OBTAINING
AND
ENFORCING
VALID
ORDERS OF PROTECTION
IN NEW YORK STATE

This manual is the collaboration between:

United States Attorney's Office
Western District of New York

State University of New York at Buffalo School of Law
Family Violence Clinic

We thank the following individuals who allowed us to reproduce their work:

Jennifer DeCarli
Domestic Violence Coordinator
Greater Upstate Law Project

Margaret Groban
Assistant U.S. Attorney
District of Maine

Victoria Lutz, Esq.
Director
Pace University Battered Women's Justice Project

Sharon Nozenchuck, Esq.
Neighborhood Legal Services, Inc.

Amy Schwartz, Esq.

Suzanne E. Tomkins, Esq.
Catherine Cerulli, Esq.
Family Violence Clinic
SUNY Buffalo School of Law

A very special thank you to David Zammiello
Family Violence Clinic

For additional copies of this manual, please contact:
United States Attorney's Office
Western District of New York
Sharon Knope, Victim/Witness Coordinator
138 Delaware Avenue
Buffalo, New York 14202
1-800-320-0682
www.usdoj.gov/usao/nyw

TABLE OF CONTENTS

INTRODUCTION

This manual is intended to serve as a guide for advocates, law enforcement, prosecutors, and judges in obtaining, ordering and enforcing **valid** orders of protection in New York State. Oftentimes, the people who first encounter a petitioner or a complainant seeking an order of protection will not be attorneys or judges but rather office clerks, court officers, domestic violence advocates and others. All of these individuals must be aware of the provisions of the Violence Against Women Act (VAWA), the Gun Control Act, and Full Faith and Credit so they can fully inform the victim of the available scope of geographic protection. Therefore, an order must be clear and accurate so that law enforcement and courts can understand whose activities and what activities are restrained. While descriptive detail is frequently essential to law enforcement, an order must be brief enough that it will be read in its entirety by all relevant parties (Victoria Lutz, Director, Battered Women's Justice Project, Pace Law Review Vol. 16 (1995)). *A sample order of protection is in the Appendix.*

HOW TO READ THIS MANUAL

First, we begin with a brief look at the history of the legal system's response to domestic violence. Next we discuss the procedures for obtaining a valid order of protection in each of the applicable courts (Family Court, Criminal Court, Supreme Court, Tribal Court and Federal Court). This is intended as a guide primarily for advocates and attorneys. Then we discuss the enforcement of valid orders of protection by examining Full Faith and Credit, Firearms and Orders of Protection, and applicable state and federal domestic violence laws. This is intended as a guide primarily for judges and law enforcement. Finally, the Appendix contains petition guidelines, sample forms, case law, statute definitions and descriptions of the various topics discussed in this manual. **Please note that the sample order of protection (family offense) in the Appendix meets the requirements for validity under federal firearms and domestic violence statutes and should be used as a guide when drafting orders of protection.** Finally, throughout this guide, you will find Notes calling attention to important suggestions and facts. These notes are intended primarily for attorneys and advocates.

Attorneys/Lay Advocates will want to pay particular attention to the notes throughout this manual and the case law, instructions for drafting petitions, and sample petitions and orders in the Appendix. **Law Enforcement** should focus on the Firearms and Full Faith and Credit sections on pages 30 - 42. **Judges** should pay particular attention to the Full Faith and Credit section, Firearms, the case law, and sample protective orders in the Appendix.

Sharon Knope
U.S. Attorney's Office

THE LEGAL SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE

Increased awareness surrounding the scope and severity of domestic violence has resulted in legislative changes at the state and federal levels. Across many communities in the United States, the legal system has become increasingly aware of the need to work in concert with numerous other community agencies in order to establish a coordinated approach to domestic violence. A coordinated community response consists of various organizations, such as those in the criminal justice, health care, educational, and social services systems, along with employers working together to effectively respond to domestic violence in the community.

The legal system's difficulty in responding to family violence is attributed to the need to maintain the delicate balance between the privatization and publication of acts which occur "behind closed doors." The purpose of recently enacted state and federal laws is to recognize and respond to the needs of victims of domestic violence. Previously, the criminalization of such behavior was considered a violation of a family's right to privacy and an assault between family members was in the primary jurisdiction of Family Court. Now, a victim may utilize either Criminal or Family Court or both to find relief from a batterer.

The **New York State Family Protection and Domestic Violence Intervention Act of 1994** provided important reforms for domestic violence crimes. It directs all police departments in New York State to adopt mandatory arrest policies pertaining to domestic violence offenses. With a mandatory arrest policy, the police officer is directed to make an arrest in instances where the officer has reasonable cause to believe that: a) a felony has been committed between household members; b) an act has been committed by the respondent/defendant in violation of a duly served order of protection that requires the respondent/defendant to stay away from the person on whose behalf the order has been issued, or that constitutes a family offense; or c) a family offense misdemeanor has been committed by a family or household member against another family or household member (unless the victim requests otherwise). In addition, the Act established the concept of concurrent jurisdiction which allows a victim of a family offense to utilize both the Criminal Court and Family Court systems at the same time.

In **1994, the Violence Against Women Act** (VAWA) was enacted by Congress, which established new federal domestic violence crimes and provided grant funding for community programs to collaboratively respond to domestic violence. In addition, VAWA declared that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender." However, in May 2000, the U.S. Supreme Court in the *Brzonkala* case ruled unconstitutional the provision that allows victims to sue their attackers in Federal Court. Please note that the rest of the provisions of VAWA are still constitutional (*for further information on the specifics of VAWA see page 43).*

The following is a brief outline of the effect of the State changes on law enforcement and the criminal justice system and the current response of police and prosecutors to domestic violence.

A Historical Look at Police Response to Domestic Violence.

a. Prior to 1977, in New York State, Family Court had primary jurisdiction of family cases unless a judge transferred the case to Criminal Court.

b. In 1977, Article 8 of the Family Court Act permitted a victim to seek relief in either Family Court or Criminal Court.

c. The "72 Hour" rule provided victims with a 72 hour period in which they had to decide which court they wished to proceed in.

d. Police response was primarily "separation and mediation" rather than arrest. Police officers separated the parties, assessed the situation, and tried to mediate the dispute. Many veteran officers were trained to respond to domestic calls this way, and some continue to do so despite new policies.

The New Domestic Violence Laws and Why the Change Occurred.

a. In the mid-1970s, domestic violence victims began suing police departments for failing to act on their behalf.

b. In 1984, the U. S. Attorney General's Task Force on Family Violence published a report stating that arrest was the preferred response to family violence cases.

c. New York State began considering "pro-arrest" policies prior to 1994. In 1994, the **Family Protection and Domestic Violence Intervention Act** was passed. The mandatory arrest provision part of the Act became effective on January 1, 1996 *(Criminal Procedural Law (CPL) 140.10 (4).*

d. New York State once again responded to domestic violence on January 26, 1998 by passing the **Primary Physical Aggressor Bill** *(CPL 140.10 (4) (c)).* It states that where typically the police arrested both parties in a physical incident, they are
now allowed to determine which party was the primary physical aggressor.

What Does Mandatory Arrest Mean?

a. The new legislation provides guidance for officers arriving on the scene of a domestic violence call. An arrest is required when the officer has probable cause that a felony or a misdemeanor has been committed between family or household members or an order of protection has been violated *(see CPL 140.10 (4)).*

b. What is "probable cause"? When an officer has reason to believe an incident has occurred, he or she has probable cause. The officer observes the crime scene, interviews the victim, perpetrator and any witnesses, and notes any injuries.

c. In the case of a misdemeanor, *CPL 140.10 (4) (c)* provides that the arrest should be made unless the victim specifically requests the perpetrator not be arrested. However, the law prohibits an officer from asking victims their preference regarding a perpetrator's arrest. If the victim makes such a request, the officer is not prohibited from making the arrest at his/her own discretion.

Once Arrested, Will the Batterer be Prosecuted?

a. A prosecutor can proceed with a case without the victim if the officer made an arrest (providing that the paperwork is sufficient). In legal terms, this means the "information" or "complaint" (charging instrument) is sufficient. For example, either the officer saw the incident, or by obtaining witnesses' statements, has enough knowledge about the incident to complete the necessary paperwork.

b. There are times when the victim will need to sign additional paperwork, often called a supporting deposition, in order to assist the prosecutor with the case. Without the victim's signature, the prosecutor cannot continue the case. Therefore, a victim's cooperation can be crucial to a prosecution.

c. "Mandatory Arrest" does <u>not</u> mean "Mandatory Prosecution".

What if the Victim is Also Arrested?

a. Under the new legislation, an officer may feel compelled to arrest the victim if probable cause exists that the victim has also committed a family offense. However, the officer should utilize the Primary Aggressor guidelines discussed in more detail below.

b. Immediately upon being arrested, the victim should consult an attorney and inform the attorney of his/her situation, i.e., that he/she is a victim of domestic violence. If the victim cannot afford an attorney, the court will appoint an attorney if the financial eligibility requirements are met. The victim should be urged to call the local domestic violence shelter for advocacy.

c. The victim should provide the attorney with all records of prior domestic violence incidents, including dates, times, injuries, witnesses, and medical information. This information is imperative for assisting the attorney in preparing a defense.

d. The police should be utilizing the **Primary Physical Aggressor Law** *(see CPL*

140.10 (4) (c)) which takes into account prior calls to the residence, the physical size of the respective parties, damage to the residence, type of injuries, self-defense, and any witnesses' statements. The law makes it clear that police are not required to arrest both parties and police should determine who is the primary physical aggressor. In a situation where an officer must invoke the primary physical aggressor law, he/she should consider the following: (i) the comparative extent of any injuries inflicted by and between the parties; (ii) whether any such person is threatening or has threatened future harm against another party of another family or household member; (iii) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and (iv) whether any such person acted defensively to protect himself or herself from injury. The officer shall evaluate each complaint separately to determine who is the primary physical aggressor and shall not base the decision to arrest or not to arrest on the willingness of a person to testify or otherwise participate in a judicial proceeding. **"Primary physical aggressor" should not be confused with "self-defense"** (*See chart in appendix).*

What is an Officer Required to do at a Crime (domestic violence) Scene?

a. An officer is mandated to complete a police report for every investigation of alleged domestic violence and distribute a victim's rights notice *(see CPL 140.10 (5)).* Even if there is no arrest or warrant advised, the officer still must complete a Domestic Violence Incident Report (DIR) and provide a copy to the victim.

b. If the officer does not respond with a report and notice, the victim should inquire why and place a call to the officer's supervisor. The victim should also call the local domestic violence shelter for information.

c. If the officer responds in any way which makes the victim feel uncomfortable, the victim should record the officer's name and badge number, and immediately discuss the situation with a representative from the local shelter.

d. Where the victim is 65 years or older, police must send a copy of the domestic violence incident report (DIR) to the New York State Committee for the Coordination of Police Services to Elderly Persons *(see CPL 140.10 (5))*. The DIR must include the age and gender of the victim and alleged offender(s). The Committee must report to the legislature on such incidents and will recommend policies and programs to assist law enforcement, the courts and the Crime Victims Board in their work with victims.

What Should the Victim Provide to the Prosecutor?

a. The victim should be contacted by the prosecutor as the case proceeds in court.

The contact may be at the first appearance, called an arraignment, or shortly thereafter, via a phone call or letter.

b. The prosecutor will be interested in learning as much as possible about the charged incident and any prior acts of domestic violence. Victims should keep copies of, or make notes of, dates and times of injuries; photographs of injuries; damage to or in the home; or any letters, cards, or audio-taped communications that may contain threats or violations of a no contact order of protection. This information should be kept in a safe place or with a trusted friend or family member.

c. If the victim has difficulty in contacting the prosecutor by calling his/her direct line, the victim should call the main office number and ask to speak to an advocate. The victim can also call the local shelter and ask for assistance in communicating with the prosecutor.

DETERMINING CONCURRENT JURISDICTION

There is no statutory crime in New York State called domestic violence. Domestic violence crimes refer to any crime that occurs between partners. For procedural purposes, however, there are certain crimes that are considered family offenses in both Criminal Law and Family Law. In addition, certain domestic violence crimes may be charged in Federal Court as well as State (Criminal) Court.

Under current law, a victim may proceed in either Family or Criminal Court, or both courts under certain circumstances *(see Family Court Act (FCA)§ 812 and CPL § 1007.07 and § 530 et seq.)*.
The local court must advise the complainant of these options at the first appearance *(CPL § 530.11 (2) (a))*. A victim may, in addition to filing in Criminal Court, file in Family Court *(FCA § 115 (e) and CPL § 100.07),* however the victim cannot control the criminal case.

Criminal Court can not transfer the case and Family Court needs the victim's permission to transfer the case. Please be aware that each court has a different purpose in the context of domestic violence and procedures vary in each county. In addition, each judge has discretion to decide whether to issue an order of protection or not (for example, whether there is good cause to issue an order of protection or to hold a criminal defendant for a grand jury hearing).

> **NOTE:** When working with a client, an advocate should inform the victim of his/her available options, i.e., the different courts he/she could proceed in and inform the victim that prosecutorial discretion and constitutional double jeopardy principles may limit the victim's ability to proceed in both courts. However, be careful not to "advise" the client of which court he/she *should* proceed in if you are not his/her attorney, as this may be perceived as providing legal advice.

See the chart on the next page for a quick and easy reference in determining concurrent jurisdiction.

Determining Concurrent Jurisdiction

1. **Is the offense a Family Offense:** **IF NO ➜** The case must be heard in Criminal Court if some other kind of offense is committed during a domestic incident.
   - Harassment 1 or 2
   - Aggravated Harassment 2
   - Assault 2 or 3
   - Disorderly Conduct
   - Attempted Assault
   - Reckless Endangerment
   - Menacing 2 or 3
   - Stalking 1, 2, 3, or 4

   IF YES ↓

2. **Is the relationship between the offender and the complainant/victim one of those defined in the Family Court Act?** Are they:
   - Legally married
   - Formerly married
   - Related by marriage
   - Related by blood
   - Child in common

   IF NO ➜ The case must be heard in Criminal Court.

   IF YES ↓

3. **Is the alleged offender 16 years or older?**

   IF NO ➜ The case must be heard in Family Court. Criminal Court has no jurisdiction over juveniles who commit Family Offenses.

   IF YES ↓

Concurrent jurisdiction exists, the complainant/victim can go to Criminal Court, Family Court or both.

Office for the Prevention of Domestic Violence 11/20/00

NEW YORK STATE FAMILY COURT[1]

Family Court is a **civil** court whose purpose is to attempt to stop the violence, end family disruption and provide protection to victims of domestic violence *(see FCA § 812 (2) (b))*. Family Court does *not* have the power to incarcerate, except in cases of a violation of an order of protection. In Family Court, the victim is called the **Petitioner** and the batterer is called the **Respondent**. A lesser threshold of evidence is required in Family Court: a preponderance of evidence.

Reasons for the Victim to Proceed in Family Court

a. The Petitioner initiates the case and decides how and whether or not to proceed.

b. Family Court can grant immediate temporary orders of protection upon filing of a petition *(FCA § 154 (d) (1) and § 821 (2))*. In Criminal Court there may be an arrest and arraignment or the victim can seek a warrant and the defendant can receive a notice to appear or be arrested on the warrant.

c. Family Court can resolve child custody, visitation, and child support *(FCA § 828 (1) (b) and 824 (h))*. In matters involving children, Family Court may appoint a law guardian for the children (although this is rarely done in most counties).

d. Both Petitioner and Respondent are entitled to be represented by an attorney, regardless of whether they can afford one, and must be advised of this by the court *(FCA § 262 (a) (ii) and CPL § 530.11 (6))*. Both parties can request an adjournment to obtain an attorney.

HOW TO PROCEED IN FAMILY COURT

QUALIFICATIONS

1. Persons Eligible for Family Court *(FCA § 812 (1)*)

The Petitioner in family offense proceedings must be a spouse, former spouse, or member of the same household as the batterer. "Members of the same family or household" are defined to include:

- Persons related by blood or marriage;
- Persons legally married to one another;
- Persons formerly married to one another;
- Persons who have a child in common, whether such persons have lived together at any time**.**

NOTE: persons who do not fall into one of these categories cannot proceed in Family Court. **Boyfriend/girlfriend relationships do *not* qualify for Family Court** (unless

[1]What follows is a brief, general outline of the Family Court process in New York State. Each county may, however, have their own procedures for domestic violence cases. Therefore, advocates and attorneys should check with their own jurisdiction before assisting victims.

they have a child in common).

2. A Family Offense Must Have Been Committed *(FCA § 812).*
The victim's Petition must allege at least one of the following offenses: *(a definition of each offense is listed in the appendix).*

- Disorderly conduct
- Harassment 1st or 2nd
- Aggravated harassment 2nd
- Menacing 2nd or 3rd
- Reckless endangerment
- Assault 2nd or 3rd
- Attempted assault
- Stalking 1st, 2nd, 3rd, or 4th

NOTE: if the act or acts that occurred do not fall into one of the above categories the case must proceed in Criminal Court.

3. Family Court Must Have Jurisdiction
Family Court must have jurisdiction over the matter or the parties to proceed *(FCA § 818)*

Matter - the county where the family offense occurred.

Parties - the county where either the victim or perpetrator resides.

NOTE: New York State residency requirement is 6 months. However, emergency jurisdiction is available *(Domestic Relations Law (DRL) 75DC)* for a victim who has fled to New York and has not had time to establish residency.

ONCE THE QUALIFICATIONS ARE MET THEN:
(Getting a Temporary Order of Protection) *FCA § 821 et seq.*

1. Complete a Family Offense Petition
The victim (or her attorney or a domestic violence program) may complete the Petition. The Petition gives notice to the court about what the victim says happened and what relief the victim is seeking. *(Suggestions on how to draft a petition are located in the appendix).* It is important to list aggravating circumstances, since this may determine whether the judge issues a summons or a warrant.

