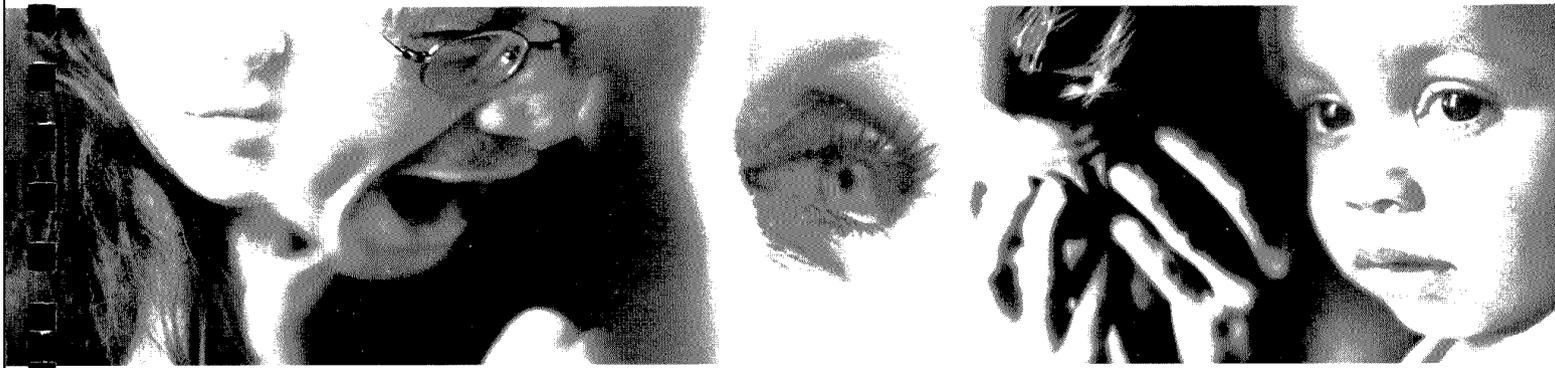


# the ohio domestic violence



## *A Practical Guide to Competence for Judges & Magistrates*



**Family Violence  
Prevention Center**

*Coordinating Ohio's Resources for Safer Families*

**Bob Taft, Governor  
Maureen O'Connor, Lt. Governor**

196349



## *About this Benchbook*

This Benchbook provides a quick reference to key domestic violence legal issues in Ohio. The three courtroom contexts where domestic violence is most likely to be at issue: criminal proceedings, protection order proceedings and parenting proceedings, are paid particular attention. In addition, applicable federal laws, especially firearms restrictions are discussed. Supplementing the legal discussion in this Benchbook, the reader will find general information about the dynamics of domestic violence and *best practice* suggestions throughout the text. This supplementary information has been included primarily to address safety concerns that accompany the legal issues in all cases involving allegations of domestic violence, and to place each court proceeding into its larger context.

The reader is also directed to review the endnotes, when further research is desired. Especially useful to the author in developing the Benchbook is the detailed discussion of Ohio domestic violence legal issues included in *Ohio Domestic Violence Law* by Ronald B. Adrine and Alexandria M. Ruden (West Group 2000). Cross-references to that significant resource have been included throughout the Benchbook.

Although this Benchbook is intended for use by judges and magistrates, the information contained should be useful to law enforcement officers, attorneys, court personnel, and domestic violence service providers.

While this Benchbook is not intended to be an authoritative statement on the legal solutions to domestic violence, it does report current scientific and legal research.

Furthermore, it represents the best professional judgment of the author and those collaborating in this project to stop the cycle of domestic violence. Similarly, it is noted the opinions and conclusions expressed in this publication are those of the author and do not necessarily reflect the views of the Department of Justice or the State of Ohio, Office of Criminal Justice Services.

A word about gender references. Domestic violence laws in Ohio are gender-neutral and legal remedies are equally available to men and women. The laws may be gender neutral, but the reality of domestic violence is not. By every reliable measure, including published United States Department of Justice and F.B.I. crime statistics, domestic violence - violence between intimate partners - is overwhelmingly a crime committed by men and against women. The language of this Benchbook reflects that reality, especially where forcing a contrary phrasing would be confusing or dishonest, and is not meant to diminish the importance of cases where the victim is male or the perpetrator is female.

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# the ohio domestic violence benchbook

*A Practical Guide to Competence  
for Judges & Magistrates*

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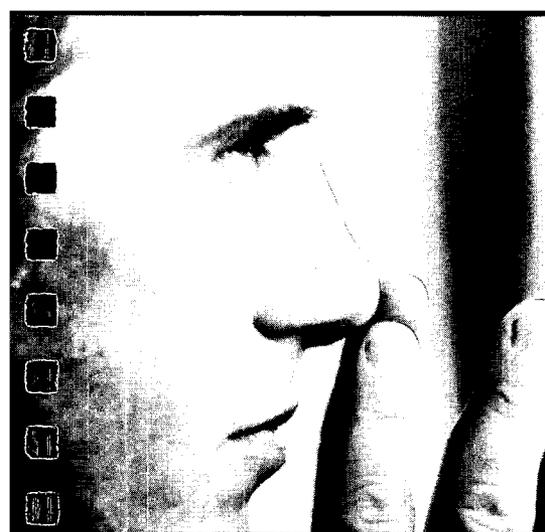
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**C**ourts have an obligation to carry out the legislative goals to protect the victims of domestic violence.



## Professional Competence in Domestic Violence Cases

Unlike crimes of violence involving strangers, domestic violence cases tend to show up repeatedly on the court's docket in cases between the same parties, but with increasing severity of violence. Understanding the *What, Why, Who* and *When* of domestic violence cases,<sup>1</sup> as well as *How* to manage such cases is essential to competent judicial decisions. A failure to achieve such understanding can severely damage the lives of the victim, the offender, the children and even the judge.

### *Domestic Violence: The What*

#### *What is domestic violence?*

- **Behavioral Definition:** Judicial understanding starts with recognizing that the behavioral definition of domestic violence is more comprehensive than the legal definition: "Domestic violence is a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partners." Some aspects of this pattern which should prove interesting to judges include:<sup>2</sup>
  - Domestic violence differs from stranger violence in that it consists of a variety of behaviors, some criminal and some not, but all of which indicate a pattern of abusive control.
  - Domestic violence is not an isolated event, but episodes that interact in a pattern to control the abused party.
  - Perpetrators often commit acts that appear aimed at children, property, or pets, which are used to control or punish the intimate partner.
  - Research of heterosexual couples indicates that a woman's motivation for using physical force is self-defense, while men use physical force for power and control.
  - The consequences of domestic violence are often lethal, with one-third of all female homicide victims in this country being killed by a husband or boyfriend.

### *Domestic Violence: The Why*

#### *What causes domestic violence?*

- **It Is Learned Behavior:** Domestic violence behaviors are learned through observation beginning in childhood and later through reinforcement, including when the legal system fails to hold the offender accountable. It is repeated because it works. It works to control the victim through fear and intimidation. Because it is learned behavior, it can be changed with sufficient motivation such as a strong court holding the batterer accountable.<sup>3</sup>

- **It Is Not Anger:** Domestic violence is not “out of control” behavior. Violence is directed, together with other tactics such as threats, gifts, promises, isolation, and financial restraints, to establish control over or punish victims. That the abuser does not typically choose the same tactics with bosses, co-workers or friends demonstrates his anger is under control and “anger management” is a misguided solution.
- **It Is Not Substance Abuse:** While substance abuse does not excuse domestic violence, it is relevant because it can increase the lethality of the violent behavior and must be considered in safety issues for the victim, children, and community. It is also relevant to treatment: experts say changing domestic violence behavior is impossible without also stopping the substance abuse, so concurrent treatment, or in-patient substance abuse treatment followed by mandatory batterer intervention treatment, is advisable.
- **It Is Not the Victim:** Research shows there is no psychological profile or demographic characteristic for battered women. Research also shows that no victim behavior could alter the perpetrator’s behavior. It is not any trait, behavior, or fault of the victim, but the attitudes and beliefs of the perpetrator that cause domestic violence.

## Domestic Violence: The When

*When is domestic violence most likely to escalate?*

- **Separation Violence:** The chances of domestic violence escalating into homicide increase significantly when the perpetrator believes that the victim is leaving the relationship, due to the potential loss of control over the victim. This also happens to be the very same period of time when judges are most likely to encounter the parties for divorce proceedings, criminal charges and protection orders. Professionally competent judicial action to promptly separate the parties, remove weapons, issue protection orders, put children in a safe setting, provide adequate family support, set strict conditions of bond, and swiftly enforce any violations, may literally mean life or death during this high danger period.
- **Different Reasons for Killing:** “It is important to note that while these [domestic violence death] statistics include both female and male victims, the two genders commit spousal murders for very different reasons. Women primarily kill their partners in self defense or in retribution for prior acts of violence, while men commonly kill in response to the woman’s attempt to leave the abusive relationship.”<sup>4</sup>

## Domestic Violence: The Who (Perpetrators)

*Who is committing the domestic violence in our communities?*

- **No Single Profile:** Researchers say domestic violence perpetrators fit into no single personality diagnosis or psychological profile. Only by hearing evidence and evaluating facts can a judge determine whether violence has occurred and who the perpetrator is. But some information about common behavior patterns and attitudes is included below to help the court in its work of fact-finding, decision-making, and determining the most effective interventions.<sup>5</sup>

- **A Gender-Based Crime:** Most men do not batter. But most batterers are men. National crime statistics show that about 95% of spouse-abuse victims are women. Violence by women against their partners is often self-defense. And, generally, the frequency and severity of male violence are far more serious than female aggression. Courts must determine the primary aggressor in each case and treat domestic violence seriously regardless of who is at fault.
- **From Abusive Homes:** Male children brought up in abusive homes have a high likelihood of battering intimates in their adult relationships.
- **Minimize, Deny, Lie, Blame:** Some perpetrators minimize and deny domestic violence, and believe their own denials rather than admit to themselves that they are abusers. Others lie to avoid the consequences or blame others – especially the victim – for their own behavior. These behaviors are similar to ones judges see in substance abusers. Judges should keep proceedings focused on the alleged perpetrator’s behavior and not the surrounding circumstances or justifications.
- **A Need to Control:** Domestic violence abusers have a great need to be in control, and are experienced in the techniques of control. They tend to use children as one of the tools for controlling their partners. They believe what they did was justified. They believe they will not be held accountable for beating their partners. And they believe they are still in control, even in the courtroom.
- **Jealous and Possessive:** Extreme jealousy and possessiveness are common among domestic violence batterers and are used as reasons for monitoring, isolating, stalking and other obsessive behaviors.
- **Nice Guys:** Some perpetrators are witty, charming and intelligent, which makes it hard for their victims or the courts to believe they will continue to be violent. It is advisable to focus on the behavior, not on the personality.
- **Serial Batterers:** Many researchers have found that batterers tend to move from one victim to another.<sup>6</sup> Even if through the intervention of the justice system a batterer leaves the current victim alone, the community, the court system, and other victims are likely to encounter the same individual again in the absence of successful batterer intervention treatment.

## *Domestic Violence: The Who (Victims)*

### *Who is likely to be the victim of domestic violence?*

- **No Profile:** The greatest predictor of whether an individual will be abused is gender: just being female. Victims of domestic violence do not fit into any personality profile and do not differ from non-battered women until they have been abused. They do not necessarily come from abusive homes or prior abusive relationships. The sole determinant of whether they are abused is the perpetrator.<sup>7</sup>
- **Isolation and Denial:** Victims have often been severely isolated in their relationships to the point where they have no family or other outside support to help them escape. They are told the justice system will do nothing for them and if their first contact to seek help is an unhelpful police officer or dismissive judge, they believe it. They may minimize the

abuse, or even deny it, either to avoid retaliation or because they blame themselves. The fewer the community resources available and the greater the barriers erected by the justice system to provide help, the more likely it is for a victim to stay put and reject criminal prosecution of the abuser or other legal remedies.

- **Staying May Be the Safest Option:** The primary reason given by victims of domestic violence for staying with their abuser is the realistic fear of getting hurt or killed. This fear is justified: in 75% of spouse assaults, the parties are already separated.<sup>8</sup>
- **Reluctant Witnesses:** Most domestic violence victims with sufficient support and resources follow through with court proceedings. However, often victims are reluctant to participate in court proceedings for a variety of reasons, including promises or threats from the perpetrator, financial pressures, or lack of confidence that the legal system can protect them. The court needs to recognize that a victim's reluctance to cooperate may be survival behavior and not disrespect for the court.
- **The Myth of False Allegations:** "In reality the overwhelming majority of women who report abuse are telling the truth, and an even greater number do not report the abuse . . . most abused women do not disclose victimization, even when reporting such information may be of vital importance to them . . . [O]f course, it is important to sort through varying accounts to ensure that no one is falsely accused of violent behavior. Nevertheless, studies continue to confirm that underreporting of violence is a much more significant problem than false accusations."<sup>9</sup>

## *Domestic Violence: The Who (Children)*

*What does professional competence require that a judge know about the children in domestic violence cases?*

- **Teaching Children Violent Ways:** Domestic violence is learned behavior. Research shows that witnessing violence between one's parents or caretakers is a more consistent predictor of future violence than being the victim of child abuse. One study found that 82% of abusive husbands had grown up in violent homes. Domestic violence tends to get passed from one generation to the next; today's batterers probably learned such behavior as children in their own homes. Consequently, children raised in violent families who do not receive intervention tend to experience domestic violence in their adult lives.<sup>10</sup>
- **Look for Child Abuse, Too:** Researchers say that in 30% to 50% of homes where the mother is being abused, the children are being physically or sexually abused as well.<sup>11</sup>
- **Physical and Emotional Harm:** The ways in which children are harmed in violent homes are numerous: abused to coerce the victim into submission; injured accidentally during a beating; abducted or used as custody pawns; interrogated about the victim's activities; or blamed by the perpetrator as the reason for the violence.
- **Long-Term Effects of Witnessing Domestic Violence:** Children who witness domestic violence often suffer intense fear, impaired self-esteem, self-blame, anxiety and depression. They are at high risk for delinquency. As adolescents, they are more likely to commit sexual assault, more likely to abuse drugs and alcohol, more likely to commit crimes against others, and more likely to commit suicide.

## Domestic Violence: The Who (Community)

### What does domestic violence cost the community?

- **Business Losses:** 96% of employed women who suffer abuse report that their work performance is hurt as a result of the family violence. Estimates of the costs of domestic violence to American businesses range between \$3 and \$13 billion in lost productivity annually, resulting from absenteeism, increased health care costs, high turnover, and lower employee productivity. Law enforcement experts say domestic violence is a leading motive for workplace homicide.<sup>12</sup>
- **Other Economic Losses:** The country's health care costs for battered women are estimated at \$6.5 to \$31 billion, not including mental health costs, increased costs of raising harmed children, the costs of homeless shelters and foster care facilities.<sup>13</sup> A heavy financial hit is also taken by law enforcement, which spends about one-third of its time responding to domestic violence calls, and imprisoning domestic violence offenders.<sup>14</sup>

## Domestic Violence: The Who (Judges)

### How does a judicial officer attain professional competence in handling domestic violence cases?

- **Professional Competence:** Judges and magistrates pride themselves on the professional competence they demonstrate in the justice system. In the field of domestic violence, professional competence comes from study. It is a brand new topic in American jurisprudence; almost all law, legal writing, and scientific research in this area has developed in the last two decades. Voluntary personal education can help judges achieve the level of professional competence to face the life and death decisions domestic violence cases present.
- **All Eyes on the Judiciary:** Almost every major institution in American law and society is now on record as recognizing the damage which domestic violence does to families, communities, and the economy. Widely noted is the historic failure of the justice system to acknowledge domestic violence as a serious crime or to recognize the barriers which the legal system itself places between victims of domestic violence and safety. All signs point to the crucial role the judiciary must play to correct these failures.

#### Best Practice

- **A Judicial Philosophy:** Cleveland Municipal Court Judge Ronald B. Adrine, a nationally recognized expert in the field, suggests a judicial philosophy of domestic violence that includes as its goals: (1) A Just Result, (2) Safety for the Victim, (3) Offender Accountability, and (4) Elimination of Recidivism. He sees the primary tools available to a judge as: (1) Self-Education, (2) Consistent Application of Policy, (3) Jail, and (4) A Coordinated Community Response.
- **No Gender Unfairness Results:** Aggressive community work against domestic violence has had surprising results. A comprehensive study of crime statistics between 1976 (about the time the U.S. began changing laws to better protect women from violence) and 1999, showed a 24% decrease in the rate of women being murdered by their partners, and a *dramatic decrease* of 69% in the rate of men being murdered by their partners.<sup>15</sup> It appears that women, when given other options (safe houses, protection orders, criminal complaints, etc.), take those avenues instead of killing to end their abuse.

• **Ethical Concerns:** There is no inherent conflict between the role of a judge as neutral arbiter and the role of a judge in opposing domestic violence. All crimes are unacceptable and part of a judge's role is to communicate this message to those in the community who violate the law. It should be a goal of all judges to improve the legal system and to serve the ends of justice, which in the domestic violence field can include the following measures.

- Self-education on domestic violence helps a judge maintain judicial competence.<sup>16</sup>
- Reducing the barriers in the judicial system for domestic violence victims to obtain lawful relief is part of a judge's administrative responsibility.<sup>17</sup>
- Judges are required to maintain impartiality in adjudicative responsibilities; judges are also charged with performing those duties without bias or prejudice,<sup>18</sup> including gender bias or prejudice against domestic violence victims.
- Judges are permitted within reasonable limits to work for improvement of the law, the legal system, and the administration of justice; making the legal system more accessible and effective for some of those it has ignored in the past.<sup>19</sup>

***Best Practice***

• **Community Cooperation:** Since a court's efforts to protect victims and hold abusers accountable will be most effective if coordinated with the actions of other community service providers, local courts are encouraged to participate with and take leadership in those coordination efforts.<sup>20</sup>

## *Domestic Violence: The How*

*What safety tools are available to courts and communities to reduce domestic violence?*

- **Lethality Factors:** Police, psychologists, domestic violence fatality review committees, and other family violence experts have identified certain behaviors, or "Lethality Factors," which may threaten victim safety, child safety, and/or court security. Judicial officers may want to consider these lethality factors in protection order decisions, counseling requirements, substance abuse screening/treatment decisions, custody determinations, visitation scheduling, and court safety planning. (See **Lethality Factors** Tab.)
- **Batterer Intervention Treatment:** Batterer intervention treatment programs, mandated now in many states though not Ohio, can enhance the safety of the victim and can change attitudes of abusers to prevent a lifetime of trouble. It is unrealistic to assume batterers will spontaneously change, so treatment orders are key tools for decreasing domestic violence. (See **Counseling** Tab.)
- **Supervised Visitation Centers:** Local courts are encouraged to identify a safe place for supervised visitations, and for supervised child drop-offs and pick-ups. Such centers are powerful community resources for protecting both children and adult victims from harm.

***Best Practice***

• **Safety Plans:** A safety plan is a specifically designed program tailored to the circumstances of each individual victim of domestic violence to improve their chances of survival. Hence, the plan is not devised for the benefit of the judicial system. Sometimes prudent safety planning requires leaving an abuser immediately; sometimes it requires waiting for a safer

time. Sometimes it requires aggressive prosecution of legal options – sometimes not. The victim is in the best position to judge safety issues. Judges can support safety planning in two ways:

- ▶ By demonstrating an understanding of victims who decide that their own safety requires asking the court to dismiss protection orders, declining to cooperate in prosecution, or refusing to appear in court
  - ▶ By asking all victims if they have a safety plan, and referring them to expert resources if they do not<sup>21</sup>
- **Coordinated Community Council:** A court may be fully committed to ending domestic violence, yet cannot succeed without the coordinated efforts of law enforcement, prosecutors, social service agencies, shelters, advocacy groups and other community resources. In those communities where such efforts have been successful, judges have played a key role in convening the coordinated community council.

## Domestic Violence: The “Not” How

*What impact might result from a judge’s failure to understand domestic violence?*

- **Professional Incompetence:** The mishandling of a single domestic violence case due to a failure to thoroughly understand this area of the law can have disastrous results for judges as well as victims.
  - ▶ *DV Death Costs Judge His Job:* Galina Komar was 32 when her abusive former boyfriend shot her to death and then killed himself, three weeks after he was released on charges of assaulting the woman and violating court orders issued to protect her. The killer had served a total of 40 days in jail before his release by Brooklyn Judge Lorin Duckman, over objections of prosecutors. New York’s highest court removed him from office for a general bias against vigorous prosecution of domestic violence cases, and other misconduct.<sup>22</sup>
  - ▶ *DV Comments Cost Judge His Job:* A judge denied a protective order for Karyn Metz after her husband was charged with assault for beating her, then proceeded to tell his clerk that an order of protection is “useless” and that “every woman needs a good pounding every now and then.” Judge Donald Roberts was removed from office by the New York State commission on Judicial Conduct.<sup>23</sup>
  - ▶ *DV Plea Bargain Forces Judge, Prosecutor Out:* Susan Fuller had been separated from her husband Stephen Sarno for a year when he caught her with another man and beat her with a flashlight. She required 17 stitches above one eye. The prosecutor plea bargained the case to a misdemeanor assault despite police insistence that they had sufficient evidence for a felony conviction. New Hampshire Judge William O’Neil sentenced Sarno to 28 days in jail on weekends, saying since “she was still his wife . . . I can’t conclude it was completely unprovoked.” Subsequently, the prosecutor was rebuked by the state attorney general and did not seek re-election. The judge was publicly criticized, featured in a 1994 *Redbook* article “America’s Most Sexist Judges,” wrote a letter of apology, and retired.<sup>24</sup>

1. Credit for the genesis of most of this chapter goes to the widely published domestic violence expert Anne L. Ganley, Ph.D. Her thorough treatment may be found in *Domestic Violence: The What, Why and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases*, Chapter 2 of the DOMESTIC VIOLENCE MANUAL FOR JUDGES, Washington State Gender and Justice Commission (1997). (Hereinafter, *Ganley*, footnotes omitted.)
2. As to this section, see *Ganley, supra* n.1, pages 2-2 to 2-8.
3. As to this section, see *Ganley, supra* n.1, pages 2-11 to 2-18.
4. See Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before the Court has Made a Finding of Abuse*, 23 Vt. L. Rev. 361 (1998).
5. As to this section, see *Ganley, supra* n.1, pages 2-18 to 2-23.
6. National Council of Juvenile & Family Court Judges, *Family Violence: A Guide to Research, COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY* (1993).
7. As to this section, see *Ganley, supra* n.1, pages 2-22 to 2-29. Also see Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REVIEW, Special Issue (1994).
8. *Id.*
9. PETER JAFFE, ET AL., WORKING TOGETHER TO END DOMESTIC VIOLENCE (Mancorp Publishing Inc. 1996).
10. As to this section, see *Ganley, supra* n.1, pages 2-36 to 2-36.
11. *Id.*
12. For this section, see Joan Zorza, *Women Battering: High Costs and the State of the Law*, CLEARINGHOUSE REVIEW, Special Issue (1994).
13. *Id.*
14. In fact, some 75 to 80% of all prison inmates come from violent homes, further increasing the long-term financial impact of domestic violence on the prison system.
15. "Protecting Battered Women Saves Lives of Men," REUTERS, January 4, 2001.
16. Code of Judicial Conduct, Canon 3(B)(2).
17. Code of Judicial Conduct, Canon 3(C)(1).
18. Code of Judicial Conduct, Canon 3(B)(5).
19. Code of Judicial Conduct, Canon 2 (A) & (B).
20. See, e.g., Adele Herrell & Meredith Hofford, *Family Violence: Improving Court Practice*, 41 JUVENILE AND FAMILY COURT JOURNAL 13 (1990), and Judge Edwin W. Kelly, *The Judge's Role in Domestic Violence Cases*, NEW HAMPSHIRE BAR JOURNAL (June 1994).
21. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 15.6 (2000).
22. NEW YORK TIMES, July 8, 1998.
23. NATIONAL LAW JOURNAL, June 30, 1997.
24. BANGOR DAILY NEWS, October 10, 1997.



