints in violation of Rule 11.”).

104. See *Hernandez v. Williams*, 632 N.E.2d 49, 52 (Ill. App. Ct. 1994) (stating that the sanction provisions of Rule 137 for pleading false or frivolous matters “apply not only to plaintiffs but to defendants as well.”); *Chi. Title & Trust Co. v. Anderson*, 532 N.E.2d 595 (Ill. App. Ct. 1988) (sanctioning defendant and his attorney for denying an allegation in a complaint that they should have known to be true).

105. See *Hernandez*, 632 N.E.2d at 53 (Ill. App. Ct. 1994) (stating that a defendant in a civil action does not have a right to “put the plaintiff to his proofs” and sanctioning defendant is proper for defending an action without a factual or legal basis).

other civil action, it should be expected that admissions and denials made in response to the petition, as well as defenses, are warranted by the facts.¹⁰⁶ There should be no such concept of *putting the petitioner to her proof*.

In cases where it is clear that physical abuse occurred, a denial of that fact would be an untrue statement and subject to sanction.¹⁰⁷ Of course, a bit of art, if not care, would have to be taken in the manner with which the allegations of physical abuse were pleaded in order to make a denial unwarranted. An allegation that “respondent struck petitioner on the right side of her face with his fist causing bruises” should not be able to be denied when that did indeed occur and the petitioner has clearly been bruised. But when the allegation is that “respondent repeatedly and savagely struck petitioner on or about the right side of her face with his fist causing bruises, pain and suffering,” the use of descriptive adverbs “repeatedly and savagely” would allow respondent to be able to deny that the physical abuse, which obviously occurred, met the level implied by the use of the adverbs.¹⁰⁸ Nevertheless, for the denial to not be evasive, it would be more accurate to plead as an answer that respondent “admits striking petitioner, but denies striking petitioner repeatedly or savagely.”¹⁰⁹ Additionally, the

106. See ILL. SUP. CT. R. OF PROF'L CONDUCT 3.1, (providing that a lawyer may not defend a proceeding unless there is a basis for doing so that is not frivolous, and that only an attorney for a defendant in a criminal proceeding or a civil litigant facing jail time may defend the action in a manner that requires establishment of proof of every element).

107. See JOSEPH, *supra* note 103, at § 14(B)(1)(a) (stating that “[i]f a denial . . . is asserted without a reasonable basis in fact or law, the presenter is subject to sanction . . .”).

108. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev 1749, 1768 n.139 (1998) (stating that it is strategically wrong to use adjectives and adverbs in pleadings because “[a] nonargumentative and simple paragraph within a complaint may very well elicit an admission in the answer, thereby conclusively establishing the facts alleged in that particular paragraph”) (quoting Michael J. Fox, *Planning and Conducting a Discovery Program*, LITIG., Summer 1981, at 13-14). See also Matthew R. Henderson, *Making The Most of Rule 216 Requests to Admit*, 83 ILL. BAR J.425 (1995) (discussing that the use of adverbs and adjectives in a request to admit can give the answerer an opportunity to respond with an evasive response rather than a simple yes or no) (citing Theodore Blumoff, Margaret Johns, & Edward Imwinkelried, PRETRIAL DISCOVERY 359 (1994)).

109. 735 ILL. COMP. STAT. 5/2-620(c) (2002). Denials must not be evasive, but must fairly answer the substance of the allegation denied. See also PARNES, *supra* note 39, at § 5-4(b)(1) (discussing that “a responsive pleader cannot deny an entire statement within an affirmative pleading that contains many factual allegations simply because one of the allegations is false” and that “a specific denial should be made for each component of the statement within the affirmative pleading that is denied, with the remaining components

allegation of pain and suffering would arguably be outside of the knowledge of respondent. Therefore, a response of insufficient knowledge to form a belief would be warranted pursuant to Section 2-610(b) of the Code of Civil Procedure.¹¹⁰ An affidavit of the truth of the lack of knowledge is to be attached to the answer.¹¹¹ But, the denial of an allegation that is unquestionably true and within the knowledge of respondent should be subject to sanctions.