Aggravating Circumstances

- Respondent caused physical or serious physical injury to the Petitioner;
- Respondent used a dangerous instrument against the Petitioner;

- Respondent has a history of repeated violations of orders of protection;
- Respondent has prior convictions for crimes against the Petitioner;
- Respondent has exposed any family or household member to physical injury;
- Like incidents, behavior, and occurrences which, to the court, constitute an immediate and ongoing danger to the Petitioner, Petitioner's family or household.

2. File the Petition.
The victim (or one of the following on behalf of the victim: any authorized agency, society or institution, for example, a domestic violence shelter, a police officer or the court) files the Petition in Family Court. The victim will be required to wait while the papers are being processed and then will be called before the judge to testify, under oath, about what happened.

3. Victim Testifies
The process is generally informal - the victim usually testifies from her seat and the judge may ask questions. The victim should concisely and specifically tell the judge what happened, including any past history of abuse and specifically tell the judge what provisions she is requesting in the temporary order of protection.

4. Judge Issues a *Temporary Order of Protection*
If the judge believes that there is good cause (which means an immediate risk of harm to the victim) the judge will issue an order of protection that is valid until the next court date *(FCA §§ 154 (d) (1) and 821 (2))*.

A temporary order of protection may *not* be issued if:

- the incident alleged in the Petition is more than 2 weeks old unless there is a compelling reason for the delay in seeking the order;
- the batterer is outside the jurisdiction and it does not appear likely that he will enter the jurisdiction;
- the victim's testimony is not credible.

5. Judge Issues Summons or Arrest Warrant for the Batterer.
The *summons*, which is prepared by the court, gives notice to the batterer that an action has been commenced and includes a copy of the Petition. The police will assist with service of these papers.

- victims should ask how the summons will be served and obtain the name and badge number of the officer serving the papers.

- victims should request that his/her address be kept confidential on any orders issued by the court.

Upon finding of aggravating circumstances or other factors, the court may issue a *warrant* for the batterer's arrest *(See FCA § 827 (a) (vii))*.

6. Order is Prepared and Registered.

If the victim is not represented by an attorney, the order will be prepared by the court clerk. It is then entered into the Statewide Registry *(the Registry is defined in the appendix)*, which is mandated in cases charging any crime or violation between spouses, former spouses, parent and child or members of the same family or household. This includes *any* crime or violation, not simply family offenses. A copy of the order is then given to the victim.

The entire process could take up to 3 hours or more.

NEXT STEPS

(Getting a Permanent Order of Protection)

1. Fact Finding Hearing

The next court appearance is called a fact finding hearing and is the first time both parties will be in court. This hearing is to determine whether the allegations of a petition are supported by a fair preponderance of the evidence. Both parties have the right to present witnesses and to cross-examine each other and the witnesses. The judge will try to resolve the case at this first appearance.

At this time, the court will advise:

- The parties of their right to counsel *(FCA § 262 (a) (ii))*;
- Provide the batterer with a copy of the Petition;
- Either release the batterer on his own recognizance; or direct that he post bail; or have him remanded into custody. If bail or incarceration has been directed, a hearing will be held within a reasonable amount of time;
- Advise the victim that she may proceed in either Family or Criminal Court or both *(CPL § 530.11 (2) (a));*
- Inquire about the existence of any other orders of protection.

If the batterer does *not* appear, the batterer may be in default, meaning that the case will be decided in his absence. The batterer is only in default if there is personal service (i.e., the papers were handed to the batterer by someone other than the victim). If the Petition was mailed, the case may be adjourned for personal service. If there cannot be personal service (ex: the batterer is hiding) the court can order another type of service.

NOTE: *This is why it is a good idea for the victim to ask how the summons is to be served on the batterer.*

If the batterer does appear and the case cannot be resolved during the fact-finding hearing, the judge will order a trial.

2. Trial

At the trial, the victim must testify and prove her case. This is the time that the victim can ask for a permanent order of protection. It is highly recommended that the victim have an attorney, particularly if custody, visitation and other complex issues need to be addressed. At trial, the victim should be prepared to have any witnesses to the incident appear and have any medical records that detail injuries from the incident sent to the court from the hospital. The victim should also bring any pictures taken of the injuries.

If the judge decides the alleged incident did occur, the court will order a dispositional hearing.

3. Dispositional Hearing

This is a hearing to determine what order of disposition should be made. Only competent material and relevant evidence may be admitted in these hearings. **Therefore, anything that was *not* already alleged in the initial petition *cannot* be brought up at this hearing**.

CASE IS RESOLVED

If the facts are established, the judge may *(FCA § 842)*:

1. Issue a **permanent order of protection for 1 to 3 years**;
2. Place the batterer on probation for a period of less than a year;
3. Require the batterer to participate in a batterer's education program;
4. Order the batterer to pay restitution not to exceed $10,000;
5. Order a suspended judgement.

The judge may dismiss the case if the preponderance of evidence is not met.

WHAT DOES A FAMILY COURT ORDER OF PROTECTION DO?

***Temporary* Order of Protection** *(FCA § 828)*

A temporary order of protection prohibits certain behaviors by the batterer or requires the batterer to do certain things. A temporary order of protection is considered an ex-parte order because only the victim has the opportunity to tell the judge what happened. Temporary orders are only in effect until the next court date.

Provisions include:

- Stay away from the home, school, place of employment or other designated location of victim and children;
- Refrain from committing a family offense;
- Refrain from committing or failing to do things that create an unreasonable risk to the health, safety or welfare of the child;
- Order the removal of the batterer from the home and for police to assist with such;
- Provide for the physical residency (custody) of the children;
- Schedule or restrict visitation;
- **May or Must** (depending on certain circumstances) remove firearms from the batterer *(for a detailed discussion on firearms, see page 36*);
- Permit the victim's address to remain confidential;
- Permit a party to retrieve personal belongings from the home;
- Order the batterer to pay temporary child support and pay medical insurance based on the victim's testimony regarding the batterer's income.

***Permanent* Order of Protection** *(FCA § 842)*

A permanent order of protection is ordered when the batterer has been served notice and has been provided an opportunity to be heard in court. Provisions are more extensive than a temporary order of protection. Permanent orders of protection are in effect for 1 year. If there are aggravating circumstances, the order may be in effect for 3 years.

Provisions include:

- Stay away from the home, school, place of employment or other designated location of victim and children;

- Refrain from committing a family offense;
- Refrain from committing or failing to do things that create an unreasonable risk to the health, safety or welfare of the child;
- Order the removal of the batterer from the home and for police to assist with such;
- Provide for the physical residency (custody) of the children;
- Schedule or restrict visitation;
- **May or Must** (depending on certain circumstances) remove firearms from the batterer *(a detailed discussion on firearms, see pg 38*);
- Permit the victim's address to remain confidential;
- Permit a party to retrieve personal belongings from the home;
- Order the batterer to pay temporary child support and pay medical insurance based on the victim's testimony regarding the batterer's income;

Additionally, permanent orders of protection can:

- Order the batterer into a batterer's treatment program and into drug and alcohol treatment;
- Order the batterer to pay the victim's reasonable attorney fees and any fees associated with obtaining and enforcing the order of protection;
- Order the batterer to pay or provide insurance to cover the costs of medical care and treatment of the victim's injuries that resulted from the incident;
- Order the batterer to observe other necessary conditions to further the process of providing the victim protection.

A FAMILY COURT ORDER OF PROTECTION *CAN NOT:*

Divide marital property or determine ownership to real or personal property. These issues are determined in Supreme Court which hears divorce matters. Family Court can not incarcerate the batterer, except in cases of a violation of an order of protection

> **NOTE**: in some counties in New York, Family Court judges are making orders of protection part of the conditions of a custody order *(Article 6 of the FCA)*. This does *not* qualify as a *valid* order of protection for purposes of the Federal Gun Control Act,

the Violence Against Women Act, and Full Faith and Credit in states other than New York. This then jeopardizes any potential federal prosecution for violations of orders of protection and federal domestic violence laws because, under the Family Court Act, an order of protection may be issued without the batterer being given notice and an opportunity to be heard *(see FCA § 656)*, which is the federal requirement.

VIOLATIONS of the ORDER OF PROTECTION *(FCA § 846 et seq.)*

If the batterer violates either the temporary or permanent order of protection, there are certain steps the victim should take:

1. Call Police
A violation of an order of protection can subject the batterer to mandatory arrest and procedures in Criminal Court.

2. File a Violation Petition in Family Court
The Family Court judge that heard the original case will hear the violation case. The Petition is filed like an original petition and sets out what the batterer did.

NOTE: if there are **multiple** violations or if **another violation** occurs while the case is pending, the victim should file a separate petition for **each** violation.

3. The Action is then Commenced
Either by service of a summons or by the issuance of an immediate arrest warrant. If the batterer is arrested pursuant to that warrant, he will be brought before the same Family Court judge and bail may be set or he may be held in custody until the next court appearance, which is usually immediately after arrest.

4. Resolve by Consent
After a violation petition is filed and there is an appearance, the court may attempt to resolve the issue by consent. If there is no consent, the court will conduct a hearing.

5. Dispositional Hearing
The victim must show that the violation(s) was *knowing* and *willful*, meaning that the batterer knew about the order of protection and meant to violate it. If the order was obtained when the batterer was in court, that is sufficient to show that he knew about the order. If the order was obtained by default, the victim has to prove that the order was served on the batterer or provide the court some other proof to show that he had

knowledge of the terms of the order. *(This is why it is a good idea for the victim to obtain the name and badge number of the officer who served the papers).*

NOTE: only relevant evidence may be admitted at these hearings, which means that any past incidents of abuse cannot be brought up unless they were referenced in the initial order of protection petition.

6. Case is Resolved

A finding of a violation of an order of protection can result in the judge ordering the following:

- Modifying the order of protection *(FCA § 154 (d) (2));*
  (For example, one that contains a stay away provision)

- Order a new order of protection for 1 to 3 years from the date of the violation finding;

- Impose one of the following:
  1. a *jail* sentence of up to 6 months (for civil contempt)
  2. consecutive jail sentences up to 6 months for each separate violation (*See Walker v Walker, 635 NYS 2d 152 (4th Dept. 1995)*
  3. a jail sentence that is suspended and can be reinstated if there is another violation
  4. probation
  5. a combination of jail and probation;

- Order the payment of the victim's attorney fees;

- Order the batterer to pay restitution up to $10,000;

- **May or Must** (depending on certain circumstances) revoke the batterer's license to carry or possess a firearm and order the immediate surrender of firearms *(see page 38 for further discussion).*

- Referral to Criminal Court for criminal prosecution.

The judge may dismiss the case if the preponderance of evidence is not met.

NEW YORK STATE CRIMINAL COURT[2]

The purpose of Criminal Court is to prosecute the perpetrator for violating a law in New York State and can result in a criminal conviction, incarceration, probation and/or a criminal fine *(see CPL 530.11 (c))*. In Criminal Court, the "victim" is the **People of New York** and the batterer is called the **Defendant**. The prosecutor (Assistant District Attorney) has control over the case, not the victim, although the victim's wishes may be taken into consideration. A greater threshold of evidence is required in Criminal Court: beyond a reasonable doubt.

Reasons for the Victim to Proceed in Criminal Court *(CPL §§ 530.12 and 530.13)*

a. Criminal Court will not cost the victim any money.

b. The District Attorney prosecutes the batterer, therefore, the victim does not need her own attorney.

c. Prosecution may be initiated by the responding officer with or without the victim's cooperation.

HOW TO PROCEED IN CRIMINAL COURT

QUALIFICATIONS

1. **Persons Eligible for Criminal Court** *(CPL § 530.12 and § 530.13)*.

   - Any victim of a criminal offense (family and non-family);
   - A designated witness (temporary orders of protection only);
   - Members of a crime victim's family or household. Eligible members of the family or household are defined as:
     1. Persons related by blood or marriage;
     2. Persons legally married to one another;
     3. Persons formerly married to one another;
     4. Persons who have a child in common, whether such persons have lived together at any time.

NOTE: Many police departments have expanded the definition of family and advocates

[2]What follows is a brief, general outline of the Criminal Court process in New York State. Each county may, however, have their own procedures for domestic violence cases. Therefore, advocates and attorneys should check with their own jurisdiction before assisting a victim.

should check with their local jurisdiction for a definition.

2. A Crime (Family Offense) has been Committed.
A family offense *(See appendix for list)* has been committed and the batterer was arrested

- by a law enforcement officer at the scene
- by a law enforcement officer pursuant to a warrant.

NOTE: in City Court, if the batterer has left the scene, the officer may provide the victim with a "warrant card". In some towns the officer will file for a warrant.

3. A Criminal Charge is Pending in Town, City or County Court.
An order of protection can be granted whenever a criminal action is pending charging a family offense *(CPL § 530.12)* or for any victim or witness in a criminal action *(CPL § 530. 13 (1))*. The case will proceed in the place where the offense occurred. For example, if the assault occurred in Buffalo, the charges would be filed in Buffalo City Court.

- if it is a felony, the batterer will be arraigned and a preliminary hearing set if the Defendant is being held. If the case is handled in local court, it means a misdemeanor plea is being offered by the prosecutor.

- if it is a misdemeanor, the charge will be handled in the local jurisdiction.

- if it is a violation of an order of protection, the charge will be filed in the jurisdiction where the violation occurred. Although the issuing judge may still be able to hear the case.

  NOTE: if the offense involves more than one jurisdiction (for instance, a harassing phone call) the batterer may be charged where the crime occurred or where the call was received.

ONCE THE QUALIFICATIONS ARE MET THEN:
(Getting a Temporary Order of Protection) *CPL § 530.12*

1. Police or Prosecutor Files Charges.
The victim will need a copy of the police report and warrant card to obtain a temporary order of protection.

2. Arraignment
The batterer is arraigned (told of the charges against him) in court. **A temporary order of protection can be requested at this time** *(CPL 530.12 (3) (a))*. The batterer is held, with or without bail, or is released. If the batterer is released and commits another offense, the judge may review the decision and remand the Defendant into custody.

3. Felony/Preliminary Hearing
If the batterer is in jail, the proceeding must be held within 144 hours of the arrest. The victim does not necessarily have to testify.

4. Pre-trial Conference Date is Set.
The case may have numerous pre-trial dates for: discovery (exchange of materials); motions; hearings and case status.

5. Trial Date is Set.

CASE IS RESOLVED
(Getting a Permanent Order of Protection) *CPL § 530.12 (5) and § 530.13 (4)*

1. Defendant Pleads Guilty or is Found Guilty at Trial.
Local judges may issue a *permanent* order of protection for the victim and the victim's family or household upon conviction of a Defendant for any crime or violation between spouses, parent and child, or members of the same household *(CPL § 530.12 (5) and § 530.13 (4))*. The order may be issued as a condition of pre-trial release, bail, an adjournment in contemplation of dismissal, conditional discharge, an adjournment, or as part of the sentence *(CPL § 530.12 and § 530.13)*.

2. Sentence
The judge may:

- Order a jail sentence;
- Order probation;
- Order a combination of jail and probation;
- Order the batterer to pay restitution to the victim (for any repairs to household items the batterer destroyed, any medical bills, etc).
- Order the batterer to perform community service;
- Order the batterer to attend a batterer's treatment program.

WHAT DOES A CRIMINAL COURT ORDER OF PROTECTION DO?

***Temporary* Order of Protection** *(CPL § 530.12)*

The conditions of a Criminal Court temporary order of protection are very similar to a Family Court order of protection. A temporary order is effective only until the expiration date on the order even though the case may extend beyond that date.

Provisions include:

- Stay away from the home, school, place of employment or other designated location of the victim and children;
- Refrain from committing a family offense;
- Refrain from committing (acts of commission) or failing to do things (acts of omission) that create an unreasonable risk to the health, safety or welfare of the child;
- Order the removal of the batterer from the home and for the police to assist with such;
- **May or Must** (depending on certain circumstances) remove firearms from the batterer *(see page 36 for further discussion)*;
- Permit a party to retrieve personal belongings from the home.

***Permanent* Order of Protection** *(CPL § 530.12 (5) and § 530.13 (4))*

Criminal Court permanent orders of protection are similar to Family Court permanent orders. Permanent orders of protection are good for 1 year if the perpetrator has been convicted of a B misdemeanor or an assault between family members, for 1 to 3 years if convicted of an A misdemeanor, and for a maximum of 5 years if convicted of a felony (*under certain circumstances*).

Provisions include:

- Stay away from the home, school, place of employment or other designated location of the victim and children;
- Refrain from committing a family offense;
- Refrain from committing (acts of commission) or failing to do things (acts of omission) that create an unreasonable risk to the health, safety or welfare of the child;

- Order the removal of the batterer from the home and for the police to assist with such;

- ***May or Must*** **remove firearms** from the batterer *(see page 36 for further discussion)*;

- Permit a party to retrieve personal belongings from the home;

Additionally, permanent orders of protection can:

- Order the batterer into a batterer's treatment program and into drug and alcohol treatment;

- Order the batterer to pay the victim's reasonable counsel fees and disbursements in obtaining and enforcing an order of protection;

- Order the batterer to pay, or provide insurance to cover, the costs of medical care and treatment of the victim's injuries which resulted from the incident;

- Observe other necessary conditions to further the process of protection;

- Order the batterer to pay restitution.

The order of protection in criminal cases must be forwarded to the Statewide Registry *(the Registry is defined in the appendix)*, which is mandated in cases charging any crime or violation between spouses, former spouses, parent and child or members of the same family or household. This includes *any* crime or violation, not simply family offenses. A copy of the order is then given to the victim and the original is entered into the Registry by the Court.

POWERS OF CRIMINAL COURT WHEN FAMILY COURT IS NOT IN SESSION

Local judges have the authority under CPL § 530.12 3-a to issue a *temporary* order of protection when Family Court is not in session (i.e., evening, weekend, holiday). Criminal Court can *not* resolve custody or visitation issues. This is done only in Family or Supreme Court and the local court has no authority to modify an order of protection issued by Supreme Court pursuant to a matrimonial action.