## Criminal Jurisdiction Courts

Unlike crimes of violence involving strangers, domestic violence cases deal with violence involving family or household members. Given the intimate relationship between perpetrators and victims, domestic violence cases pose a unique set of issues for the judicial system. Ohio courts have an obligation – as mandated by the Supreme Court of Ohio – to carry out the legislative goal of protecting victims of domestic violence in Ohio, as well as to ensure a fair trial for all parties.<sup>1</sup>

### *Bond and Pretrial Release Considerations*

#### *Why do bail decisions in domestic violence cases deserve special judicial attention?*

- **Life and Death Decisions:** It is difficult to overstate the crucial importance of bail decisions to victim safety and even survival. It is well documented the most dangerous time in a victim's life is at the termination of the romantic or marital relationship – which the filing of criminal charges dramatically punctuates.<sup>2</sup> Uninformed bail decisions, whether from lack of individual case data or lack of judicial understanding of the dynamics of domestic violence, place innocent parties in harm's way.
- **Statutory Authority for Victim's Presence with an Advocate:** The victim may be present with a victim advocate or other support person at every critical stage of the proceedings, held on the record when the defendant is present, unless the court determines, in the interest of justice, that the victim's presence will impede a fair proceeding.<sup>3</sup> (See **Victim Advocates** Tab.)
- **Victim at Arraignment:** If the victim is present at arraignment, the court should seize the opportunity to obtain relevant information from the victim concerning all of the specific bond considerations outlined below. Ignoring this opportunity to hear from the victim as well as the defendant may hamper the court's ability to make fully-informed bond decisions.
- **Legal Parameters of Bail:** In determining the types, amounts, and conditions of bail, Crim. R. 46 requires the court to consider all relevant information, including but not limited to:
  - ▶ The nature and circumstances of the crime charged
  - ▶ The weight of the evidence against the defendant
  - ▶ The confirmation of the defendant's identity
  - ▶ The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution
  - ▶ Whether the defendant is on probation, a community control sanction, parole, post-release control, or bail
  - ▶ *Note:* In addition, all courts must observe the requirements of R.C. 2919.251, 2919.271, and 2937.23 (discussed below), governing the setting of bail and domestic violence cases.

#### **Best Practice**

*May the court consider the danger posed by the alleged offender to the victim and community in setting bail and conditions of bond?*

- **Lethality Factors:** Crim. R. 46 allows for consideration of *all relevant information*. A judge may consider as relevant, lethality indicators in setting bail amounts and conditions. (See **Lethality Factors** Tab.)
- **Special Bond Considerations:** Whenever the defendant is charged with domestic violence, felonious assault, aggravated assault, assault, menacing by stalking, or aggravated trespass involving a family or household member, AND the defendant was previously convicted for any such offenses, OR the defendant was subjected to the terms of a protection order (whether or not it involves the victim of the new charge), the following rule applies. Notwithstanding any provisions of Crim. R. 46 to the contrary, R.C. 2919.251 requires the court to consider all of the factors below before setting bail:

- ▶ Whether the defendant has a history of domestic violence or a history of other violent acts
- ▶ Whether the defendant has a history of mental problems
- ▶ Whether the defendant has a history of violating the orders of any court or governmental entity
- ▶ Whether the defendant is potentially a threat to any other person
- ▶ Whether the setting of bail at a high level will interfere with any treatment or counseling that the defendant or the family of the defendant is undergoing

*When may the court require a mental evaluation as a condition of bond?*

- **Mental Evaluations:** A mental evaluation can be particularly valuable in a bail determination because the examiner is required to provide an opinion as to whether the defendant represents a substantial risk of physical harm to other persons as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that placed other persons in reasonable fear of violent behavior and serious physical harm, or evidence of present dangerousness.<sup>4</sup>

- ▶ If the defendant is charged under R.C. 2919.27 with violating a protection order and that violation involved conduct by the defendant that caused a family or household member to believe the defendant would cause physical harm to that member or his/her property, R.C. 2937.23 requires the court to determine whether to order a mental evaluation of the defendant pursuant to R.C. 2919.271. If the court decides to issue such an order, the evaluation must occur *before bail is set*.<sup>5</sup>
- ▶ If the defendant is charged with menacing by stalking, R.C. 2919.271 authorizes the court to order a mental evaluation.<sup>6</sup>
- ▶ The court may also order a defendant who has been released on bail to submit to a mental evaluation.<sup>7</sup>

- **Denial of Bail:** Pursuant to the Ohio Constitution, a person charged with a capital offense where proof is evident, or the presumption is great, is not entitled to bail. Since 1999, a judge may deny bail to persons accused of certain offenses, upon a mandatory hearing upon motion of the prosecuting attorney. The applicable charges are: aggravated murder (non-capital offense); murder; aggravated vehicular homicide; and F4 OMVI offenses (DUI)<sup>8</sup>

- **Bail Investigation/Recommendation:** By definition, the more complete the information available to the judge at the time of setting bond, the more well-informed that decision will be. In order to set

conditions which will “ensure defendant’s appearance or public safety,”<sup>9</sup> judges should require adequate information, either from prosecution and defense counsel, or where resources allow from a court pretrial screening officer. At minimum, this information should include:

- *Residence*: The address where the defendant will reside if released
- *Employment*: Where and for how long, or means of support if unemployed
- *Education*: The highest grade completed by the defendant
- *Mental Health*: Whether the defendant has ever been evaluated for any mental health problems
- *Substance Abuse*: Whether the defendant has any substance abuse problems
- *Law Enforcement Reports*: All information available from law enforcement officials, including additional factors that have become known since the investigation
- *Criminal Records Check*: Prior criminal history

• **Bail Conditions:** Pursuant to Crim. R. 46(A), a person who is entitled to release shall be released on one or more of the following types of bail: personal recognizance, bail bond, or surety bond. In addition, the court may impose any of the following conditions of bail:

- *Private Supervision*: Place the defendant in the custody of a designated person or organization agreeing to supervise the defendant
- *Movement Restrictions*: Place restrictions on the travel, association, or place of abode of the defendant during the period of release
- *Limited Release*: Place the defendant under a house arrest or work release program
- *Victim Contact*: Regulate or prohibit the defendant’s contact with the victim
- *Witness Contact*: Regulate or prohibit the defendant’s contact with witnesses or others associated with the case, upon proof of the likelihood that the person will threaten, harass, injure, or seek to intimidate those persons
- *Treatment*: Require a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail
- *Ensure Appearance or Safety*: Impose any other constitutional condition considered reasonably necessary to ensure defendant’s appearance or public safety

### **Best Practice**

• **Other Considerations:** Because of the ongoing risk of danger and intimidation of witnesses in domestic violence cases, bail conditions should require the defendant to reside apart from the victim, irrespective of the stated wishes of the defendant and/or complaining witness.

• **Supervised Release Conditions:** If a defendant is released on conditions of supervision, those conditions should include at minimum the following.<sup>10</sup> The supervising officer should be required to immediately inform the court of any violation of bail conditions.

- Office visits to court supervisor
- Urinalysis

*What types of conditions are typical for supervised release on bond?*

- ▶ Community-based referrals, e.g., drug/alcohol counseling
- ▶ Home visits, if deemed necessary
- ▶ Monitoring and verification of any specific conditions, e.g., TPOs, substance abuse treatment, employment
- ▶ Telephone contacts with court supervisor
- ▶ Electronic home detention devices
- ▶ Tracking and notification of court dates

- **Revocation for New Acts or Threats:** The prosecutor in the case may file a motion asking the court to revoke the bond or personal recognizance granted to the defendant, upon receiving the affidavit of a victim stating the defendant, or someone acting at the defendant's direction, has committed or threatened acts of violence or intimidation against the victim, the victim's family, or the victim's representative.<sup>11</sup>
- **Unauthorized Dismissal:** Pursuant to amended Substitute Senate Bill 98, effective March 13, 1998, a judge of a municipal court, district court, or court of common pleas does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney, law director, village solicitor, or other chief legal officer responsible for the prosecution of the case.<sup>12</sup>
- **Right to Counsel & Waiver:** Defendants charged with domestic violence crimes should be encouraged to retain or request an attorney. In addition to defendant's interests, the justice system's interests are served by such advice. Case law has established, in order to successfully prosecute a subsequent domestic violence crime as a felony, prosecutors must prove the defendant was represented by counsel at the time of his prior conviction or knowingly waived his right to counsel at that time.<sup>13</sup> Use of a written Waiver of Counsel form will avoid unnecessary difficulty in use of prior convictions. A jury trial waiver must also be in writing once the defendant has requested a trial by jury.

*Why is it critical to obtain a written waiver of counsel when domestic violence defendants decline legal counsel?*

## Temporary Protection Order (TPO)

*What crimes trigger the court's authority to consider issuing a temporary protection order?*

- **TPO Statutory Authority:** Ohio law permits the filing of a motion for a criminal temporary protection order (TPO) by the complainant, by the arresting officer (in an emergency if the complainant is unable to file), or by the court. A TPO may be issued whenever a complaint for domestic violence, felonious assault, aggravated assault, menacing by stalking, or aggravated trespass involving a family or household member, or a violation of a municipal ordinance that is substantially similar to any of those offenses, has been filed.<sup>14</sup> Same-gender couples are eligible for relief.<sup>15</sup> (*Note:* For information about protection orders where the parties have no relationship covered by this statute, see the **Stalking Protection Order** Tab.)
- **Victim's Presence with Victim Advocate:** The complainant and victim advocate or another person providing support to the victim have the right to be present at all stages on a motion for a TPO.<sup>16</sup> (See **Victim Advocate** Tab.)

What procedural requirements govern the temporary protection order process?

- **TPO Procedure:** Often the complainant and defendant are present at arraignment and the court can hear the motion for TPO at that time. If the defendant is not present, a two-step process is required, an *ex parte* hearing followed by a hearing with an opportunity for both parties to be present. The latest revision of the Ohio Standard Domestic Violence Forms provides one comprehensive TPO entry useable for either type of hearing.
  - Ohio law permits the court to issue a TPO as an *ex parte* order upon motion of the complainant or upon the court’s own motion, “as a pretrial condition of release if it finds that the safety and protection of the complainant or other family or household member of the alleged offender may be impaired by the continued presence of the alleged offender.”<sup>17</sup>
  - If the court issues an *ex parte* TPO, “it shall conduct, as soon as possible after the issuance of the order, a hearing in the presence of the alleged offender not later than the next day on which the court is scheduled to conduct business . . . to determine whether the order should remain in effect, be modified, or be revoked.”<sup>18</sup>
    - ◊ Thus, if a defendant is arrested for domestic violence on a Friday or Saturday, the court may issue an *ex parte* TPO and conduct a hearing on the following Monday when the court is in session.

How can a criminal court avoid becoming a visitation dispute forum?

Best Practice

- **TPO Relief Available:** The court may issue a TPO “as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant, alleged victim, or the family or household member, including a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment” of those persons.<sup>19</sup> The Supreme Court of Ohio has adopted a mandatory comprehensive form for this purpose.<sup>20</sup>
- **TPO Visitation Issues:** By issuing a TPO, the court has made a finding “that the safety and protection of the complainant or other family or household member of the alleged offender may be impaired by the continued presence of the alleged offender.”<sup>21</sup> The mandate of the statute and the Supreme Court of Ohio are to protect victim safety. This mandate should not be derailed by visitation issues.
- **Other Visitation Issues:** Criminal courts have no jurisdiction or legal tools to address child visitation and should not be persuaded to do so. The court should issue whatever protection orders it finds necessary for the safety and protection of the adult victim and children, even if that protection temporarily prevents the exercise of visitation. The order should advise the parties to set a hearing with a court that has parenting jurisdiction so an appropriate new visitation order can be issued with full knowledge of the alleged domestic violence, and upon such conditions that do not violate the terms of the TPO.
- **TPO Mutual Protection Orders:** “Mutual TPOs” are severely restricted under Ohio law.<sup>22</sup> If a TPO has been issued against the defendant, another TPO may not be issued against the complainant (or other family or household member) unless *both* of the following apply:
  - The defendant has filed a separate complaint for domestic violence

or for felonious assault, aggravated assault, menacing by stalking, or aggravated trespass involving a family or household member, AND

- ▶ The court determines both the complainant (or other family or household member) and defendant “acted primarily as aggressors” AND neither “acted primarily in self defense” AND in accordance with the standards and criteria of Sec. 2919.26, it should issue the TPO against the complainant (or other family or household member)

### *Why must the court reject ex parte attempts to modify temporary protection orders?*

- **TPO Modification:** Generally, the court should not lift or modify a TPO while the underlying criminal case is still pending. TPOs should not be modified or vacated without input from defense counsel, prosecuting attorney, and the victim. The statutory requirement that allows a victim be present at all critical stages of the proceedings<sup>23</sup> prohibits the ethically-questionable<sup>24</sup> practice of modifying a TPO at the request of the defendant or defense counsel without the opportunity for the complainant to be heard.
- **TPO Termination:** Any disposition of criminal charges terminates the criminal court TPO, as does the issuance of a civil court CPO arising out of the same activities.<sup>25</sup>
- **TPO Enforcement:** Any violation of a TPO is by definition a violation of bond conditions, which can result in bond revocation. Any violation of a TPO is also a separate crime, which may result in arrest upon probable cause and separate criminal charges.<sup>26</sup>
- **TPO Costs, NEW Federal Law:** Ohio law prohibits charging a petitioner a fee for filing a petition for a TPO.<sup>27</sup> In addition, a federal law adopted in 2000 requires each state to certify to the United States Attorney General by October, 2002, that no unit of state or local government requires a victim to bear any costs associated with filing, issuance, registration or service of any protection order. This ban applies to all courts, clerks, and law enforcement agencies, and appears to apply at both the filing stage and the final disposition stage of all protection order proceedings.<sup>28</sup>

## *Sentencing Considerations for Domestic Violence Crimes*

### *When is the court required to allow victim statements and required to order victim impact statements?*

- **Victim Statement:** In all criminal cases, before imposing sentence upon the defendant, the court shall permit the victim of the crime to make a statement concerning the effects of the crime upon the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated.<sup>29</sup> In all felony cases, “if the offender, in committing the offense, caused, attempted to cause, threatened to cause, or created a risk of physical harm to the victim of the offense, the court, prior to sentencing the offender, shall order the preparation of a victim impact statement by the department of probation.”<sup>30</sup>
- **Pre-Sentence Investigation:** Following a conviction or guilty plea to domestic violence or other crimes of violence involving family or household members, the court should obtain as much of the following information as possible prior to sentencing. A Pre-Sentence Investigation Report (PSI) should generally be ordered if such services are available to the court.

- ▶ *Victim Contact*: In addition to receiving any mitigating information from defendant or defendant’s counsel, every reasonable effort should be made to contact the victim, victim’s advocate, or authorized victim representative to obtain a victim impact statement.
- ▶ *Safety Check*: Determine the need for special conditions of probation or release that will provide for the on-going safety of the victim (e.g., continued absence of the offender, temporary removal of weapons from the household, etc.).
- ▶ *Violence History*: Determine if the offender was the victim or perpetrator of prior act(s) of domestic violence.
- ▶ *Treatment Needs Assessment*: Arrange for assessment by a batterer intervention program to determine if the offender can benefit from such a program.
- ▶ *Substance Abuse Assessment*: Arrange for an alcohol and drug evaluation, when indicated.

**Best Practice**

- ▶ *Financial Situation*: Gather information from the victim and offender regarding the victim’s financial circumstances and their future relationship. The court’s overriding concern should be for the safety of the victim and other household members. Notwithstanding the victim’s financial circumstances or the victim’s wishes to resume a relationship with the offender, if the court determines the safety of the victim and other household members requires the offender be separated from them, the court should order separation as a condition of probation or, when appropriate, a term of incarceration.
- ▶ *Child Presence*: Determine whether the offense was “committed in the vicinity of a child.” This is a factor weighing in favor of imposing imprisonment at the time of sentencing.<sup>31</sup>
- ▶ *Lethality Evaluation*: Consider lethality factors as provided by law enforcement, pre-trial services, and any other source. (See **Lethality Factors** Tab.)

• **Sentencing Considerations in Domestic Violence Cases:**

Sentences for domestic violence offenders should hold the offender accountable, demonstrate the court and the community regard this offense very seriously, and protect the victim and the community from further harm. The court shall consider any victim impact statement in determining the sentence to be imposed upon the offender.<sup>32</sup>

**Best Practice**

- ▶ *Batterer Accountability*: Judges should not underestimate the value to the batterer himself of holding the batterer accountable for domestic violence behavior. Given the high rate of recidivism and the high likelihood of escalating violence – which often result in dire consequences to the batterer as well as the victim – judicial leniency does no favors for domestic violence batterers.

**Best Practice**

- **No Diversion**: Almost all experts strongly discourage courts from using diversion in domestic violence cases. Such programs allow that in exchange for some period of good behavior and/or attendance at some minimal counseling, charges will be dropped against the offender. Diversion fails to hold the offender accountable, impedes subsequent felony enhancement of domestic violence convictions, may interfere with protective parenting orders,<sup>33</sup> and potentially discourages victims from filing charges in the future. In fact, the State of California statutorily banned the use of domestic violence diversion by judges in 1996, because such programs:<sup>34</sup>

*Why are diversion programs for domestic violence offenders strongly discouraged by experts?*

- ▶ Communicate the message that domestic violence is not criminal behavior
- ▶ Are often a calendar management tool, instead of a corrections tool
- ▶ Provide little or no formal monitoring
- ▶ Hide the fact that many defendants who appear to be first time offenders have previously committed domestic violence assaults

### **Best Practice**

• **Lethality Factors May Suggest Incarceration:** A judge should consider a term of incarceration if the record and any PSI reveal one or more of the following lethality factors:

- ▶ *Serious Injury or Threat:* The victim suffered serious bodily injury, or the offender caused any person in the household of the offender to believe he or she would cause serious bodily injury.
- ▶ *Forced Sex:* The offender engaged in, or exhibited a genuine threat of, forcible sexual activity to any adult or child in the household or engaged in any prohibited intra-familial sexual activity.
- ▶ *Weapon Use or Threat:* The offender used a weapon, or caused the victim to reasonably believe that he or she would use a weapon.
- ▶ *Continued Intimidation:* The offender continued after arrest to engage in intimidation of the victim by phone, mail or other means, either personally or through a third party.
- ▶ *Stalking:* The offender has stalked the victim, personally or through a third party.
- ▶ *History of Violence:* The offender has a history of domestic violence or other offense of violence.
- ▶ *Escalating Violence:* The offender has engaged in a pattern of escalating violence.
- ▶ *Defies Community Control:* The offender has previously violated court orders or been non-compliant with police, probation officers, or batterer intervention counselors.
- ▶ *Child Presence:* The offense was “committed in the vicinity of a child.” This is a factor weighing in favor of imposing imprisonment at the time of sentencing.<sup>35</sup>
- ▶ *Treatment Success Unlikely:* A batterer intervention program has assessed the offender as inappropriate for intervention treatment.
- ▶ *Egregious Circumstances:* In special cases such as felonious assault, or in cases involving elderly, pregnant, child, or handicapped victims, the court should consider imposing a period of extended incarceration. For repeat and felony offenders, the court should consider imposing the maximum period of incarceration.
- ▶ *Lethality Factors:* In addition to the above factors, a judge in determining sentencing should consider the full breadth of lethality indicators. (See **Lethality Factors** Tab.)

• **Probation/Community Control Sanctions:** If the court chooses to sanction the offender through probation<sup>36</sup> or community control sanctions,<sup>37</sup> in lieu of incarceration, then a court should consider imposing:

- ▶ *Back-up Sentence:* A corresponding suspended term of incarceration to provide added incentive to the offender to comply with the terms of probation.
- ▶ *Sufficient Time:* Supervised probation is recommended in

*What terms of probation are most appropriate in sentencing domestic violence offenders?*

misdemeanor cases for a period not less than one year; supervised community control sanctions in felony cases are recommended for a period not less than three years.

- ▶ *Treatment Requirement:* Because domestic violence offenders are unlikely to unlearn behaviors and attitudes without help, perhaps the most meaningful condition a court can impose is batterer intervention treatment for a period of not less than one year.<sup>38</sup> (See **Counseling** Tab.)
- ▶ *Require Formal Supervision:* Formal, supervised probation/ community control sanctions make offenders more accountable for their crimes and provide an extra measure of protection by providing victims an officer of the court to contact, in the event of subsequent threats or assaults. Unsupervised probation/ community control sanctions should not be granted.
- ▶ *Personal Supervisory Contact:* Weekly face-to-face meetings by the offender with the probation officer following sentencing. Any modification in this schedule should require court approval for good cause.
- ▶ *Victim Contact Requirement:* Immediate contact by the probation officer with the victim, then periodically, to encourage the reporting of any non-compliance by the offender with the court's orders.
- ▶ *Safety Orders:* Any other conditions which seek to preserve the safety of the adult victim and children, including:
  - ◆ Prohibiting future violence, stalking, threat of violence or any other criminal conduct in relation to a family or household member
  - ◆ Placing restrictions on the offender's movement as needed to protect the victim, other family members, and the community
  - ◆ Ordering restitution to the victim,<sup>39</sup> including:
    - medical costs
    - counseling for the adult victim and child witnesses
    - replacement of locks, change of locks
    - replacement of destroyed property
    - victim moving expenses
    - emergency protective shelter or hotel costs

Best Practice

- **Victim Notification:** Victim safety will be enhanced if the court orders that whenever a domestic violence defendant is released from incarceration at any stage of the proceedings, jail personnel will immediately notify the victim of the release.<sup>40</sup>

Best Practice

- **Law Enforcement Notification:** During a period of probation or community control, a police officer may arrest the offender without a warrant if the officer has reasonable grounds to believe the person has violated a court-ordered condition.<sup>41</sup> Thus to increase offender accountability and victim safety, the court should notify the law enforcement agencies having jurisdiction over the areas in which the victim and offender live and work of the conditions of the offender's probation/ community control, especially:

- ▶ A condition prohibiting ownership, possession or use of a firearm or deadly weapon

*Why should law enforcement agencies as well as probation officers be notified of probation conditions?*

- ▶ A condition prohibiting offender from being within a specified structure or geographic area
- ▶ A condition that confines the offender to a residence, facility, or other structure
- ▶ A condition that prohibits the offender from contacting or communicating with any specified individual (such as the victim)
- ▶ A condition that prohibits the offender from associating with a specified individual

• **Probation Violations:** Any non-compliance with the court's probation/community control sanction order, including, but not limited to, allegations of continued harassment (verbal or physical), unauthorized contact, or substance abuse should cause the probation officer to initiate violation proceedings, including arrest where probable cause of the violation can be established. New acts of violence or protection order violations generally should cause the probation officer to seek probation revocation.

## Endnotes

1. *Felton v. Felton* (1997), 79 Ohio St.3d 34.
2. Nearly 30% of all female homicide victims were known to have been killed by their current or former husbands or boyfriends, and the rate of intimate partner violence against women separated from their husbands was 25 times higher than against married women. Ronet Backman & Linda E. Saltzman, U.S. DEP'T OF JUSTICE, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1, 4 (1995). *Also see* Angela Browne, WHEN BATTERED WOMEN KILL (1987).
3. R.C. 2919.26(A)(2), R.C. 2930.09. The statute leaves to the judge the decision of whether the support person may sit with the victim at counsel table.
4. R.C. 2919.271.
5. R.C. 2937.23.
6. R.C. 2919.271(A)(1)(b).
7. R.C. 2929.271(C)(1).
8. R.C. 2937.222.
9. Crim.R. 46(B)(7).
10. R.C. 2951.02(C)(1)(a). For an explanation of valid probation conditions, see RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 12.14, at n.406 (2000).
11. R.C. 2930.05.
12. R.C. 1901.20, 1907.02, R.C. 2931.03.
13. The applicability of federal firearms restrictions upon criminal convictions also depend upon legal representation or waiver of counsel. 18 U.S.C. § 921 (33) (B) (i).
14. R.C. 2919.26(A)(1).
15. *See* Adrine and Ruden, *supra* n.10, § 4.3 (2000).
16. R.C. 2919.26(A)(2), R.C. 2930.09.
17. R.C. 2919.26(D)(1).
18. R.C. 2919.26(D)(2).