Actions seeking an order of protection are subject to two separate sanction provisions, each of which contains a different standard for sanction. Supreme Court Rule 137, generally applicable to all civil actions, provides that the court “may impose” sanctions when a denial is not “well grounded in fact” to the “best . . . knowledge, information and belief” of the person who signed the answer “formed after reasonable inquiry.”¹¹² Section 226 of the DVA provides for sanction for “allegation and denials, made without reasonable cause and found to be untrue.” The language is mandatory - “shall subject the party” as opposed to the permissive language of Rule 137 - “the court . . . may impose.”¹¹³ Though the two provisions are separate and distinct, Section 226 appears to not be utilized. I could not find any reported decisions in which sanctions were sought thereunder. In the one reported decision imposing sanctions in an order of protection case for reasons that would also invoke Section 226, Rule 137 was relied upon exclusively.¹¹⁴ What is interesting, is that the trial court denied sanctions sought, in part, for allegedly unfounded factual allegations

admitted”).

110. 735 ILL. COMP. STAT. 5/2-610(b) (2002) (stating that every allegation not explicitly denied is considered to be admitted “unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge . . .”).

111. 735 ILL. COMP. STAT. 5/2-610(b) (2002).

112. ILL. SUP. CT. R. 137. *See, e.g., In re Marriage of Cheger*, 571 N.E.2d 1135, 1142 (Ill. App. Ct. 1991) (awarding attorney’s fees in a divorce as both a statutory award of fees pursuant to Section 508(a)(1) of Marriage and Dissolution of Marriage Act, 705 ILL. COMP. STAT. 5/508(a)(1) (2002), and as a sanction pursuant to Rule 137 for false denial in answer of allegations of adultery).

113. 705 ILL. COMP. STAT. 60/226 (2002). *See George Timberlake & Nancy Pionk, Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. C. L. J. 1027, 1030 (1989) (discussing the discretionary, rather than mandatory, nature of sanctions under Rule 137).

114. *See, e.g., Rankin ex rel. Heidelbaugh v. Heidelbaugh*, 747 N.E.2d 483 (Ill. App. Ct. 2001) (finding it to be an abuse of discretion to deny sanctions against attorney for filing an unfounded emergency order of protection sought by developmentally disabled adult against his adoptive parents).

found to be at least totally lacking in supportive evidence, if not just untrue.¹¹⁵ The reviewing court found the denial of sanctions to be an abuse of discretion.¹¹⁶ If the mandatory language of Section 226 were taken on its face, the trial court would not have had the discretion to deny sanction thereunder, as the court does with sanctions sought pursuant to Rule 137.¹¹⁷ Consequently, the imposition of sanctions would have been mandatory.

Section 226 is somewhat unique in terms of Illinois procedure in that it is a special sanction standard that applies to a specific body of law. I am not aware of, nor could I find a comparable sanction provision applicable to a different substantive area. Neither could my colleague, Professor Jeffrey Parness, author of *Illinois Civil Procedure*.¹¹⁸ As Professor Parness points out in his book, “[o]ften a special pleading requirement is accompanied by a special sanction standard.”¹¹⁹ For example, Section 2-622 of the Code of Civil Procedure provides that the plaintiff attach an affidavit to the complaint stating that the affiant has reviewed the facts and consulted with a knowledgeable health care professional.¹²⁰ Untrue allegations in the affidavit “shall subject the party pleading them” to sanctions.¹²¹ Section 226 of the DVA, however, is not applicable to any special pleading requirement. It appears to exist only because of the nature of the action, and not to further the purposes of a procedural mechanism.¹²²

115. *Id.* at 447.

116. *Id.*

117. *See, e.g., id.* at 454 (discussing “that a trial court has discretion in determining whether sanctions should be applied.”).

118. Conversation with Professor Jeffrey A. Parness, Northern Illinois University College of Law.

119. PARNES, *supra* note 39, at § 14-2(a), at 308.

120. 735 ILL. COMP. STAT. 5/2-622 (2002).