Modifying Family Court Order of Protection *(FCA §154(d)(2) & CPL § 530.12(3)(b))* Local judges *do* have the authority to modify a Family Court temporary or permanent order of protection on an *ex parte* basis when the Family Court is not in session upon request of the victim, provided that the victim submits a sworn affidavit. If the Criminal Court does modify the

Family Court order of protection, the Criminal Court is to immediately forward a copy of the modified order to the Family Court which issued the original order. *(The Office of Court Administration offers a manual that details the steps in the process, a copy of the relevant pages are provided in the Appendix).*

VIOLATIONS OF CRIMINAL COURT ORDERS OF PROTECTION

(CPL § 530.12(11) and 530.13(8))

Enforcement of Criminal Court orders of protection are treated by the Criminal Courts as "Criminal Contempt". Several recent amendments to the criminal procedure law raise the level of criminal contempt from a misdemeanor to a felony in particular instances. Violations are subject to the rules regarding mandatory arrest.

If the batterer violates either the temporary or permanent order of protection, there are certain steps the victim should take:

1. **Call Police**.
   A violation of an order of protection can subject the batterer to mandatory arrest and procedures in Criminal Court.

2. **Procedures Proceed Similar to the Filing of Initial Charges**.
   Arrest, arraignment, bail, preliminary hearing, etc.

3. **Case is Resolved**
   A violation of an order of protection can result in:

- A modified order of protection. For example, one that contains a stay away provision;
- A new order of protection for 1 to 3 years from the date of the violation finding (Only if the case is resolved with a new charge);
- A jail sentence, the length of which depends on the crime;
- A suspended jail sentence that can be reinstated if there is another violation;
- An order of probation;
- An order of jail and probation combined;
- Restitution;
- **May** revoke the batterer's license to carry or possess a firearm and order the immediate surrender of firearms *(See page 36 for further discussion*).

NEW YORK STATE SUPREME COURT

Supreme Court is a court of general jurisdiction. Supreme Court has exclusive jurisdiction over matrimonial actions, and thus, is the only court that can issue a judgement of divorce. New York State does not have a straightforward "no-fault" divorce. In Supreme Court the party bringing the action is called the **plaintiff** and the party responding to the action is called the **Defendant**. Parties to a divorce must allege grounds for the divorce and residency requirements pertain to all divorce actions.

Reasons for the Victim to Proceed in Supreme Court

a. Supreme Court has the power to award equitable distribution and decide property issues.

b. Supreme Court is the only court that can issue a divorce along with an order of protection.

HOW TO PROCEED IN SUPREME COURT *(DRL § 240 and 252).*

QUALIFICATIONS:

1. Must have a matrimonial action already in progress.
- must be married or formerly married and asking for a modification

2. Residency requirements.

3. Supreme Court must have jurisdiction.

ONCE THE QUALIFICATIONS ARE MET THEN:

The plaintiff's attorney prepares a motion followed by numerous other procedures. The process is much more extensive and detailed than Family Court or Criminal Court, therefore, victims who are seeking a divorce along with an order of protection should have legal assistance.

NOTE: there are filing fees associated with Supreme Court.

WHAT DOES A SUPREME COURT ORDER OF PROTECTION DO?

Supreme Court may issue an order of protection in conjunction with a divorce or separation, or as part of a custody proceeding. The order of protection may be issued prior to a final judgement, in the final judgement, or after final judgement. Orders of protection remain in effect after the entry of a final matrimonial judgement and during the minority of any child whose custody or visitation is the subject of a provision of a final judgement order.

Provisions include:

- Stay away provision;
- Visitation parameters;
- Refrain from committing a family offense;
- Permission to enter the residence during a specified time in order to remove personal belongings not in issue;
- Refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of the children;
- Require payment of attorney fees;
- Other conditions as are necessary to further the purposes of protection.

NOTE: Beginning November 1, 2000, technical changes were implemented in the Domestic Relations Law (DRL), which is the law that governs matrimonial proceedings in Supreme Court. These changes conform the Domestic Relations Law with the Family Court Act regarding the issuance of temporary orders of protection. Victims requesting a temporary order of protection in Supreme Court are entitled to file such motion or pleading containing this request on the same day that such person first appears in court. Furthermore, a hearing on this motion or portion of the pleading requesting the temporary order of protection shall be held on the same day or the next day the Court is in session following the filing of such motion or pleading. If the Supreme Court issues the temporary order of protection, the Court can also order and must order (in certain circumstances) in accordance with *FCA § 842 (a)* the surrender of firearms, the revocation or suspension of a batterer's firearms license, and/or direct that such party be ineligible for such a license. Lastly, the Supreme Court may direct the payment of restitution, not to exceed $10,000, in accordance with *FCA § 841 (e).*

A SUPREME COURT ORDER OF PROTECTION *CAN NOT*:

In matrimonial actions, Supreme Court may *not* change an order of protection issued by *Family Court* without giving the parties an opportunity to be heard. Under DRL § 240 3-b, Supreme Court can find the Defendant in contempt and incarcerate him/her. However, Supreme Court's focus is generally more on protecting the victim rather than punishing the perpetrator.

FEDERAL COURT

Federal Court is a Criminal Court whose purpose is to prosecute perpetrators for violating a law against the United States. Federal Court has the power to incarcerate. Similar to state Criminal Court, in Federal Court it is the United States versus the Defendant. The prosecutor (Assistant United States Attorney) has control over the case, not the victim, although the victim's wishes may be taken into consideration. The threshold of evidence required in Federal Court is the same as required in Criminal Court: beyond a reasonable doubt.

ORDERS of PROTECTION in FEDERAL COURT

Federal Court does NOT regularly issue orders of protection due to the fact that Congress failed to provide authority for Federal Courts to do so. Victims must go to either Family Court or State Criminal Court to obtain an order of protection. However, in certain very specific circumstances, an order of protection can be obtained in Federal Court *(see Title 18 United States Code § 1514 (a) (1) and 1514 (b) (1) which allows for temporary and permanent orders of protection, respectively: ".....if there are reasonable grounds to believe that harassment of an identified victim or witness in a federal criminal case exists...").* These statutes are applicable **only** when **all of the three** following criteria are met:

1. There is a *federal* domestic violence or related (i.e., threats, kidnaping, etc) case;

2. The victim does *not* qualify for Family Court (i.e., boyfriend/girlfriend relationship);

3. The victim does *not* qualify for Criminal Court (i.e., there is no state charge pending).

NOTE: Questions may arise when a Defendant has been previously convicted of a non-domestic violence related federal offense (for example, bank robbery) and is incarcerated in a federal penitentiary. Sometimes, while incarcerated, the Defendant may begin to harass or threaten the victim through the phone or mail. However, if the communication does not rise to the level of a federal offense (no interstate element or the threats are not explicit) the Defendant can not be prosecuted in Federal Court and, as stated above, the victim cannot obtain an order of protection in Federal Court. Therefore, the victim must obtain an order of protection in either Family Court or Criminal Court, depending upon the previously stated criteria. However, obtaining an order through these courts may be difficult because of the inability to provide service upon the Defendant and the fact that the Defendant, most likely, will not be able to appear. (US Marshals, who are responsible for transporting federal prisoners to and from custody, will generally not execute any state writs, especially for "simple" orders of protection matters.)

WHAT FEDERAL COURT CAN DO

The judge may impose bail conditions similar to conditions of a Family Court or State Criminal Court order of protection (i.e., stay away from victim and/or the children, refrain from communicating with the victim and/or children, etc), however, these conditions are effective only while the case is pending. At the time of sentencing, the judge may impose conditions of supervised release (the period following a term of imprisonment) or probation similar to an order of protection but these conditions are only effective during the period of supervised release or probation.

A copy of the terms of bail conditions and/or supervised release will be provided to the victim by the U.S. Attorney's Office Victim/Witness Coordinator.

FEDERAL COURT *CAN NOT*

Neither bail conditions or supervised release conditions are considered an actual "order of protection" per se, therefore, they will *not* be entered into the statewide registry.

Because federal bail and supervised release conditions are not defined as orders of protection, they may not be enforced by other states according to the Full Faith and Credit provisions *(see 18 USC § 2265)*. Nevertheless, violations of these conditions should still be treated by law enforcement as a crime and enforced since federal orders are nationwide. Law enforcement may call the judge who issued the order to verify the terms if necessary.

WHAT SHOULD A VICTIM DO?

Because the federal procedures and requirements are different from Family or State Criminal Court, if a victim of a *federal* crime needs an order of protection, the victim (or his/her advocate or attorney) should discuss this with either the Assistant U.S. Attorney prosecuting the case or with the U.S. Attorney's Office Victim/Witness Coordinator.

TRIBAL COURT

Within the United States there are many sovereign Native American Indian Nations. The federal government has a government to government relationship with these nations. As U.S. citizens, Native Americans may be subject to federal, state and local laws. However, on Indian reservations, a member of a tribe is *generally* subject to only federal and tribal laws. *A non-member would not be subject to tribal laws for criminal violations occurring on tribal lands and would be tried in state or Federal Court.* If an act of violence occurs off the reservation within the jurisdiction of the state, the state has jurisdiction over the act.

In New York, there are 7 federally recognized Native American tribes: Cayuga Nation; Oneida Nation; Onondaga Nation; Seneca Nation; St. Regis Band of Mohawk Indians; Tonawanda Band of Seneca Indians and the Tuscarora Nation. Each has their own tribal court system. Procedures for obtaining an order of protection or temporary restraining order vary from nation to nation. **What follows is a brief general discussion of some pertinent provisions of the Seneca Nation of Indians Peacemakers-Court and Surrogates Court Civil Procedure Rules. Because each nation's procedures are different, it is important to contact the appropriate court official for the correct procedure to follow when dealing with a tribal court.**

REMEMBER: Tribal court orders of protection are to be given Full Faith and Credit per federal and state law.

INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

(IN THE SENECA NATION OF INDIAN'S PEACEMAKERS COURT)

Article 14, Injunctions, of the Seneca Nation of Indians Peacemakers-Court and Surrogates Court Civil Procedure Rules governs the general procedures for obtaining a permanent injunction or temporary restraining order.

Pursuant to this article, a plaintiff may request an injunction when a "Defendant threatens or is about to do…an act in violation of a plaintiffs rights" which are the subject of an underlying action. An injunction is requested by motion, which must include an affidavit that demonstrates the cause of action and alleges either

- that the Defendant is committing or threatening harmful acts against the plaintiff; or
- that the plaintiff has demanded and would be entitled to a restraining order against the Defendant from the commission of such acts, and that such acts would injure the plaintiff if committed during the pendency of the underlying action.

A preliminary injunction requires notice to both parties. The court will determine at a hearing whether the injunction should issue.

Prior to the hearing, a plaintiff may be entitled to a temporary restraining order (TRO), which can be issued without notice to the Defendant. If, on a motion for an injunction, the plaintiff can show that she will suffer immediate and irreparable injury from the acts of the Defendant unless the Defendant is restrained prior to the hearing for the injunction, the court may issue a TRO that prohibits such acts.

Other provisions of Article 14 deal with service, modifying or vacating injunctions or Temporary Restraining Orders and other matters.

Offenses Committed on Tribal Lands - New York State Jurisdiction

Title 25 United States Code § 232 allows New York State "jurisdiction over offenses committed by or against Indians on Indian reservations within the state of New York to the same extent that the State would have jurisdiction over offenses committed elsewhere within the state." However:

- this does **not** mean that New York has **exclusive** criminal jurisdiction over offenses committed on Indian lands *(see U.S. v Burns, N.D.N.Y. 1989, 725 F.Supp. 116).*

- the statute gives New York State **concurrent** jurisdiction with the federal government over criminal offenses on Indian lands *(see U.S. v Cook, C.A.2 (N.Y.) 1991, 922 F.2d 1026, certiorari denied 111 S.Ct. 2235, 500 U.S. 941, 114 L.Ed.2d 477).*

- New York courts have jurisdiction to consider criminal charges committed on Indian lands located within the state *(see People v. Cook, N.Y. Co. Ct. (1975) 365 N.Y.S.2d 611, 81 Misc.2d 235).*

- New York jurisdiction **is limited only by** 18 U.S.C. § 1153 (Indians committing murder, manslaughter, kidnaping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon or resulting in serious bodily injury, assault against a child under 16 years, arson, burglary and robbery) where the federal government retains exclusive jurisdiction over the crime of murder and other specified crimes *(see People v. Edwards, N.Y.Sup. (1980), 428 N.Y.S.2d 406, 104 Misc.2d 305, reversed 432 N.Y.S.2d 567, 78 A.D.2d 582).*

NOTE: per CPL § 2.10 (persons designated as peace officers) and CPL § 1.20 (persons designated as police officers) and Exec. Law § 835 (definition of police agency), Tribal Nations and members are *not* considered either peace officers or police officers under New York State.

CUSTODY ORDERS: The Indian Child Welfare Act (ICWA) states that tribal custody orders take precedent over state orders in matters involving Native American children. For assistance with these matters, attorneys and advocates should contact the Office of Tribal Justice at 202-514-8812.

FULL FAITH AND CREDIT

"Full Faith and Credit" means that any order of protection from one state will be upheld or enforced by another state if certain conditions are met. Orders of protection are given Full Faith and Credit from one state to another if the provisions of the Violence Against Women Act (VAWA), which are codified in sections of the New York State Domestic Relations Law (DRL), Family Court Act (FCA), Criminal Procedural Law (CPL), Penal Law (PL) and the Executive Law are met. (New York State enacted enabling legislation to promote full faith and credit which became effective on December 23, 1998).

UNDER VAWA *(see 18 USC § 2265)*

and as codified in New York State law, orders from one state must be enforced in another state if:

1. The issuing court had **jurisdiction** over the parties (the victim or the perpetrator resides in the jurisdiction) and subject matter (the power to hear the case) and;

2. The person against whom the order applies had **reasonable notice and an opportunity to be heard** in court.

NOTE: temporary orders of protection (ex-parte) will apply if the person against whom the order applies was provided notice and an opportunity to be heard within a reasonable time after issuance of the order and the court made a specific finding that the victim was entitled to the order.

NOTE: **mutual** orders of protection issued against both Petitioner/complainant and Respondent/Defendant will apply only if the order or portion of the order sought to be enforced was supported by a petition, cross-petition, complaint, or other written pleading, and there was a specific judicial finding that the person seeking the order was entitled to the order of protection.

UNDER NEW YORK LAW

- *CPL § 140.10-4(b)* provides that a police officer *shall* arrest a person for a crime if he has reason to believe that a duly served order of protection is in effect and the order appears to have been served by a court of competent jurisdiction of this state, another state or territorial or tribal jurisdiction.

- *CPL § 530.11-5* gives Full Faith and Credit to orders of protection and temporary orders or protection issued by other states if the issuing court had personal jurisdiction over the Defendant and the Defendant had notice and a reasonable opportunity to be heard. Also provides for free registration of the order with the clerk of the court who shall transmit the information into the Statewide registry.

- *CPL § 530.12 -11* adds out of state orders of protection to the category for which a court may revoke bail, order a case restored to the calendar, etc., in the event the Defendant has willfully disobeyed such order.

- *CPL § 530.14 -3* includes out of state orders of protection as grounds for revocation or suspension of firearms licenses.

- *PL § 120.14 -3* extends Menacing 2nd and 3rd to include violation of an out of state order of protection.

- *PL § 215.51* extends Criminal Contempt 1st to include violation of an out of state order of protection.

- *PL § 215.52* extends Aggravated Criminal Contempt to include violation of an out of state order of protection.

- *CPL § 530.13 -4(a)* allows a court to issue an order of protection directing a Defendant to stay away from any victims designated by the court.

In addition, the New York State legislation made conforming amendments to the Domestic Relations Law and the Family Court Act.

DETERMINING VALIDITY

All valid protective orders must be enforced according to the terms of the order, even though the order may seem to be invalid in the enforcing jurisdiction, i.e., either the victim would not be eligible (ex: same sex couple) or the foreign order grants more relief (ex: longer duration). If the order appears valid on its face, the enforcing jurisdiction determines:

1. How the order is enforced;
2. The arrest authority;
3. The specific crimes to be charged for the violation of the order.

NOTE: entry into the Statewide registry is *not* a requirement for enforcement.

Law enforcement should presume the order of protection is valid if:

1. The order correctly names the parties;
2. Has not expired;
3. Names the issuing court;
4. Signed by or on behalf of a judicial officer.

NOTE: defects on the face of the order or boxes that are not checked do *not* invalidate the order.

What if the officer is unable to confirm service on the Defendant?

1. Notify the Defendant immediately of the terms of the order.
2. Inform the Defendant that the officer will enforce the terms of the order.
3. Document that the Defendant was notified of the terms.
4. If probable cause exists to believe the Defendant committed a crime, may arrest.

What if the Order contains a defect which causes questions of validity?

1. If probable cause exists to believe the Defendant committed a crime, may arrest.
2. Contact the issuing jurisdiction.

What if the victim does not have a copy of the out-of-state order of protection?

a. Contact the issuing jurisdiction.
b. Search the appropriate Statewide registry.
c. May arrest based upon a statement by the victim and corroborating circumstances that there is a valid order.

What if the Defendant has left the scene?

1. If the Defendant has violated the order and has committed a criminal offense, make an arrest.

NOTE: if the officer concludes that he/she does not have enough probable cause to make an arrest based on a violation of a protection order, the officer should explain to the victim the procedure to be followed if the victim wants to file criminal charges against the Defendant.

What if the Defendant has crossed state lines?

1. If any provisions of VAWA are involved *(see page 43 for further discussion)*, the officer should contact the U.S. Attorney's Office in addition to making an arrest (if there is enough probable cause to do so).

2. Regarding Firearms - see page 36.

FULL FAITH & CREDIT CHECKLIST

What does the law require?
New York must enforce valid orders of protection issued by out of state and tribal courts as if they were issued by a New York court as long as the order remains in effect in the issuing jurisdiction.