19. R.C. 2919.26(C)(1).
20. Sup. Form 10.02-A.
21. R.C. 2919.26(D)(1).
22. R.C. 2919.26(I).
23. R.C. 2919.26(A)(2), R.C. 2930.09
24. C.J.C. Cannon 3(B)(7)
25. R.C. 2919.26(E)(2).
26. R.C. 2919.27.
27. R.C. 2919.26(I).
28. 42 U.S.C. § 3796gg-5.
29. R.C. 2930.14.
30. R.C. 2947.051.
31. *See* R.C. 2929.12, 2929.22.
32. R.C. 2929.13, 2929.19.
33. *See Moore v. Moore*, No. 93 CA 114, 1994 WL 370005 (5th Dist. Ct. App., Licking, 7-11-94).
34. CALIFORNIA JUDGES BENCHBOOK, DOMESTIC VIOLENCE CASES IN CRIMINAL COURT § 3.3 (2000).
35. R.C. 2929.12, 2929.22.
36. R.C. 2951.02(C)(1)(b). For an explanation of valid probation conditions, *see* Adrine and Ruden, *supra* n.10, § 12.14, at notes 398-413 (2000).
37. R.C. 2929.15 to .17.
38. R.C. 2951.02(C)(1)(b), R.C. 2929.17(N). *See* Melissa Gross, et al., *Court Sentencing Options and Recidivism Among Domestic Violence Offenders*, DOMESTIC VIOLENCE REPORT, Civic Research Institute, Inc. (April/May 2000).
39. R.C. 2951.02(C)(1)(a).
40. Crime victims may also access the state's VINE system (Victim Information and Notification Everyday) by calling 1-800-770-0192. When completed, the service will electronically link all Ohio county courts, county jails, state prisons, and juvenile facilities to the VINE National Call Center in Louisville, KY.
41. R.C. 2951.08.





## Civil Protection Orders

First created in Ohio in 1978, a Civil Protection Order (CPO) provides forms of relief that no other legal remedy can.<sup>1</sup> The CPO statute, R.C. 3113.31, requires courts to provide emergency relief on an accelerated schedule that is almost unknown elsewhere in American law. It is a powerful statute, granting domestic relations courts broad powers to end family violence and provide safety to family members. Courts are mandated by the Supreme Court of Ohio to use the law for that purpose.<sup>2</sup>

### *Comparing CPO with Other Proceedings*

#### *How does a Civil Protection Order case differ from similar cases?*

- **CPO and Criminal Case:** By law, a pending criminal prosecution of domestic violence charges does not prevent a victim from obtaining a civil domestic violence protection order.<sup>3</sup>
- **CPO and TPO or SPO:** The issuance of a Temporary Protection Order (TPO) or Stalking Protection Order (SPO) by a criminal court does not prevent a victim from also obtaining a civil domestic violence protection order.<sup>4</sup> A careful victim will always obtain a CPO in addition to a criminal court protection order, for several reasons.<sup>5</sup> First, a CPO provides more extensive relief than a criminal protection order. Second, a CPO lasts longer; a criminal court protection order expires as soon as the criminal case terminates for any reason, while a CPO lasts up to five years. A TPO or SPO also expires when a civil court issues a civil protection order arising out of the same circumstances.<sup>6</sup>
- **CPO and Divorce:** A CPO action must be brought as a separate claim from a claim for divorce. Except at the *ex parte* stage, a CPO is a final appealable order.<sup>7</sup> CPOs provide much broader remedies than temporary restraining orders issued in a divorce case. The existence of such restraining orders may not be used as an excuse to deny CPO relief.<sup>8</sup> However, the portion of a CPO which allocates parental rights and responsibilities for the care of minor children, as well as the portion which provides for child support or spousal support, terminates on the date that a domestic relations court or juvenile court issues an order concerning those issues.<sup>9</sup>
- **CPO and Stalking Protection Orders:** Because the CPO definition of domestic violence *includes* stalking, and a CPO can forbid stalking behavior, a CPO is the correct remedy for a stalking victim who is an intimate partner or family/household member. Only when the victim and stalker have no relationship covered under the CPO law should a victim be required to seek a stalking protection order instead.

### *What laws and rules govern Civil Protection Order cases?*

- **Statutory Definition:** Domestic violence CPO cases are governed by R.C. 3113.31. Civil domestic violence is defined more broadly than criminal domestic violence, as follows:<sup>10</sup>
  - Attempting or recklessly causing bodily injury to a family or household member; placing another family or household member, by threat of force, in fear of imminent serious physical harm; committing a violation of R.C. 2903.211 (Menacing by Stalking) or 2911.211 (Aggravated Trespass); or committing an act with respect to a child resulting in the child being an abused child as defined in R.C. 2151.031.
  - The Supreme Court of Ohio interprets this definition as requiring proof by a preponderance of the evidence (not clear and convincing evidence) that: Petitioner or petitioner's family is in danger of domestic violence.<sup>11</sup> Proof of actual prior violence is not required; a threat of violence is sufficient.<sup>12</sup> It is the fear of the victim, not the intent of the perpetrator that is crucial as to threats.<sup>13</sup> Corroboration of the petitioner's testimony is not required. The statute does not require the prior violence be recent and does not require proof the respondent knowingly intended to create the danger or fear.
- **Jurisdiction and Venue:** Only a court with domestic relations jurisdiction may issue a CPO.<sup>14</sup> There is no residency requirement for a petitioner to be eligible for a CPO and no requirement the activities which put the victim in fear occur in the State of Ohio. Venue is proper in any county where the defendant resides, where the cause arose, or where the petitioner currently or temporarily resides.<sup>15</sup>
- **Costs, Federal Law:** Ohio law prohibits charging a petitioner a fee for filing a petition for a protection order.<sup>16</sup> In addition, a federal law adopted in 2000 requires each state to certify to the United States Attorney General by October, 2002, that no unit of state or local government requires a victim to bear any costs associated with filing, issuance, registration or service of any protection order. This ban applies to all courts, clerks, and law enforcement agencies, and appears to apply at both the filing stage and the final disposition stage of all protection order proceedings.<sup>17</sup>

## Eligible Parties

### *Who is eligible to obtain a CPO, and against whom can one be filed?*

- **Eligible Petitioners:** A petition requesting relief may be filed by the victim, by the victim's parent, or by any adult member of the victim's household, on behalf of themselves and/or other victims of domestic violence.<sup>18</sup> The petitioner and each person specifically identified in a protection order are collectively designated as "protected parties" on Ohio's mandatory standard domestic violence forms. Same-gender couples are eligible for relief.<sup>19</sup>

- **Potential Respondents:** A petition may be filed *against* any of the following categories of persons:<sup>20</sup> the spouse or former spouse of the victim; a cohabitant with the victim in the past five years;<sup>21</sup> the natural or putative parent of the victim's child, *whether or not they have lived together*; the parent or child of the victim; any other relative by blood (consanguinity) or marriage (affinity) of the victim who resides or has resided with the respondent.

## Initial Procedures

### How is the CPO case initiated?

- **Standard Ohio Forms:** The Supreme Court of Ohio, through the Rules of Superintendence for the Courts of Ohio, adopted certain forms and instructions for mandatory statewide use in all CPO cases.<sup>22</sup>
- **Petition:** The petition must set forth the following information: an allegation the respondent engaged in domestic violence against a family or household member, including a description of the nature and extent of the domestic violence; the relationship of the respondent to the petitioner, and to the victim if that person is someone other than the petitioner; and a request for relief under the statute.<sup>23</sup>
- **Victim Advocate:** A victim advocate may accompany a petitioner at all stages of the judicial proceedings.<sup>24</sup> The role of the victim advocate is not to give legal representation, but to provide support and assistance to the petitioner. (See **Victim Advocate** Tab.)

## Ex Parte Hearing

### What are the provisions for emergency CPO relief?

- **Emergency Scheduling:** The court must hold an *ex parte* hearing the same day the petition is filed; the law does not provide for issuance of a CPO solely on the basis of a review of the petition.<sup>25</sup>
- **Magistrate Decision:** The assigned judge should personally hear *ex parte* petitions whenever possible. When a magistrate holds the *ex parte* hearing, the judge should review and sign any *ex parte* CPO approved by the magistrate, making it a "permanent order" under Civ. R. 53(E)(4)(c). "Interim orders" (also under Civ. R. 53(E)(4)(c)) should be avoided due to the 28-day expiration of such orders.
- **Power to Grant Relief:** After the *ex parte* hearing, the court may grant a Civil Protection Order which includes terms designed to bring about a cessation of domestic violence and protect the safety of the petitioner and family and household members, including the minor children.<sup>26</sup> If no protection order is issued at the *ex parte* hearing, the court may not dismiss the action, but must set the matter down for a full hearing on the petition<sup>27</sup>
- **Service of Petition:** After the Court conducts an *ex parte* hearing, the court shall issue a copy of any CPO to the petitioner, respondent, and all

law enforcement agencies that have jurisdiction to enforce the order. The court shall direct a copy of an order be delivered to the respondent on the same day the order is entered.<sup>28</sup> Contrary to ordinary procedure, the CPO statute puts the responsibility for delivery on the court not the petitioner.<sup>29</sup>

## Full Hearing on CPO Petition

### What rules govern the full hearing phase of a CPO case?

- **Scheduling Full Hearing:** If the court, after an *ex parte* CPO hearing, issues an order granting possession of the mutual residence to the petitioner, to the exclusion of the respondent, then the full hearing shall be scheduled within seven court days. Otherwise, the full hearing shall be scheduled within ten court days.<sup>30</sup>

- **Continuance of Full Hearing:** The court may continue the full hearing if the respondent has not yet been served, or in order for either party to obtain counsel, or by consent of the parties, or for other good cause.<sup>31</sup> A continuance of the full hearing or failure of service does not cause the *ex parte* CPO to expire.<sup>32</sup> Thus, unless the court for some reason abbreviates the duration of the *ex parte* order, the petitioner will remain protected until the full hearing can be held.

#### **Best Practice**

- **Request for Counsel:** To maintain fairness between the parties and give both the opportunity to have their legal interests represented, the court should generally approve a continuance request by an unrepresented petitioner when the respondent appears at a hearing with legal counsel.

#### **Best Practice**

- **Default for Appearance:** If the respondent fails to appear at the full hearing after proper service, the full hearing should proceed by default. If the petitioner fails to appear, the court should consider the possibility injuries or intimidation are the cause. "The likelihood that one of these situations may exist makes the dismissal of the civil protection order petition based solely on the petitioner's failure to appear, without further inquiry, potentially dangerous to the petitioner."<sup>33</sup> A brief continuance in order for counsel, victim advocates, or court staff to inquire is advisable. Any dismissal under these circumstances should be without prejudice.

- **Power to Grant Relief:** After the full hearing, the court may grant a CPO which includes terms designed to bring about a cessation of domestic violence and protect the safety of the petitioner and family and household members, including the minor children.<sup>34</sup>

- **Issuance of Order:** After the Court conducts a full hearing a copy of any CPO shall be issued by the court to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct a copy of the order be delivered to the respondent on the same day the order is entered.<sup>35</sup>

- **Mutual Orders Prohibited:** Most authorities agree "ordering both parties to stay away from each other" does nothing to promote victim safety or to hold those who commit family violence accountable for their actions. The General Assembly has banned such orders, while allowing each party to obtain their own separate protection orders in separate actions, upon sufficient proof presented at separate hearings.<sup>36</sup>

- **Magistrate Decision after Full Hearing:** Objections to a Magistrate Decision filed pursuant to Civil Rule 53(E)(3) after a full hearing shall operate as an automatic stay of execution until the court disposes of the objections. Although this stay applies to the orders recommended in the full hearing Magistrate Decision, the stay does not apply to the *ex parte* CPO issued by the judge, which arguably remains in effect until the objections are determined.

**Best Practice**

▶ *Time for Objection:* The possibility of objections after the full hearing provides an incentive for ordering the maximum legal duration statutorily allowed for *ex parte* protection orders, in order to prevent a potential gap in court-ordered protection for the family.

## Duration of CPO

*Why should judges be reluctant to limit the duration of relief?*

- **CPO Expiration Date:** Any *ex parte* protection order, full hearing protection order, or consent agreement is valid until a date certain, but not later than five years from the date of its issuance or approval.<sup>37</sup> The duration of any CPO should be based solely on consideration of victim safety.

**Best Practice**

- **Duration:** Absent reasons that justify granting less protection than the law allows, a five-year duration should be ordered. Even *ex parte* orders can serve a valuable long-term protective function if service or other reasons delay the full hearing.<sup>38</sup> Court convenience, document management, or blanket policies should never outweigh victim safety in setting the duration of court protection provided to victims. As a victim may be injured after an accelerated expiration date expires, written findings justifying less protection than the full five years allowed would be prudent.

## Relief Available to Victims and Children

*What types of relief make a CPO such a powerful tool to protect families?*

- **Extensive Court Power:** After an *ex parte* or full hearing, the court may grant any protection order, with or without bond, to bring about a cessation of domestic violence.<sup>39</sup> This statute gives a trial court extensive authority to tailor a domestic violence civil protection order to the exact situation before it.<sup>40</sup> An *ex parte* CPO should address the following relief as appropriate.<sup>41</sup> Each of these options is itemized in the mandatory forms promulgated by the Supreme Court of Ohio. The court may:
  - ▶ Direct the respondent to refrain from abusing family or household members.<sup>42</sup>
  - ▶ Grant exclusive possession of the residence to the petitioner.<sup>43</sup> A protection order may not in any manner affect title to any real property.<sup>44</sup>
  - ▶ Order the respondent to vacate or remain away from the residence.<sup>45</sup> The default distance included in the Ohio standard forms is 500 yards; a specific distance is easier for law enforcement officers to enforce than a “stay away” provision.<sup>46</sup>
  - ▶ Order the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member;<sup>47</sup> the Ohio standard forms reinforce this with

optional prohibitions against interference with petitioner's utilities, mail, phone service, and pets.

- ▶ Allocate temporary parental rights and responsibilities.<sup>48</sup> (See discussion below, and **Custody & Visitation** Tab.)
- ▶ Order the respondent to provide child support and spousal support.<sup>49</sup>
- ▶ Order respondent to obtain counseling.<sup>50</sup> (See **Counseling** Tab.)
- ▶ Require respondent to post a compliance bond.
- ▶ Order weapons removed and prohibit weapons possession by the respondent (See **Weapons** Tab.)
- ▶ Grant other relief as equitable and fair, including the use of a motor vehicle by the petitioner and the apportionment of personal property.<sup>51</sup>

- **Restricting Child Access:** The CPO court cannot change existing custody and visitation orders. This does not prevent the court from prohibiting access to children when a respondent poses a safety threat to the petitioner or other protected persons, including the children. It is not just physical harm to children that justifies such restrictions, but misuse of the children to manipulate the other parent and the court, such as past or threatened abduction, quizzing children concerning the other parent's activities, withholding financial support (whether court-ordered or not), disobeying existing visitation orders, etc. The statutory mandate to protect victims of domestic violence, and the Supreme Court of Ohio endorsement of that mandate, both argue for preventing child access in protection orders whenever appropriate. Any reluctance on the part of the court to "interfere with visitation" should be tempered by the fact that the prior parenting orders were issued by a court without knowledge of the current domestic violence behavior.

### **Best Practice**

- ▶ *Coordinating Parenting Orders:* A CPO should properly balance the court's obligation to address safety concerns, while not permanently intruding upon parenting rights. A judicious CPO addresses safety first, placing whatever restrictions the court deems appropriate on child access by the respondent. Then, in order to preserve parenting rights, the CPO should order the restrictions shall remain in effect until such time as a court with custody jurisdiction – after being fully informed of the domestic violence behavior which caused the issuance of the CPO – issues new parenting orders *under terms which do not cause the respondent to violate the other terms of the CPO.*

## **Consent Agreements**

*When should – and shouldn't – a court approve a consent agreement?*

- **Statutory Authority:** The statute allows a court to approve a proposed consent agreement between the parties,<sup>52</sup> but only if the court first determines it will bring about a cessation of domestic violence, and that such an agreement adequately addresses the safety of the petitioner and family and household members, including the minor children.<sup>53</sup>

### **Best Practice**

- **Suspicious Consent:** Judicial officers should be alert for agreements obtained by physical coercion, threats of custody litigation,<sup>54</sup> witness intimidation,<sup>55</sup> and similar unethical or illegal litigation tactics.<sup>56</sup> Special vigilance is appropriate when a consent agreement is negotiated between legal counsel and a victim acting *pro se*.<sup>57</sup>

- **Unlawful Consent Terms:** When criminal domestic violence charges are pending at the time parties negotiate a civil consent agreement, judges should question whether the agreement includes an illegal arrangement to settle criminal charges in violation of statutory prohibitions against compounding a crime.<sup>58</sup>

## Modification & Renewal of CPO

### *How can a CPO be modified or renewed?*

- **No Modification by Conduct:** Reconciliation is common after the justice system intervention has abated the violence. However, only the court issuing the CPO may modify or dismiss it. Parties cannot do so by their out-of-court agreement or conduct. Police are required to enforce violations of CPOs by arrest of the respondent, even if the parties have apparently reconciled by mutual agreement.<sup>59</sup> All mandatory protection order forms prescribed by the Supreme Court of Ohio provide a notice required by statute that a CPO cannot be waived or nullified by consent or invitation.<sup>60</sup>

#### Best Practice

- **Modification:** Courts should require parties who wish to modify or terminate a CPO to appear for a hearing so the court can evaluate whether the request is made in good faith and without coercion. The court should make findings as to why the CPO is no longer necessary to protect the petitioner and other protected persons. Rather than dismiss a CPO completely, a prudent practice is to modify the CPO but leave in effect, at minimum, the paragraph which prohibits future violence.
- **Renewal Authority:** Any protection order issued or consent agreement approved pursuant to R.C. 3113.31 may be renewed in the same manner as the original order or agreement was issued or approved. A CPO may be renewed for up to five years.<sup>61</sup> The basis for renewal is the same as for the original CPO. The lack of a new incident of domestic violence since the issuance of the prior protection order should not prevent renewal if there is still cause for the victim to be in fear of serious physical harm from the respondent. Prior domestic violence – at least when coupled with threats of future violence – is sufficient.<sup>62</sup> The statute includes no requirement that the prior violence be recent.<sup>63</sup>

## Enforcement of a CPO

### *What procedures are available to enforce compliance with a CPO?*

- **Criminal or Contempt Enforcement:** The violation of any civil protection order or consent agreement issued under R.C. 3113.31 constitutes a crime under R.C. 2919.27 and subjects the violator to prosecution under that section.<sup>64</sup> The law requires any officer of a law enforcement agency to enforce a protection order issued by any court in this state in accordance with the provisions of the order, including removing the respondent from the premises, if appropriate.<sup>65</sup> The violation of any civil protection order or consent agreement may also be punished as contempt of court by the domestic relations court.<sup>66</sup>
- **Preferred Arrest Policy:** The law provides for a preferred arrest policy if a peace officer has reasonable ground to believe a person has committed the offense of domestic violence or the offense of violating a protection order or consent agreement.<sup>67</sup> Peace officers must provide

victims with information about protection orders and domestic violence shelters.<sup>68</sup> A peace officer, who arrests an offender for violating a protection order or consent agreement that is on its face valid, is immune from liability in a civil action for damages.<sup>69</sup> All CPOs are enforceable throughout the state per Ohio law<sup>70</sup> and throughout the country per federal law. (See VAWA Tab.)

- **Cooperation with Law Enforcement Agencies:** The court is required to issue a copy of all protection orders and consent agreements to all law enforcement agencies that have jurisdiction to enforce those orders.<sup>71</sup> The court must also provide, for every protection order issued, a "Protection Order Notice to NCIC," Form 10-A, to the local law enforcement agency responsible for maintaining NCIC computer records.<sup>72</sup> Note: The Brady Handgun Disqualifier check box does not apply to *ex parte* orders, because the subject has not yet had an opportunity for a hearing.

### **Best Practice**

- **Dangerous Times:** Because the period of the parties' separation is the most likely time for a domestic violence victim to be killed, many law enforcement agencies have begun to regard protection orders as an early warning system. Courts should, immediately upon filing, fax copies of protection orders to law enforcement agencies where petitioners live or work. Faxing copies of dismissal entries is also advisable.

## ***Endnotes***

1. *Felton v. Felton* (1997), 79 Ohio St. 3d 34.

2. "Courts have an obligation to carry out the legislative goals to protect the victims of domestic violence." *Felton v. Felton* (1997), 79 Ohio St.3d 34.

3. R.C.3113.31(G).

4. *Id.*

5. See Brigner, Judge Mike, *Civil Protection Orders in Ohio Domestic Violence Cases*, 9 DOMESTIC RELATIONS JOURNAL OF OHIO 37 (May/June 1997).

6. R.C.2919.26(E)(2)(b).

7. R.C. 3113.31(G).

8. *Felton v. Felton* (1997), 79 Ohio St.3d 34.

9. R.C. 3113.31(E)(3)(b).

10. R.C. 3113.31(A)(1).

11. *Felton v. Felton* (1997), 79 Ohio St. 3d 34.

12. R.C. 3113.31(D).

13. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 8.4 (2000).

14. R.C. 3113.31(A)(2).

15. Civil Rule 3(B)(10).

16. R.C. 3113.31(J).

17. 42 U.S.C. § 3796gg-5.

18. R.C. 3113.31(C).

19. See Adrine and Ruden, *supra* n.13, § 9.10 (2000).

20. R.C. 3113.31(A)(3).

21. The essential elements of "cohabitation" are sharing of familial or financial responsibilities, and consortium. *State v. Williams* (1997), 79 Ohio St.3d 459. Same gender couples are eligible for relief under the CPO statute. See Adrine and Ruden, *supra* n.13, § 9.10 (2000).

22. Sup. R. 10.01, *et seq.* Domestic relations courts are required by these rules to make packets of these forms available upon request.

23. R.C. 3113.31(C).
24. R.C. 3113.31(M).
25. R.C. 3113.31(D).
26. R.C. 3113.31(D)(1) and (E)(1).
27. R.C. 3113.31(D)(3).
28. R.C. 3113.31(F)(1).
29. R.C. 3113.31(F)(1). Case law has not yet explored the ramifications of this statutory requirement. However, the explicit mandate that the court order delivery of protection orders to the respondent should make courts reluctant to shift this responsibility to the petitioner by such means as dismissing for failure of service; abbreviating the five-year duration of the *ex parte* CPO, in order to "encourage the petitioner to obtain proper service;" or allowing the clerk of courts to collect fees from the petitioner for service.
30. R.C. 3113.31(D)(2)(a).
31. *Id.*
32. R.C. 3113.31(D)(2)(b).
33. See Adrine and Ruden, *supra* n.13, § 11.4, at fn 55 (2000).
34. R.C. 3113.31(D)(1) and (E)(1).
35. R.C. 3113.31(F)(1).
36. R.C. 3113.31(E)(4). If the parties file a petition simultaneously, the court may dispose of the matters in one hearing.
37. R.C. 3113.31(E)(3)(a).
38. See Adrine and Ruden, *supra* n.13, § 10.21, at 326 (2000).
39. R.C. 3113.31(E)(1) & (2).
40. *Felton v. Felton* (1997), 79 Ohio St.3d 34.
41. R.C. 3113.31(E)(1) & (2).
42. R.C. 3113.31(E)(1)(a).
43. R.C. 3113.31(E)(1)(b) & (c).
44. R.C. 3113.31(E)(5).
45. *Id.*
46. The court should carefully evaluate requests for reducing the zone of protection when respondent claims to live near the petitioner. The timing and motives for locating close to petitioner should be closely questioned. Safety of the petitioner should be the overriding determinant; if safety considerations require an order than causes respondent to relocate, it should be remembered that *most* CPOs cause the respondent to relocate.
47. R.C. 3113.31(E)(1)(g).
48. R.C. 3113.31(E)(1)(d).
49. R.C. 3113.31(E)(1)(e).
50. R.C. 3113.31(E)(1)(f).
51. R.C. 3113.31(E)(1)(h).
52. R.C. 3113.31(E)(1).
53. R.C. 3113.31(D)(1) and (E)(1).
54. DR 7-102 (A) (1) prohibits a lawyer from asserting a position "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." No exception is stated for using the threat of a custody fight to coerce concessions in a divorce or domestic violence case. And EC 7-10 advises against the infliction of needless harm on third persons, which would include children in a divorce or domestic violence case.
55. Criminal sanctions are provided for attempting to influence, intimidate, or hinder a witness - including a complaining witness - by force or by unlawful threat of harm to person or property. R.C. 2921.03.
56. For example, DR 7-104 (A) prohibits an attorney from communicating with *or causing another to communicate with* a represented party. No exception is stated for advising a client to communicate with a petitioner in a domestic violence case.
57. If a petitioner is unrepresented, DR 7-104 (B) prohibits an attorney from giving any advice to the petitioner, except to seek counsel.
58. See R.C. 2921.21.
59. R.C. 2919.27.
60. R.C. 3113.31(E)(7)(a).