121. 735 ILL. COMP. STAT. 5/2-622(e) (2002).

122. Petitions for orders of protection are sometimes subject to criticism when they are used to gain advantage in an expected divorce proceeding. One party will file a petition with questionable allegations seeking exclusive possession of the marital residence and temporary custody of the children. Having the children in their custody and in response to an allegation of domestic violence is viewed as giving such party a strategic advantage in later proceedings. Section 226 and its mandatory imposition of sanctions could be viewed as a deterrent to such abuse of order of protections proceedings, as has been incorporated into statutes in other states, but there is nothing to indicate that was the intention of the drafters.

B. IMPROPER PURPOSE

Defending an action seeking an order of protection for purposes of intimidating a petitioner/witness who will be called to testify against the respondent in a later criminal prosecution or for the purpose of obtaining discovery for that action raises the question of whether the defense is for an “improper purpose” within the meaning of Rule 137. There are two contexts in which this can arise. In one, as discussed above, the respondent has made unwarranted denials to the petition, subjecting himself to sanctions for asserting denials that are both not well-grounded in fact and asserted for an improper purpose.¹²³ In the second, the respondent may have a legitimate basis for denying factual allegations in the petition and/or have good faith contentions as to the relief sought. Though the defense may be meritorious, it may still subject the respondent to sanctions if brought for an improper purpose.¹²⁴

Rule 137, tracking the language of the 1983 version of Rule 11,¹²⁵ provides that the signature of an attorney or party that is required on “every pleading, motion, and other paper” constitutes a certificate that the document “is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”¹²⁶ The list of “improper purposes” is not meant to be exclusive, but rather is exemplary.¹²⁷ The basic notion is that it is an

123. See Jerold S. Solovy, et al., *Sanctions Under Federal Rules of Civil Procedure 11*, C842 ALI-ABA 97 at 162 (discussing that “[t]here is often an overlap between the inquiry regarding whether a pleading is frivolous and whether it is filed for an improper purpose,” citing *In re Kunstler*, 914 F.2d 505, 508 (4th Cir. 1990) and *In re Grantham Bros.*, 922 F.2d 1438, 1443 (9th Cir. 1991)).

124. See generally Solovy, *supra* note 123, at 159-63 (discussing “filing a well-founded complaint for [an] improper purpose”); JOSEPH, *supra* note 103, at § 13(C), at 221-23 (discussing sanctions for “ill-motivated meritorious positions.”).

125. Rule 137 became effective on August 1, 1989, and was identical to a predecessor statutory provision, ILL. REV. STAT. CH. 110, para 2-611 (1987) but for three exceptions, most notably making the imposition of sanctions discretionary rather than mandatory. See Timberlake & Pionk, *supra* note 113, at 1027-28 (discussing the evolution of sanction provisions in Illinois and the differences in various formulations). See also PARNES, *supra* note 39, at § 14-2(a) n.6 (discussing that Rule 137 was “modeled after the 1983 version of [Rule 11]).

126. ILL. SUP. CT. R. 137.

127. See 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE*, ¶ 11.11[8][a], (3d ed. 2002) (discussing the comparable language of Rule 11 and stating that the “list is not inclusive. An attorney or party may be sanctioned for any improper purpose.”).

improper purpose to engage in litigation for a purpose other than intending to obtain relief from the judicial action.¹²⁸

Whether a well-founded claim or defense can be considered to have been brought for an improper purpose is a source of some disagreement in the federal circuits.¹²⁹ Some circuits have flatly held that if an action has merit, it cannot be said to have been brought for an improper purpose.¹³⁰ These are sometimes referred to as *mixed*