Is there Probable Cause to Enforce an Out of State or Tribal Order?

If the following requirements are met:
- the order has not expired ➜ **YES** - Probable cause exists for Enforcement of the order
- the order correctly names the parties
- the order is signed by a judicial officer
- the order states the Respondent had notice and an opportunity to be heard (or the victim informs the officer of such)

If the above requirements are not met: ➜ **NO** - Probable cause does *not* exist for enforcement of the order

Is there Probable Cause to Enforce *Mutual* Out of State or Tribal Orders?

If the following requirements are met:
- the mutual order was supported by a petition, cross petition or complaint ➜ **YES** - Probable cause exists for enforcement of the order.
- there was a specific judicial finding that the person was entitled to the order.

****POINTS TO REMEMBER****

1. The law does not require the order to be in the statewide registry in order to be enforced but it should be checked.

2. There is good faith immunity for any officer making a probable cause arrest under this law.

IMMUNITY FROM LIABILITY FOR LAW ENFORCEMENT

(Information provided by Mary Pat Fleming, Civil Chief, U.S. Attorney's Office)

The new Full Faith and Credit statutes provides a **good faith immunity** for officers making arrests therefore, it is best to err on the side of safety for the victim. If the order ***appears valid*** and there is ***probable cause the order has been violated***, an arrest should be made. In the event a victim cannot produce a valid copy of the order of protection issued by a foreign jurisdiction, the officer should take steps to ensure the safety of all involved, then attempt to verify the terms and validity of the order through the national or state registries or with the issuing jurisdiction. *When officers act reasonably to enforce the law, they receive the benefit of immunity from liability even if later it is uncovered that there was no basis for police action*. A police officer who in good faith attempts to protect the person who is the subject of an order of protection would not fall within the four factors listed on the next page and would most likely be found to have qualified immunity for his actions. The qualified or "good faith" immunity enjoyed by police officers shields them from personal liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" *(see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).* Under the qualified immunity doctrine, a law enforcement officer may also assert immunity to federal actions brought under 42 USC 1983

Key to protection for law enforcement is that the officer must have taken some action- immunity exists when making a good faith arrest, not for the failure to arrest. In fact, law enforcement may be exposed to civil liabilities for failure to arrest if they do not enforce the valid order of protection *(see Appendix for case law citing law enforcement liability in cases where they failed to arrest).*

NOTE: To date, there has not been any cases where a batterer sued law enforcement for making an arrest under the Full Faith and Credit provisions.

Immunity from False Arrest/Imprisonment

Enforcement of out-of-state restraining orders by an arrest based on probable cause should shield the officer from charges of false arrest and false imprisonment. In *Logue v Dore (103 F.3d 1040 (1 Cir. 1997))* a police officer was charged with false arrest and false imprisonment on the ground that the officer did not have probable cause to arrest the Defendant for violating a restraining order because Defendant allegedly was not aware of the terms of the order. Charges were ultimately dropped. The court dismissed the false arrest/imprisonment charges because the Defendant's knowledge relevant to determining guilt or innocence had no bearing on the reasonableness of the officer's belief a crime was committed.

Reliance on Police Communication or Bulletin

The U. S. Supreme court has held that law enforcement officers should not be held personally liable when they reasonably rely upon a police communication or bulletin that later is determined

to be erroneous *(see Whiteley v. Warden, 401 U.S. 560, 91 S. Ct. 1031, 28 L.Ed.2d 306 (1965) and U.S. v Hensely, 469 U.S. 221, 105 S. Ct. 675, 83 L.Ed.2d 604 (1985))*. Reliance upon law enforcement information has become known as the "fellow officer rule". This "fellow office rule" has been held by various courts to apply to information from a computer, radio, telephone, or teletype, and from different officials in different states and agencies.

Civil Liability for Failure to Protect

Under New York law, there is a narrow right to recover from a municipality for its negligent failure to provide police protection where a promise of protection was made to a particular citizen and, as a consequence, a "special duty" to that citizen arose *(see Cuffy v. City of New York., 513 N.y.S.2d 372 (C.A. 1985)*. The elements of this "special relationship" are:

1. An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
2. Knowledge on the part of the municipality's agents that inaction could lead to harm;
3. Some form of direct contact between the municipality's agents and the injured party;
4. That party's justifiable reliance on the municipality's affirmative undertaking.

The decision whether there will be a special duty or relationship between the municipality and the injured party will necessarily be fact specific. The factors that will be most difficult to prove for the injured party will be the direct contact portion and the justifiable reliance factor *(see Merced v. City of New York., 552 N.Y.S.2d 96 (C.A. 1990))*. A judicial order of protection in and of itself will not suffice. The bottom line is that recovery will be difficult and will only result when all four elements of the special relationship are established. *(See Appendix for further case law)*.

FIREARMS[3]

Federal Law

Federal law criminalizes the possession of, and transfer of, firearms to individuals convicted of a qualifying misdemeanor crime of domestic violence and to individuals subject to an order of protection issued after notice and an opportunity to be heard. These federal laws, part of the Gun Control Act, work in conjunction with the New York State laws regarding firearms and domestic violence, which will also be discussed below. For a quick reference, see the chart following this discussion.

For the purposes of the following statutes, "**intimate partner" is defined as the spouse or former spouse of the person; an individual who is a parent of a child of the person; or an individual who co-habitates or has co-habitated with the person** *(18 USC § 921 (32)).*

1. **Possession of a Firearm while Subject to an Order of Protection***(18 USC § 922 (g) (8))*
   It is unlawful for any person to possess a firearm who is subject to a court order that:

   - Was issued after notice an opportunity to be heard;
   - Restrains such person from harassing, stalking, or threatening *an intimate partner or child of such intimate partner*;
   - Includes a finding that the person presents a credible threat to the physical safety of such intimate partner or intimate partner's child;
   - Explicitly prohibits the use, attempted use or threatened use of physical force.

Does this apply to law enforcement? No. There is an *official use exemption* - this restriction does not apply to any firearms issued to law enforcement officers or military personnel as long as they are on duty. Personal firearms are not subject to this exemption - meaning law enforcement and military personnel subject to a qualifying order of protection may not possess firearms while off duty.

Important point: Any person in New York State who is subject to an order of protection that meets the above requirements is in violation of federal law if he/she is in possession of a firearm. *See the Case Law in the Appendix for further discussion.*

---

[3]It is important to work with the U.S. Attorney's Office in your jurisdiction in order to effectively utilize the New York State and Federal firearm laws.

2. Possession of a Firearm After Conviction of a Misdemeanor Crime of Domestic Violence *(18 USC § 922 (g) (9))*

It is illegal for a person to possess a firearm after having been previously convicted of a crime of domestic violence *in any court.*

- To qualify as a misdemeanor crime of domestic violence, the crime must have as an element the use or attempted use of physical force or the threatened use of a deadly weapon;

- Due process requirements (notice + opportunity to be heard) must have been met.

Does this apply to law enforcement? Yes. The official use exemption does not apply to this section, therefore, if a law enforcement officer has a previous conviction of domestic violence offense, the officer may not possess a firearm even while on duty. However, a person may still be able to possess a firearm if the conviction was expunged or set aside.

Important point: This is a retroactive statute. Therefore, any previous conviction, (ex: conviction 10 years ago) will apply. *See Case Law in the Appendix for further discussion.*

3. *Transfer* of a Firearm to a Person Convicted of a Misdemeanor Crime of Domestic Violence *(18 USC § 922 (d) (9)).*

It is illegal to knowingly transfer a firearm to a person convicted of a misdemeanor crime of domestic violence.

Key legal element: this must be knowing, person must know the individual has been previously convicted of a domestic violence crime.

Does this apply to law enforcement? Yes. The official use exemption does not apply to this section.

4. *Transfer* of a Firearm to a Person Subject to an Order of Protection *(18 USC § 922 (d)(8)).*

It is unlawful for any person to knowingly transfer a firearm to a person subject to an order of protection that restrains such person from harassing, stalking, or threatening an intimate partner or the child of an intimate partner.

Key legal element: this must be knowing, person must know the individual is subject to an order of protection.

Does this apply to law enforcement? No. There is an official use exemption as long as the officer is on duty.

5. <u>Possession of a Firearm After Conviction of a Felony</u> *(18 USC § 922 (g) (1))*

It is unlawful for any person who has been previously convicted in any court of a crime that constitutes a felony (punishable by more than one year incarceration) to own or possess a firearm.

PENALTIES: For all of above federal statutes - 10 YEAR MAXIMUM SENTENCE.

New York State Law

Effective November 1, 1996, all orders of protection (Family Court and Criminal Court) are authorized and, if particular information is provided to the court, are required to contain conditions with respect to firearms. When entertaining an application for either a temporary order of protection or a permanent order of protection, the court is to inquire as to whether the Defendant has access to weapons and whether there is risk of a firearm injury to the victim. In any such situation, a **"gun surrender" condition** should be included in the temporary or permanent order of protection:

"Defendant shall surrender any and all firearms owned or possessed, including, but not limited to, the following [list the known weapons] to the [town, village or city police department or sheriff's department or state police if there is no local police department] such surrender shall take place on [specify date and time]."

FCA § 842-a, CPL § 530.14 and DRL § 240(3) and 252(9) provide guidelines to judges regarding the surrender of firearms and the suspension and revocation of firearms licenses when issuing temporary and final orders of protection and when they find the order has been willfully violated.

<u>Mandatory</u> Suspension and Revocation of Firearms - *Temporary* Order of Protection
Family Court, Criminal Court and Supreme court **must**:

1. **Suspend -** any current firearms license.

2. **Revoke -** any eligibility for a firearms license.

3. **Surrender** - order the immediate surrender of all firearms possessed by Defendant

<u>when the court has good cause to believe that</u>:

1. The Defendant was previously convicted of a violent felony offense *(PL § 70.02(1))*

2. The Defendant willfully violated a prior order of protection and the violation involved
   - the infliction of serious physical injury *(PL § 10.00(10))*
   - the use or threatened use of a deadly weapon *(PL § 10 (12) and (13))*
   - any violent felony offense *(PL § 70.02(1))*.

3. The Defendant has a prior conviction for stalking 1st, 2nd, 3rd, or 4th *(PL § 120)*

Permissive **Suspension and Revocation of Firearms - *Temporary* Order of Protection**
Family Court, Criminal Court and Supreme court **may** suspend any license, order any Respondent or Defendant ineligible for a firearms license and order the immediate surrender of any firearms owned or possessed when:

1. There is a *substantial risk* of the use or threatened use of a firearm**.**

<u>Mandatory</u> Suspension and Revocation of Firearms -*Permanent* Order of Protection
Family Court, Criminal Court and Supreme court **must**:

1. **Suspend -** any current firearms license.

2. **Revoked -** any eligibility for a firearms license.

3. **Surrender** - order the immediate surrender of all firearms possessed by Defendant

<u>when the court has good cause to believe that</u>:

1. The Defendant was previously convicted of a violent felony offense *(PL § 70.02(1))*

2. The Defendant willfully violated a prior order of protection and the violation involved
   - the infliction of serious physical injury *(PL § 10.00(10))*
   - the use or threatened use of a deadly weapon *(PL § 10 (12) and (13))*

- any violent felony offense *(PL § 70.02(1))*.

3. The Defendant has a prior conviction for stalking 1st, 2nd, 3rd, or 4th *(PL § 120)*

NOTE: where the license suspension/revocation is discretionary or mandatory and the court is uncertain as to whether the Defendant has a license, the court should order suspension/revocation and leave it to law enforcement to determine whether the Defendant has a firearms license.

Applicability to Police and Peace Officers

Although corresponding amendments only cite PL Art. 400, which does not include peace officers and police officers, the bill states that it shall not be deemed to limit, restrict or otherwise impair the authority of the court to order the surrender of any and all pistols, other firearms,etc by the Defendant. Thus, surrender orders may be issued against police and peace officers; license revocation, suspension and ineligibility orders may not. **However, do not forget to review federal requirements.**

Surrender of Firearms

1. The surrender must be ordered on a specific date and time.

2. The law enforcement agency must notify the court that the surrender has taken place.

3. Such surrenders are considered "voluntary" for purposes of the exemptions from prosecution enumerated in PL § 265.20(1)(f).

4. **Hearing**: the Defendant has a right to a hearing to "challenge" the order revoking the firearms license. The court must commence a hearing within 14 days of the issuance of the order. The right to challenge the order does *not* prevent the court from issuing the order prior to a hearing. The law is silent as to the burden of proof or procedures to be followed at such a hearing.

5. **Notice to Central Registry and New York State Police.** The Family Protection Registry Center must be notified of any license suspension/revocation, license ineligibility and surrender orders in family offense cases. The New York State Police and local law enforcement must be notified as well, including orders issued in criminal, non-family offense cases.

   Transmittal of Criminal and Family Court *family offense cases* orders of protection to the registry will automatically satisfy the notice requirement to the State Police. However, in *non-family offense* cases, which are not included in the registry, the notice must be sent separately to: NYS Police, Pistol Permit Section, State Office Bldg. Campus, Bldg. 22,

1220 Washington Ave., Albany, NY 12226.

6. Firearms so surrendered must be retained by law enforcement for a period of one year (unless the order of protection is in effect longer) and then, if the owner is properly licensed, either be returned to the owner if the owner makes the proper arrangements, if not, the weapons will be declared a nuisance and destroyed or transferred to a dealer for sale *(PL § 400.05 (6))*.

FIREARMS CHECKLIST

GUN + ORDER OF PROTECTION = FEDERAL CRIME *IF*:

1. The order of protection was issued after a hearing in which the Defendant had notice and an opportunity to be heard (temporary orders *may* apply if the Defendant was given notice within a *reasonable* time)

   NOTE: does not require that Defendant actually appear or make any statements, only that he/she had reasonable notice and opportunity.

2. The Order of Protection states:

   a) Defendant poses credible threat to the physical safety of the victim.
   b) contains language prohibiting harassment, stalking, and threats that would place the victim in fear of bodily injury.

3. Victim is the **intimate partner** (spouse; former spouse; has a child in common with; is co-habitating or has co-habitated with the Defendant) of the Defendant.

Does NOT apply to law enforcement as long as they are on duty.

GUN + MISDEMEANOR CONVICTION OF DOMESTIC VIOLENCE = FEDERAL CRIME *IF:*

1. Federal or state misdemeanor conviction in any court.

2. Qualifying misdemeanor crimes must include one element of:
   a) use of physical force; or
   b) attempted use of physical force; or
   c) threatened use of a deadly weapon.

3. Defendant must:
   a) be the spouse or former spouse of the victim; or
   b) be the parent or guardian of the victim; or
   c) have a child in common with the victim.

Applies to law enforcement even while on duty.

VIOLENCE AGAINST WOMEN ACT (VAWA)[4]

Interstate Domestic Violence *(18 USC § 2261 (a)(1) and (a)(2))*

1. Travel or Conduct of offender: A person travels in interstate or foreign commerce or enters or leaves Indian country with the intent to injure, harass or intimidate a spouse or **intimate partner,** and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner;

   Key elements: intent, *no bodily injury necessary*, interstate or foreign travel.

   Definition of Intimate partner: spouse; former spouse; individuals who share a child in common; persons who have co-habited together; or who are currently cohabiting together as spouses or any other person similarly situated to a spouse *(18 USC § 2266 (A) & (B))*

   NOTE: Dating relationships are *not* considered intimate partners.

2. Causing travel of victim: A person causes a spouse or **intimate partner** to travel interstate or foreign commerce or to enter or leave Indian country, by force, coercion, duress or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse or intimate partner.

   Key elements: intent, force or coercion, crime of violence, interstate or foreign travel.

   Definition of Intimate partner: spouse; former spouse; individuals who share a child in common; persons who have co-habited together; or who are currently cohabiting together as spouses or any other person similarly situated to a spouse *(18 USC § 2266 (A) & (B))*

   NOTE: Dating relationships are *not* considered intimate partners.

3. Penalties for both:
   (i) life sentence or any term of years if death occurs;
   (ii) not more than 20 years imprisonment for permanent disfigurement or if life threatening bodily injury occurs;
   (iii) not more than 10 years if serious bodily injury occurs of if the offender used a dangerous weapon;
   (iv) not more than 5 years in any other case.

---

[4] The Violence Against Women Act provisions were amended and went into effect on October 28, 2000. The new provisions are contained herein.

Interstate Violation of a Protection Order *(18 USC § 2262 (a)(1) and (a)(2))*

1. Travel or conduct of offender: A person who travels in interstate or foreign commerce or enters or leaves Indian country with the intent to engage in conduct that:

    - Violates a portion of a protective order that involves protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person; or
    - Would violate such a portion if occurred within the jurisdiction in which the order was issued; and
    - Subsequently engages in such conduct.

    see Determining Validity on page 31 as to what qualifies as a valid order

    Key elements: intent; **actual physical travel**.

    NOTE: Intimate partner **not** required for 2262 (a)(1) - *****Does* include orders of protection issued between dating couples**.**

2. Causing travel of victim: A person who causes another person to travel in interstate or foreign commerce or enter or leave Indian country, by force, coercion, duress or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that 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 that would violate such a portion of a protection order in the jurisdiction in which the order was issued.

    Key elements: intent, force or coercion, conduct violates protection order.

    NOTE: Dating relationships *are* included.

3. Penalties for both:
    - life sentence or any term of years if death occurs;
    - not more than 20 years imprisonment for permanent disfigurement or if life threatening bodily injury occurs;
    - not more than 10 years if serious bodily injury occurs of if the offender used a dangerous weapon;
    - not more than 5 years in any other case.

Interstate Stalking *(18 USC § 2261A)*

Whoever travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with intent to kill, injure, harass, or intimidate **another person** and in the course of, or as a result of, such travel places the person in reasonable fear of death or serious bodily injury to that person, a member of the person's **immediate family**, or the spouse or intimate partner of that person; or

uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described above.