61. R.C. 3113.31(E)(3)(c).
62. *Woollum v. Woollum* (1999), 131 Ohio App.3d 818.
63. R.C. 3113.31(D).
64. R.C. 3113.31(L)(1)(a).
65. R.C. 3113.31(F)(3).
66. R.C. 3113.31(L)(1)(b).
67. R.C. 2935.03(B)(3)(b).
68. R.C. 3113.31(I), R.C. 2935.032(C).
69. R.C. 2935.032(F).
70. R.C. 3113.31(F)(3).
71. R.C. 3113.31(F)(1).
72. Sup. R. 10.

## Children and Violence

Every judge who handles cases involving the allocation of parental rights and responsibilities, popularly known as “custody and visitation,” will acknowledge child safety as a priority. Judges can benefit from a thorough understanding of how domestic violence affects children<sup>1</sup> and how it should affect their decisions concerning children. Some statistics linking child safety and domestic violence may prove interesting:

- It is reported that up to 70% of the men who batter their wives also abuse their children physically and/or sexually.<sup>2</sup> The most conservative estimates for the overlap between wife assault and child abuse is 30%.<sup>3</sup>
- Fathers who batter the mother are twice as likely to seek sole custody of their children than are non-violent fathers and are three times as likely to be in arrears in child support.<sup>4</sup>
- Domestic violence is the origin of more than 50% of child abductions, usually perpetrated by fathers or their agents.<sup>5</sup>
- Children who suffer abuse have an increased risk for physical aggression, antisocial behavior, depression, and parent-child relational problems.<sup>6</sup>

### *How Domestic Violence Should Affect Custody Decisions*

*What neglect and domestic violence factors must a court consider in parenting decisions?*

- **Violence Too Often Ignored:** It may appear obvious that children do not belong in the care of individuals who may harm them or teach them violent behaviors, but in reality violence is often ignored in parenting decisions. It has been found that judges tend to award custody to battering fathers at the same rate they award custody to non-violent fathers.<sup>7</sup> One noted expert cites several reasons why judges may view batterers favorably, including gender bias, the fact the batterer is usually wealthier, and disregard of the primary caretaker role.<sup>8</sup>
- **Statutory Child Neglect Factors:** Judicial officers are required to consider the following child neglect factors. These factors must be considered against granting a shared parenting decree and against naming the offending parent as the residential parent in a custody decree.<sup>9</sup> These factors should also trigger contemplation of visitation restrictions.
  - Whether either parent has been convicted of or pleaded guilty to any crime involving any act that resulted in a child being a neglected child; or
  - Whether either parent has been determined to be the perpetrator of a neglectful act that is the basis for an adjudication a child is a neglected child; or
  - Whether there is reason to believe either parent has acted in a manner resulting in a child being neglected.
- **Statutory Domestic Violence Factors:** Judicial officers are also required to consider the following domestic factors in all custody,<sup>10</sup> visitation,<sup>11</sup> modification,<sup>12</sup> and shared parenting<sup>13</sup> decisions:
  - Whether a parent has been convicted of or pleaded guilty to a R.C. 2919.25 domestic violence crime or any other offense involving a family or household member who is a subject of the parenting proceeding;<sup>14</sup> or

## What other safety considerations should the court take into account?

- Whether, in shared parenting determinations, either parent has “[A]ny history of, or potential for, child abuse, spouse abuse, other domestic violence, or parental kidnapping.”<sup>15</sup>
- **Other Safety Factors:** The court should be alert for evidence of other safety risks that might require protective parenting orders:
  - ▶ The safety of the child and when the other parent is at risk.
  - ▶ Domestic violence resulted in serious injuries.
  - ▶ A parent has a history of violent behavior.
  - ▶ A parent has a history of stalking or other obsessive behavior.
  - ▶ Weapons are involved.
  - ▶ A child has been the victim of domestic violence or sexual abuse.
  - ▶ A child has witnessed domestic violence against the other parent.
  - ▶ A parent has demonstrated a propensity to violate prior court orders, including temporary protection orders or criminal protection orders.
  - ▶ A parent or other member of the parent’s household has abused alcohol or other drugs.
  - ▶ A parent has demonstrated homicide threats, suicide threats, abduction threats, acute depression, or other serious mental health issues.
  - ▶ A parent must relocate due to incidents of threats of physical violence and harm.
- **Protective Parenting Orders:** With the primary goal of providing for the safety of the child and the adult victim of violence, the court in its discretion should consider protective parenting options when evidence of neglect, violence, or safety factors are present. Such options include:
  - ▶ Denying shared parenting to an abuser
  - ▶ Denying residential parent and legal custodian rights to an abuser
  - ▶ Denying visitation
  - ▶ Requiring supervised visitation
  - ▶ Requiring supervised visitation exchange at a safe location
- **Danger to Child from Witnessing Abuse:** A judicial assumption that only children who have been *physically* abused deserve court protection from the violent parent, ignores the damage done to children just by *witnessing* domestic violence in the home.<sup>16</sup> Children who witness abuse of their mothers in the home are at high risk for alcohol and drug use, criminal behavior, sexual acting out, running away from home, and suicide.<sup>17</sup>
- **“Friendly Parent” Considerations:** Ohio is one of 28 states that requires a court to consider, as a custody factor, a parent’s willingness to facilitate visitation.<sup>18</sup> Ohio’s visitation statute favors “frequent and continuing contact” for both parents.<sup>19</sup> While these provisions are appropriate in most cases, they conflict with the requirement to consider domestic violence as a factor.<sup>20</sup>
  - ▶ “The ‘friendly parent’ and ‘frequent and continuing contact’ preferences can work together in favor of the abusive parent, who will often appear in court to be the ‘friendly’ parent; the abused

parent often wants to limit her own and the children's contact with the batterer, out of concern for her children's and her own safety."<sup>21</sup>

- ▶ "In this situation, it is recommended the court carefully consider the physical and emotional safety of the abused parent and children, and resolve any balancing test in favor of protecting that safety."<sup>22</sup>

### *What can a court do to ensure it has all the evidence it needs to fully protect children?*

- **Obtaining Evidence About Family Violence:** In order to fulfill their responsibility to determine the best interests of children, judicial officers need not be content with the often scant and self-serving evidence presented by the adult parties and their counsel. Judicial officers should recognize parents who are the victims of domestic violence may in some cases be unwilling or unable to adequately present evidence on these issues, due to fear of retaliation or lack of financial resources.<sup>23</sup> Courts should require sufficient investigation and presentation of evidence on all relevant parenting issues, including domestic violence issues.<sup>24</sup> Court actions to obtain such evidence may include:

- ▶ Procuring an independent investigation<sup>25</sup>
- ▶ Ordering physical, psychological and psychiatric examinations of the parents and/or children<sup>26</sup>
- ▶ Interviewing the children in chambers<sup>27</sup>
- ▶ Appointing a CASA advocate or guardian *ad litem*<sup>28</sup>
- ▶ Appointing an attorney to represent the children<sup>29</sup>
- ▶ Awarding of attorney fees to the financially disadvantaged spouse to allow that parent a fair opportunity to represent the interests of the children<sup>30</sup>
- ▶ Requiring each party to establish to the court's satisfaction the children are safe from abuse and safe from witnessing domestic violence while in that party's care

## *How Domestic Violence Should Affect Visitation Decisions*

### *Why is domestic violence a factor in visitation as well as custody decisions?*

- **Recognize Potential for Danger:** Courts should recognize the potential for renewed violence during visitation as well as misuse of children as a tool of continued control. Visitation periods and visitation exchange have proven to be dangerous situations for many battered women and for their children.<sup>31</sup> According to one study, 5% of abusive fathers, during visitation, threaten to kill the mother, 34% threaten to kidnap their children, and 25% threaten to hurt their children.<sup>32</sup> Battering men use custodial access to the children as a tool to terrorize battered women or to retaliate for separation.<sup>33</sup> These considerations led a National Institute of Justice study to conclude that "nowhere is the potential for renewed violence greater than during visitation."<sup>34</sup>
- **Put Child's Safety Interests before Parent's Visitation Interests:** Despite all the documented evidence of the harms and dangers to adult victims and children from unrestricted visitation in domestic violence cases, many courts decline to issue protective visitation orders.<sup>35</sup> Experts advise that: "A parent's 'right to visitation' cannot take precedence over a child's exposure to a high-risk environment."<sup>36</sup>

**Best Practice**

*What judicial tools are available to make visitation a safe experience?*

• **Honor No-Contact Orders:** If a court has issued protection orders prohibiting contact between parents, all subsequent visitation arrangements should avoid any requirement or opportunity for the visiting parent to violate the protection orders. When a court exercising proper parenting jurisdiction issues custody and visitation orders, that action causes civil protection orders concerning parenting rights to terminate automatically.<sup>37</sup> However, no statute gives a court with parenting jurisdiction the authority to nullify any other portion of a civil or criminal court protection order. Thus, if the visiting parent is forbidden from contact with the custodial parent, no visitation order should require prohibited contact. If a protection order also forbids any contact with a child, the court with parenting jurisdiction should postpone issuing any parenting order that might endanger the child, until the judge can communicate with the judge who issued the protection order and until a full evidentiary hearing is held.

**Best Practice**

*In what ways should evidence of domestic violence change the way courts look at relocation cases?*

• **Visitation Orders a Court Can Use to Protect Children:** In making visitation arrangements whenever domestic violence has occurred or is threatened, the court should consider the following types of action:<sup>38</sup>

- ▶ Start with short daytime visits in a public place, increasing time only if visits go well
- ▶ Provide for the exchange of children to occur in a protected setting
- ▶ Order visitation arrangements that do not require any contact between the parents
- ▶ Mandate supervision by an agency (at the visiting parent's cost) or third party (someone not under the control of the abuser)
- ▶ Require that the abuser complete, to the satisfaction of the court, a batterer intervention treatment program or other designated counseling as a condition of the visitation
- ▶ Require the visiting parent to abstain from possession of any controlled substances and from consumption of alcohol during and for 24 hours preceding each visitation
- ▶ Limit overnight visitation
- ▶ Require a bond for the return and safety of the child
- ▶ Restrict the abuser's movement as needed to protect the victim, other family members, and the community
- ▶ Suspend all visitation if there is a credible threat that the abuser will flee with the child based upon prior credible threats
- ▶ Keep the address of the abused party and the child confidential
- ▶ Docket hearing dates to review how the order is working

• **Relocation:** The complex considerations which a court must consider in parental relocation cases are made more complex where domestic violence is a factor. In addition to normal motivations in an increasingly mobile society, such as employment and educational opportunities, battered women may wish to relocate because family, support, or protection may be in another county or state.

- ▶ Domestic violence cases highlight a conflict when only the primary caretaker is restricted from moving. "It does not seem equitable that the non-custodial parent should be allowed to move freely while the custodial parent is restricted."<sup>39</sup>

## Best Practice

▶ *Relevant Factors:* No Ohio statute identifies the factors that should be considered in making relocation decisions. One court, New York's highest court, listed the following relevant factors in relocation cases involving domestic violence:<sup>40</sup>

- ◆ level and quantum of abuse and threats
- ◆ availability of local family services
- ◆ location of abused parent's family
- ◆ age of children and their relationship with abuser
- ◆ evidence of child abuse
- ◆ instances where children witnessed parent abuse
- ◆ economic position of each parent
- ◆ any other factors which significantly bear upon the child's welfare

## Mediation

### What should courts consider before ordering mediation in a domestic violence case?

- **Mediation Generally:** One of the most popular forms of alternative dispute resolution is the mediation process, where a neutral third party facilitates a face-to-face attempt to negotiate an agreement of differences.<sup>41</sup> In parenting cases involving domestic violence or child abuse, the court may order mediation only if the court determines it is in the best interests of the parties to order mediation and makes specific written findings of fact to support its determination.<sup>42</sup>
- **Mediation in Domestic Violence Cases:** Due to the unequal bargaining power between the parties in most domestic violence cases, many experts question the usefulness of mediation.<sup>43</sup> States with experience in mediating custody disputes generally prohibit or strictly regulate mediation for families where there has been domestic violence.<sup>44</sup> (See **Mediation Tab**.)

## Endnotes

1. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, Chap. 14 (2000).
2. Bawker, Arbitell & McFerron, *On The Relationship Between Wife Beating and Child Abuse*, FEMINIST PERSPECTIVES ON WIFE ABUSE, Kersti Yllo & Michelle Bogard, eds., 1988. See also RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 14.7, at n.183 (2000).
3. NANCY K.D. LEMON & PETER JAFFE, DOMESTIC VIOLENCE AND CHILDREN, RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM, at 22-23, Family Violence Prevention Fund (1995). (Ed. Note: An excellent resource for judges on all aspects of parenting issues where domestic violence is present. Call 415-252-8900 to order.)
4. Editors, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, at 40, American Psychological Association (1996).
5. Geoffrey Greif & Rebecca Hagar, *Abduction of Children By Their Parents: A Survey of the Problem*, SOCIAL WORK, 1991.
6. Athena Garrett with Heather Libbey, *Theory and Research on the Outcomes and Consequences of Child Abuse and Neglect*, National Institute of Justice (1997), available at <http://www.ojp.usdoj.gov/nij/childabuse/bg2.html>. See also TRAUMA, VIOLENCE, & ABUSE: A REVIEW JOURNAL, Sage (2000).
7. Liss, M.B. and Stahly, G.B., *Domestic Violence and Child Custody*, BATTERING AND FAMILY THERAPY, A FEMINIST PERSPECTIVE 181 (Hansen, M., & Harway, M., eds, 1993).
8. Joan Zorza, *How Abused Women Can Use the Law to Help Protect Their Children*, ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN Peled, E., Jaffe, P, and Edelson, J, eds. (Sage 1995).
9. R.C. 3109.04(C); R.C. 3109.04(F)(1)(h).
10. R.C. 3109.04(C); R.C. 3109.04(F)(1)(h).
11. R.C. 3109.051(D)(12).

12. R.C. 3109.04(C); R.C. 3109.04(F)(1).
13. R.C. 3109.04(C); R.C. 3109.04(F)(2).
14. R.C. 3109.04(C).
15. R.C. 3109.04(F)(2)(c).
16. See Adrine and Ruden, *supra* n.1, § 14.11 (2000).
17. JAFFE, WOLFE & WILSON, CHILDREN OF BATTERED WOMEN (1990).
18. R.C. 3109.04(F)(1)(f) and (i).
19. R.C. 3109.051(A).
20. R.C. 3109.04(F)(1)(h).
21. NANCY K.D. LEMON & PETER JAFFE, DOMESTIC VIOLENCE AND CHILDREN, RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM, 44-45, Family Violence Prevention Fund (1995).
22. *Id.*
23. See Adrine and Ruden, *supra* n.1, § 14.7 (2000).
24. See Voris, Judge Michael, *Civil Orders of Protection: Do They Protect Children: the Tag-along Victims of Domestic Violence?* 17 OHIO NORTHERN U. L. Rev. 599 (1991).
25. R.C. 3109.04(C).
26. R.C. 3109.04(C); Civ.R. 35.
27. R.C. 3109.04(B).
28. R.C. 3109.04(B)(2)(a).
29. Civ.R. 75(B)(2).
30. R.C. 3105.18(H).
31. See Julie Kunce Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, 30 CLEARINGHOUSE REV. 295 (1996).
32. Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113,1119 (1996).
33. David Finkelhor, Gerald Hotaling & Andrea Sedlak, 1990, as cited by B. Hart in PROTECTIVE SERVICES QUARTERLY, 1993.
34. PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT PRACTICE AND ENFORCEMENT 43 (1990).
35. See Adrine and Ruden, *supra* n.1, § 14.15 (2000).
36. Carla Garrity & Mitchell Baris, *Custody and Visitation: Is it Safe?* 17 FAM. ADVOCATE. 40, 43 (1995).
37. R.C. 3113.31(e)(3)(B).
38. See the National Council of Juvenile and Family Court Judge's MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 405 (1994); and Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229 (1995).
39. NANCY K.D. LEMON & PETER JAFFE, DOMESTIC VIOLENCE AND CHILDREN, RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM, 155-156, Family Violence Prevention Fund (1995).
40. *Desmond v. Desmond*, 509 N.Y.S. 2d 979 (N.Y. 1986).
41. See Adrine and Ruden, *supra* n.1, § 14.23 (2000).
42. R.C. 3109.52(A).
43. "[T]he violence, and resulting fear, taint *all* aspects of the negotiation process. . . .The extraordinary power imbalance and the batterer's refusal to negotiate in good faith usually sabotage even well-intentioned mediations." Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. LAW Q. 719, 731 (Fall 1999).
44. See Adrine and Ruden, *supra* n.1, § 14.23, and citations therein (2000).

# Stalking Protection Orders

In order to protect victims of stalking behavior when there is no family or intimate partner relationship, that is, for strangers and acquaintances, the Ohio General Assembly has created criminal and civil stalking protection order statutes. The Criminal Stalking Protection Order (SPO) created by R.C. 2903.213, and the Civil Stalking Protection Order (CSPO) created by R.C. 2903.214, expand the judicial system's authority to protect the victims of domestic violence. It is the nature of the relationship and not the nature of the behavior which distinguishes stalking protection orders. Existing law for Temporary Protection Orders and Civil Protection Orders already allow for courts to ban stalking behavior, but only between intimate partners and family or household members. The new laws define a new category of victims who are now eligible for similar relief.<sup>1</sup>

## Criminal Stalking Protection Order (SPO)

### Can criminal courts protect the victims who are not family or household members?

- **SPO Statutory Authority:** A Stalking Protection Order may be issued as a pretrial condition of release by the criminal court with jurisdiction over certain designated crimes.<sup>2</sup> An SPO may be issued when a complaint alleges a violation of R.C. 2903.11 (Felonious Assault), 2903.12 (Aggravated Assault), 2903.13 (Assault), 2903.21 (Aggravated Menacing), 2903.211 (Menacing by Stalking), 2903.22 (Menacing), or 2911.211 (Aggravated Trespass), or comparable municipal statutes.<sup>3</sup>
- **SPO Eligible parties:** The complainant/alleged victim may apply for an SPO, but only if the victim is *not* a family or household member of the defendant.<sup>4</sup> The complainant and each person specifically identified in a protection order are collectively designated as "Protected Parties" on Ohio's mandatory standard SPO forms. Stalking Protection Orders were created to cover strangers and mere acquaintances, that is, persons who are not a relative, intimate partner, or family or household member of the perpetrator. Victims of intimate partner or family violence can instead apply for a Temporary Protection Order (TPO),<sup>5</sup> or Civil Protection Order (CPO),<sup>6</sup> or Civil Stalking Protection Order (CSPO)<sup>7</sup> against stalking behavior.
- **SPO Lethality Factors:** Judicial officers may want to consider lethality assessment tools in all protection order decisions. (See Lethality Factor Tab.)
- **SPO Initial Procedure:** A complainant/alleged victim must file a motion requesting a protection order, using language specified in the statute.<sup>8</sup> The court can also issue an SPO on its own motion.<sup>9</sup> The Supreme Court of Ohio developed forms which must be used in all stalking protection order cases.<sup>10</sup> The forms include a motion that complies with the statutory language, and instructions for completing the motion.
- **SPO Hearings:** The court must hold a hearing by the next court day following the filing of the motion.<sup>11</sup> The statute forbids holding a defendant solely for purposes of a hearing on the motion requesting a protection order.<sup>12</sup> The court must order service of the SPO upon the defendant the same day it is issued.<sup>13</sup> If the court's initial SPO was issued at an *ex parte* hearing, the court must schedule another hearing "as soon as possible but not later than the next day that the court is in session" to determine whether that order should remain in effect, be modified, or be revoked.

## *What types of relief does a Stalking Protection Order provide?*

## *How can a Stalking Protection Order be modified or terminated?*

- **SPO Relief Available:** If the court finds the safety and protection of the complainant/alleged victim may be impaired by the continued presence of the alleged offender, the court may issue a protection order as a pretrial condition of release.<sup>14</sup> The SPO may include any terms the court finds necessary to insure the safety and protection of the complainant/alleged victim.<sup>15</sup> The forms mandated by the Supreme Court of Ohio include a full range of optional orders.<sup>16</sup>
- **SPO Weapons Restrictions:** The issuance of a stalking protection order triggers federal firearms possession restrictions. (See **Weapons** Tab.) The federal firearms remedies, however, are no substitute for detailed orders in the SPO requiring immediate surrender of deadly weapons and locally enforceable weapons restrictions.
- **SPO Modification & Termination:** Only the court that issued the SPO can modify it. Courts must notify the parties an SPO cannot be waived or nullified by consent of the parties.<sup>17</sup> The mandatory Ohio forms include this notice. Requests by the parties for modification or termination of an SPO will probably be few, since the parties are by definition strangers or mere acquaintances, and “reconciliation” of a relationship is unlikely. The SPO terminates upon disposition of the underlying criminal charge or when a Civil Stalking Protection Order (CSPO) is issued relating to the same facts.<sup>18</sup>
- **SPO Enforcement:** Any violation of an SPO is by definition a violation of bond conditions, which can result in bond revocation. Any violation of an SPO is also a separate crime, which may result in arrest upon probable cause and separate criminal charges.<sup>19</sup>
- **SPO Costs, Federal Law:** Ohio law prohibits charging a petitioner a fee for filing a petition for an SPO.<sup>20</sup> In addition, a federal law adopted in 2000 requires each state to certify to the United States Attorney General by October, 2002, that no unit of state or local government requires a victim to bear any costs associated with filing, issuance, registration or service of any protection order. This ban applies to all courts, clerks, and law enforcement agencies, and appears to apply at both the filing stage and the final disposition stage of all protection order proceedings.<sup>21</sup>

## *Civil Stalking Protection Order (CSPO)*

## *Can civil courts protect the victims who are not family or household members?*

- **CSPO Statutory Authority:** Civil Stalking Protection Order cases are governed by R.C. 2903.214. The common pleas court of the county in which the person to be protected by the protection order resides has jurisdiction to hear CSPO cases.<sup>22</sup>
- **CSPO Lethality Factors:** Judicial officers may want to consider lethality assessment tools in all protection order decisions. (See **Lethality Factor** Tab.)
- **CSPO Eligible Parties:** Any person may seek a CSPO on behalf of themselves and any other family or household member. Civil Stalking Protection Orders were created to cover strangers and acquaintances.

Persons who are related, intimate partners, family and household members of the perpetrators are eligible instead to request a Civil Protection Order (CPO) from the domestic relations court against stalking behavior.<sup>23</sup> But, unlike the SPO statute, nothing in the CSPO statute prohibits victims of intimate partner violence from asking for a CSPO instead. The petitioner and each person specifically identified in a protection order are collectively designated as “Protected Parties” on Ohio’s mandatory standard domestic violence forms.