128. See JOSEPH, *supra* note 103, at § 13(B)(2) (stating that “[a]n improper purpose is any purpose other than one to vindicate rights (substantive or procedural) or to put claims of right to a proper test,” and “[i]f a complaint is not filed to vindicate rights in court, its purpose must be improper.”). See also *In re Kunstler*, 914 F.2d 505, 518-520 (4th Cir. 1990) (discussing whether an action was pursued for an improper purpose in terms of whether a complaint was filed for purposes other than to vindicate rights and stating “[i]f a complaint is not filed to vindicate rights in court, its purpose must be improper”); *Cook v. Kiewit Sons Co.*, 775 F.2d 1030, 1036 (4th Cir. 1985) (upholding the trial court’s imposition of sanctions and quoting with approval the statement of the Judge Schwartz that sanctions were appropriate because the action had been filed, “‘not to vindicate rights but to multiply proceedings and to put defendants and the courts to needless efforts and expense,’ and with the purpose of ‘vexing, harassing and impeding the defendants in the proper performance of their duties under the law.’”). But see JOSEPH, *supra* note 103, at § 13(B)(2), (stating, it is not an improper purpose “to put claims of right to a proper test.”). As discussed *supra* notes 103-06 and accompanying text, putting a party to their proof does not have a proper place in civil litigation. As will be discussed *infra*, at notes 162-65 and accompanying text, such also runs afoul of Rule 3.1 of the ILL. RULES OF PROF’L CONDUCT, and of the ABA MODEL RULES OF PROF’L CONDUCT.

129. See MOORE ET AL., *supra* note 127, at ¶ 11.11[8][d] (stating that “[c]ourts disagree on the question of whether sanctions may be imposed for filing a well-founded document for an improper purpose” and citing the Second, Fifth and Ninth Circuits as holding such is not sanctionable, while the Seventh Circuit holds to the contrary); JOSEPH, *supra* note 103, at § 13(C), at 221-23 (discussing that “[t]here is a slight split among the Circuits as to whether sanctions may be imposed for the filing of a meritorious paper for an improper purpose.”); SOLOVY, *supra* note 123, at 160-61 (discussing that “[c]ourts are split over the question of whether a lawyer or party can be sanctioned for filing a well-founded complaint for an improper purpose.”).

130. See, e.g., *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987) (stating that “a non-frivolous complaint cannot be said to be filed for an improper purpose.”); *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313, 320 (5th Cir. 1989):

[t]he filing of a complaint that complies with the ‘well grounded in fact and warranted by existing law’ prong of Rule 11 cannot, as a matter of law, harass the defendant as Rule 11 forbids, regardless of the plaintiff’s subjective intent, or so we have held. *Nat’l Ass’n of Gov’t Employees v. Nat’l Fed’n of Fed. Employees*, 844 F.2d 216, 223-24 (5th Cir. 1988). If *Jennings*’ original complaint passes the test of non-frivolousness, its filing does not constitute harassment for Rule 11 purposes.

Jennings, 877 F.2d at 320; *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995) (reversing imposition of sanctions on a non-frivolous complaint filed for the improper purpose of “exerting pressure on defendants through the generation of adverse and

purposes cases.¹³¹ But to simply hold that a facially meritorious claim cannot be brought for an improper purpose ignores the obviously conjunctive language that considers frivolousness and impropriety as independent factors, each of which must be met.¹³² Similarly, because the requirements are separate and distinct, not every complaint that is frivolous is filed for an improper purpose.¹³³

There are no Illinois cases directly on point, though one decision, *Dyer v. Zoning Bd. Of Appeals*,¹³⁴ has mentioned the concept of sanctioning a party for a meritorious claim brought for an improper purpose. Therefore, because Illinois courts often look to federal court precedent in deciding Rule 137 cases, the federal decisions are instructive.¹³⁵ The split in the circuits also turns, in part, upon the question of whether a court should delve into the subjective intent of an attorney or litigant in order to ascertain whether a filing was intended for an improper purpose. So doing is said by critics to foster satellite litigation.¹³⁶ Nevertheless, the Seventh Circuit has indicated that a subjective inquiry is appropriate in order to ascertain whether an

economically disadvantageous publicity . . .”).