Key elements: intent, course of conduct, any person.

Definition of another person: *not limited to intimate partner*, includes dating and other relationships. Immediate family is defined as spouse, parent, sibling, child or any other person living in the same household and related by blood or marriage.

NOTE: *****Does* **include orders of protection issued between dating couples.**

Penalties:
- life sentence or any term of years if death occurs;
- not more than 20 years imprisonment for permanent disfigurement or if life threatening bodily injury occurs;
- not more than 10 years if serious bodily injury occurs of if the offender used a dangerous weapon;
- not more than 5 years in any other case.

Victim's Right to Speak at Bail Hearing *(18 USC § 2263)*

In any proceeding determining whether a Defendant charged with any VAWA crime shall be released pending trial, or determining release conditions, the victim shall have the right to be heard regarding the Defendant's dangerousness. (The U.S. Attorney's office may also move for pre-trial detention of the Defendant).

Mandatory Restitution *(18 USC § 2264)*

In any VAWA case, the Court **must** order restitution to the victim for any losses associated with the related VAWA offense. Restitution includes:
- medical services related to physical, psychiatric, or psychological care;

- physical or occupational therapy or rehabilitation;
- necessary transportation, temporary housing, and child care expenses;
- lost income;
- attorney's fees, plus any costs in obtaining a civil protection order;
- any other losses suffered by the victim as a proximate result of the offense.

OTHER RELEVANT FEDERAL LAWS

Self-Petitioning for Battered Immigrant Women and Children *(8 USC § 1154)*

This law, passed as part of the 1994 VAWA, allows spouses and children who are abused or subject to extreme cruelty by their U.S. citizen or legal permanent resident (LPR) spouse or parent to apply for legal residency in the U.S. without the sponsorship of the abuser spouse or parent. This concept is called self-petitioning. In addition, the unabused parents of children, who are subject to abuse by their parent's U.S. citizen or LPR spouse, may also self-petition and the abusive U.S. citizen or LPR spouse does not have to be also the parent of the abused child.

Requirements for self-Petitioner:

- Must be **currently** married to the abusive U.S. citizen or LPR (or the parent is a U.S. citizen or LPR);
- the marriage was in good faith;
- they are eligible for an immigration visa (through their marriage to a U.S. citizen or LPR or by being the child of a U.S. citizen or LPR);
- must reside in the U.S.;
- must have resided in the U.S. with the abuser at some point (no specific time length);
- must have suffered battery or extreme cruelty during the marriage or if a child is self-petitioning, during the time living with the abuser;
- must have good moral character;
- and they or their child must suffer extreme hardship if deported.

The importance of this law cannot be overstated. Before this law was enacted, an abused spouse or child had to have their U.S. citizen or LPR spouse or parent sponsor them for legal residency status. Thus, it was very easy for the abusers to exert power and control over their victims because they could use the constant threat of deportation and/or not agree to sponsor them to become LPRs. With this new law, abused spouses and children can now petition to remain in the United States on their own - without any "help" from the abuser.

> **NOTE**: because the above requirements are long, complex and tedious to prove, it is advisable that advocates work in conjunction with immigration attorneys in order to successfully collect all of the documents necessary to prove the above requirements.

Obscene or Harassing Phone Calls in Interstate Commerce *(47 USC § 223)*

Knowingly using a telephone or other telecommunications device to annoy, threaten, abuse or harass another which is obscene, lewd, lascivious, filthy or indecent:

a. whether or not communication ensues;
b. makes or causes the telephone to repeatedly or continuously ring;
c. repeatedly uses a telecommunication device with actual communication to recipient.

Key elements: intent to harass; content must be annoying or obscene; cross state lines

Penalties: Fine and/or up to 2 years in prison.

Threats in Interstate Communication *(18 USC § 875)*

Transmits across state lines or internationally *any communication* (can include e-mail) of threats of:

a. demand for ransom for release of kidnaped person;
b. kidnaping or injuring another person;
c. with intent to extort, injuring the property or reputation of another person or threatening to accuse another person of a crime.

NOTE: while the statute says "any communication", the most common is the telephone but keep in mind that this must be either across state lines or international boundaries.

Key elements: intent; crossing state lines or international boundaries.

Penalties: Fine and/or up to 2 years to 20 years depending upon intent and severity of threat.

Mailing Threatening Communication *(18 USC § 876)*

Knowingly mails through the U.S. Postal Service any threats of:

a. Demand for ransom for release of kidnaped person;
b. With intent to extort, kidnaping or injuring another person.

Key elements: intent; using the U.S. Postal service; threat must be explicit

Penalties: Fine and/or up to 2 years to 5 years depending upon intent and severity of threat.

Kidnaping *(18 USC § 1201)*

Unlawful abduction and holding of another person for ransom or otherwise when:

a. The person is transported across state lines or international boundaries;
b. In federal jurisdiction;
c. On aircraft jurisdiction.

Key elements: holding for purpose; less than 24 hours does not preclude investigation

Penalties: any term of years, or life in prison; if victim dies, death penalty possible

NOTE: This statute does **not** generally apply to parental kidnaping (i.e., parents who violate custody orders).

NEW YORK STATE LAWS
AFFECTING DOMESTIC VIOLENCE VICTIMS

CHILD CUSTODY AND VISITATION (1996)

The Domestic Relations Law (DRL) considers incidences of domestic violence in child custody and visitation cases *(DRL § 240 (1))*. The state legislature spelled out the need to consider violence as a factor when determining custody. The legislature recognized the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed violence.

A. This change became effective on May 21, 1996. It requires judges to consider domestic violence as a factor when deciding custody and visitation disputes, including supervised visitation requests.

B. The party who raises domestic violence allegations must make sworn statements as to the violence in a pleading that is part of the custody or visitation case.

C. The judge deciding the case must find that the allegations of violence are proven by a preponderance of the evidence in order for the law to apply.

D. The law requires the judge to consider the effect of the domestic violence upon the "best interests of the child" together with other facts and circumstances that the judge deems relevant in making his or her decision.

E. The statute does not define domestic violence. However, at least one judge has interpreted the law liberally to extend it beyond cases of overt acts of violence which cause physical injury.

CUSTODY PROHIBITION IN SIBLING MURDER CASES (1999)

This law, effective July 27, 1999, prohibits the court from awarding visitation or custody of a child to any person who has been convicted of first or second degree murder of that child's sibling, half-sibling, or step-sibling *(see DRL § 240 (1) (c))*.

ADOPTION AND SAFE FAMILIES ACT (1999)

This new law conforms New York State to the federal Adoption and Safe Families Act regarding foster care and adoption procedures, timetables, etc. It also implements two new provisions for

domestic violence cases *(FCA § 1052(b)(ii))*.

a. First, courts must now consider the presence of domestic violence in the home when determining whether or not the need to place a child would be eliminated if the abuser was ordered to leave the home via an order of protection.
b. Secondly, the Office of Children and Family Services must study the extent to which domestic violence victims' children are removed from the home as a result of the abuser's conduct.

WELFARE REFORM

Domestic violence victims may be exempt from certain requirements imposed by recent welfare reform. New York State has elected to implement the Family Violence Option which is intended to assist victims *(Social Services Law § 349-a)*.

a. All applicants and recipients of public assistance will receive a copy of a form that advises them of the availability of services for domestic violence victims and potential exemptions from welfare requirements.

b. All applicants and recipients must be screened to determine the existence of domestic violence. All other welfare assessments, including employability and child support referrals, must be put on hold until the domestic violence assessment is complete.

c. The definition of a "domestic violence victim" is broad enough to include threats of physical abuse and a sworn statement alone is sufficient to establish that domestic violence has occurred.

d. A domestic violence liaison assesses the credibility and safety of the victim, makes referrals, and determines the need for any waivers from welfare requirements.

e. New York State permits waivers for four months for the following program requirements:

- child support cooperation;
- work activity;
- residency;
- drug and substance abuse programs;
- education;
- ineligibility of minor parents;
- time limits.

f. Waivers can be granted only when compliance with program requirements would make it more difficult for the individual or the individual's children to escape from domestic violence, or subject them to further risk of violence. A waiver is permitted only if the victim is *currently* in danger.

g. Applicants who are screened for domestic violence are promised confidentiality with the exception of child abuse and neglect.

PREVENTING INSURANCE DISCRIMINATION (1996)

Chapter 174 of Insurance Laws of 1996 prohibits insurance companies in New York State from discriminating against people who are victims of domestic violence *(Insurance Law § 2612)*.

a. Prohibitions include denial of policies or contracts, demands for higher premiums, designation of domestic violence as a pre-existing conditions and lower broker fees for writing or renewing a policy.

VICTIM IMPACT STATEMENTS (1998)

This law allows a crime victim to include in a victim impact statement, that is submitted or presented at a parole hearing, any information concerning threatening or intimidating conduct toward the victim, the victim's representative, or the victim's family made by the inmate after sentencing *(Exec. Law § 259-i and 9 NYCRR § 8002.4)*

PAROLE BOARD TOLL-FREE ACCESS (1999)

This law requires the New York State Parole Board to provide toll-free telephone access so crime victims may contact the Board regarding an inmate's release *(Exec. Law § 259-i)*.

CRIME VICTIM COMPENSATION (1999)

This law expands crime victim compensation for counseling expenses to cover spouses and children of crime victims who have been physically injured. Moreover, it provides that victims of sex offenses are presumed to have suffered from physical injury *(Exec. Law § 624*).

WRITTEN NOTIFICATION of INMATE RELEASE (1998)

This law obligates the prosecutor to provide the victim of a violent crime with a form created by the NYS Department of Correctional Services whereby the victim may indicate a demand to be informed of the escape, absconding, discharge, parole, conditional release or release to post-release supervision of the person so imprisoned *(see CPL 380.50 (4) and (5))*.

INTERIM PROBATION SUPERVISION (1999)

This law expands the allowable conditions of interim probation supervision to include electronic monitoring as well as any other necessary or appropriate conditions to end the conduct which resulted in court involvement *(CPL § 390.30)*.

PAROLE BOARD VICTIM CONFIDENTIALITY (1999)

This law mandates that the NYS Parole Board must keep the name and address of a crime victim confidential when the victim submits a statement to the Board regarding the release of an inmate *(Exec. Law § 259-i and § 633)*.

VOTING RIGHTS

Recent legislation allows victims of domestic violence living in shelters to vote in elections by absentee ballot *(Exec. Law § 11-308)*.

WORKPLACE VIOLENCE POLICY

This law requires the New York State Office for the Prevention of Domestic Violence, in conjunction with the State Department of Labor and an independent task force, to develop a model domestic violence employee awareness and assistance policy for businesses. The purpose of the model policy is to provide businesses with the best practices, policies, protocols, and procedures in order that they may ascertain domestic violence awareness in the workplace, assist affected employees, and provide a safe and helpful working environment for employees. *(Exec. Law § 575(9))*.

UNEMPLOYMENT BENEFITS (1996)

This law, effective July 26, 1996, states that when a victim of domestic violence voluntarily separates from employment as a result of abuse, this separation may be deemed for good cause

for the purposes of unemployment benefits. *(Labor Law § 593).*

NOTICE TO PRENATAL/POSTPARTUM PATIENTS (1998)

This law, which went into effect January 23, 1998, requires hospitals and health care centers to disseminate domestic and family violence information to all prenatal/postpartum patients. This notice, developed by several state agencies, provides information about the effects of child abuse and domestic violence and describes services available to women and children who experience such violence. *(Public Health Law § 2803-p).*

APPENDICES

APPENDIX
A

NEW YORK STATE FAMILY OFFENSES

The specific behavior or act which constitutes a crime is found in the Penal Law. Most of these enumerated crimes have been further modified by court decisions.

1. Disorderly Conduct *(Penal Law § 240.20)*
Intentionally creating a public disturbance, inconvenience or alarm by fighting, tumultuous, violent or threatening behavior.

NOTE: The Family Court Act does *not* require a public disturbance.

Key elements: intent; to create a disturbance.

Offense level: this is a Violation.

2. Harassment 1st *(Penal Law § 240.25)*
Intentionally and repeatedly harasses another person by:
(i) following a person in a public place;
(ii) engaging in a course of conduct or committing acts which place a person in a reasonable fear of physical safety.

Key elements: intent; repeated or continuous conduct; fear of physical injury

Offense level: this is a class B Misdemeanor.

3. Harassment 2nd *(Penal Law § 240.26)*
With intent to harass, annoy, or alarm a person:
(i) strikes, shoves, kicks, subjects to physical contact, or attempts or threatens to do so;
(ii) follows a person in a public place;
(iii) follows a course of conduct or repeatedly commits acts which annoy or alarm.

Key elements: intent; physical contact *without* injury; repeated conduct.

Offense level: this is a Violation.

4. Aggravated Harassment *(Penal Law § 240.30)*
With intent to annoy, alarm, threaten or harass another:
(i) Communicates or causes a communication by mechanical or electrical means anonymously or otherwise by telephone, telegraph, mail or other form of written communication;

(ii) Makes a telephone call, whether there is conversation or not, with no legitimate purpose to communicate;
(iii) Commits an act of harassment 1st and has been convicted of harassment 1st within the past ten years.

NOTE: this crime constitutes Stalking.

Key elements: intent; harassing contact by phone or mail, including hang up calls for no legitimate purpose; repeat conviction for Harassment 1st.

Offense level: this is a class A Misdemeanor.

5. Menacing 2nd *(Penal Law § 120.14)*

1. Intentionally places a person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon or dangerous instrument;

2. Repeatedly follows or engages in a course of conduct or commits it over a period of time, which places a person in reasonable fear of physical injury, serious physical injury or death;

3. Violates an order of protection (duly served or has actual knowledge of) by committing an act of Menacing 3rd.

NOTE: this constitutes a crime of Stalking.

Key elements: intent; fear of physical injury or death by display of weapon; repeated action over time.

Offense level: this is a class A Misdemeanor.

6. Menacing 3rd *(Penal Law § 120.15)*
By physical menace places, or attempts to place, a person in fear of death, imminent serious physical injury or serious injury.

NOTE: no injury is necessary and no weapon needed.

Key elements: fear of injury or death *without* a weapon.

Offense level: this is a class B Misdemeanor.

7. Reckless Endangerment 1st *(Penal Law § 120.25)*
Depraved indifference to human life, creates a *grave risk of death* to another.

Key elements: reckless actions which cause danger of physical injury.

Offense level: this is a class D Felony.

8. Reckless Endangerment 2nd *(Penal Law § 120.20)*
Recklessly places another person in substantial risk of physical injury.

NOTE: No physical injury is necessary - only the risk of. The Family Court Act refers only to reckless endangerment.

Key elements: reckless actions which cause danger of serious injury.

Offense level: this is a class A Misdemeanor.

9. Assault 3rd *(Penal Law § 120.00)*

1. With intent to cause physical injury, causes physical injury or recklessly causes physical injury;

2. with criminal negligence causes physical injury by means of a deadly weapon or dangerous instrument.

NOTE: Injury must have *substantial* pain. Physical injury is defined by case law. For example, one NY court found a handkerchief to be a dangerous instrument when it was stuffed in the victim's mouth to keep her from crying out and she suffocated to death.

Key elements: intends to cause physical injury and does.

Offense level: this is a class A Misdemeanor.

10. Assault 2nd *(Penal Law § 120.05)*

1. With intent to cause serious physical injury, causes serious physical injury;

2. causes physical injury by means of a weapon or dangerous instrument;

3. injury must have substantial pain.

Key elements: intends to cause serious physical injury and does or does so with a weapon

Offense level: this is a class D Felony.

11. Assault 1st *(Penal Law § 120.10)*

1. With intent to cause serious physical injury, causes serious physical injury by means of a deadly weapon or dangerous instrument;

2. with intent, seriously disfigures or maims, dismembers or destroys a body part or organ;

3. With depraved indifference, recklessly causes serious physical injury.

NOTE: some defendants may act "reckless" and still be held liable under certain provisions. Attempted assault means all elements of assault are present (i.e., intent) but does not complete the assault. Attempted assault and assault 3rd are enumerated in the Family Court Act.

Key elements: intends to cause serious physical injury and does with a weapon.

Offense level: this is a class B Felony.

STALKING CRIMES

As of December 1, 1999, stalking is a specific crime found in the Penal Law. There are four degrees of stalking and each crime is an enumerated family offense (i.e., meaning Family Court also has jurisdiction). The legal definition for each degree of stalking is complex and built upon each other. The degree of stalking to be charged will depend upon, among other things, whether or not the defendant has a previous stalking conviction and/or has been previously convicted of a **specified predicate crime**. The specified predicate crimes are listed in the Penal Law Section 120.40 (5). Stalking crimes also cover stalking type behavior directed at third parties and immediate family members (Stalking 4th), as well as, threats of bodily injury to victims' immediate family members and previous convictions of specified predicate crimes against the victim and/or immediate family member (Stalking 3rd and Stalking 2nd).

1. Stalking 4th *(Penal Law § 120.45)*

(i) Reasonable fear of material harm to physical health, safety or property of that person, an immediate family member or a third party acquaintance;

(ii) Material harm to the mental or emotional health by following, telephoning or initiating communication or contact with that person, an immediate family member, or a third party acquaintance *and* they were clearly informed to stop this conduct;

(iii) Reasonable fear that employment, business or career is threatened because he/she is appearing, telephoning or initiating contact at the person's job *and* they were clearly told to stop this conduct;

Key elements: intent, repeated or continual behavior that causes fear, no legitimate purpose.

Offense level: this is a class B Misdemeanor.

2. Stalking 3rd *(Penal Law § 120.50)*
(i) commits stalking 4th against three or more people or more separate transactions for which the person has not been previously convicted;

(ii) commits stalking 4th **and** has a previous conviction of stalking 4th or another predicate crime within the last 10 years against the victim or an immediate family member of the victim;

(iii) with intent to harass, annoy or alarm someone - engages in course of conduct that causes the victim (or the victim's family member) reasonable fear of injury (serious or not), sexual offense, kidnaping or death.