## What are the legal procedures for a Civil Stalking Protection Order case?

- **CSPO Procedure:** The Supreme Court of Ohio has adopted certain forms and instructions for mandatory statewide use in all CSPO cases. Courts are required by this rule to make packets of these forms available upon request.<sup>24</sup> A person seeks relief by filing a petition alleging the respondent engaged in a violation of R.C. 2903.211 (Menacing by Stalking) against the person to be protected.
- **CSPO Victim Advocate:** A victim advocate may accompany a petitioner at *all stages* of the judicial proceedings.<sup>25</sup>

### Best Practice

▸ *Support and Assistance:* The role of the victim advocate is not to give legal representation, but to provide support and assistance to the petitioner. No victim advocate should be allowed to be called as a witness, nor be required to disclose a surname in any proceeding in the court without written leave of the assigned judge for good cause shown. (See **Victim Advocate** Tab.)

- **CSPO Ex Parte Hearing:** Upon request, the court must hold an *ex parte* hearing the same day the petition is filed; the law does not provide for issuance of a CSPO solely on the basis of a review of the petition. The assigned judge should personally hear *ex parte* petitions whenever possible and should review and sign any *ex parte* CSPO signed by a magistrate. Interim orders on *ex parte* hearings should be avoided due to the 28-day expiration of such orders.<sup>26</sup>
- **CSPO Full Hearing:** If the court, after an *ex parte* CSPO hearing, issues a CSPO, a full hearing shall be scheduled within ten court days.<sup>27</sup>
  - If a magistrate presides over the full hearing, any objections to a Magistrate Decision filed pursuant to Civil Rule 53(E)(3) shall operate as an automatic stay of execution of that judgment until the court disposes of the objections. Although this stay applies to the protection order issued in the Magistrate Decision, the stay does not apply to the *ex parte* CSPO issued by the judge as a result of the *ex parte* hearing, which remains in effect until the objections are determined. The objection applies to the magistrate’s full hearing and cannot stay the judge’s *ex parte* order.
  - This should provide judges with an incentive, in addition to victim safety, for not arbitrarily limiting the duration of *ex parte* protection orders.
- **CSPO Relief Available:** After an *ex parte* hearing, the court may grant a Civil Stalking Protection Order which includes any terms the court “finds necessary for the safety and protection of the person to be protected.”<sup>28</sup> After a full hearing, the court may grant a CSPO that “contains terms designed to ensure the safety and protection of the person to be protected.”<sup>29</sup>

## What types of relief does a Civil Stalking Protection Order provide?

- **CSPO Cooperation with Law Enforcement Agencies:** Swift communication by the court with law enforcement agencies is crucial to victim safety.

- ▶ *Required Notice:* The court is required to issue a copy of all protection orders and consent agreements to all law enforcement agencies that have jurisdiction to enforce those orders.<sup>30</sup>
- ▶ *NCIC Form:* The court must provide a “Protection Order Notice to NCIC,” Form 10-A, to the local law enforcement agency responsible for maintaining NCIC computer records. This form should be completed and forwarded for every protection order issued. Note: The Brady Handgun Disqualifier does not apply to *ex parte* orders, because the subject has not yet had an opportunity for a hearing.

**Best Practice**

- ▶ *Lethality Precautions:* Because the period of the parties’ separation is the most likely time for a domestic violence victim to be killed, many law enforcement agencies have begun to regard protection orders as an early warning system. Upon filing, courts should immediately fax copies of protection orders to law enforcement agencies where petitioners live or work. Faxing copies of dismissal entries is also advisable.

- **CSPO Mutual Orders Prohibited:** The court may not issue “mutual” CSPOs. The court may not require the petitioner to do or refrain from doing any act, unless the respondent files a separate petition and sets the matter for a separate hearing on its merits.<sup>31</sup>

- **CSPO Weapons Restrictions:** The issuance of a stalking protection order triggers federal firearms possession restrictions. (See **Weapons** Tab.) The federal firearms remedies, however, are no substitute for detailed orders in the CSPO requiring immediate surrender of deadly weapons and locally enforceable weapons restrictions.

- **CSPO Modification:** Only the court that issued the CSPO can modify it. Courts must notify the parties that a CSPO cannot be waived or nullified by consent of the parties.<sup>32</sup> The mandatory Ohio forms include this notice. Requests by the parties for modification or termination of a CSPO will probably be few, since the parties are by definition strangers or mere acquaintances, and “reconciliation” of a relationship is unlikely.

- **CSPO Expiration:** Any *ex parte* protection order, full hearing protection order, or consent agreement is valid until a date certain, but not later than five years from the date of its issuance or approval.<sup>33</sup>

- ▶ *Other Considerations:* The duration of any CSPO should be based solely on consideration of victim safety. Absent some articulable reasons, which justify granting a victim of stalking less protection than the law allows, a five-year duration should be stated. Court convenience, document management, or blanket policies should never outweigh victim safety considerations in setting the length of court protection provided to victims. As the public may require an explanation why the full duration of protection was not ordered when a victim is injured after an accelerated expiration date expires, it would be prudent to make written findings justifying a decision to provide less protection than the full five years allowed by the statute.

*How can a Civil Stalking Protection Order be modified?*

*Should judges be reluctant to limit stalking protection order relief?*

**Best Practice**

- **CSPO Costs, Federal Law:** Ohio law prohibits charging a petitioner a fee for filing a petition for a CSPO.<sup>34</sup> In addition, a federal law adopted in 2000 requires each state to certify to the United States Attorney General by October, 2002, that no unit of state or local government requires a victim to bear any costs associated with filing, issuance, registration or service of any protection order. This ban applies to all courts, clerks, and law enforcement agencies, and appears to apply at both the filing stage and the final disposition stage of all protection order proceedings.<sup>35</sup>

## Endnotes

1. For information about the crime of stalking generally and responses of society and the law, see STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT, 39, U.S. Department of Justice (1998) (summary published in *Network News*, Ohio Domestic Violence Network (March 1998); Clare Dalton and Elizabeth M. Schneider, *Stalking and Domestic Violence*, BATTERED WOMEN AND THE LAW 668 (2001); Gavin DeBecker, *THE GIFT OF FEAR* (Little, Brown 1997); Jeffrey Toobin, *Stalking in L.A.*, THE NEW YORKER, (February 24 & March 3, 1997); Christina Carmody, *Deadly Mistakes*, ABA JOURNAL 68 (September 1994).
2. R.C. 2903.213(A).
3. R.C. 2903.213(A).
4. R.C. 2903.213(A).
5. R.C.2919.26. This criminal Temporary Protection Order statute can be used to prohibit stalking conduct as well as other domestic violence behavior.
6. R.C. 3113.31. This Civil Protection Order statute can be used to prohibit stalking conduct as well as other domestic violence behavior.
7. R.C. 2903.214. This Civil Stalking Protection Order statute, unlike the Stalking Protection Order statute, does not specifically forbid intimate partners, family and household members from applying for relief, but since stalking behavior between such intimate or related parties is one of the types of conduct which may be prohibited by a Civil Protection Order under R.C. 3113.31, and since the CPO statute offers more remedies, that is the type of relief that such parties will usually seek.
8. R.C. 2903.213(B).
9. R.C. 2903.213(D)(1).
10. Sup. R. 10.03.
11. R.C. 2903.213(C)(1).
12. R.C. 2903.213(F).
13. R.C. 2901.213(G)(1).
14. R.C. 2903.213(C)(1).
15. R.C. 2903.213(C).
16. Sup.R. Form 10.03-A, *et seq.*
17. R.C. 2903.213(C)(2)(a).
18. R.C. 2903.213(E)(2).
19. R.C. 2919.27.

20. R.C. 2903.213(I).
21. 42 U.S.C. § 3796gg-5.
22. R.C. 2903.214(A) & (B).
23. R.C. 3113.31.
24. Sup. R. 10.03.
25. R.C. 2903.214(L).
26. Civ.R. 53(E)(4)(c).
27. R.C. 2903.214(D)(2)(a).
28. R.C. 2903.214(D)(1).
29. R.C. 2903.214(E)(1).
30. R.C.2903.214(F)(1).
31. R.C. 2903.214(E)(3).
32. R.C. 2903.214(E)(5)(a).
33. R.C. 2903.214(E)(2)(a).
34. R.C. 2903.214(J).
35. 42 U.S.C. § 3796gg-5.

## Lethality Factors

In the last two decades, law enforcement authorities, social scientists, and other experts have researched “lethality factors” – indicators of future dangerousness of individuals and situations.<sup>1</sup> These factors may assist those who make critical decisions about the safety of others. At the end of this section is a *checklist* of various lethality indicators that can be used as an assessment tool. Many law enforcement agencies and courts throughout the nation are now using such tools to evaluate domestic violence cases for potential escalation.

### Lethality Assessment Tools & Their Uses

*Is lethality assessment a function that neutral judicial officers ought to be performing?*

- **Danger Assessment is an Existing Judicial Function:** Every judicial officer who handles domestic violence cases (as well as parenting cases and many criminal cases) is already responsible for making danger assessments in a wide variety of circumstances: protection order decisions, bond considerations, sentencing decisions, probation restrictions, parenting determinations, and court safety planning.
  - In every case where danger is a potential issue, judicial officers consciously or unconsciously make decisions that affect safety and sometimes survival. Even a judicial decision *not* to consider danger is still a decision that by default has an equal impact upon safety and survival.
  - Competent discharge of judicial duties requires an evaluation of possible danger to crime victims, witnesses, jurors, court personnel, and the public at large whenever risks are evident.
  - Statutes, rules, and case law sometimes specifically require such judicial evaluation of risks. For instance, R.C. 2919.251 requires a court to consider “whether the defendant is potentially a threat to any other person,” among other danger factors, before setting bail.
  - Judicial decision-making concerning safety involves more than just individual case findings. Supervision of magistrates, pre-trial service officers, probation officers, bailiffs, court security officers, and other individuals and agencies under the court’s control is essential to ensure their safety decisions are consistent with those of the judge who is ultimately accountable to the public for those decisions.
  - Demanding thorough investigation and complete disclosure of all relevant danger information from attorneys, court staff, and outside agencies is the surest way for a judge to ensure all safety decisions for which the judge must answer are fully-informed and factually defensible.

#### ***Best Practice***

#### ◦ **Examples of Lethality Tools at Work**

*How can a judge use lethality factors to assess cases?*

- The *Domestic Violence Protocols* for the civil and criminal justice system in Montgomery County, Ohio, suggest that lethality factors be considered at every aspect of the domestic violence case, beginning with the police dispatch stage and continuing through

arrest procedures, bond considerations, criminal sentencing, protection order issuance and enforcement, and parenting determinations.<sup>2</sup>

- ▶ A laminated pocket-sized card containing lethality factor questions is issued to law enforcement officers in Cleveland, Ohio and Duluth, Minnesota, among other places, to help officers gather lethality information for use in assigning caseworkers and assisting judges set bail. “And simply having to answer such questions may open a victim’s eyes to how serious the situation really is.”<sup>3</sup>
- ▶ The New Jersey Supreme Court publishes an 8-page *Visitation Risk Assessment Instrument* to help judges and other officials make safe visitation orders for children by assessing lethality factors in eight categories:<sup>4</sup>
  - ◆ Domestic Violence
  - ◆ Child Abuse
  - ◆ Child Exposure to Domestic Violence
  - ◆ Substance Abuse
  - ◆ Criminal History
  - ◆ Psycho-Social Factors
  - ◆ Parental Capacity/Experience
  - ◆ Previous Visitation Experience
- ▶ California law specifically states “the public safety shall be the primary consideration” in the setting of bail and requires consideration of such lethality factors as:<sup>5</sup>
  - ◆ Seriousness of victim’s injuries
  - ◆ Alleged threats against victim or witnesses
  - ◆ Alleged use of firearms or other deadly weapons
  - ◆ Prior history of convictions and arrests, including for domestic violence
- ▶ The *Michigan Domestic Violence Benchbook* includes a section on “Understanding the Abuser – Assessing Lethality,” which includes descriptions of six common characteristics of abusers:<sup>6</sup>
  - ◆ Dependency and jealousy
  - ◆ Belief in men’s entitlement to dominate women
  - ◆ Isolation
  - ◆ “Jekyll and Hyde” personality
  - ◆ Poor interpersonal skills
  - ◆ Refusing to accept responsibility for the violence

## *Use of Lethality Factors in Criminal Cases*

*How can criminal courts make use of lethality assessment tools?*

- **Using Lethality Factors in Making Bond Decisions:** News accounts often report batterers being released on minimal bonds with no effective release conditions, then immediately killing their intended victims. Judges have been variously vilified, disciplined, and even forced from office when it appears information about the dangerousness of the defendant was potentially available to the court, but not demanded by the judge, or worse, ignored by the judge.<sup>7</sup>

- **A Critical Stage for All Concerned:** A judge’s decisions concerning bond and pretrial release conditions could well determine a domestic violence victim’s survival. The reasons should be apparent:
  - The abuser is angry over being arrested, but more significantly over the loss of control that represents.
  - The abuser often blames the victim for the arrest.
  - The arrest is a vivid indicator the relationship is ending, which is often a trigger to fatal violence.
  - Token bond and release conditions confirm to the abuser the justice system cannot or will not put boundaries on his behavior.
  
- **Criminal Rule 46:** This rule allows for consideration of all relevant information in setting types, amounts, and conditions of bail. This may include information concerning lethality factors.
  - Such information may not materialize without the court’s insistence it be provided by prosecutors, pretrial service officers, court personnel, complainants and defendants.
  - Proactively demanding sufficient information to make competent judicial decisions will pay dividends in community safety, as well as reduce the chance of “If only I had known. . .” public regrets over a tragedy.
  - If a judge believes full disclosure of lethality information at arraignment will taint the judicial mind for future proceedings, the community is better served by a fully-informed bond decision and a voluntary recusal.
  
- **Using Lethality Factors in Sentencing Decisions:** Sentences for domestic violence offenders should hold the offender accountable and communicate the message the court regards this offense seriously. When pre-sentence investigation services are available, the court should require a thorough disclosure of lethality factors so fully-informed sentencing decisions can be made. The court should also require a victim impact statement be sought, so any aggravating circumstances are known prior to sentencing.

**Best Practice**

- **Other Considerations:** Montgomery county has adopted domestic violence protocols which suggest a judge should consider a term of incarceration if one or more of the following lethality factors are present:<sup>8</sup>
  - The victim suffered **serious bodily injury**, or the offender caused any adult or minor child in the household of the offender to believe he or she would cause serious bodily injury.
  - The offender engaged in, or exhibited a genuine threat of **forcible sexual activity** to any adult or minor child in the household or engaged in any prohibited intra-familial sexual activity.
  - The offender used a **deadly weapon** or caused the victim to reasonably believe he or she would use a weapon;
  - The offender has continued to engage in **on-going intimidation of the victim** by phone, mail or other means, by the offender personally or through a third party.
  - The offender or a third party-agent of the offender has **stalked the victim**.
  - The offender has a **history of domestic violence** or other offense of violence.

- ▶ Offender has engaged in a **pattern of escalating violence**.
- ▶ The offender has **previously violated court orders** or been non-compliant with probation or batterer intervention.
- ▶ The offense was “**committed in the vicinity of a child,**” i.e., within 30 feet or within the same residential unit as a child under 18 years of age. By statute, this factor weighs in favor of imposing imprisonment at the time of sentencing.<sup>9</sup>
- ▶ A batterer intervention program has assessed the offender as **inappropriate for intervention**.
- ▶ In addition to the above factors, a judge, in determining sentencing, should consider the full breadth of lethality indicators.

## *Use of Lethality Factors in Civil Cases*

### *How can civil courts make use of lethality assessment tools?*

- **Protection Order Cases:** Courts issuing Civil Protection Orders and Civil Stalking Protection Orders may find lethality factors useful in determining the necessity and duration of batterer intervention treatment orders, making other counseling orders, setting other terms of protection orders, prioritizing domestic violence case hearings, and planning court safety .
- **Parenting Cases:** Courts making parenting orders in domestic violence cases or in other cases where domestic violence is present may find lethality factors useful in awarding custody, determining whether shared parenting orders are appropriate, and setting safe visitation orders.

## *Endnotes*

1. D.G. Saunders, *Prediction of Wife Assault*, in Campbell, J. (ed.), *Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers*, Sage Publications, California (1995); Barbara Hart, *Assessing Whether Batterers Will Kill*, in *Confronting Domestic Violence: Effective Police Response*, Pennsylvania Coalition Against Domestic Violence (1990).
2. The Montgomery County (Ohio) Criminal Justice Council DOMESTIC VIOLENCE PROTOCOL (2001).
3. *A Pocket-Size Yardstick for Violence*, OMAHA WORLD-HERALD, March 23, 2000.
4. DOMESTIC VIOLENCE PROCEDURES MANUAL, Issued under the Authority of the Supreme Court of New Jersey and the Attorney General of the State of New Jersey (1998).
5. Cal. Pen. C. § 1275.
6. Mary M. Lovik, J.D., DOMESTIC VIOLENCE BENCHMARK, Michigan Judicial Institute, § 1.5 (1998).
7. For example, a Florida judge was labeled by READER’S DIGEST magazine as one of *America’s Worst Judges* for repeatedly lowering bonds on domestic violence and drunk driving defendants. See Schafran, *There’s No Accounting For Judges*, 58 ALBANY LAW REV. 1063 (1995). The most serious sanctions appear in cases where the judicial decisions were accompanied by sexist remarks, the demeaning of domestic violence victims, and overt sympathy for domestic violence perpetrators.
8. Montgomery County (Ohio) Criminal Justice Council DOMESTIC VIOLENCE PROTOCOL (2001).
9. See R.C. 2929.12 and 2929.22.

# LETHALITY FACTOR CHECKLIST

Lethality factors should be used as guidance in the determination of dangerousness in individual cases. No individual factor is necessarily to be given greater "weight;" any one factor may or may not be indicative of high lethality.

## A. Severity of Violence

- serious injury
- threats to kill
- use of weapons
- threats with weapons
- strangulation/choking of victim
- sexual assault/abuse
- abuse of animals
- sadistic/terrorist/hostage acts
- abuse during pregnancy
- property damage to intimidate or control
- forcible entry to gain access to victim
- repeated/escalating violence

## B. Child Endangerment

- child abuse
- violence in presence of child(ren)
- threats to abduct child
- threats to harm child

## C. Centrality of Victim to Defendant

- obsessive behavior (phone harassment, monitoring, wiretapping)
- stalking
- ownership (sees victim as property)
- isolation of victim (social/physical/financial)

## D. Anti-Social Behavior

- assaults on others
- violence or threats in public
- threats/harassment of victim's family/friends

## E. Failed Community Control of Defendant

- violated protection/restraining orders
- violated Probation/Community Control
- prior batterer intervention/treatment

## F. Defendant Criminal History

- numerous police calls
- prior arrests for domestic violence
- prior charges for domestic violence
- prior convictions for domestic violence
- charges are pending
- other criminal history

## G. Psychological Indicators of Defendant

- suicidal threats
- extreme life stressors (job loss, death in family)
- hospitalized and/or treated for depression
- hospitalized and/or treated for other mental illness

## H. Other Danger Indicators

- victim is separating, or recently separated, from partner
- defendant has access to weapons
- defendant has weapons training
- defendant abuses alcohol/drugs
- parties have intimate/romantic relationship
- defendant interferes with victim's access to emergency services (pulled phone from wall, etc.)
- other unusual behavior of defendant



# Weapons

The court should recognize the danger which weapons pose to victims of domestic violence, children, law enforcement officers, lawyers, judges, court staff, and even perpetrators themselves in suicide cases. Research confirms what experience suspects: the quicker weapons are removed from a domestic violence situation, the safer everyone in the zone of danger will be.<sup>1</sup> Failure to protect these targets with determined judicial efforts can result in tragedy. Preventive measures should include orders to law enforcement to seize all available weapons (whether or not they have already been used to cause domestic violence<sup>2</sup>), as well as weapon surrender and possession restrictions in protection orders, as a condition of pretrial release, and as a condition of probation/community control.

## *Effects of Federal Firearms Laws*

*What federal firearms restrictions should courts recognize in their deliberations?*

- **Effect of Federal Firearms Restrictions on State Court Orders:**

In addition to any state court weapons orders, federal firearms restrictions apply in most state criminal domestic violence and state protection order cases.<sup>3</sup> Law enforcement agencies are required after every domestic violence-related arrest to consider notifying federal authorities of any apparent violation of federal firearms restrictions.<sup>4</sup> State courts are without jurisdiction to negate federal criminal restrictions. A state court order that purports to allow an individual to possess a firearm despite the existence of a valid protection order will not prevent prosecution if federal restrictions apply, and may leave the judge subject to questions of acting beyond jurisdiction.

- Federal firearms restrictions are no substitute for state court orders banning weapons possession without which victims will be limited to federal enforcement.

- **Effect of Federal Firearms Restrictions on Criminal**

**Convictions:** Since 1994, federal law has forbidden individuals convicted of most *felonies* to ship, transport, possess, or receive any firearm or ammunition.<sup>5</sup> It is also a violation of federal law for any person who has been convicted of a *misdemeanor* crime of domestic violence to ship, transport, possess, or receive any firearm or ammunition.<sup>6</sup> These restraints do not expire and can be removed only by pardon or expungement of the conviction.<sup>7</sup> These federal restrictions apply in addition to Ohio felony laws banning possession of a firearm while under a disability, which includes felony and juvenile convictions of crimes of violence or drug crimes, plus drug dependency, chronic alcoholism, and mental incompetence.<sup>8</sup>

- **Effect of Federal Firearms Restrictions on Protection Orders:**

Since 1994, federal law prohibits individuals, who are subject to a final protection order, from possessing any firearm or ammunition.<sup>9</sup> The constitutionality of this federal law has been upheld in Ohio.<sup>10</sup> It is well within the authority of trial courts to recognize this federal restriction by explicitly restraining an individual subject to a protection order from possessing a weapon or firearm.<sup>11</sup> However, Ohio courts have no jurisdiction to “waive,” override federal firearms restrictions, or grant individuals immunity from prosecution for a violation. This federal firearms disability stays in effect until the termination of the protection order and may not be lifted or stayed by the issuing court.<sup>12</sup>

- **Effect of Federal Firearms Restrictions on Law Enforcement and Military Personnel:**<sup>13</sup>

- ▶ *Service weapons:* Service weapons used in the line of duty *are exempt* from the federal felony conviction restrictions,<sup>14</sup> but *are not exempt* from the federal misdemeanor conviction restrictions.<sup>15</sup> Service weapons used in the line of duty *are exempt* from the federal protection order restrictions. However, this exemption is applicable to those who are subject to a protection order only if the order is silent as to firearms possession;<sup>16</sup> if the protection order specifically prohibits an officer from possessing a firearm, federal law does not protect the officer from being bound by that restriction.
- ▶ *Personal weapons:* In contrast, personal weapons of law enforcement officers and military personnel *are not exempt* from federal laws prohibiting firearms use after criminal convictions or protection order entry.<sup>17</sup>

## *Deciding Whether to Impose Weapons Restrictions*

### *What factors should a court consider concerning weapons in a domestic violence case?*

- **Lethality Considerations:** The court should look to the totality of the circumstances in deciding weapons restrictions, including the severity of the violence, a death or suicide threat, a preoccupation with weapons or weapons collection, any indication of mental instability, use of weapons for violence or threats, weapons training, weapons availability, recent separation of the parties, and the victim's fear the perpetrator will re-offend. (See **Lethality Factors** Tab.) Because the time of separation when the relationship is ending is the most dangerous period for the victim, this is an especially crucial time to remove weapons from the situation.
- **Ohio Standard Domestic Violence Forms:** Courts and parties in every Ohio domestic violence case must use forms that are identical or "substantially similar" to those specified in the Rules of Superintendence.<sup>18</sup> These forms make reference to all the forms of relief that a court is authorized to grant under R.C. 3113.31(E). They also require a warning page to be attached to all protection orders issued in the state. This warning page advises defendants/respondents they may be subject to federal penalties for possessing, transporting, or accepting a firearm. In addition, the prescribed form "Protection Order Notice to NCIC" contains Brady Handgun Disqualifier information that is entered into law enforcement computer records.<sup>19</sup>
- **Check Boxes Available:** The standard form protection orders all include check box paragraphs prohibiting possession of any deadly weapon<sup>20</sup> and requiring defendant/respondent to surrender all deadly weapons to law enforcement, to be held in protective custody until further court order. In virtually all circumstances where violence has occurred or is threatened, judges should check this box to require surrender of weapons. If a court exercises its discretion not to mark the weapons restriction box, it would be prudent to articulate in writing why weapons possession does not jeopardize the security of the protected parties.