131. See, e.g., JOSEPH, *supra* note 103, § 13(B)(2) at 216.

132. See JOSEPH, *supra* note 103, § 13(B)(2) at 216 (stating that “[t]here is no textual support for a limitation of improper purpose analysis to frivolous, as opposed to non-frivolous complaints” and that “[a] balanced reading of the Rule does not support [the position that non-frivolous complaints are not subject to sanction for an improper purpose].”). See also *Whitehead v. Food Max of Miss.*, 332 F.3d 796, 802 (5th Cir. 2003) (holding that nonfrivolousness and not filing for an improper purpose are separate obligations, the violation of either of which warranted sanctions); *In re Kunstler*, 914 F.2d 505, 518 (4th Cir. 1990) (discussing whether a complaint has been filed “to vindicate rights in court” is the key issue in assessing whether an action has been filed for an improper purpose, and that “[i]f a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose.”).

133. See MOORE ET AL., *supra* note 127, ¶ 11.11[8][e] (stating that, “the court may not infer an improper purpose based merely on a finding that the legal claims or contentions were frivolous.”).

134. 534 N.E.2d 506 (Ill. App. Ct. 1989). See also Donald B. Hilliker & David F. Wentzel, *Coping in the 90's: The Demand on Illinois Litigators Under Supreme Court Rule 137*, 80 ILL. B.J. 168, 172-73 (1992) (discussing that it is “unclear in Illinois whether a lawyer or party can be sanctioned for filing a well-founded complaint for an improper purpose” and stating “[t]he issue was raised but not decided in [*Dyer*]”).

135. PARNES, *supra* note 39, at § 14-2(a) n.7.

136. See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (rejecting inquiry into the subjective intent of the presenter of a paper in order to “reduce the need for satellite litigation when a district court is called upon to impose a rule 11 sanction.”).

improper purpose was the motivation for a filing.¹³⁷ Commentators have correctly pointed out that the divergent views on this matter are largely semantic, or simply misguided, as courts should be able to infer an improper purpose from objective conduct.¹³⁸ Illinois commentators are in agreement that meritorious litigation can be pursued for improper purposes in violation of Rule 137.¹³⁹

An improper purpose can most easily be inferred from successive filings of repetitive actions or multiple motions and like tactics.¹⁴⁰ Inferring an improper purpose from the defense of an action, not to mention a possibly meritorious defense, is much more subtle. Nevertheless, courts have found an improper purpose when a party pursues one action for the purpose of gaining some advantage in a different action. For example, it has been held to be an improper purpose: to commence a civil action for the purpose of intimidating witnesses or gaining leverage and discovery for a related criminal prosecution;¹⁴¹ to file documents in a bankruptcy action for the purpose of delaying a related foreclosure;¹⁴² or to attempt to cause a judge to recuse himself from a different proceeding.¹⁴³ When the circumstances

137. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), (holding that “[b]ecause Rule 11 has a subjective component as well, the district court must find out why [plaintiff] pursued this litigation.”).

138. See JOSEPH, *supra* note 103, § 13(A)(1), at 213 (“This dispute is largely semantic. When a court is called upon to determine whether the improper purpose clause has been violated, the court can do so only by inferring the presenter’s intent from his or her objective behavior.”); William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985) (“In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney’s subjective intent. The record in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings [were interposed for an improper purpose].”).

139. See, e.g., *Hilliker & Wentzel*, *supra* note 134, at 173 (“Given the plain language of Rule 137, it would seem that even meritorious litigation, if pursued to harass or for other improper reason, violates the lawyer’s duty under Rule 137.”).

140. See JOSEPH, *supra* note 103, § 13(A)(1), at 213-14 (listing behaviors that indicate an improper purpose).

141. *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990) (sanctioning counsel for bringing a civil action to gain advantage in a subsequent criminal action); *Davison v. Engelke*, 1997 WL 585818 (Minn. Ct. App. 1997) (sanctioning plaintiff for commencing a civil action to engage in discovery not allowed in a criminal case and to intimidate potential witnesses in the criminal case).

142. *In re Weiss*, 111 F.3d 1159, 1171 (4th Cir. 1997) (upholding the finding of an improper purpose in filing documents in a bankruptcy court for the purpose of delaying a collateral foreclosure action).