Key elements: repeated or continual behavior that causes fear.

Offense level: this is a class A Misdemeanor.

3. Stalking 2nd *(Penal Law § 120.55)*
(i) Commits stalking 3rd **and** in the course of committing that offense displays or possesses or threatens the use of a firearm or other dangerous instrument;

(ii) Commits stalking 3rd **and** has a conviction within the last 5 years of a predicate offense against the victim or the victim's immediate family member;

(iii) Commits stalking 4th **and** has been convicted of stalking 3rd against *any* person;

(iv) Being 21 years or older repeatedly follows someone under 14 years with intent to put that person in fear of physical injury or death.

Key elements: intent, previous conviction of stalking.

Offense level: this is a class E Felony.

4. **Stalking 1st** *(Penal Law § 120.60)*
Commits stalking 3rd and:

(i) intentionally or recklessly causes physical injury to such person;

(ii) commits a class A Misdemeanor defined in Article 130 of the Penal Law;
(iii) commits a class E Felony defined in § 130.25, 130.40 or 130.85;

(iv) commits a class D Felony defined in § 130.30 or 130.45.

Key elements: commits stalking 3rd; intentionally or recklessly causes physical injury; commits any of the enumerated sex offenses.

Offense level: this is a class D Felony.

Definitions for Stalking Offenses

Immediate family member is defined as: spouse, former spouse, parent, child, sibling, or any other person who regularly resides or has regularly resided in the household of a person.

Predicate crimes are defined as the following:

1. A violent felony offense;

2. A crime defined in Penal Law §§ 130.20; 130.25; 130.30; 130.40; 130.45; 130.55; 130.60; 130.70 or 255.25;

3. Assault 3rd, Menacing 2nd, Coercion 1st, Coercion 2nd , Aggravated Harassment 2nd, Harassment 1st, Menacing 3rd, Criminal Mischief 1st, 2nd and 3rd, Criminal Tampering 1st, Arson 3rd and 4th, Criminal Contempt 1st, Endangering the Welfare of a Child, Stalking 2nd, 3rd, 4th **or** an offense in any other jurisdiction which includes all of the essential elements of any such crime for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed.

CRIMINAL CONTEMPT

1. Criminal Contempt 2nd *(Penal Law § 215.50)*
Intentional disobedience or resistance of a lawful mandate.

Key elements: intent; disobeys the provisions of an order of protection (ex: calls when the order says no contact)

Offense level: this is a class A Misdemeanor.

2. Criminal Contempt 1st *(Penal Law § 215.51)*
Intentionally places or attempts to place the person protected in reasonable fear of physical injury or serious physical injury or death;

By displaying a deadly weapon or dangerous instrument or what appears to be a firearm (Menacing 2nd);

By repeatedly following such person or engaging in a course of conduct or repeatedly committing acts over a period of time (Menacing 2nd);

By communicating or causing communication to be initiated by mechanical or electronic device - anonymously or otherwise - by telephone, telegraph, or mail, or other written communication (Aggravated Harassment 2nd);

With intent to harass, annoy, threaten or alarm the person protected: repeatedly makes telephone calls to such person whether or not conversation ensues, with no purpose (Aggravated Harassment 2nd);

Strikes, shoves, kicks or otherwise subjects such a person to physical contact (Harassment 2nd);

By physical menace, intentionally places or attempts to place a protected person in reasonable fear of death, imminent serious physical injury or physical injury (Menacing 3rd).

Key elements: causes a reasonable fear of injury, serious injury or death.

Offense level: this is a class E Felony.

3. Aggravated Criminal Contempt *(Penal Law § 215.52)*

When in violation of a duly served order of protection, or if the defendant had actual knowledge because he was in court, the defendant intentionally or recklessly causes physical injury to a person for whose protection such order was issued.

Key elements: actually causes injury.

Offense level: this is a class D Felony.

APPENDIX B

PRIMARY PHYSICAL AGGRESSOR GUIDELINES

(Issued pursuant to Chapter 4 of the Laws of 1997)

Cross Complaint/Primary Aggressor

1. The intent of this policy is to protect the victims of domestic violence.
2. Cross-complaint arrests based solely upon the parties' allegations shall not be made. Where probable cause exists to believe that more than one family or household member has committed a family offense misdemeanor against one or more such members, the following policies shall apply:
   a. The officer shall not inquire as to whether the victim seeks an arrest of such person, or
   b. Threaten the arrest of any person for the purpose of discouraging requests for police intervention.
3. Officers are not required to arrest both or all parties. However, the "primary physical aggressor" shall be arrested. The primary physical aggressor is not necessarily the person who was first to use force. During the officer's investigation to determine who was the primary physical aggressor, the officer shall consider the following:
   a. The comparative severity of any injuries inflicted by and between the parties;
   b. Whether any such person has made threats of future harm against another party or another family or household member;
   c. Whether any such person has a prior history of domestic violence that the officer can reasonably ascertain;
      NOTE: When investigating this factor at the scene, the following sources of information may be available: agency records, NYSPIN Registry of Orders of protection, criminal history, prior acts of violence against others, reports of other officer(s) responding to address for past incidents and statements of neighbors or others in the residence.
   d. Whether any such person acted defensively to protect himself or herself or a third person from injury.
4. When investigating such a case, the officer shall evaluate each person's complaint separately to determine who was the primary physical aggressor. The officer shall not base a decision to arrest or not to arrest on the willingness of a person to testify or otherwise participate in a judicial proceeding.
5. The arrest of the primary physical aggressor does not prohibit the officer from arresting both or all parties. If more than one arrest is made, a separate Domestic Incident Report (DIR) shall be filed for each victim and each DIR shall cross reference the other.
6. No arrest shall be made for acts which the officers have probable cause to believe were committed in self-defense in accordance with Article 35.00 of the Penal Law of New York.
7. Should a complaint relating to the same incident be made at a later time - a delayed cross-complaint - it shall be investigated according to the guidelines outlined above and any arrest decision shall be made in a manner consistent with this policy.

§140.10 Arrest without a warrant by police officer; when and where authorized.

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
   a. Any offense, when he has reasonable cause to believe that such person has committed such offense in his presence; and
   b. A crime, when he has reasonable cause to believe that such person committed such crime, whether in his presence or otherwise.
2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:
   a. Such offense was committed or believed by him to have been committed within the geographical area of such officer's employment; and
   b. Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or believed t o have been committed or in an adjoining county, in and through any county of the state, and may arrest him in any county in which he apprehends him.
3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55
4. Notwithstanding any other provisions of this section, a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that:
   a. A felony, other than subdivision three, four, nine or ten of section 155.30 of the Penal Law, has been committed by such person against a member of the same family or household, as member of the same family or household is defined in subdivision one of section 530.11 of this chapter; or *(1996, chgd. by chap. 511, eff. 11/6/96)*.
   b. A duly served order of protection is in effect, or an order of which the respondent or defendant has actual knowledge because he was present in court when such order was issued; and
      (i) such order directs the respondent or defendant stay away from persons on whose behalf the order of protection has been issued and the respondent or defendant committed an act or acts in violation of such "stay away" provision of such order; or
      (ii) the respondent or defendant commits a family offense as defined in subdivision one of section 812 of the Family Court Act or subdivision one of section 530.11 of this chapter in violation of such order of protection *(1995, chgd. by chap. 349, eff. 1/1/96, expires 7/1/2001)*

   The provisions of this subdivision shall apply only to orders of protection issued pursuant to sections 240 and 252 of the Domestic Relations Law, Article 4,5,6, and 8 of the Family Court Act and section 530.12 of this chapter; or

c. A misdemeanor constituting a family offense, as described in subdivision one of section 530.11 of this chapter and section 812 of the Family Court Act, has been committed by such person against such family or household member, unless the victim requests otherwise. The officer shall [not] *neither* inquire as to whether the victim seeks an arrest of such person *nor threaten the arrest of any person for the purpose of discouraging requests for police intervention. Notwithstanding the foregoing, when an officer has reasonable cause to believe that more than one family or household member has committed such a misdemeanor, the officer is not required to arrest such person. In such circumstances, the officer shall attempt to identify and arrest the primary physical aggressor after considering: (i) the comparative extent of any injuries inflicted by and between the parties; (ii) whether any such person is threatening or has threatened future harm against another party or another family or household member; (iii) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and (iv) whether any such person acted defensively to protect himself or herself from injury. The officer shall evaluate each complaint separately to determine who is the primary physical aggressor and shall not base the decision to arrest or not to arrest on the willingness of a person to testify or otherwise participate in a judicial proceeding.*

Nothing contained in this subdivision shall be deemed to (a) *require the arrest of any person when the officer reasonably believes the person's conduct is justifiable under Article 35 of Title C of the Penal Law*; or (b) restrict or impair the authority of any municipality, political subdivision, or the division of state police from promulgating rules, regulations and policies requiring the arrest of persons in additional circumstances where domestic violence has allegedly occurred. *(1997, chgd. by chap. 4, eff. 1/12/98. Matter in brackets eff. only until 1/12/98. Matter in italics eff. 1/12/98).*

No cause of action for damages shall arise in favor of any person by reason of any arrest made by a police officer pursuant to this subdivision, except as provided in sections 17 and 18 of the Public Officers Law and sections 50-k, 50-l, 50-m, and 50-n of the General Municipal Law, as appropriate. *(1994, added by chap. 222, eff. 1/1/96, expires 7/1/2001; chgd. by chap. 224; 1995, chgd. by chaps. 17, 356; 1996, chgd. by chap. 533, eff. 8/8/96).*

5. Upon investigating a report of a crime or offense between members of the same family or household as such terms are defined in section 530.11 of this chapter and section812 of the Family Court Act, a law enforcement officer shall prepare and file a written report of the incident, on a form promulgated pursuant to section 837 of the Executive Law, including statements made by the victim and by any witnesses, and make any additional reports required by local law enforcement policy or regulations. Such report shall be prepared and filed, whether or not an arrest is made as a result of the officers' investigation, and shall be retained by the law enforcement agency for a period of not less than four years. Where the reported incident involved an offense committed against a person who is sixty-five years of age or older a copy of the report required by this subdivision shall be sent to the New York State Committee for the Coordination of Police

Services to Elderly Persons established pursuant to section 844-b of the Executive law *(1994, added by chap. 222; chgd. by chap. 224; 1997, chgd. by chap. 626, eff. 9/17/97).*

	Justification/ Self-Defense **Under Article 35 of the Penal Law, a trier of fact..**	**Primary Physical Aggressor** **In deciding which party is the primary physical aggressor under § 140.10 of the Criminal Procedure Law, a police officer...**
Shall compare injuries inflicted by and between the parties.		Yes. CPL. § 140.10 (4)(c)(i)
Shall consider whether person is making or has made threats of future harm against other party or other family/household.		Yes. CPL § 140.10 (4)(c)(ii)
Shall consider whether either party has history of domestic violence that officer can reasonably ascertain.		Yes. CPL § 140.10 (4)(c)(iii)
Shall consider whether either party acted defensively to protect himself/herself from injury.		Yes. CPL § 140.10 (4)(c)(iv)
Shall evaluate each complaint separately.		Yes. CPL § 140.10 (4)(c)
Shall not base the decision to arrest or not to arrest on willingness of a party to testify/participate in judicial proceeding.		Yes. CPL § 140.10 (4)(c)
Shall not be required to arrest a person whose conduct the officer believes is justifiable under Article 35 of the Penal Law, entitled "Defense of Justification."		Yes. CPL § 140.10 (4)(c)
May arrest person in additional circumstances where domestic violence has allegedly occurred if required by the rules, regulations or policies of a municipality, political subdivision or division of the state police.		Yes. CPL § 140.10 (4)(c)
Must find that potential offender/victim had reasonable belief that physical force is necessary to defend self or third party from imminent use of unlawful force by other party.	Yes. PL § 35.15(1)	

Must consider whether conduct was provoked by the potential offender/victim.	Yes. PL § 35.15(1)(a)	
Must consider whether potential offender/victim was initial aggressor.	Yes. PL § 35.15(1)(b)	
If potential offender/victim was the initial aggressor, must consider whether he or she had withdrawn from the encounter and effectively communicated the withdrawal to the other party, and whether the other party continued the incident by the use or threatened imminent use of unlawful physical force.	Yes. PL § 35.15(1)(b)	
If potential offender/victim used deadly force, must consider whether the other party was using or was about to use deadly physical force.	Yes. PL § 35.15(2)(a)	
If potential offender/victim used deadly force, must consider whether potential offender/victim knew that he or she could, with complete safety to self and others, avoid the necessity of using such force by retreating.	Yes. PL § 35.15(2)(a) Potential offender/victim may be exempted from the duty to retreat if: (1) inside his or her own dwelling and not the initial aggressor (PL § 35.15(2)(a)(i)) or (2) if acting at the directions of a police or peace officer to assist in effecting an arrest or preventing and an escape from custody (PL § 35.15(2)(a)(ii) and 35.30)	
If potential offender/victim used deadly force, must consider whether the other party was committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.	Yes. PL § 35.15(2)(b)	

If potential offender/victim used deadly force, must consider whether the other party was committing or attempting to commit a burglary, and the potential offender/victim was in possession or control of, or licensed or privileged to be in, a dwelling or occupied building, and the potential offender/victim reasonably believed a burglary of such dwelling or building and the potential offender/victim reasonably believed that the use of deadly force was necessary to prevent or terminate the commission or attempted commission of the burglary.	Yes. PL § 35.15(2)(c) and PL § 35.20(3)	

APPENDIX C

SELECTED STATE AND FEDERAL CASE LAW

(Prepared by Jennifer DeCarli, Esq.
Domestic Violence Coordinator, Greater Upstate Law Project - April, 2000)

DOUBLE JEOPARDY

People v. Markidis., *2000 WL 520939 (Rochester City Court) (April 10, 2000)*
Relying on the recent *People v Wood* decision, defendant moved to dismiss the misdemeanor information, charging him with assault 3rd, due to the previous disposition of an Article 8 petition in Family Court based on the same offense. Family Court issued an order of protection and mandated the defendant/respondent to attend and complete domestic violence and substance abuse counseling, while the assault charge was pending in Criminal Court.

The court distinguished this scenario from the holding in *Wood*. *Wood* held that when a Family Court and Criminal Court issue orders of protection that are both subsequently violated, if a Family Court imposes a punitive sanction for a violation of an order of protection - this forecloses any criminal prosecution for the same act. **In contrast, in the case at bar, the defendant was not subject to a punitive sanction in Family Court and thus, *Wood* did not apply.**

People v McGraw., *524 N.Y.S.2d 343 (Nassau County Ct. 1988)*
Defendant was charged with criminal contempt for violating an order of protection obtained by his wife. The wife filed a Violation of an Order of Protection petition in Family Court and the matter was settled. Subsequently, criminal charges were filed against the defendant. Defendant argued that there was no jurisdiction over the charges because the matter was handled in Family Court and any action would constitute double jeopardy. Defendant's arguments were rejected. **The court held that the charge of criminal contempt was not a family offense, so there is no right of election.** In addition, the court noted that the People were bringing charges against the husband, not his wife. Therefore, Criminal Court has jurisdiction over the charge. As to the double jeopardy argument, **the court held that Family Court proceedings are civil and did not constitute a prosecution, so there was no double jeopardy problem**. However, the court did dismiss the charge in furtherance of justice because the matter had been resolved in Family Court with the consent of both parties.

People v. Wood, *260 AD2d 102, 698 NYS2d 122 (4th Dept. 1999).*

Defendant's ex-wife obtained two "no contact" orders of protection, one from Rochester City Court and the other from Monroe County Family Court. Defendant was first found guilty of contempt in Family Court for violation of the Family Court order by making five harassing phone calls to his ex-wife. He was sentenced to six months in jail. Defendant was also

subsequently found guilty of criminal contempt for violating the City Court order. The issue defendant raised on appeal was whether the prosecution of criminal contempt charges in Supreme Court constituted double jeopardy where he had previously been found guilty of contempt in Family Court. **The Court reversed defendant's conviction for criminal contempt for violation of the City Court order. It held that the prosecution for violation of the City Court order did indeed violate the double jeopardy clause as a subsequent prosecution for the same underlying conduct that had resulted in defendant's Family Court conviction of contempt.**

The Court found that because the Family Court prosecution for contempt despite being a civil proceeding, was punitive in nature. The Court noted that the incarceration penalty provided by Article 8 of the Family Court Act for contempt was punitive in nature. Moreover, the "beyond a reasonable doubt" standard required to hold the defendant guilty of contempt in Family Court was further persuasive evidence that the Family Court proceeding was essentially criminal in nature. The Court therefore determined that the Family Court conviction of contempt was criminal, not civil. The Court then proceeded to determine whether the subsequent prosecution in Supreme Court for violation of the City Court order was for the same defense of which defendant had been found guilty in Family Court. The Court held that it was a subsequent prosecution for the same offense.

The Court applied the "same elements test" for determining whether the subsequent proceeding against the defendant violated the Double Jeopardy Clause. To determine whether the charges in the two courts were for the same underlying offense, the Court examined whether one proceeding required proof of an element that the other did not. Despite the fact that the prosecutions stemmed from different orders of protection, the Court found that both proceedings involved the same statutory elements applied to the same underlying conduct. The defendant's conviction in of the criminal contempt in the Supreme Court was unconstitutional as a subsequent prosecution that violated the Double Jeopardy Clause. Furthermore the Court also found that the Supreme Court conviction violated New York's statutory double jeopardy provision, CPL § 40.20.

People v. Campbell, *269 AD2d 460, 703 NYS2s 498 (2nd Dept. 2000).*

Defendant was charged in Supreme Court with criminal contempt in the first degree and criminal contempt in the second degree for violating an order of protection that required him to stay away from his ex-girlfriend. The jury returned a guilty verdict for second degree contempt, but did not reach a verdict on the first-degree charge. The court declared a partial mistrial and at a second trial on the charge of first-degree criminal contempt only, the defendant was found guilty. The court held that because the defendant had been previously convicted of second degree contempt, which was a lesser-included offense of the subsequent prosecution for first degree contempt, the Double Jeopardy Clause had been violated.