## Weapons Issues in Domestic Violence Cases

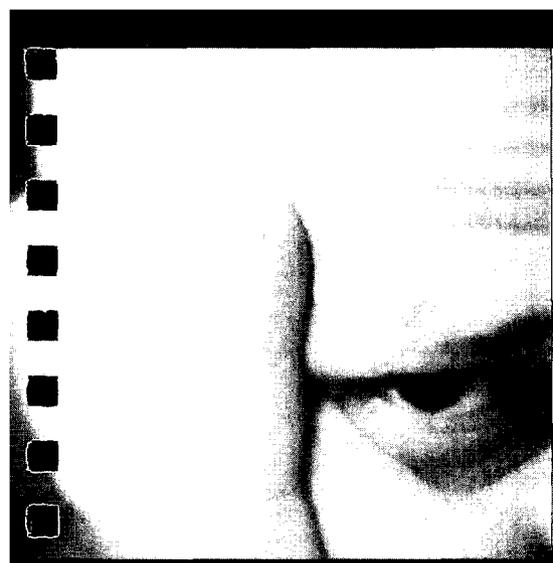
### What are the weapons issues in civil and criminal cases?

- **Seizure Without Protection Order:** An Ohio law enforcement officer is required to seize as contraband any deadly weapon used, threatened to be used, or brandished in any incident of alleged domestic violence or alleged violation of a protection order.<sup>21</sup> This statutory duty is independent of any protection order provision concerning weapons.
- **Statutory Authority TPO:** In criminal Temporary Protection Order cases, the court may issue as a pretrial condition of release orders designed to ensure the safety and protection of the protected parties.<sup>22</sup> Since the statute is preventive in nature, not remedial or punitive, the court must decide solely whether future violence may be prevented by a no weapons order.
- **Statutory Authority CPO:** In Civil Protection Order cases, the court may issue such orders it finds necessary to end domestic violence and to grant equitable and fair relief.<sup>23</sup> Since the statute is preventive in nature, not remedial or punitive, the court must decide solely whether future violence may be prevented by a no weapons order.
- **Statutory Authority SPO:** In criminal Stalking Protection Order cases, the court may issue, as a pretrial condition of release, orders designed to ensure the safety and protection of the protected parties.<sup>24</sup> Since the statute is preventive in nature, not remedial or punitive, the court must decide solely whether future violence may be prevented by a no weapons order.
- **Statutory Authority CSPO:** In Civil Stalking Protection Order cases, the court may issue orders designed to insure the safety and protection of the protected parties.<sup>25</sup> Since the statute is preventive in nature, not remedial or punitive, the court must decide solely whether future violence may be prevented by a no weapons order.

## Endnotes

1. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 11.16 (2000).
2. See Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before the Court has Made a Finding of Abuse*, 23 Vt. L. Rev. 361 (1998).
3. See Susan Carbon, Peter MacDonald & Seema Zeya, *Enforcing Domestic Violence Protection Orders Throughout the Country: New Frontiers of Protection for Victims of Domestic Violence (Part II), Relationship Between VAWA Full Faith and Credit and Federal Firearms Legislation*, 5 JUVENILE AND FAMILY CT. JOURNAL 43-48 (1999).
4. R.C. 2935.032(G).
5. 18 U.S.C. § 922(g)(1). Felonies are defined as “any crime punishable by imprisonment for a term exceeding one year.”
6. 18 U.S.C. § 922(d)(8) and (g)(8). The definition of “misdemeanor crime of domestic violence” is found at 18 U.S.C. § 921(a)(33). This restriction applies to all convictions, even those which occurred prior to the adoption of the law in 1996.

7. 18 U.S.C. § 921(a)(33)(B)(ii).
8. R.C. 2923.13. *See also* R.C. 2923.11 to .24 for other Ohio weapons-related crimes.
9. 18 U.S.C. § 922(g)(8), which includes a definition of a protection order for purposes of this statute. The maximum penalty for violating this statute is a fine and ten years in prison. 18 U.S.C. § 924(a)(2).
10. *Conkle v. Wolfe* (1998), 131 Ohio App.3d 375.
11. *Woollum v. Woollum* (1999), 131 Ohio App.3d 818.
12. A New Jersey court held that the federal law prohibits return of confiscated weapons while the protection order remains in effect. *New Jersey v. S.A.*, 675 A.2d 678 (NJ Super, 1996).
13. *See* Adrine and Ruden, *supra* n. 1, § 11.16 (2000).
14. 18 U.S.C. § 925(a)(1).
15. 18 U.S.C. § 925(a)(1). One federal circuit court has ruled this provision violates equal protection provisions, as it treats misdemeanor police officers more harshly than felon police officers. *Fraternal Order of Police v. U.S.* 152 F.3d 998 (CA DC, 1998).
16. 18 U.S.C. § 925(a)(1).
17. However, personal weapons use despite federal criminal conviction restrictions may be allowed upon application to the Secretary of the Treasury. 18 U.S.C. § 925(c).
18. Sup.R. 10 (law enforcement notice); Sup.R. 10.01 (civil protection order forms); Sup.R. 10.02 (criminal protection order forms); Sup.R. 10.03 (stalking protection order forms).
19. Sup.R. Form 10-A. The Brady Handgun Disqualifier information is provided pursuant to 18 U.S.C. § 922(d)(8).
20. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon. R.C. 2923.11(A).
21. R.C. 2935.03(B)(3)(h).
22. R.C. 2919.26(C)(2)(a).
23. R.C. 3113.31(E)(1) and (E)(1)(g).
24. R.C. 2903.213(C)(1).
25. R.C. 2903.214(D)(1) and (E)(1).



## Evidentiary Issues

Certain evidentiary issues are likely to arise frequently in the context of domestic violence cases. The General Assembly enacted a series of changes in domestic violence law in 1994 designed to end the era of “he said - she said” trials. The legislature demanded that law enforcement agencies and prosecutors focus on thorough investigation, evidence collection and trial presentation of all available evidence. Evidence that many courts were not used to seeing in domestic violence cases is now being offered.<sup>1</sup>

### *Hearsay Issues*

*What evidence rules concerning hearsay statements most commonly arise in domestic violence cases?*

- **Hearsay Generally:** Hearsay is defined at Evid. R. 801(C) as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The Rules of Evidence spell out numerous exceptions and the most common in domestic violence cases are discussed here. Note whether the declarant is “unavailable” becomes an issue only when applying Evid. R. 804. Under the remaining rules, the availability of the declarant is immaterial.
- **Admissions:** From witnesses, police officers, 911 tapes and similar sources come the most common type of out-of-court statements, a party-opponent’s own admissions. These are admissible as non-hearsay, by Evid. R. 801(D)(2)(a)
- **Excited Utterance:** The emotion-charged atmosphere surrounding most domestic violence incidents often provides statements by complainants, defendants, children, and other witnesses offered as excited utterances. Victims are likely to make statements to police or 911 operators while still under the dominion of the exciting event. Evid. R. 803(2) allows an exception to the hearsay rule based on the high degree of credibility found in sudden unplanned statements.<sup>2</sup>
- **Present Sense Impression:** Statements describing or explaining an event as it is observed, or immediately thereafter, are admissible unless the circumstances show them to be untrustworthy. Evid. R. 803(1) allows an exception to the hearsay rule based upon the high degree of trustworthiness found in the spontaneity of contemporary statements.<sup>3</sup>
- **Then-Existing Condition:** Evidence of a domestic violence victim’s fear, pain, motive, or intent is often the subject of statements concerning then-existing mental, emotional, or physical condition. Evid. R. 803(3) allows an exception to the hearsay rule based upon the usual reliability of expressions of a declarant’s present condition.<sup>4</sup>
- **Statement for Medical Purpose:** Medical treatment, past and current, of domestic violence victims often generates records kept for diagnostic or treatment purposes. Evid. R. 803(4) allows an exception to the hearsay rule based upon the motive for truthfulness when seeking medical aid.<sup>5</sup>

- **Recorded Recollection:** A witness in a domestic violence case may need a record to refresh their memory during testimony. Evid. R. 803(5) allows an exception to the hearsay rule based upon the reliability of records made when the matter was fresh.<sup>6</sup>
- **Judgment of Previous Conviction:** It is especially pertinent to felony domestic violence cases to prove prior convictions as an element of the crime for enhancement purposes.<sup>7</sup> Evid. R. 803(21) allows an exception to the hearsay rule based upon the reliability of official criminal court records.<sup>8</sup>
- **Declarant Unavailable:** The best judge of a domestic violence victim's safety is the victim herself. That sometimes leads to a reluctance to testify. Ohio courts set a two-part test for allowing certain types of out-of-court statements<sup>9</sup> by an unavailable declarant<sup>10</sup> to come into evidence as an exception to the hearsay rule: First the prosecution must make reasonable good faith efforts to secure appearance; and second, the out-of-court statement must bear sufficient indicia of reliability.<sup>11</sup>

## 911 Tapes

### *How do 911 tapes come into evidence?*

- **Proper Foundation:** Frequently, tape recordings of 911 emergency calls are offered into evidence to impeach the defendant's story and to prove threat, physical attack, a victim's fear, adverse effects on children, etc. A proper foundation is required, to include establishing relevance, authenticity,<sup>12</sup> chain of custody, and the probative value outweighs any prejudice.<sup>13</sup>
- **Hearsay Exception Required:** A 911 tape may be offered for impeachment or as an admission against interest by the defendant. But usually the tape is offered for the truth of the matter asserted and is not subject to cross-examination; thus, an exception to hearsay must be established, such as present sense impression, excited utterance, then-existing mental, emotional, or physical condition, recorded recollection, or statement under belief of impending death.<sup>14</sup>

## Prior Bad Acts

### *When are prior bad acts by the defendant admissible or inadmissible in a domestic violence prosecution?*

- **Generally Inadmissible:** The nature of domestic violence as a recurring and escalating crime often creates the issue of the admissibility of "other acts" evidence. Generally, evidence of prior or subsequent criminal acts is not admissible in criminal cases.<sup>15</sup>
- **Exceptions:** Where the probative value of the evidence is not outweighed by the prejudice to the defendant,<sup>16</sup> evidence of other acts may be admitted to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>17</sup> For example, if the defendant claims the complainant's injuries were accidental, evidence of prior domestic violence may be admissible to prove defendant's culpable mental state and the lack of accident.

## The Child Witness

*How should the court manage the prospect of a child witness in a domestic violence case?*

- **Child As Competent Witness:** Children are present in 80% to 90% of domestic violence cases<sup>18</sup> and in 25% of cases when their mother is murdered.<sup>19</sup> Therefore, the question of children testifying arises often in domestic violence cases. In Ohio, any child may be called to the witness stand; if under the age of ten, the child must appear to be capable of receiving just impressions and relating them truthfully.<sup>20</sup>
- **Protection of Child Witness:** The court should assist counsel in careful consideration of whether a child should be required to testify against a parent, and in protecting the child from harm by the litigation process.<sup>21</sup> The court should be alerted to the possibility the child-witness has also been abused.<sup>22</sup>

## The Reluctant Victim

*Why should the court expect little cooperation from many victims, and what should be done about it?*

- **Victim Behavior:** It may appear illogical for victims of domestic violence to abandon proceedings, reconcile with the abuser, publicly support the abuser's denial and minimization of violence, or flee the jurisdiction with the children. But if seen as survival tactics by those who know their abusers better than anyone else, those actions appear less illogical. It is important to remember most victims are seeking to stay safe, while courts are seeking final solutions.
- **Judicial Considerations:** Courts should not be surprised if some victims are reluctant to proceed or testify, fail to appear for hearings, try to dismiss protection orders, and then return later for help. Financial pressures, lack of housing, fear of losing custody, and threats from the abuser are possible reasons why it is difficult for many victims to follow through, even when it appears obvious to others that they should. No Ohio law permits courts to deny relief to victims who have failed to complete prior court processes. Accordingly, punishing victims for "wasting the court's time" by such practices as punitive arrest, verbal chastisement, threats to withhold future relief, or demanding petitioners pay court costs to "teach them a lesson," serve only the unintended purpose of discouraging victims from seeking help from the justice system in the future.

### Best Practice

- **Response to Reluctant Victims:** The *Michigan Domestic Violence Benchbook* urges judges to focus on three specific concerns when dealing with reluctant victims:<sup>23</sup>
  - *Coercion:* A legitimate fear of death or injury deters many victims. If a judge sees the victim appearing with the abuser to request dismissal, one attorney appearing on behalf of both victim and abuser, an abuser with a history of violence, a case with allegations of serious violence, or any other suspicious circumstances, the court should seek more information about the parties' situation before taking action.

- ▶ *Ambivalence About Outcome:* Victims are ambivalent about proceeding due to concerns with family preservation, financial hardship, or retaliatory violence. The court can address such concerns in several ways:
  - ◆ Stress to all parties the court is in control, not the victim; in criminal cases remind them the case is a matter between the defendant and the state
  - ◆ Permit work release when appropriate
  - ◆ Provide adequate family support
  - ◆ Impose immediate sanctions for violations of court orders
  - ◆ If the victim abandons a court proceeding, waive costs and make it clear to all parties the court's doors will remain open to offer future protection, if necessary. Victims often make several unsuccessful attempts before leaving their abusers, but may not try again if they think courts will not be receptive to their case.<sup>24</sup>
- ▶ *Lack of Confidence in the Justice System:* Past encounters with the justice system may contribute to a victim's perception that it cannot stop the violence, or worse, that it can but will not. This perception can be created by such factors as: dual arrest of the victim and perpetrator; court delays and complexity; misinformation about the court system given by the abuser; discourteous court or clerk employees; abusive tactics by opposing counsel; being arrested for not appearing at court; failure of the judicial system to arrest, prosecute, and sentence abusers for court order violations; failure to force the abuser to provide financial support; or the latest example of victim abuse by the judicial system - arresting victims for "aiding and abetting" the violation of their own protection orders.<sup>25</sup>

- **Increasing Confidence in the Justice System:** A court can increase its credibility as a resource for domestic violence victims by:

- ▶ Expediting domestic violence cases.
- ▶ Providing adequate family financial support.
- ▶ Enforcing violations of protection orders and family support orders strictly and promptly.
- ▶ Maintaining confidential victim records.
- ▶ Providing domestic violence training for court personnel.
- ▶ Providing clear information to unrepresented parties about court procedures.
- ▶ Protecting unrepresented parties from abusive litigation tactics.
- ▶ Treating domestic violence offenses at least as seriously as stranger violence.
- ▶ Working with community and criminal justice agencies for a coordinated policy concerning domestic violence.

- **Victimless Prosecution:** The General Assembly in 1994 revised Ohio's arrest laws to allow prosecutors to go forward with domestic violence cases whether the victim cooperates or not.<sup>26</sup> Victimless prosecution is not a new concept; every murder case is tried without the participation or testimony of the victim. Given sufficient law enforcement investigation and prosecutorial preparation, domestic violence cases can be brought to court. Prosecutors in Quincy, Massachusetts, report an equal conviction rate with or without victim testimony.

## **Best Practice**

• **How to Deal with a Victim Who Refuses to Testify:** The state of Washington's *Domestic Violence Manual for Judges* suggests several court procedures for dealing with reluctant victims without compromising their safety:<sup>27</sup>

- ▶ Issue subpoenas for all victims to reinforce to the defendant that the court, not the victim, controls the proceedings, and discourage manipulation and intimidation.
- ▶ Establish procedures for obtaining detailed information to ascertain whether a reluctant victim has been coerced or intimidated.
- ▶ Consider continuing the case to allow the victim to obtain legal assistance and/or counseling from a victim/witness or domestic violence program before proceeding further.
- ▶ Provide the victim with the same type of victim/witness protection program as is provided to witnesses in drug and organized crime cases, before the court considers coercing the victim testimony, if the court concludes that there is a reasonable likelihood that the perpetrator may inflict lethal violence on the victim in retaliation for testimony.
- ▶ Arrest or incarceration of a domestic violence victim to compel testimony generally should not be ordered since such an action may serve only to re-victimize the victim.

## ***Endnotes***

1. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 5.13 & § 15.8 - 15.9 (2000).
2. *Id.*, § 5.14 & § 15.8, and cases cited therein (2000).
3. *Id.*, § 5.15 & § 15.8, and cases cited therein (2000).
4. *Id.*, § 5.16 & § 15.8, and cases cited therein (2000).
5. *Id.*, § 5.17 & § 15.8, and cases cited therein (2000).
6. *Id.*, § 5.18 & § 15.8, and cases cited therein (2000).
7. R.C. 2919.25(D).
8. See Adrine and Ruden, *supra* n.1, § 5.19 and cases cited therein (2000).
9. Evid. R. 804(B).
10. Evid. R. 804(A).
11. See Adrine and Ruden, *supra* n.1, § 5.21 and cases cited therein (2000).
12. See Evid.. R. 901.
13. See Adrine and Ruden, *supra* n.1, § 6.14 & § 15.8, and cases cited therein (2000).
14. Evid. R. 803 and Evid. R. 804(B)(2).
15. Evid. R. 404(B).
16. *State v. Smith*, 49 Ohio St.3d 137 (1990).
17. Evid. R. 404(B); R.C. 2945.59.

18. M. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, MEDATION QUARTERLY (1990).
19. Stephen E. Doyne, et al., *Custody Disputes Involving Domestic Violence: Making Children's Needs A Priority* 50(2) JUVENILE AND FAMILY CT. JOURNAL 1-12 (1999).
20. Evid. R. 601(A).
21. See Adrine and Ruden, *supra* n.1, § 6.15 & § 15.8, and cases cited therein (2000). Also see Chris A. Messerly, *The Child Witness in Tort Cases: The Trials and Tribulations of Representing Children*, 24 WM. MITCHELL L. REV. 169 (1998).
22. Studies have found where the mother has been abused their children have also been abused in 30% to 70% of the cases. See Rita Smith and Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, THE JUDGES' JOURNAL 38, 40 (Fall 1997).
23. Adapted from MARY M. LOVIK, DOMESTIC VIOLENCE BENCHMARK: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS, Michigan Judicial Institute (1998).
24. While some judges assess all costs against victims who dismiss a case to "teach them a lesson," this practice now appears to be banned by federal law. Each state is required to certify to the United States Attorney General by October, 2002, that no unit of state or local government requires a victim to bear any costs associated with filing, issuance, registration or service of any protection order. This ban applies to all courts, clerks, and law enforcement agencies, and appears to apply at both the filing stage and the final disposition stage of all protection order proceedings. 42 U.S.C. § 3796gg-5.
25. This practice was rejected by both the trial and appellate courts in *N. Olmsted v. Bullington* (2000), 139 Ohio App.3d 565, 571 ("[T]o allow the city to focus on the victim's behavior abrogates the General Assembly's historical efforts to require police officers to turn their attention from the victim's actions and place their attention squarely where it belongs, on the offender's behavior.")
26. R.C. 2935(B)(3)(e)(ii). And see Adrine and Ruden, *supra* n.1, Chapter 5 and cases cited therein (2000).
27. Adapted from DOMESTIC VIOLENCE MANUAL FOR JUDGES, 1997, Washington State Gender and Justice Commission.



## Counseling

Batterer intervention treatment or other appropriate counseling should be ordered whenever the court finds that such treatment will serve the statutory purpose of enhancing the safety of the victim and holding offenders accountable.

### Statutory Authority

*Do courts have statutory authority to order counseling?*

- **Civil Proceedings:** The domestic relations court in its discretion may order the respondent to attend a batterer intervention treatment program, or other counseling.<sup>1</sup>
- **Criminal Proceedings:** A batterer treatment program may be imposed as a condition of a delayed sentence,<sup>2</sup> a condition of probation<sup>3</sup> or community control.<sup>4</sup>

***Best Practice***

▶ *Protective Purpose:* Batterer treatment programs serve no *protective* purpose. Treatment is most valuable when used as a supplement to, not a substitute for, court actions designed to protect the safety of adult victims and children such as incarceration, supervised probation and protection orders.<sup>5</sup>

***Best Practice***

▶ *Punitive Purpose:* Batterer treatment programs serve no *punitive* purpose. Courts risk communicating to the offender and the community that domestic abuse is not truly “criminal” when they order treatment in lieu of punitive sanctions such as jail and fines. Batterer treatment programs should not be used as a calendar management tool, in lieu of trial and sentencing.<sup>6</sup>

***Best Practice***

▶ *Restorative Purpose:* Batterer treatment programs serve no *restorative* purpose. Courts should not substitute treatment for restitution to the victim or community through compensatory payments or community service.<sup>7</sup>

### Court Procedures

*What considerations should the court entertain when ordering the offender to treatment?*

- **Indications:** Batterer intervention treatment should be ordered whenever the court finds such treatment will serve the statutory purpose of enhancing the safety of the victim and other family members.<sup>8</sup> Unless the court can make a finding the offender is unlikely to reoffend, and he is likely to spontaneously change his attitude toward violence against his victim, a treatment order is prudent.

- **“First-Time” Offenders vs. “Serious” Offenders:** The first time the court sees an offender presents the best opportunity for a court that is interested in preventing future violence. Since domestic violence usually involves a high rate of recidivism<sup>9</sup> and an escalating pattern of violence, early intervention with the first-time offender can deter repeated and more dangerous violence.<sup>10</sup> More serious offenders appear to be obvious candidates for batterer treatment. These are cases where physical violence is severe or repeated, weapons are used or threatened, the abuser is a repeat offender and other lethality factors are present. (See **Lethality Factors** Tab.) However, these are also the cases where jail and other punitive sanctions are also the most strongly indicated, prior to any court-mandated treatment.
- **Serving Community Interests:** Court insistence on successful batterer treatment serves interests beyond the abuser’s current victim and children. Many researchers have found batterers tend to move from one victim to another.<sup>11</sup> Even if the justice system is successful in persuading a batterer to leave the current victim alone, the community, the court system, and other victims are likely to encounter the same individual again in the absence of immediate successful treatment.
- **Contraindications:** In some circumstances, court-mandated batterers treatment *in lieu of incarceration* is unlikely to succeed and may pose a threat to victim safety and public safety. Courts should be reluctant to grant treatment prior to incarceration, when:
  - The victim fears re-assaults by the domestic violence perpetrator.
  - Ordering the perpetrator to attend a batterer treatment program outside of a prison setting poses a danger to the domestic violence victim.
  - The batterer has previously disregarded court orders.
  - The batterer has previously failed to satisfactorily complete a batterer treatment program.
  - The batterer has unresolved substance abuse or mental health problems which would interfere with batterer’s treatment.

**Best Practice**

• **Other Considerations:**

- *Warning of Consequences:* The court should communicate to the abuser *satisfactory* completion of the program is required, not mere attendance. Satisfactory completion should mean attendance, payment of fees, participation in group discussions, and compliance with rules. The court should further warn the abuser failure to satisfactorily complete the program will result in penalties such as contempt sanctions, incarceration, revocation of community control/probation, or other consequences the court might deem appropriate.
- *Notifications & Monitoring:* For any type of mandated intervention program, the court should notify the treatment program of the court order requiring successful completion of the program. Successful completion should be evidenced by progress reports to the court from the professionals conducting the treatment. A court employee or a probation officer should periodically check with the treatment program to confirm compliance. Programs accepting court mandated offenders should be obligated to report to the court if the offender misses any appointment. Failure to appear for an appointment is not a privileged communication.<sup>12</sup>

- *Costs:* Persons ordered to complete batterer intervention treatment should be required to pay the costs of that treatment. Most programs arrange a payment schedule. Accountability for violent behavior can be encouraged by economic consequences.
- *Reinstatement:* Court procedures should ensure proceedings are promptly reinstated, if the court determines a new offense has been committed and the offender is not progressing satisfactorily in the treatment program. These developments should be regarded as warnings of possible escalation of the violence, which require immediate court intervention.