143. *Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985) (finding an improper purpose in

make it apparent that respondent has defended an order of protection for similar purposes, sanctions should follow no less than when a plaintiff has commenced an action for such improper purposes. The heart of the inquiry should be whether respondent defended the action for purposes related to that action, or some other action. Using the defense of one suit solely to benefit another suit burdens the petitioner and the court with time and resources expended for a purpose unrelated to the suit at hand. When a party does not seek to vindicate rights in the immediate action, the purpose is improper.¹⁴⁴

One of the difficulties in determining whether sanctions are appropriate when a respondent defends a domestic violence order of protection case is that the question of the existence and extent of the alleged physical abuse is relevant for multiple purposes. A finding of abuse is necessary for an order of protection to be issued.¹⁴⁵ In situations where there is not an issue of whether the abuse occurred, cross-examination of the victim concerning the nature and circumstances of the abuse may also be relevant to a determination of appropriate relief.¹⁴⁶ Therefore, contesting the abuse in a situation where there is no question that it took place does not necessarily constitute an improper purpose within the meaning of Rule 137. But when the respondent cross-examines petitioner and her witnesses, but puts on no proof, does not testify and does not argue for or against any remedies, it becomes apparent there is no relief sought through the

filing a civil rights action against the judge who presided over the plaintiff's divorce in order to get the judge to recuse himself).

144. See *Cook v. Kiewit Sons Co.*, 775 F.2d 1030, 1036 (9th Cir. 1985) (quoting Judge Schwartz from a predecessor action that an action is improper when brought "not to vindicate rights but to multiply proceedings and to put defendants and the courts to needless efforts and expense.").

145. See *supra* notes 13-15 and accompanying text.

146. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 961-66 (1993) (discussing that in many states evidence of domestic violence is a factor in determining the best interests of the child in making custody awards). See, e.g., 750 ILL. COMP. STAT. 5/602(a)(7) (2002) (providing that "the occurrence of ongoing abuse as defined by Section 103 of the Domestic Violence Act of 1986" shall be a factor to be considered by the court in determining the custody according to the best interest of the minor child); 750 ILL. COMP. STAT. 5/602(a)(6) (2002) (providing that "physical violence or threat of physical violence by the child's potential custodian" shall be considered by the court in determining custody according to the best interest standard); 750 ILL. COMP. STAT. 60/214(b)(6) (2002) (providing that abuse of the minor child by the respondent shall raise the rebuttable presumption that it is in the child's best interest to not be in the custody of the respondent).

defense and no basis for it.¹⁴⁷ Rather, it is interposed for use in the later expected criminal prosecution, such as discovery or harassment of a future adverse witness.

Sanctioning a party for filing a meritorious complaint for an improper purpose has been the subject of the issuance of cautions by commentators who fear a chilling of the pursuit of vindication of substantive rights¹⁴⁸ or interference with constitutional guarantees.¹⁴⁹ Even greater caution should be exercised when considering sanctioning a party or attorney for defending a suit brought against them. Nevertheless, both federal courts and Illinois state courts have shown the ability to exercise appropriate caution, and it remains that there are defenses that are devoid of merit, as well as defenses pursued for improper purposes.¹⁵⁰ When such occur, sanctions should be assessed, just as they should when frivolous or harassing complaints are filed.

The Fourth Circuit's opinion in *In re Kunstler* is instructive as to how to draw the line between a defense of an action for an improper purpose and a legitimate defense.¹⁵¹ *Kunstler* involved a civil rights action brought against numerous governmental and law enforcement officials in their individual and official capacities by persons facing

147. See *Hernandez v. Williams*, 632 N.E.2d 49, 54 (Ill. App. Ct. 1994) (sanctioning defendant's attorney in a small claims action for defending a case without factual basis and finding an indication of no basis for the defense in the fact that defendant cross-examined plaintiff's witnesses but put on no proof in defense).

148. See JOSEPH, *supra* note 103, at § 13(C), at 219 (stating the courts should be "circumspect" about imposing sanctions for a meritorious paper filed for an improper purpose).