The Court held that "after being convicted of only the lesser-included charge…the defendant could not be constitutionally prosecuted for the greater charge." The defendant's conviction of contempt in the first degree was therefore reversed.

JURISDICTION

People v Johnson., *282 N.Y.S.2d 481 (1967)*
Defendant was indicted for second-degree assault on his wife. He moved to dismiss the indictment and transfer the case to Family Court, but his motion was denied and he plead guilty to third-degree assault. Defendant appealed his conviction, arguing that County Court did not have proper jurisdiction over the case. Section 812 of FCA gives the Family Court "exclusive original jurisdiction over any proceeding concerning acts which would constitute disorderly conduct or an assault between spouses." **The Court held that Family Court's jurisdiction was not limited to simple assaults, but included felony assaults.** If Family Court feels that its forum is not appropriate for the specific case, it has the authority to transfer the case to County court for criminal sanctions. **The Court held that Family Court must initially review the case and make the determination whether it should be treated as a family offense or a crime before County court can have any jurisdiction.**

Montalvo v Montalvo., *286 N.Y.S.2d 605 (NYC Fam. Ct. 1968)*
Defendant and his wife had been separated for about six weeks. The wife refused to reconcile with her husband and he shot her. Defendant was charged with assaulting his wife. The case was properly transferred from Criminal Court to Family Court since it was an assault between spouses and Family Court has original jurisdiction. Family Court transferred the case back to Criminal Court. **It was determined that Family Court would not be able to help the family since the wife did not want to get back together with her husband. The court felt that the defendant was potentially dangerous and that there was a societal interest in criminal prosecution.** Additionally, the defendant had to be in Criminal Court anyway due to a weapon charge. The "family offense" proceedings were not appropriate in this case.

Hawley v. Hawley., *355 N.Y.S.2d 962 (Fam. Ct. Sullivan County 1974)*
Defendant was charged with assaulting his wife. The matter was scheduled to be heard in Family Court. Before the case was heard, the wife was killed in an automobile accident. Following the assault, the couple did not live together and had not reconciled before her death. Obviously, her death put an end to any attempts at reconciliation. The court noted that Family Court handles offenses that, if committed between non-family members, would constitute a crime. Family Court handles these cases in an effort to keep families intact. **Therefore, if the goal of Family Court can no longer be attained, that court is not appropriate and the matter should be transferred to Criminal Court.**

People v. Singleton., *532 N.Y.S.2d 208 (NYC Crim. Ct. Bronx County 1988)*
Defendant was charged with various crimes involving a dispute with his wife. He questioned the jurisdiction of Criminal Court to handle the charges. The wife initially filed petitions in Family Court for the conduct. Subsequently, she filed criminal complaints against her husband for the same charges. **The wife has a right of election to choose a forum on those charges that constitute a family offense. However, one cannot begin proceedings in another forum if 72 hours have passed since the original filing and nothing has been disposed or the case was decided on the merits.** The court held that, since petitions were filed in Family Court first, the wife "made a binding election" to go forward in Family Court on the family offenses. The Criminal Court has jurisdiction over the other charges because they are not offenses handled by Family Court and they are not "inextricably linked to one of the family offenses." Lastly, the court noted that the wife's election was valid, even though it may not have been an informed decision.

Sowich v. Taurisano., *682 N.Y.S.2d 834 (Fam. Ct. Oneida County 1998)*
Petitioner, an unmarried mother, alleged a family offense against her child's father. At the time, neither the mother nor the father had custody of the child, who had been adopted by the mother's parents. Relying on the Fourth Department's decision in *Orellana v. Escalante 653 N.Y.S.2d 992 (App. Div. 4th Dept. 1997)* that the "relationship of affinity between stepparent and stepchildren terminates upon the divorce of the parent and the stepparent," this court extended the law to hold that **the relationship between a child and parent terminates upon adoption of the child**, pursuant to DRL § 117(1)(a). In this case, since the child had been adopted prior to the filing of the petition by the mother, there was "no child in common", so the mother lacked standing to file a family offense petition.

COURTS ABILITY TO PUNISH VIOLATIONS OF ORDERS

United States v Von Foelkel., *136 F.3d 339 (2d Cir. 1998)*
An order of protection was issued upon defendant's divorce because he verbally and physically abused his wife during their marriage. After the divorce, defendant's ex-wife and their son moved away. Four years later, defendant located his wife. Defendant was convicted of violating 18 USC § 2262(a)(1), part of the Violence Against Women Act, which makes it a crime to cross state line with the intent to violate an order of protection and then to violate it. Defendant challenged the constitutionality of the statute. The **2nd Circuit held the statute to be constitutional as a "valid exercise of Congress's authority under the Commerce Clause" because the channels of interstate commerce are used**. Defendant also claimed that the court erred in admitting evidence of prior bad acts, that the prosecutor's summation was improper, and that there was not enough evidence to sustain his conviction. **The court held that evidence of prior bad acts was relevant to prove his intent to violate the order of protection**, the prosecutor's summation was proper, and the evidence supported the conviction. *(See also United*

States v Casciano., 124 F.3d 106 (2d Cir. 1997), cert. denied, 118 S. Ct. 639 (1997), upholding a conviction under 18 USC § 2262(a)(1) without considering the statute's constitutionality.)

Cole v. Cole, *556 N.Y.S.2d 217 (Fam. Ct. Delaware County 1990)*
Wife sought to have order of protection enforced by punishing husband for violation. The husband is not being punished for the times that he violated the order by living with her, with her own permission. He is only being punished for violating the order by not leaving when she made it clear that she no longer wanted him around. **The court held that, even though the couple had lived together subsequent to receiving the order of protection, the order was still in effect**. The order was not modified or nullified in any way when the two willing lived together. The order remains in full effect until modified by a court. **The wife's willing co-habitation did not constitute a waiver of her rights.**

Walker v. Walker., *635 N.Y.S.2d 152 (1995)*
Upon determining that the husband had violated an order of protection held by his wife with three separate written communications, Family Court sentenced the husband to six months for each violation of the order, to run consecutively. **The Court held that "the Family Court is not generally precluded from imposing, in the exercise of prudent and appropriate discretion, a maximum six-month jail commitment for each separate and distinct violation of an order of protection, to be served consecutively."** Family Court is given the authority to impose jail terms under FCA § 846-a. The husband argued that Family Court could only impose a maximum of six months jail term, regardless of the number of violations. This would make no sense because it would allow one to violate an order numerous times with no added consequences. The purpose of the FCA and the issuance of orders of protection is "attempting to stop the violence, end family disruption, and obtain protection." Nothing in the statute limits consecutive sentences for multiple violations.

People v. Clark, *262 AD2d 711, 692 NYS2d 748 (3rd Dept. 1999), affirmed, 95 NY2d 773, 710 NYS2d 297 (2000).*

After defendant was arraigned on charges of assaulting and menacing his wife, the court issued a temporary order of protection that omitted the wife's name. Later, after an altercation between the defendant and his wife, the wife brought charges of two counts of criminal contempt in the first degree for violation of the temporary order. County Court granted defendant's motion to dismiss the charges, holding that the order was defective because it did not name defendant's wife.

The Appellate Division, Third Department, modified the order dismissing one count of the indictment, reasoning that the mere omission of the victim's name from the order did not warrant dismissal where the order had been presented to the defendant with explicit oral

instructions as to what conduct the order prohibited and to whom it applied. The oral order was therefore held enforceable.

People v. Eichele, *258 AD2d 592, 685 NYS2d 739 (2nd Dept. 1999).*

Defendant ignored a restraining order and confronted the woman who had obtained the order and threatened to kill her. Defendant was acquitted of criminal possession of a weapon and of menacing, but convicted of criminal contempt. Defendant appealed his conviction of contempt on the ground that it was inconsistent with his acquittal of the other charges.

Although the court held that defendant had not preserved these issues for review on appeal, it noted nevertheless that defendant's acquittal on the charges of menacing and weapons charges were not inconsistent with the finding that defendant intentionally placed the victim in reasonable fear of physical injury or death when he visited defendant at her place of employment in violation of the restraining order and threatened to kill her. Defendant's conviction of criminal contempt for violation of the order was therefore affirmed.

People v. Abramov, *172 Misc.2d 186, 658 NYS2d 567 (Sup. Ct., Queens 1997).*

Defendant was charged with first degree criminal contempt for violating a valid order of protection. Defendant challenged the charge, claiming it violated the Ex Post Facto clause of the Constitution. **The Court noted that the Ex Post Facto clause is violated only when a criminal law is both retrospective and it disadvantages the offender**. The Court noted that conviction on a contempt charge would indeed disadvantage the defendant insofar as the he might be subject to a longer sentence than if a protective order had not been in effect. **The Court nevertheless held that the criminal contempt law was not retrospective because it was in existence when the defendant committed the crime, defendant's behavior was not innocent when committed and the defendant's punishment for prior crimes was not being increased.** Additionally, because the criminal contempt statute was designed to protect domestic violence victims by strengthening penalties for violations of protective orders, the law's intent was clearly prospective, rather than retrospective, as well. Accordingly, defendant's motion challenging the contempt charge was denied.

VALIDITY OF ORDERS

Muldrew v. Mixon., *654 N.Y.S.2d 912 (App. Div. 4th Dept. 1997)*
Petitioner sought an order of protection. Family Court granted the petition and denied respondent's request for a hearing. **The Appellate Division held that since respondent had**

denied the "material allegations", he was entitled to a fact-finding hearing at which petitioner would have to prove the allegations by a preponderance of the evidence. Family Court erred in granting the petition without holding the fact-finding hearing.

REVOCATION OF FIREARMS LICENSES

Toneatti v. Schiavone., *698 N.Y.S.2d 690 (App. Div. 2d Dept. November 8, 1999)*
After a hearing, Family Court revoked the appellant's license to carry firearms and this appeal was taken. The court affirmed Family Court's order and **held that the question of whether appellant had threatened the use of a deadly weapon was a disputed factual issue for the Family Court to decide. The Family Court's determination regarding the credibility of witnesses is to be afforded great weight**. In this case, its determination to revoke the appellant's firearm license was not against the weight of evidence.

LIABILITY OF LAW ENFORCEMENT TO ENFORCE ORDERS

Mastroianni v. County of Suffolk., *668 N.Y.S.2d 542 (1997)*
Decedent called police stating her husband had violated an order of protection by entering her house and throwing her furniture all over her yard. When police responded, they found the decedent's husband visiting neighbors. The husband denied entering decedent's house and no one had seen him do so. Since the husband was no longer at the scene, the officers did not arrest him. The officers watched decedent's house for an hour and remained in the area. When they did leave the area, they were called back to it within ten minutes because the decedent had been stabbed by her husband. This action was brought to recover damages for decedent's death based upon the officers' failure to protect the decedent. **The court held that a "special relationship" existed between the decedent and the officers**. According to the court, "the elements of this 'special relationship' are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." *(See Cuffy v. City of New York., 513 N.Y.S.2d 372)*. **The court concluded that all of the elements were fulfilled to establish a special relationship between the decedent and the officers. There was a valid order of protection in place, the officers had direct contact with the decedent, and the officers statements to the decedent, along with their actions, led decedent to justifiably rely on their protection.**

Sorichetti v. City of New York., *492 N.Y.S.2d 591 (C.A. 1985)*
Wife obtained three separate Family Court orders of protection against her abusive husband. Police were called numerous times to the couple's home and later to the wife's separate residence

because of the domestic violence but failed to arrest the husband each time. The last order of protection allowed the husband visitation with the couple's youngest child. During one weekend visitation, the husband threatened to kill his wife and made references that she would never see her infant daughter again. The wife showed the police her order of protection and told them her husband had just threatened to kill her and her daughter. Police failed to do anything because "there was no bodily injury." Husband failed to return daughter at the conclusion of visitation. After numerous attempts to get the police involved with no success, the husband's sister went to the husband's home to check and found the husband passed out and the daughter severely injured. The husband had stabbed the infant daughter with a fork, knife and screwdriver and had attempted to saw off her leg. The child was hospitalized for 40 days and remains permanently disabled. An action was filed by the wife against the City of New York to recover damages inflicted upon the child by the father citing that the City negligently failed to take the husband into custody or otherwise prevent his assault upon the daughter after being informed that he may have violated a Family Court order of protection and that he had threatened to do harm to the infant. **The court held that recovery was allowed for an infant's injuries in which there was a preexisting judicial order of protection. The court relaxed the direct contact requirement with law enforcement officials because of the close relationship between the mother (for whom the order of protection was issued) and the child and the fact of the existence of the judicial order of protection itself**.

DOMESTIC VIOLENCE INCIDENT REPORTING

Michael J. Groves v. State University of New York at Albany et. al.., *N.Y.A.D. 3rd Dept. NYLJ, April 20, 2000)*
In this decision of first impression, the Court held that the reporting requirements for law enforcement contained within the 1994 Family Protection and Domestic Violence Intervention Act should be read broadly to include reporting domestic violence incidents when the relationship between the parties does not fit the statutory definition of family or household member found in C.P.L. § 530.11 and FCA § 812.

Petitioner had appealed the dismissal of his application by the Supreme Court, to direct the respondent to expunge certain domestic incident reports filed against him. Petitioner argued that because he and the victim were not members of the same family or household as defined by CPL § 530.11 and FCA § 812, the respondent had no authority to prepare and file the domestic incident reports (DIR) against him. Petitioner and respondent were involved in a dating relationship, which is not covered under New York's definition of a family or household member.

The Appellate Division affirmed the lower court's ruling. The Court held that although the Act affords certain types of relief only to individuals who meet the definition of a family or household member (concurrent jurisdiction, mandatory arrest), this does not mean that law enforcement agencies doe have the authority to investigate and maintain records of **all** reports of

domestic violence, including reports from individuals who are not members of the same family or household. The Court held that although the Act limits certain types of relief to certain victims, this does not mean that DCJS and law enforcement agencies do not have a legitimate interest in investigating and maintaining reports of domestic violence between individuals in other types of relationships. Furthermore, the Court cited to Executive Law § 837(15), which authorizes DCJS to distribute a domestic incident report pursuant to CPL §140.10 to all law enforcement agencies for the purpose of recording and investigating all alleged incidents of domestic violence regardless of whether or not an arrest is made.

FEDERAL DOMESTIC VIOLENCE AND FIREARM CASE LAW

Specific Elements of Interstate Domestic Violence - 18 U.S.C. 2261(a)(2)

U.S. v. Page - *167 F.3d 325, (C.A. 6 (Ohio) 1999*)
cert denied, Page v. U.S., 120 S.Ct. 496 (U.S. Nov 15, 1999) (No. 99 - 97) -
On a rehearing en banc, the 6th Circuit Court of Appeals upheld the conviction of the defendant under 18 U.S.C. S 2261 (a)(2), interstate domestic violence, by an equally divided court. Defendant had prohibited the victim from leaving his condominium by using mace. Over the course of a few hours, he beat the victim with a claw hammer, pipe wrench and his fists. He then forced her into his car and drove through West Virginia and into Pennsylvania, with the purpose of evading state prosecution. Four hours later, he delivered the victim to an emergency room in Pennsylvania. During the travel, the defendant did not physically touch the victim. However, he did threaten to push her out of the car and the victim's pre-existing injuries were aggravated due to the forced travel and the defendant prohibiting her from seeking immediate medical treatment.

The issue was whether the statute was intended to cover an attack preceding the interstate travel. This was an issue of first impression. The court held that the statute does reach situations where the beating of an intimate partner occurs prior to travel as long as it is integrally related to the subsequent forced travel across state lines. In addition, the court ruled that in this particular case, the aggravation of the victim's injuries as well as the threats to push her out of the car that occurred during the travel were further injuries caused during the travel. The dissent argued that the plain reading of the statute should only apply to injuries sustained during or as a result of such forced travel.

U.S. v. Helem , *186 F.3d 449 (C.A.4 (N.C.) 1999)*
Defendant was convicted of interstate domestic violence. Defendant prevented his estranged wife from leaving his apartment by choking her. While continuing to choke her, he made threatening remarks regarding death while striking her in the face numerous times. The victim lost consciousness. After regaining consciousness, the defendant released the victim and apologized. Defendant forced the victim to leave the apartment and he drove the victim south, refusing to stop at hospitals along the way although his wife was in considerable pain. Eventually, the defendant took his wife to a hospital after she started coughing up blood, whereby she was finally able to communicate to the physician's assistant what had happened to her. The victim suffered multiple bruises, two black eyes, fractured cheekbones, bruises on her neck, and numerous cuts and scratches.

Again, the issue was whether or not the "in the course or as a result of that conduct" requirement of interstate domestic violence, 18 U.S.C. 2261(a)(2), was satisfied. The 4th Circuit agreed with the court's ruling in *Page* by holding that physical violence occurring before interstate travel

begins can satisfy the "in the course or as a result of that conduct" requirement of 18 U.S.C. 2261(a)(2).

Constitutionality of VAWA

U.S. v. Bailey - *112 F.3d 758, (C.A.4 (W.Va.) 1997)*
Defendant was convicted of kidnapping and interstate domestic violence. Defendant inflicted a head injury on his wife in their home and then drove in out and out of the state, with his wife either in the trunk of his car or in their backseat, for a period of five days before taking her to a hospital in Kentucky for medical assistance. The defendant's wife suffered permanent injuries and massive impairment to her total body functioning. She will most likely never walk again but may eventually learn to feed herself and talk. Defendant was sentenced to life imprisonment, a concurrent 20 year sentence, five year term of supervised release and $40,000 in restitution.

The Court upheld the defendant's conviction. More specifically, the Court held that Section 2261(a) of the VAWA did not violate the Commerce Clause since it requires the crossing of a state line, which place the transaction "squarely in interstate commerce". In addition, the Court held that the kidnapping charge and the interstate domestic violence charge were not multiplicatus since they both require proof of an element that the other does not.