### Best Practice: Duration of Batterer Intervention Treatment

*How long should the court order an abuser to attend counseling?*

- **Duration of Treatment:** Experts in the relatively new field of batterer intervention treatment cannot yet tell courts how long abusers should be ordered to participate in treatment in order to meet court objectives of protecting victims and changing attitudes of domestic violence offenders. However, experts agree:
  - Longer is better. There appears to be a growing consensus a minimum of one year is required for treatment to be effective. California now mandates a full year of batterer intervention treatment for persons convicted of domestic violence crimes.<sup>13</sup> Several state protocols require programs to be a minimum of 16 to 26 weeks in duration.
  - Ordering batterer treatment for the maximum period allowed by law has been found to be the approach that leads to the lowest rate of recidivism.<sup>14</sup> Offenders who successfully complete treatment sooner can seek early termination of probation or other counseling orders.
  - Token programs of a few sessions or less serve no real treatment purpose. An abuser's complex, long-term behavior patterns and attitudes about family violence are not easily changed in programs of less than 26 weeks.<sup>15</sup>

### Best Practice: Inadvisable Orders

*Should the court ever order the victim into counseling?*

- **Victim Counseling:** Criminal courts have no jurisdiction to order victims of crimes to undergo counseling. Domestic relations courts may,<sup>16</sup> but should not. By ordering a victim to undergo counseling, it furthers the commonly held perception the legal system does not take domestic violence seriously, and may communicate to the victim the abuse is her fault.
- **Joint Counseling:** Experts almost unanimously recommend against *joint* counseling or family therapy in domestic violence situations due to the potential danger which such circumstances pose to victims.<sup>17</sup>

## *Is anger management effective treatment for batterers?*

- **Individual Therapy:** Experts thoroughly concur group therapy is the appropriate treatment method for batterers. Private individual counseling with the abuser's personal therapist should not be ordered as a *substitute* for group batterer intervention treatment by specialists trained in that field. By allowing an offender to keep his abusiveness private, the court reinforces the notions that domestic violence is a private family matter, not a crime.<sup>18</sup>
- **Anger Management Classes:** Most abusers use violence, threats, emotional abuse, economic manipulations, etc. to maintain control of their victims. Consider whether the abuser is holding a job without stalking his boss or hitting his secretary. If outbursts of anger and violence occur only in the abuser's home, he apparently has his anger under control, and is unlikely to benefit from anger management lessons.
- **Mediation:** Mediation is no more appropriate between a domestic violence victim and perpetrator than it is between any other crime victim and perpetrator. In domestic violence matters, mediation should rarely be ordered in lieu of trial, sentencing, or appropriate batterer intervention treatment. (See **Mediation** Tab.)
- **Substance Abuse or Mental Health Counseling:** Substance abuse or mental health problems do not cause or excuse domestic violence; treatment of the former is no substitute for treatment of the latter. Such treatment should be ordered in addition to and not in lieu of batterer intervention treatment. Otherwise, the result is a "sober batterer."<sup>19</sup>

## *Best Practice: Standards for Batterer Intervention Treatment Programs*

### *What standards should a court require for court-ordered programs?*

- **Program Philosophy:** At least 25 states, though not Ohio,<sup>20</sup> have developed standards for batterer intervention programs into which individuals may be ordered by courts. Whenever a court orders a respondent into batterer intervention treatment, it should be a program that meets specific standards the court has established, and should serve the court's purposes of protecting domestic violence victims and changing attitudes of domestic violence offenders. A program should recognize the following principles:
  - Domestic violence is a crime, not a pathology or mental disorder.
  - Domestic violence may consist of a single act of violence and often is a pattern of coercive control.
  - The offender, and only the offender, is accountable for the violence.
  - The first priority is victim safety.
  - Primary aggression, self defense, and dual battering are distinctions requiring different responses.
- **Program Elements:** The critical elements of a batterer intervention program include: group sessions with other abusers; confidentiality waivers for court and victim; on-going assessment; regular and reliable reports to the court noting progress, new offenses, and non-compliance; reports to the victim noting indicators of increased risk to the victim's safety; penalties for non-compliance; agreements for on-going monitoring and consultation with local domestic violence agencies;

referrals for victims to advocacy programs; assessment of offender's need for victimization counseling in addition to batterer counseling and coordination of efforts with local agencies.

## The Lawyer's Role

### How can lawyers assist clients in dealing with domestic violence behavior?

- **Preventing Crime:** A lawyer *may* reveal "the intention of his client to commit a crime and the information necessary to prevent the crime, notwithstanding attorney-client privilege." No exception is stated just because the intention is to injure a family member.<sup>21</sup>
- **Duty to Report Child Abuse:** All attorneys, including judges, are under a statutory duty to report child abuse. This duty is mandatory, very broad in scope, and arises immediately. The duty requires an attorney (and many other professionals) to immediately report to the public children services agency or police.<sup>22</sup>
  - If the attorney "knows or suspects" that a child "has suffered or faces a threat of suffering"
  - If there is "any physical or mental wound, injury, disability, or condition"
  - If it is "of a nature that reasonably indicates abuse or neglect of the child"

#### **Best Practice**

▸ *A Judge's Consideration:* Judges should encourage family lawyers to, at minimum, screen all clients, victim, perpetrator, or child, for possible abuse and the need to address safety and counseling issues. "A lawyer's silence constitutes collusion with the batterer and likely malpractice."<sup>23</sup>

#### **Best Practice**

▸ *Disciplinary Considerations:* While not specifically addressed in the Disciplinary Rules, the requirements of professional competency<sup>24</sup> and the stated duties of a lawyer to a client<sup>25</sup> indicate a lawyer should advise a client to seek counseling for mental health, chemical dependency, and/or battering behavior when those issues imperil the client's health and legal interests, or the safety of the client's family. Courts should encourage lawyers to assist their clients by offering such advice.

#### **Best Practice**

▸ *Ethical Considerations:* "Attorneys representing batterers need to know that it is possible to ethically and zealously represent an abuser without placing the victim in further danger. Since the abuser's lawyer may be the only person with any influence over the batterer, speaking up can reap surprising results. [Several defense counsel] suggest that private attorneys should be clear that continued representation is contingent on the batterer's acknowledging the problem and entering a batterer's intervention program."<sup>26</sup>

1. R.C. 3113.31(E)(1)(f).
2. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, § 12.13, at fn 378 (2000).
3. R.C. 2951.02(C)(1)(b). For an explanation of valid probation conditions, see Adrine and Ruden, *supra* n.2, § 12.14, at notes 398-413 (2000).
4. R.C. 2929.15 to .17.
5. Mary M. Lovik, J.D., Domestic Violence Benchbook, A Guide to Civil and Criminal Proceedings, § 6.3, Michigan Judicial Institute (1998).
6. *Id.*
7. *Id.*
8. See Adrine and Ruden, *supra* n.2, § 10.17; § 11.13, at n.304 (2000).
9. One recent study found batterer intervention treatment to be the sentencing option which had the greatest impact on recidivism. See Melissa Gross, et al., *Court Sentencing Options and Recidivism Among Domestic Violence Offenders*, DOMESTIC VIOLENCE REPORT, Civic Research Institute, Inc. (April/May 2000).
10. Since very few victims call the police until after multiple incidents of physical abuse, courts rarely see actual first time offenders.
11. *Family Violence: A Guide to Research*, COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY (1993), National Council of Juvenile & Family Court Judges.
12. See *Jenkins vs. Metropolitan Life Ins. Co.* (1961), 171 Ohio St. 557.
13. Cal. Pen. C. 1203.097(a)(6).
14. Sonkin, *The Assessment of Court-Mandated Male Batterers*, DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 32 (Sonkin, ed. 1986).
15. A.R. KLEIN, PROBATION/PAROLE SUPERVISION PROTOCOL FOR SPOUSAL ABUSERS 86 (March 30, 1989).
16. R.C. 3113.31(E)(1)(f).
17. David Adams, *Treatment Models for Men Who Batterer: A Profeminist Analysis*, FEMINIST PERSPECTIVES ON WIFE ABUSE, 176-199 (K. Yllo & M. Bograd, Eds. 1988) Sage, Newbury Park, CA.
18. See Gus B. Kaufman, Jr., Ph.D., *Why Individual Therapy is Not Appropriate for Batterers*, DOMESTIC VIOLENCE REPORT Civic Research Institute, Inc. (February/March 2000).
19. See Adrine and Ruden, *supra* n.2, § 11.13, at n.304 (2000).
20. In 1992, Ohio's leading domestic violence resource agency, the Ohio Domestic Violence Network (614-784-0023), issued proposed batterer treatment standards.
21. DR 4-101 (C) (2).
22. R.C. 2151.421(A)(1). Violation of this statute is a misdemeanor of the fourth degree, R.C. 2151.99.
23. Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L. Q. 719, 725 (Fall 1999).
24. EC 6-1 through 6-6.
25. EC 7-5 through 7-12.
26. Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. LAW Q. 719, 728 (Fall 1999).



## Victim Advocates

Ohio is one of 24 states that provides for domestic violence victim advocates<sup>1</sup> in their court systems. A victim advocate is a person who provides support and assistance to a victim of domestic violence, both within and outside the justice system. The role of the victim advocate is not to give legal representation, but to provide support and assistance to the petitioner. Judges should not underestimate the valuable services which victim advocates also provide *to the courts*. By assisting victims with court paperwork requirements, helping them track court dates, exploring available legal services, explaining court procedures and time constraints, encouraging honest and thorough disclosures, and reducing anxiety over court appearances, victim advocates inevitably serve significant court goals as well as help victims.

### Statutory Authority & Procedural Considerations

**What statutory considerations as to victim advocates must the court take into account?**

- **TPO and CPO Proceedings:** A victim advocate or another person providing support to the victim has the right to be present at *all stages* of the judicial proceedings on a motion for a temporary protection order (TPO)<sup>2</sup> and on a petition for a civil protection order (CPO).<sup>3</sup>
- **Criminal Cases:** At a victim's request, the court shall permit the victim to be accompanied by an individual to provide support to the victim unless the court determines exclusion of the victim is necessary to protect the defendant's right to a fair trial. The statute leaves to the judge the decision of whether the support person may sit with the victim at counsel table, but the statute has no meaning if the support person is relegated to the audience with the rest of the public.<sup>4</sup>
- **Privilege:** Ohio does not recognize a privilege for communications between a victim and an advocate, so no confidentiality attaches to such communications.<sup>5</sup>

#### *Best Practice*

▶ *Other Privilege Considerations:* Given the statutory nature of the position of victim advocates, the court should not allow advocates to be called as a witness, nor require them to disclose a surname in any proceeding in the court without written leave for good cause shown. The court should verify valid evidentiary purposes are intended by forcing advocate testimony, and the judicial system is not being used as a tool for further harassment of the victim or victim advocate.

- **Unauthorized Practice of Law:** At least six states, but not Ohio, specifically exempt victim advocates from charges of unauthorized practice of law when they are assisting victims within the scope of their statutory authority.<sup>6</sup> Providing general information about legal rights does not constitute the unauthorized practice of law, as long as the non-lawyer does not offer specific legal advice relating to those rights.<sup>7</sup> A Maryland Attorney General Opinion provided by the Supreme Court of Ohio Board of Commissioners on the Unauthorized Practice of Law in response to an inquiry on this specific topic states a lay advocate may give the following services without practicing law:<sup>8</sup>

- ▶ Provide victims with basic information about the existence of legal rights and remedies
- ▶ Provide victims with basic information about the manner in which judicial proceedings are conducted

- ▶ Assist victims in preparing legal pleadings and documents
- ▶ Sit with a victim at the trial table, if permitted by the court
- ▶ Engage in the general advocacy of the rights of victims of battering as a group

## *Best Practice: Court-Based Advocacy*

### *What are the benefits and functions of court-based advocacy programs?*

- **Advantages of Court-Based Programs:** To the extent resources allow, each court should consider establishing a court-based victim advocacy program, as many Ohio counties have done. Such programs are beneficial to the court and the public it serves, as well as to victims, by:
  - ▶ Making the justice system and legal remedies more accessible to victims of domestic violence
  - ▶ Improving court efficiency in managing its domestic violence caseload
  - ▶ Increasing victim safety
  - ▶ Increasing batterer accountability
  
- **Services Court-Based Advocates Can Provide:** Consistent with the ethical code of the National Organization of Victim Assistance, court-based advocates would minimally perform the following functions. These services may vary depending on whether the services are provided through a civil<sup>9</sup> or criminal court:
  - ▶ Contact and interview the domestic violence victim as soon as possible, ideally before police leave the crime scene, but not later than at the arraignment or initial appearance stage of the criminal proceedings.
  - ▶ Provide information regarding court procedures and legal remedies, including civil protection orders available through domestic relations courts, temporary protection orders available through criminal courts, local resources for affordable or free legal counsel and protection order enforcement resources.
  - ▶ Assist in completing forms for protection orders.
  - ▶ Communicate regularly with the prosecutor — only with the victim’s consent — providing information not in the police report, how the victim may be contacted, the current status of the relationship between offender and victim, protection order violations, etc.
  - ▶ Maintain contact with victim, assist in notifying her of hearings and case status and inform the victim how to contact the jail to check on the release of the offender.
  - ▶ Accompany victim to court hearings and arrange for a safe witness waiting area and other protection services available in the court.
  - ▶ Refer the victim and the victim’s children to shelter and other needed services.
  - ▶ Inform the victim of compensation potentially available through the Ohio Crime Victims Compensation Program and assist with the application process.
  - ▶ Help deliver protection orders and court notices to victims unable to attend arraignments or other court appearances due to hospital stays, physical incapacity, lack of notice or other reasons.

- Remind law enforcement and judicial officials of the critical importance of immediately notifying victims of release of offenders from jail.
- Provide emotional support, crisis intervention, safety planning, and advocacy services to the victim through the entire pendency of the court case(s).

## *Endnotes*

1. See RONALD B. ADRINE AND ALEXANDRIA M. RUDEN, OHIO DOMESTIC VIOLENCE LAW, Chapter 16 (2000).
2. R.C. 2919.26(A)(2).
3. R.C. 3113.31(M).
4. R.C. 2930.09.
5. See Adrine and Ruden, *supra* n. 1, § 16.4 (2000).
6. Illinois: 750 ILCS § 60/205(b) (2001); Iowa: Iowa Bar Rules 120.1 (2001) (Domestic Violence Victim Counselors); North Dakota: N.D. Sup. Ct. Admin. R. 34 § 4 and 6 (2000); Michigan: MSA § 2950c (2000); Maryland: Md.A.G. 95-056, 1995 WL 783587, at \*1 (12-19-95); Minnesota: *In re Domestic Abuse Advocates*, 1991 Minn. LEXIS 34, No. C2-87-1089 (Minn. 1991).
7. See Adrine and Ruden, *supra* n. 1, § 16.3 (2000).
8. Maryland: Md.A.G. 95-056, 1995 WL 783587, at \*1 (12-19-95).
9. For a good example of court-based advocacy in a civil court setting in Ohio, see the Butler County Domestic Relations Court program.

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## Violence Against Women Act

Since the early 1990s, Congress has become involved in drafting federal anti-domestic violence legislation. The majority of this legislation falls under the Violence Against Women Act (VAWA). This section briefly discusses VAWA, related federal legislation, and their implications for state judges.

### *Full Faith and Credit for Protection Orders*

*What laws require courts to give full faith and credit to the protection orders of other states?*

- **U.S. Constitution:** State courts are already required, pursuant to the United States Constitution, to give “full faith and credit” to most final court decisions delivered by other state courts.<sup>1</sup>
- **VAWA Mandates:** State courts must provide full faith and credit to all protection orders issued by any other state and enforce such protection orders as though they were the orders of the state; provided the following due process requirements have been met by the issuing court:
  - *Jurisdiction:* The state issuing the protection order must have jurisdiction over the parties and the matter under the laws of that state.<sup>2</sup>
  - *Notice and opportunity:* The person against whom the order was sought must have been given reasonable notice and opportunity to be heard within the time required by the issuing state law, sufficient to protect that person’s right to due process.<sup>3</sup>
  - *Mutual protection orders:* These are enforceable interstate only if (1) the responding party filed a separate complaint or other written pleading seeking a protection order, and (2) a specific finding was made by the issuing court that each party was entitled to such an order.<sup>4</sup>
- **Definition of Protection Order:** For full faith and credit purposes, a protection order is any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.<sup>5</sup>
- **Full Faith and Credit in Ohio:** In compliance with VAWA, Ohio requires the acknowledgment and enforcement of all out-of-state protection orders by both its courts and law enforcement agencies.<sup>6</sup>

### *How does VAWA attempt to protect information about domestic violence victims from public disclosure?*

- **Protected Information:** VAWA includes several provisions designed to prevent offenders of domestic violence laws from obtaining access to information regarding victims of domestic violence.
  - **U.S. Postal Service Policy:** VAWA requires the U.S. Postal Service to prohibit access to victim information in the following two ways:
    - ▶ *Residential addresses:* The U.S. Postal Service must deny public access to the residential addresses of victims of domestic violence after being presented with a valid protection order by such victims.<sup>7</sup>
    - ▶ *Domestic violence shelter addresses:* The U.S. Postal Service must also deny access to the addresses of domestic violence shelters after receiving confirmation from the state domestic violence coalition of its domestic violence shelter status.<sup>8</sup>
  - **Bureau of Motor Vehicle Policies:** VAWA also prohibits, under the Driver's Privacy Protection Act, the dissemination or sale of any information regarding licensed drivers (e.g. name, address, telephone number, social security number, etc.).<sup>9</sup>
  - **Social Security Administration Procedures:** The Social Security Administration will provide victims of domestic violence with new social security numbers upon the receipt of an affidavit by both the victim and a supporting affidavit by a third party. The affidavit of both the victim and third party must include written evidence of the domestic violence. Examples of qualified third parties include medical professionals, police officers, domestic violence shelters, etc.
- Best Practice**
- **Court Review:** State courts should review all court rules, procedures, and orders to ensure that the court does not disclose information which federal law intends to keep protected. The court should also review whether its rules and orders require or permit third parties, such as clerks or parties to a pending case, to disclose protected information.

## Domestic Violence Crimes under VAWA

### *What constitutes the federal crime of interstate domestic violence?*

- **Interstate Domestic Violence:** It is a federal crime for a person to commit "interstate domestic violence."<sup>10</sup> A person commits interstate domestic violence in either of the following ways:
  - ▶ *Traveling across state lines to commit violence against a spouse or intimate partner:* A person travels across state lines to commit violence against a spouse or intimate partner by (1) crossing state lines with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and (2) committing or attempting to commit a crime of violence against that spouse or intimate partner while in the course of or as a result of such travel.<sup>11</sup>

▶ *Causing a spouse or intimate partner to travel across state lines by use of violence:* A person causes a spouse or intimate partner to travel by way of violence by (1) causing a spouse or intimate partner to cross state lines by force, coercion, duress, or fraud and (2) committing or attempting to commit a crime of violence against that spouse or intimate partner while either in the course of, as a result of, or to facilitate such conduct or travel.<sup>12</sup>

◆ Intimate partner is defined as “a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser.”<sup>13</sup>

## *How does interstate stalking differ from interstate domestic violence?*

- **Interstate Stalking:** It is a federal crime for a person to commit “interstate stalking.”<sup>14</sup> A person commits interstate stalking in either of the following ways:
  - ▶ *Traveling across state lines to stalk another person:* A person travels across state lines to stalk another person by (1) crossing state lines with the intent to kill, injure, harass, or intimidate another person; and (2) such travel places that person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family of that person, or the spouse or intimate partner of that person.<sup>15</sup>
  - ▶ *Stalking another person from another state:* Stalking a person from another state requires (1) use of interstate commerce, (2) intent, and (3) reasonable fear.<sup>16</sup>

## *How does federal law penalize interstate violation of a protection order?*

- **Interstate Violation of a Protection Order:** It is a federal crime for a person to commit “interstate violation of a protection order.”<sup>17</sup> A person commits interstate violation of a protection order in either of the following ways:
  - ▶ *Traveling across state lines and violating a protection order:* A person travels across state lines and violates a protection order by (1) crossing state lines with the intent to engage in the requisite conduct, and (2) subsequently engaging in such conduct.<sup>18</sup>
  - ▶ *Violating a protection order by causing another person to travel:* A person violates a protection order (1) by causing another person to cross state lines by force, coercion, duress, or fraud, and (2) in the course of, as a result of, or to facilitate such conduct or travel, engaging in the requisite conduct.<sup>19</sup>
    - ◆ Requisite conduct is defined as conduct that (1) violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to another person, or (2) that would violate such portion of a protection order in the jurisdiction in which the order was issued.<sup>20</sup>

## *What federal firearms restrictions are triggered by the issuance of a protection order?*

- **Possession of a Firearm While Subject to a Protection Order:** It is a federal crime for a person to possess a firearm while subject to a qualifying protection order.<sup>21</sup> This statute also applies to the possession of ammunition, as well as shipping or receiving any firearm or ammunition through interstate or foreign commerce. A violation of 18 U.S.C. 922 § (g)(8) requires (1) notice and opportunity to be heard

concerning the order, (2) restraint of the requisite conduct; and (3) specific finding or prohibition.

- ▶ *Notice and opportunity*: The protection order must have been issued after a hearing at which such person received actual notice and had an opportunity to participate.<sup>22</sup>
- ▶ *Restraint of the requisite conduct*: The protection order must restrain such person from (1) harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person; or (2) engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.<sup>23</sup>
- ▶ *Specific finding or prohibition*: The protection order must include either (1) a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (2) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.<sup>24</sup>

• **Penalties for VAWA Violations**: Federal VAWA penalties (violations of 18 U.S.C. § 2261, 2261A, 2262) include:

- ▶ Life or Any Term: if death of the victim results.<sup>25</sup>
- ▶ Less Than 20 Years: if permanent disfigurement or life threatening bodily injury to the victim results.<sup>26</sup>
- ▶ Less Than 10 Years: if serious bodily injury to the victim results, or if the offender uses dangerous weapon.<sup>27</sup>
- ▶ Less Than 5 Years: any other case.<sup>28</sup>
- ▶ Fines may be assessed.<sup>29</sup>
- ▶ Restitution of the full amount of the victim's losses as determined by the court shall be ordered for any offense under 18 U.S.C. § 2261 *et seq.*<sup>30</sup>
- ▶ Losses: include medical services; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorneys' fees, plus any costs incurred in obtaining a civil protection order; and any other losses suffered by the victim as a proximate result of the offense.<sup>31</sup>

## Endnotes

1. U.S. Const. Art. IV § 1.

2. 18 U.S.C. § 2265(b)(1).

3. 18 U.S.C. § 2265(b)(2).

4. 18 U.S.C. § 2265(c).

5. 18 U.S.C. § 2266(5).

6. R.C. 2919.27(A)(3); R.C. 2919.272(D); R.C. 3113.31(N)(1).

7. 42 U.S.C. § 40281.

8. 42 U.S.C. § 40281, 42 U.S.C. § 13951.