149. See Carol Rice Andrews, *Jones v. Clinton: A Study In Politically Motivated Suits, Rule 11, And the First Amendment*, 2001 BYU L. REV. 1 (2001) (discussing whether sanctioning a plaintiff for filing a meritorious case for an improper purpose violated a First Amendment of access to the courts).

150. See, e.g., *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 289-90 (4th Cir. 1987) (failing to find an abuse of discretion in not sanctioning a defendant for dropping two defenses on the eve of trial after considerable expense by plaintiff in conducting discovery in face of plaintiff's allegation that the defenses had been raised "to deplete their resources and force them to abandon their suit."); *Matich v. Gerdes*, 550 N.E.2d 622, 630 (Ill. App. Ct. 1990) (refusing to find the trial court engaged in an abuse of discretion in refusing to sanction a defendant who had denied liability in an answer and interrogatory even though defendant and his counsel had a letter from his insurance carrier indicating defendant had no defense because, in part, defendant had stipulated to facts that established his liability).

151. *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990). *Kunstler* was recently cited with approval by the Fifth Circuit and followed in *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 807 (5th Cir. 2003) (ordering sanctions for two improper purposes in seeking a writ to execute a judgment: to embarrass the opposing party and self-promotion).

criminal charges.¹⁵² Plaintiffs sought expedited discovery, which was resisted by defendants on the grounds that it was sought to gain information concerning the criminal prosecution.¹⁵³ A little over a month after filing, plaintiffs sought voluntary dismissal of the civil action.¹⁵⁴ Defendants sought Rule 11 sanctions which were granted by the trial court for full fees and costs, as well as an additional sanction for each baseless claim.¹⁵⁵ The Fourth Circuit affirmed, agreeing with the trial court that the civil action was commenced for improper purposes because, "plaintiffs' counsel never intended to litigate [the action] and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution."¹⁵⁶ The Court found that it was proper for the trial court to infer improper purpose from viewing the "circumstances surrounding the case, when viewed as a whole."¹⁵⁷

Similarly, viewing the whole circumstances of the defense of an order of protection may reveal when the defense was not conducted to vindicate rights, but rather was for the improper purposes of intimidating a witness or engaging in otherwise unobtainable discovery for a related criminal case. Courts should consider several factors as part of the whole circumstances. It is important to assess whether there was any basis for denying allegations of abuse. Of course baseless denials are in and of themselves subject to sanction,¹⁵⁸ but light is also shed on whether the defense was conducted for an improper purpose. This is especially the situation where a respondent has responded to allegations in a petition with assertion of Fifth Amendment privilege.¹⁵⁹ A baseless course of action may indicate it was pursued for a purpose that was other than to vindicate rights and, hence, improper.¹⁶⁰ But other circumstances must also be considered, as a baseless defense does

152. *In re Kunstler*, 914 F.2d at 511.

153. *Id.* at 511-512.

154. *Id.*

155. *Id.* at 512.

156. *Id.* at 519.

157. *Id.* at 520.

158. *See supra* note 103 and accompanying text.

159. *See supra* notes 74-76 and accompanying text.

160. *In re Kunstler*, 914 F.2d 505, 519 (4th Cir. 1990) ("If counsel willfully files a baseless complaint, a court may properly infer that it was filed either for purposes of harassment, or some purpose other than to vindicate rights through the judicial process.").

not necessarily indicate an improper purpose.¹⁶¹ It should also be considered whether the respondent put forth any proof. Where respondent has merely cross-examined adverse witnesses but put on no witnesses of their own, it may be inferred that the cross-examination was not for the purpose of vindicating rights, but rather to gather otherwise unobtainable discovery for a corresponding criminal case. As previously discussed, there should be no concept of *putting a party to their proof*. Therefore, cross-examination by itself is suspect of being an improper purpose. Additionally, courts should consider whether the aggressiveness of the cross examination was inappropriate as that indicates an attempt to intimidate or harass the witness. Finally, if the above factors occur in the context of a pending criminal prosecution, improper purpose may more likely be inferred from the circumstances.