9. 18 U.S.C. § 2721 - § 2725.
10. 18 U.S.C. § 2261.
11. 18 U.S.C. § 2261(a)(1).
12. 18 U.S.C. § 2261(a)(2).
13. 18 U.S.C. § 2266(7)(A)(i).
14. 18 U.S.C. § 2261A.
15. 18 U.S.C. § 2261A(1).
16. 18 U.S.C. § 2261A(2).
17. 18 U.S.C. § 2262.
18. 18 U.S.C. § 2262(a)(1).
19. 18 U.S.C. § 2262(a)(2).
20. The 6th Circuit held in *United States v. Page* that 18 U.S.C. § 2261 *et seq.*'s prohibition of the requisite conduct "during or as a result of interstate travel" includes requisite conduct that takes place prior to interstate travel and that enables the offender to force the victim to travel across state lines.
21. 18 U.S.C. § 922(g)(8).
22. 18 U.S.C. § 922(g)(8)(A).
23. 18 U.S.C. § 922(g)(8)(B).
24. 18 U.S.C. § 922(g)(8)(C)(i) - (ii).
25. 18 U.S.C. § 2261(b)(1), 2261A, 2262(b)(1).
26. 18 U.S.C. § 2261(b)(2), 2261A, 2262(b)(2).
27. 18 U.S.C. § 2261(b)(3), 2261A, 2262(b)(3).
28. 18 U.S.C. § 2261(b)(5), 2261A, 2262(b)(5).
29. 18 U.S.C. § 2261(b), 2261A, 2262(b).
30. 18 U.S.C. § 2264.
31. 18 U.S.C. § 2264(b)(3).





## Mediation

Mediation is different from other dispute resolution processes because the mediator serves as an impartial third party. Other key elements of the mediation process are: self-determination by the parties; making informed, voluntary decisions and agreements and confidentiality.<sup>1</sup> The mediator controls the process and assists the parties in their negotiations, but has no decision-making authority.<sup>2</sup> In Ohio's court-connected programs those who mediate the allocation of parental rights and responsibilities are prohibited by statute from making recommendations to the court.<sup>3</sup> In other court-connected mediation programs, confidentiality provisions<sup>4</sup> ensure mediators maintain confidentiality and do not make recommendations.

### *Mediation & Domestic Violence*

*Is mediation appropriate where domestic violence is present?*

#### ***Best Practice***

- **No Mediation of Violence:** It is inevitable, given the prevalence of domestic violence, courts and mediators will see many individuals who are experiencing varying degrees of abuse. Research indicates 10% to 50% of women entering divorce mediation have experienced domestic violence.<sup>5</sup> There is near universal agreement among mediation professionals the issue of the violence itself should never be mediated. That is, a court should *never* allow parties to bargain over whether there will be violence.<sup>6</sup>

▸ *Caution:* While it is unlikely that a court would deliberately order parties to mediate over when and how much violence will be allowed, the very same effect can result from any ill-advised mediation order on such issues as parenting when domestic violence is present in the family.

- **Violence Inconsistent with Mediation Goals:** The convergence of mediation and domestic abuse raises critical challenges to the basic premises of mediation.<sup>7</sup> How can participation be voluntary if an abused party is ordered into mediation? What could a mediator ever do to "balance the power" enough to allow parties to proceed fairly and safely? If a court refers an abuse case to mediation doesn't it imply the court is not taking domestic violence seriously? How will a victim be protected against further abuse? What is the propriety of having the victim and the abuser in the same room together? The court should seek to answer all of these questions to its satisfaction before ordering mediation where domestic violence is present.
- **Model Code:** The National Council of Juvenile and Family Court Judges drafted the Model Code on Domestic and Family Violence in 1994 to give courts guidance relative to domestic and family violence issues. The Model Code calls for courts to take special precautions with mediation referrals in the presence of domestic violence or a protection order.<sup>8</sup>

## Guidelines for Court Ordered Mediation

### What rules govern when mediation may be ordered?

- **Juvenile Court Cases:** Several juvenile courts in Ohio operate programs that mediate domestic violence behavior in delinquency cases and child abuse, dependency and neglect cases.<sup>11</sup>
- **Parenting Cases:** R.C. 3109.052 reflects the policy perspective that mediating when domestic violence is present is generally inappropriate. It provides for the mediation of parental rights and responsibilities in both domestic relations and juvenile courts, but first the court must consider whether any party has been convicted of or pled guilty to domestic violence or child abuse. If so, the court can only order the parties to mediation if it makes specific written findings of fact that mediation is in their best interests.<sup>10</sup>
- **Criminal Cases:** The National Council of Juvenile and Family Court Judges Model Code<sup>9</sup> recommends that there should be no mediation of a domestic violence or stalking criminal charge, the rationale being the appropriate treatment of domestic violence as a crime requires a judicial determination in each case. There are no provisions to allow mediation in Ohio criminal cases of domestic violence filed pursuant to R.C. 2919.25 *et seq.*
- **Civil Protection Order Cases:** The National Council of Juvenile and Family Court Judges Model Statute also recommends there should be no mediation of conditions of a domestic violence or stalking protection order. The issuance of civil protection orders pursuant to R.C. 3113.31 may appear to offer an opportunity for mediation, because the statute provides for temporary allocation of parental rights and responsibilities; however the statute does not specifically provide for mediation of any issues in a civil protection order case. Such cases require quick judicial balancing of victim safety, child safety, parental rights and parental responsibilities, and are not appropriate for mediation.

## Screening Cases for Mediation

### How and why should courts screen potential mediation cases for domestic violence?

- **Screening for Violence:** The Revised Code gives few guidelines to Ohio courts for determining whether mediation is appropriate. Certain circumstances make cases incompatible for mediation, or suggest the need for special procedures to enhance safety of the parties if they do proceed. Many court mediation programs, informed by lessons learned from the victim advocacy community, have adopted policies and instituted sophisticated screening protocols to address these concerns, usually by rejecting for mediation cases where safety and fairness cannot be assured.

#### **Best Practice**

- ▶ *Court Ordered Mediation:* “[C]ourts ordering mediation should institute a careful screening mechanism to predetermine the presence of domestic violence. If the court then insists mediation should occur, the victim and offender should not be in the same room, and the victim should have legal counsel and/or an advocate present.”<sup>12</sup>

- **Varying Motivations for Mediation:** Courts should not make presumptions about who will want to mediate or their reasons for making that choice. An abuser may want to participate in mediation out of genuine concern for the children — or to avoid the authority of the court; to delay the proceedings, and to continue control over the victim. A victim may want to participate in mediation out of a desire to maintain some control of the process — or due to lack of funds for litigation due to coercion from the abuser, to placate the abuser, or to avoid a threatened custody fight. It is therefore not uncommon for both parties to hide their true motivations from the court.

### Best Practice

- ▶ *Forced Mediation:* The difficult question faced by the court is not whether to allow mediation by parties who want to attempt it, but whether to force parties to mediate when only one party wants to try this process. Well-motivated parties could decide to mediate even without court intervention. But if the court is asked to *order* mediation or *reverse* its protection orders to allow mediation, careful screening should be required to uncover hidden motives and violence; this can prevent forcing a party into an unfair or dangerous mediation process.<sup>13</sup>
- **Screening System Objectives:** Before implementing a mediation program, a court should ensure the following:
  - ▶ There is a standard, comprehensive procedure for screening for domestic violence before mediation.
  - ▶ The mediator has special training in domestic violence and mediation.
  - ▶ The mediator uses processes and procedures that are appropriate for the circumstances.
  - ▶ The person who may be a victim of violence desires the mediation.
  - ▶ The person who may be a victim of violence has the option to have a supporting person of his or her choice in attendance at mediation, including but not limited to an attorney or advocate.
  - ▶ The parties have the capacity to mediate without fear of coercion or control.<sup>14</sup>
- **Screening System Components:** Sample mediation screening tools are available to courts.<sup>15</sup> Typically, pre-mediation screening for domestic violence consists of the following components:
  - ▶ *Records Review:* A review of court documents to check for domestic violence complaints, protection orders or convictions.
  - ▶ *Questionnaire:* Each party completes a questionnaire which seeks to ascertain the existence of behaviors suggestive of domestic abuse. Many such screening tools, based on theories of power and control in domestic abuse, ask questions regarding a wide range of coercive or controlling behaviors. These questionnaires may be mailed to the parties and returned to the court, or they may be completed in person before the mediation orientation session.
  - ▶ *Personal Interview:* Parties may also be interviewed by telephone or in person. In-person, individual interviews are best because the screener can assess body language and assure that the answers are given in private without immediate coercion or fear of harm.<sup>16</sup>

- **Mediator Vigilance:** Once parties enter mediation, the mediator has an obligation to continue screening for abuse and assessing the parties' comfort level with the mediation process. Mediators should be attuned to how freely the parties interact with each other, disclose relevant information, follow through on individual tasks, and adhere to minor interim agreements.
- **Opting Out:** Either party or the mediator should be able to terminate the mediation when it appears a party may be harmed if the process continues or the process is not being used as intended. The mediator must be careful in explaining the termination to the parties so as not to implicate the victim. Lastly, in reporting the status of excluded or terminated cases to the court, the mediator must comply with the confidentiality rules<sup>17</sup> and limit the report to the fact that no agreement was reached.

## Other Guidance for Ohio Courts

### *What new guidance on mediation may courts expect?*

- **Proposed Rule of Court:** The Supreme Court of Ohio's Office of Dispute Resolution Programs, with guidance from the Supreme Court Committee on Dispute Resolution, proposes adoption of language similar to the National Council of Juvenile and Family Court Judges' model language on mediation and domestic violence. This language could be included in Rule 16 of the Rules of Superintendence for Common Pleas Court. The proposal is available from the Office of Dispute Resolution Programs or at its web site.<sup>18</sup>
- **Mediation Training Standards:** Currently, most family mediation training programs in Ohio include a maximum of two hours of training content on domestic abuse. The Office of Dispute Resolution has undertaken a project to significantly enhance mediator training on the subject of domestic abuse and mediation. Goals include increasing the consistency of practice among mediators, as well as ensuring safety for mediation participants. The American Bar Association Center on Children and the Law developed a model curriculum for training mediators on the subject of domestic abuse<sup>19</sup> and this is being adapted for use in Ohio. The final product, a curriculum providing a minimum of 16 hours of specialized instruction, is expected to be ready for use in 2002.

## Endnotes

1. These elements are articulated in R.C. 2317.023 (mediator privilege), R.C. 3109.052 (mediation of parenting agreements), as well as in R.C. 179.01-04 that establish the Ohio Commission on Dispute Resolution and Conflict Management. See [www.state.oh.us/cdr/](http://www.state.oh.us/cdr/), for additional information about the Commission.

2. See OHIO JUDGES RESOURCE MANUAL Chapter 10, Ohio Judicial Conference (2000), *see also*, [www.sconet.state.oh.us/dispute\\_resolution/](http://www.sconet.state.oh.us/dispute_resolution/).

3. R.C. 3109.052(B).

4. R.C. 2317.023. *See also State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St. 3d 203.
5. *See* Karla Fischer, Neil Vidmar, and Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 1993.
6. *See* MEDIATION IN THE CASES OF DOMESTIC ABUSE: HELPFUL OR UNACCEPTABLE RISK, THE FINAL REPORT OF THE DOMESTIC ABUSE AND MEDIATION PROJECT, coordinated by the Maine Court Mediation Service and supported by a grant from the State Justice Institute, January, 1992.
7. *See* Ronald B. Adrine and Alexandria M. Ruden, Ohio Domestic Violence Law, § 14.23 (2000).
8. *See* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, NATIONAL CONFERENCE OF JUVENILE AND FAMILY COURT JUDGES, 1994. Available at [www.dvlawsearch.com/pubs/](http://www.dvlawsearch.com/pubs/).
9. *Id.*
10. R.C. 3109.052(A).
11. Further information is available from the Supreme Court of Ohio Office of Dispute Resolution Programs, 30 E. Broad Street, 35th Floor, Columbus, OH, (614) 752-4700, [www.sconet.state.oh.us/dispute\\_resolution/](http://www.sconet.state.oh.us/dispute_resolution/).
12. *Supra*, note 8, at 731-732 (1999).
13. “[T]he battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, not free to identify and advocate for components essential for her autonomy and safety and that of her children, not free to terminate mediation when she concludes it is not working. She is ultimately not free to agree or disagree with the language of the agreement. Her apparent consent is under duress.” Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 321 (1990).
14. *See* Katherine M. Reihing, *Protecting Victim’s of Domestic Violence and their Children after Divorce: The American Law Institute’s Model*, 37 FAMILY AND CONCILIATION COURTS REV. 401 (1999). *Also see* The Model Code, *supra*, at note 9.
15. Samples of screening instruments are available from the Office of Dispute Resolution Programs, *supra* at note 12. *See e.g.* Linda Girdner’s MEDIATION TRIAGE. This Conflict Assessment Protocol has four parts leading to three categorizations of families: 1) those likely to benefit from mediation conducted as usual; 2) those likely to benefit from mediation conducted with specific ground rules, resources, and skills, and 3) those more likely to experience harm, who should be excluded from mediation.
16. *See* Jessica Pearson, *Mediation When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, MEDIATION QUARTERLY, No. 4, (Summer 1997). Pearson notes that although 80 percent of programs that participated in her review of court-connected mediation programs reported conducting screening, only half of them used private interviews.
17. R.C. 3109.052
18. *Supra*, at note 12.
19. DOMESTIC ABUSE AND CUSTODY MEDIATION TRAINING FOR MEDIATORS, AND DOMESTIC ABUSE AND CUSTODY MEDIATION FOR JUDGES AND ADMINISTRATORS, American Bar Association Center on Children and the Law (1999).





## ***Victim Referral Resources***

### **OHIO Statewide Toll-free Information Line 1-800-934-9840**

The Ohio Domestic Violence Network (ODVN) operates a statewide toll-free information line that provides access to local domestic violence shelter numbers 24 hours a day via a voice mail system. The number is usually answered by staff during business hours. After business hours, the system prompts a caller to select 1, then the first three letters of any county in Ohio. The system then provides the number of the shelter in that county or the closest shelter serving that county. At this number, victims can order free of charge ODVN's source book on domestic violence, *Information is Power*.

### **National Domestic Violence Hotline 1-800-799-SAFE (7233)**

The National Domestic Violence Hotline provides callers with crisis intervention, information about domestic violence, and referral to local programs 24 hours a day, in both English and Spanish. The Hotline also has interpreters available to translate an additional 139 languages.

### **American Bar Association Free Legal Help Information Service**

American Bar Association Service Center

541 North Fairbanks Court

Chicago, IL 60611

312-988-5522

Web site: [www.abanet.org/legalservices/publicfree.html](http://www.abanet.org/legalservices/publicfree.html)

## ***State Resources***

### **Action Ohio Coalition for Battered Women**

Contact: Phyllis Carlson-Riehm, Executive Director

36 West Gay Street, Suite 311

Columbus, Ohio 43215

1-888-622-9315

Action Ohio Coalition for Battered Women is a statewide nonprofit organization that provides an array of resources and services, including information and referral, outreach and education, workshops and conferences and legislative and public policy updates. Action Ohio collaborates with other state and local organizations and enlists the support of community volunteers for public awareness and prevention activities. Action Ohio advocates for public policy reforms at state and federal levels, in an effort to support domestic violence victims and to hold batterers responsible for their actions.

### **Family Violence Prevention Center, Ohio Office of Criminal Justice Services**

Contact: Sharon L. Reichard, Director

400 East Town Street, Suite 300

Columbus, Ohio 43215

1-888-448-4842 (Ohio only) or 614-466-7782

Web site: [www.ocjs.state.oh.us/fvpc/](http://www.ocjs.state.oh.us/fvpc/)

The Family Violence Prevention Center serves as an information clearinghouse for public and private organizations and individuals throughout Ohio that strive to prevent family violence and provide assistance to victims. The Center provides leadership for a coordinated effort to reduce and prevent family violence in Ohio.

## **Ohio Domestic Violence Network**

Contact: Nancy Neylon, Executive Director  
4041 North High Street, Suite 400  
Columbus, Ohio 43214  
1-800-934-9840 or 614-784-0023  
Web site: [www.ohiodvnetwork.org/](http://www.ohiodvnetwork.org/)  
E-mail: [todvn@ee.net](mailto:todvn@ee.net)

The Ohio Domestic Violence Network's (ODVN) Resource Center houses a comprehensive collection of videos, books and articles on domestic violence. Resources specifically for judges include the judicial curriculum published by the Family Violence Prevention Fund. These items are available for loan at no charge. In addition, ODVN maintains a comprehensive list of batterer intervention programs throughout Ohio. The web site provides links to more detailed information about Ohio's local domestic violence programs as well as links to other state and national web sites on domestic violence. ODVN also offers extensive training programs, and provides on-site and telephone technical assistance to communities implementing a coordinated response to domestic violence.

## **Ohio State Legal Services Association**

555 Buttles Avenue  
Columbus, Ohio 43215  
614-221-7201  
Web site: [www.iwaynet.net/~olsa/](http://www.iwaynet.net/~olsa/)

Ohio State Legal Services Association (OSLSA) is a two-part legal services program, with a direct service component (Southeastern Ohio Legal Services) and a state support component. The administrative offices and state support center are located in Columbus. Direct service offices are spread throughout central and southeastern Ohio. The office maintains a statewide directory of Legal Aid services.

## **The Supreme Court of Ohio**

30 East Broad Street  
Columbus, Ohio 43266-0419  
1-800-826-9010 or 614-466-3456  
Web site: [www.sconet.state.oh.us/](http://www.sconet.state.oh.us/)

- **Standard Domestic Violence Forms Committee**

Contact: Melissa Knopp, Staff Attorney  
614-466-4199  
E-mail: [knoppm@sconet.state.oh.us](mailto:knoppm@sconet.state.oh.us)

This Committee is responsible for creating and updating the domestic violence and stalking standard forms and instructions which the Supreme Court of Ohio adopted for mandatory statewide use in Supt. R. 10 *et seq.* The forms may be accessed in the Rules of Superintendence section of the court's web site: [www.sconet.state.oh.us/rules/superintendence/](http://www.sconet.state.oh.us/rules/superintendence/).

- **Office of Dispute Resolution Programs**

Contact: C. Eileen Pruett, Director  
1-800-826-9010 or 614- 752-4700  
Web site: [www.sconet.state.oh.us/dispute\\_resolution/](http://www.sconet.state.oh.us/dispute_resolution/)

This Office is developing a model curriculum for training mediators on the subject of domestic abuse, to increase the consistency of practice among mediators, as well as ensure safety for mediation participants.

- **Ohio Judicial College**  
Contact: John Meeks, Director, or Christy Tull, Program Manager,  
Family Law Education  
1-800-826-9010 or 614-752-8677  
E-mail: [jcollege@sconet.state.oh.us](mailto:jcollege@sconet.state.oh.us)  
Web site: [www.sconet.state.oh.us/judcoll/](http://www.sconet.state.oh.us/judcoll/)  
The Judicial College provides education to judges, magistrates,  
and other court personnel, including training on domestic  
violence issues.

- **Ohio Judicial Conference**  
Contact: Anne M. Larrison, Executive Director  
10 West Broad Street, Suite 1360  
Columbus, Ohio 43215  
1-800-282-1510 or 614-466-4150  
Web site: [www.state.oh.us/ojc](http://www.state.oh.us/ojc)  
Among many services to Ohio Judges, the Conference  
publishes the *Ohio Judges Resource Manual* (2000), which  
includes information on judicial handling of domestic violence  
cases.

### Texts

- Ronald B. Adrine and Alexandria M. Ruden, *OHIO DOMESTIC VIOLENCE LAW*, West Group (2000).
- Sowald Morganstern, *DOMESTIC RELATIONS LAW*, West Group (1997).

## National Resources

### National Council of Juvenile and Family Court Judges (NCJFCJ)

P.O. Box 8970  
Reno, Nevada 89507  
1-800-527-3223  
Web site: [www.ncjfcj.unr.edu/](http://www.ncjfcj.unr.edu/)

The Family Violence Department of the NCJFCJ provides information, resources and tangible assistance for judges working in the field of domestic violence, including a judicial curriculum. The NCJFCJ developed the *MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE*, which is available at [www.dvlawsearch.com/pubs/](http://www.dvlawsearch.com/pubs/).

- **National Judicial Institute**  
P.O. Box 8970  
Reno, Nevada 89507  
1-800-527-3223  
Web site: [www.ncjfcj.unr.edu/](http://www.ncjfcj.unr.edu/)  
The National Judicial Institute is a partnership created between the NCJFCJ and the Family Violence Prevention Fund. Funded by the U.S. Department of Justice, the Institute presents a highly interactive symposium that allows judges from different jurisdictions and levels of experience to learn from each other.

### Family Violence Prevention Fund

383 Rhode Island Street, Suite 304  
San Francisco, CA 941-5133  
415-252-8900  
Web site: [fvpf.org/](http://fvpf.org/)

The Family Violence Prevention Fund is a nonprofit organization that develops domestic violence prevention strategies in the justice, public education, child welfare and health fields. Among its programs are the National Judicial Institute (see above), and development of model domestic

violence curricula for judges and other professionals. Three publications of particular interest to judges with custody, civil and criminal jurisdiction, respectively, are: *Domestic Violence and Children: Resolving Custody and Visitation Disputes*; *Domestic Violence in the Civil Court*, and *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases*. Available at 415-252-8900.

### **State Justice Institute**

1650 King Street, Suite 60  
Alexandria, Virginia 22314  
703-684-6100

Web site: [www.statejustice.org/](http://www.statejustice.org/)

The State Justice Institute was established by federal law in 1984 to award grants to improve the quality of justice in the state courts, facilitate better information sharing and coordination between state and federal courts and foster innovative solutions to common problems faced by all courts. The SJI has been providing funding on domestic violence issues since 1994. For grant applications, research projects, and contact information check the web site under grant information by category.

### **American Bar Association Commission on Domestic Violence**

Web site: [www.abanet.org/domviol/](http://www.abanet.org/domviol/)

The American Bar Association Commission on Domestic Violence website provides valuable information and statistics on a wide range of domestic violence issues and extensive links to other resources and organizations. The website includes listings of ABA policies, training materials, legal briefs and sample legal forms relevant to domestic violence issues and proceedings.

## ***Other Benchbooks***

**Arizona:** BENCHBOOK FOR ORDERS OF PROTECTION AND INJUNCTIONS AGAINST HARASSMENT IN DOMESTIC VIOLENCE CASES, Judicial College of Arizona (1999). Available at 602-542-9637.

**California:** CALIFORNIA JUDGES BENCHBOOK, DOMESTIC VIOLENCE CASES IN CRIMINAL COURT (2000). Available at web site: [www.ceb.ucop.edu/catalog/crimgen.html](http://www.ceb.ucop.edu/catalog/crimgen.html).

**Michigan:** Mary M. Lovik, J.D., DOMESTIC VIOLENCE BENCHBOOK: A GUIDE TO CIVIL AND CRIMINAL PROCEEDINGS, Michigan Judicial Institute (1998). Although some references are state-specific, this Guide gives extensive and detailed assistance to the court on the handling of every aspect of domestic violence cases. May be ordered or read on-line at web site:

[www.supremecourt.state.mi.us/courtdata/dvbench.htm](http://www.supremecourt.state.mi.us/courtdata/dvbench.htm).

**New Jersey:** DOMESTIC VIOLENCE PROCEDURES MANUAL, Issued under the Authority of the Supreme Court of New Jersey and the Attorney General of the State of New Jersey (1998). Available at 609-984-4228; web site: [www.judiciary.state.nj.us/](http://www.judiciary.state.nj.us/).

**Tennessee:** Kathy Skaggs, Esq., Ed., TENNESSEE DOMESTIC ABUSE BENCHBOOK, Produced by Administrative Office of the Courts and Tennessee Coalition Against Domestic and Sexual Violence (2000). Available at (800) 448-7970; web site: [www.tscaoc.tsc.state.tn.us/](http://www.tscaoc.tsc.state.tn.us/).

**Washington:** DOMESTIC VIOLENCE MANUAL FOR JUDGES, Washington State Gender and Justice Commission (1997). One of the oldest, most comprehensive Benchbooks in the country for assisting judges in domestic violence matters. Although some references are state-specific, this Manual is a valuable resource for judges in any state. A newer version is due to be released soon. Available at 360-705-5290; web site: [www.courts.wa.gov/commission/genderandjustice/publicat.cfm](http://www.courts.wa.gov/commission/genderandjustice/publicat.cfm).