C. RULE 3.1 OF THE RULES OF PROFESSIONAL CONDUCT

An attorney who defends an order of protection for the purposes of trying to intimidate a future adverse witness in a subsequent criminal prosecution or obtaining discovery that would otherwise not be obtainable in a criminal prosecution is in violation of Rule 3.1 of the Illinois Rules of Professional Conduct.¹⁶² Rule 3.1 prohibits an attorney from defending a proceeding or controverting an issue unless there is a non-frivolous basis for so doing. Rule 3.1 is identical to Rule 3.1 of the ABA Model Rules of Professional Conduct. The commentary to the Model Rule explains that an action is frivolous if its purpose is to harass a person, which should include intimidation of a witness, or if the attorney is “unable to make a good faith argument on the merits of the action taken.”¹⁶³ Cross-examination of the petitioner for purposes of

161. See *id.* at 519 (“The existence of baseless allegations does not alone require a finding of improper purpose.”).

162. ILL. SUP. CT. R. 3.1:

Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ILL. SUP. CT. R. 3.1.

163. ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT, R. 3.1 cmt. (2002).

discovery for another case and without later argument on the merits would also be frivolous within the meaning of the rule.

Rule 3.1 contains an exception for criminal proceedings or other proceedings with risk of incarceration in which a lawyer may require proof of every element, thereby *putting the party to its proof*. But the limited application of the exception clarifies that in civil actions there is no such concept of putting a *party to its proof*. As previously discussed, such would functionally negate the requirement of admissions and denials to each factual allegation of a complaint. Simply put, both rules of civil procedure and codes of professional conduct require a lawyer representing a client to admit that which is true. Therefore, the practice of cross-examination of a petitioner under the guise of testing her story is neither procedurally nor ethically permissible.

Additionally, the commentary to Model Rule 3.1 makes clear that procedural and ethical rules are intended to be merged together. It states that "Rule 3.1 is best analyzed in tandem with Rule 11", which it "parallels", and that the two rules "[were] conceptualized to address the same concerns."¹⁶⁴ This makes perfect sense, for it would indeed be odd to consider an attorney's actions to be ethically impermissible but procedurally valid.¹⁶⁵

CONCLUSION

There is no reason why a petitioner in an action for an order of protection should be subjected to abuse twice - the first time being that which gave rise to the action, and the second time being a frivolous or needless defense that subjects petitioner to cross-examination only for the purpose of seeking to intimidate or gain discovery to gain advantage in a later criminal prosecution of the respondent. Of course, care must be exercised to make sure that respondents who are defending the order

164. *Id.*

165. *See, e.g., Hernandez v. Williams*, 632 N.E.2d 49, 53 (Ill. App. Ct. 1994) (affirming the imposition of sanctions against attorneys who defended action to simply "put the plaintiff to his proofs" and stating, "[f]urther we note that Rule 137, just like Rule 11 . . . 'creates duties to one's adversary and to the legal system.'" (citing *Mars Steel Corp. v. Cont'l Bank, N.A.*, 880 F.2d 928, 932 (7th Cir. 1989)). *See also First Fed. Sav. Bank of Proviso v. Drovers Nat'l Bank of Chicago*, 606 N.E.2d 1253, 1256-57 (Ill. App. Ct. 1992) (finding that a frivolous appeal brought for an improper purpose was subject to sanction under the courts inherent powers and in violation of the professional obligations of Rule 3.1).

of protection in good faith are not sanctioned for so doing. But that care should not be so cautiously exercised that frivolous and/or improper purpose defenses escape sanction. Though the line between the two is fine, nonetheless it can and should be drawn, as courts are called upon to draw such lines with great frequency. Victims of domestic violence are certainly worthy of the careful attention of the courts required to distinguish the defensible from the indefensible and the proper from the improper purpose. Additionally, the legislature should adopt a provision excluding testimony given in an order of protection from use in a later criminal proceeding. This would greatly reduce the incentive to defend a petition for an order of protection for an improper purpose.