U.S. v. Gluzman, *953 F.Supp. 84 (S.D.N.Y. 1997)*
This case was brought against a woman for conspiring to commit the murder of her estranged husband. The defendant was convicted of conspiring to commit interstate domestic violence and for committing interstate domestic violence. Defendant conspired to and actually did travel from New Jersey to New York with the intent to murder her estranged husband, and once in New York, she did murder him with the assistance of a friend.

The Court reviewed the legislative history of Section 2261 in order to decide on the defendant's argument that Congress exceeded its authority to legislate under the Commerce Clause when it enacted Section 2261. The defendant argued that interstate travel in furtherance of spousal abuse is not an activity affecting interstate commerce and Section 2261 does not regulate a commercial activity or contain a requirement that the activity be connected to interstate commerce.

The Court held that Congress had a rational basis for concluding that the regulation of interstate domestic violence was "reasonably adapted to an end permitted by the Constitution". Furthermore, the Court concluded that the statute does have an identifiable interstate nexus, because it regulates conduct in interstate commerce, not conduct affecting interstate commerce since it requires the actual crossing of a state line with the intent to commit domestic violence and the actual commission of that violence.

U.S. v. Lankford III., *196 F.3d 563, (C.A. 5 (Tex.) 1999)*
Defendant appealed from his conviction by a jury of kidnapping, interstate domestic violence, and using a firearm during and in relation to the commission of those crimes. The defendant forced his estranged wife into a car, by threatening to kill her and then himself with a gun that was visible to his estranged wife. The defendant handcuffed his wife's wrist to the gear shift and continuously warned her not to seek assistance from anyone. The defendant drove his estranged wife from Kansas to Oklahoma, forced his estranged wife to spend the night in Oklahoma with him and he forced her to have sex with him repeatedly. Although the victim was not handcuffed for the entire trip, she never attempted to cry out for help or flee due to the defendant's continuous threats to hurt her and himself if she did so.

The Court affirmed the lower court's decision and rejected the numerous arguments raised by the defendant. As for the defendant's specific challenge to the interstate domestic violence charge, the defendant argued that there was insufficient evidence to establish that he crossed a state line with intent to injure, harass or intimidate his spouse. In addition, he argued that the interstate domestic violence section of the VAWA was unconstitutional. The court held that the jury chose to give more credibility to the victim's testimony than the defendants and that her testimony did not assert facts that she could not have observed nor events that could not have occurred. In addition, the court found that there was sufficient evidence to support the government's case that the defendant crossed state lines with the intent to harass, injure or intimidate his wife and that during the course of or as a result of such travel, he did intentionally commit a crime of violence and caused his wife bodily injury. Lastly, the court held that the interstate domestic violence section of the VAWA did not violate the Commerce Clause.

U.S. v. Ruggles, *2000 WL 221970 (6th Cir.(Ky))*
Defendant was convicted by a jury of interstate domestic violence, two counts of interstate stalking, and interstate violation of a protective order. The facts supporting the charges occurred throughout a four month time period (April 1997 - July 1997) and ranged from traveling across state lines to threaten the victim and various relatives of the victim, using fraud to force the victim to drive across state lines to an acquaintance's home where he then forced her to engage in sexual activities with the acquaintance, traveling across state lines in order to ransack the victim's home and leave a knife in her door and contacting and confronting the victim in clear violation of a protective order.

The Court upheld the defendant's conviction on all charges finding that the Government presented sufficient evidence to establish all elements of the above charges and a rational juror could have found that the defendant committed the essential elements of the crimes charged.

FIREARM OFFENSES

A. Case Law on 18 U.S.C. Section 922(g)(8*)*
Recent federal cases that have upheld the constitutionality of 18 U.S.C. Section 922 (g)(8) include *U.S. v. Baker*, *U.S. v. Visnich*, *U.S. v. Henson*, *U.S. v. Spruill* , *U.S. v. Wilson* and *U.S. v.*

Reddick. Thus far, only one district level court in *U.S. v. Emerson* struck down 18 U.S.C. Section 922 (g)(8) as unconstitutional. The following provides the brief facts and arguments in each case. Since most of the cases involve the same constitutional arguments by the defendants, these challenges and the responses by the courts to these main challenges are summarized thereafter.

U.S. v. Baker, *197 F.3d 211(C.A. 6 (Ky) 1999), cert denied by Baker v. U.S., 120 S.Ct. 1262, (U.S. Feb. 28, 2000) (No. 99-8027)*
Defendant was convicted of unlawfully possessing a firearm while subject to a domestic violence protective order. On appeal, the defendant argued that the statute was unconstitutional and that knowledge of the law is a required element of 18 U.S.C. 922(g)(8). **Defendant's conviction was affirmed.**

Defendant had a history of committing domestic violence as evidenced by the three separate protection orders that had been issued against him by three different girlfriends. When defendant accidently shot himself, police were alerted to the defendant's possession of firearms while subject to multiple protection orders.

U.S. v. Wilson, *159 F.3d 280, (C.A. 7 (Ill.) 1998), Rehearing and Suggestion for Rehearing En Banc denied Nov. 16, 1998, cert denied by 119 S.Ct. 2371 (U.S. June 21, 1999) (No. 98-8724)*
Defendant was convicted by a jury of unlawfully possessing a firearm while subject to an order of protection in violation of 18 U.S.C. 922(g)(8). Defendant appealed. Among other things, defendant challenged the constitutionality of the statute, claiming it violated the Commerce Clause the Tenth Amendment and his due process rights under the 5th Amendment. **Defendant's conviction was affirmed.**

During the running of a routine check on the defendant's drivers license by a state trooper, the trooper learned of an outstanding arrest warrant on the defendant for failure to appear in court. The defendant was eventually placed under arrest and during an inventory search of the defendant's truck, the trooper found a shotgun and a rifle in defendant's vehicle and a loaded hand-gun in the defendant's fanny pack. At the time of defendant's arrest, he was subject to an order of protection arising from divorce proceedings initiated by his now ex-wife. The defendant had been informed about the order of protection by the Judge and had agreed to its terms.

U.S. v. Visnich, *65 F. Supp.2d 669 (N.D. Ohio, 1999)*
Defendant was charged with knowingly possessing firearms and ammunition in and affecting interstate commerce while subject to a domestic relations restraining order in violation of 18 U.S.C. 922(g)(8). **Defendant's motion to dismiss the charge was denied**

A domestic relations restraining order was issued against the defendant in July of 1998 which prohibited the defendant from abusing his wife and daughters and mandating that he stay away from them. Defendant was also prohibited from possessing, using, carrying or obtaining any deadly weapons. In April of 1999, defendant was arrested for breaking into the home of a

friend's ex-wife to obtain some personal items for the friend. A subsequent search of defendant's vehicle by the police produced 16 various firearms and other ammunition.

U.S. v. Spruill, *61 F. Supp.2d 587 (W.D. Texas, 1999)*
Defendant's motion to dismiss the indictment charging him with violation of 18 U.S.C. 922(g)(8) was denied. Defendant argued that the statute violated his due process rights as well as his constitutional right to bear arms. **Defendant's motion was denied.**

Defendant's wife filed for a divorce and a restraining order. The A.D.A. handling the restraining order application contacted the defendant to notify him of this application. The Defendant agreed to the entry of the order and signed the order in the A.D.A.'s office. Since the defendant could not read, the A.D.A. explained the contents of the restraining order to the defendant. However, he did not inform the defendant that he could not possess firearms because he was unaware of this federal law and he had never heard a party admonished to this effect. Defendant agreed to the order even though the A.D.A. informed him he could hire counsel, object to the order and appear before a judge on the issue. Thus, the defendant never appeared before a judge, no hearing was ever held and the order did not make a finding that family violence ever occurred.

Defendant was arrested by federal agents because his friend had contacted authorities due to the defendant informing him that he was going to shoot his estranged wife. Federal agents had the friend set up a transaction whereby they would exchange guns. After taping the phone conversation between the defendant and the friend and witnessing the exchange, federal agents arrested the defendant.

U.S. v. Henson, *55 F.Supp.2d 528 (S.D. W. Va 1999)*
Defendant moved to dismiss the indictment charging him with violation of 18 U.S.C. 922(g)(8), alleging that the statute violated the 2nd Amendment and the 5th Amendment. **The motion was denied.**

A final order of protection was issued against defendant prohibiting him from harassing, stalking, and threatening his ex-wife. Soon thereafter, the defendant drove to the residence of his ex-wife's boyfriend and chased the couple into the boyfriend's apartment building. Police were called and the defendant was arrested several blocks from the apartment building. He had a loaded .22 caliber revolver in his vehicle upon his arrest.

Importantly, in this case the defendant was also a convicted felon. He had been convicted of 2nd degree arson in 1990. The court relied on this fact when addressing the defendant's constitutional due process challenge, claiming that this case is distinguishable from *Emerson* since the defendant was already a convicted felon, who had prior notice of his loss of the right to bear arms.

U.S. v. Emerson, *46 F.Supp.2d 598 (N.D.Texas, 1999)*
Defendant moved to dismiss an indictment charging him with a violation of 18 U.S.C. 922(g)(8). **The Court granted the motion holding that the statute violated the defendant's 5th Amendment due process rights to be subject to prosecution without proof of knowledge that he was violating the statute and his 2nd Amendment right to bear arms.**

Defendant's wife filed a petition for divorce and an application for a temporary restraining order. The application for the TRO sought to preclude the defendant from making certain financial transactions and from making threatening communications or actual attacks on his wife during the pendency of the divorce proceedings. At the hearing on the TRO, the defendant appeared pro se, and the defendant's wife testified to the defendant's threats against a man with whom she had been having an affair and a TRO was issued. However, no findings were made that the defendant had threatened violence against any member of his family. Additionally, the defendant was not informed that in accordance with federal law, he could not possess firearms while subject to the order of protection.

U.S. v. Reddick, *203 F.3d 767 (C.A. 10 (Okl.) 2000)*
Defendant was found guilty of violating 18 U.S.C. 922(g)(8) and appealed arguing the statute violated his due process rights and the court incorrectly failed to require proof that he intended to harm the person who received the restraining order. The court affirmed the conviction.

After attempting to strangle his estranged wife, defendant's wife filed for a restraining order. After a hearing on the order, the district court issued the order which mandated that the defendant stay away from his wife as well as stop harassing, threatening and stalking her. However, the court did not advise defendant of the federal law prohibiting him from possessing any firearms or ammunition while the order was in effect and this warning was not contained within the written order. While the order of protection was still effective, the defendant approached his wife at her work and informed her that he had a firearm in his vehicle. He threatened to kill himself in front of her if she called the police. When police were called, defendant fled the scene and was later apprehended with the firearms.

Summary of Main Constitutional Arguments Against 18 U.S.C. 922 (g)(8) and The Majority Response

1) Argument that the Statute Violates Defendant's 5th Amendment Due Process Rights

In the majority of the cases summarized above, the defendants argued that convictions under 18 U.S.C. 922(g)(8) violate their due process rights since they did not have notice that federal law prohibits the possession of firearms while subject to an order of protection. All of the circuit courts have rejected this argument. Only two district court decisions, *Emerson* and *Ficke*, have held that the defendant's due process rights were violated. These two decisions cite the lengthy dissent from Judge Posner in *Wilson* whereby he wrote that "922(g)(8) is "a trap that sprang on

the defendant as he engaged in conduct he never would have suspected was criminal." Judge Posner recommends placing printed warnings on all protective orders in order to ameliorate this due process issue.

However, the majority of courts have adhered to the old legal maxim - "ignorance of the law is no excuse." and have refused to find that 18 U.S.C. 922(g)(8) should be an exception to this rule. When rejecting this due process argument, the court in *Baker* specifically found that even if orders of protection do not carry legal warnings regarding 18 U.S.C. 922 (g)(8), the defendant's due process rights are still not violated. The *Baker* court stated, "The fact that Baker had been made subject to a domestic violence protection order provided him with notice that his conduct was subject to increased government scrutiny. Because it is not reasonable for someone in his position to expect to possess dangerous weapons free from extensive regulation. "

2) Argument that the Statute Violates the Second Amendment Right To Bear Arms

There is considerable debate about whether or not the 2nd Amendment guarantees an individual or collective right to bear arms. As mentioned above, most of the courts have relied upon decisions made by circuit Courts of Appeal that have found only a collective right to bear arms exists. For example, the courts cite the Sixth Circuit's decision in *U.S. v. Warin* when addressing this argument. The *Warin* court specifically stated, "It is clear that the Second Amendment guarantees a collective rather than an individual right." The *Warin* court found it inconceivable that the 2nd Amendment conferred an individual right to bear arms.

The Court in *Spruill* discusses this issue in detail summarizing the only Supreme Court decision on this issue this century - the 1939 case of *U.S. v. Miller*. In *Miller*, the Supreme Court unanimously reversed the District Court's decision that the 1934 Firearms Act violated the 2nd Amendment. However, the *Miller* decision did not specifically hold that the 2nd Amendment permits the federal government to ban individual possession of all weapons. In light of the debate, most courts have held that until there is a clear opinion from the Supreme Court on this issue, they will follow the majority's opinion that the 2nd Amendment does not prohibit the federal government from imposing some restrictions on private gun ownership.

However, one must note that the decision in *Emerson* involved a lengthy discussion on this issue and it held that 18 U.S.C. 922(g)(8) did violate the 2nd Amendment right to bear arms.

3) Argument That The Statute Violates The Commerce Clause

Courts have found that Congress did not violate the Commerce Clause when enacting 922(g)(8) because the statute does contain a jurisdictional element connecting the statute to interstate commerce. ("individuals subject to domestic violence protection orders can not ship or transport in interstate or foreign commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce") The Courts have unanimously found that the inclusion of this jurisdictional element in the statute satisfies the minimal nexus to interstate commerce needed to pass constitutional muster under the Commerce Clause. See *U.S. v. Myers,* 187 F.3d 644 (8th Cir. 1999)

4) Argument that the Statute Violates the Equal Protection Clause
The *Baker* court held the statute does not violate equal protection since it does not infringe upon the exercise of a fundamental right or disadvantage a suspect class. Defendants have no personal right to possess a weapon (2nd Amendment guarantees a collective right - See *U.S. v. Warin*, 530 F.2d 103 (6th Cir. 1976)) and individuals subject to protective orders are not a suspect class. Thus, the statute only warrants a rational basis review whereby as long as it is rationally related to a legitimate state interest - it will pass constitutional muster. The *Baker* court specifically stated, "We believe 922(g)(8) is rationally related to the government's legitimate interest in curtailing the incidence of domestic violence. The statute reflects Congress's determination that persons subject to domestic violence protection orders pose an increased threat to the safety of their intimate partners and children."

B. Summary of Case Law on 18 U.S.C. 922(g)(9)

Recent federal cases that have upheld the constitutionality of 18 U.S.C. Section 922 (g)(9) include *U.S. v. Lewitzke*, *Gillespie v. City of Indianapolis*, *U.S. v. Boyd* and *U.S. v. Beavers.* Only one federal district court, in *U.S. v .Ficke,* has struck down 18 U.S.C. Section 922 (g)(9) as unconstitutional. Since the constitutional arguments are similar to the above arguments against 18 U.S.C. 922(g)(8), the following provides only the case cites and a brief synopsis of the case.

Gillespie v. City of Indianapolis, *185 F.3d 693 (C.A. 7 (Ind.) 1999), cert denied by 120 S.Ct. 934, 145 L.Ed.2d 813 (U.S. Jan 8, 2000) (No.99 - 626)*
A city police officer sued the city and sought injunctive relief to protect his continued employment. Defendant was a police officer who was convicted of a qualifying misdemeanor crime of domestic violence in 1995. Because of this conviction, the Indianapolis Police Department terminated the defendant. Additionally, he challenged the constitutionality of 18 U.S.C. 922(g)(9) by arguing that the statute violated the Tenth Amendment, the equal protection rights guaranteed by the 5th Amendment, the Second Amendment and that Congress exceed its authority under the Commerce Clause when enacting this state.

The Court rejected all of defendant's arguments and affirmed the lower court's decision to dismiss the action.

U.S. v. Beavers, *2000 WL 174861 (6th Cir. (Mich.)), petition for cert filed (Apr 10, 2000) (No.99-9004)*
Defendant plead guilty to possession of firearms after a conviction for a misdemeanor crime of domestic violence. Subsequently, the court denied defendant's motion to withdraw his guilty plea and dismiss the indictment. Defendant appealed claiming that 18 U.S.C. 922(g)(9) violated his due process rights.

The Court affirmed the lower court's decision. When addressing the due process argument, the court held that the defendant's conviction on a domestic violence offense sufficiently placed him on notice that the government might regulate his ability to own or possess a firearm.

U.S. v. Boyd III, *52 F. Supp.2d 1233 (D.C. Kansas, 1999)*
Defendant motioned to dismiss the indictment charging him with 18 U.S.C. 922 (g)(9). The motion was denied. The Court held that 18 U.S.C. 922 (g)(9) did not violate the Commerce Clause, the Tenth Amendment, the Ex Post Facto Clause or the Second Amendment.

U.S. v. Lewitzke, *176 F.3d 1022 (7th Cir., (Wisc.) 1999)*
Defendant was convicted by a jury of 18 U.S.C. 922 (g) (9). The Court affirmed the conviction holding that 18 U.S.C 922 (g)(9) did not violate equal protection.

U.S. v. Mitchell, *2000 WL 309298 (4th Cir.(Va.) 2000*
Defendant challenged his conviction under 18 U.S.C. 922 (g) (9) claiming that the government must prove he knew that possession of a firearm was illegal, the statute violated the Ex Post Facto Clause and the due process clause of the 5th Amendment. The court rejected all of defendant's arguments and affirmed the conviction.

U.S. v. Ficke, *58 F.Supp.2d 1071, (D. Neb. 1998)*
The defendant moved to dismiss the indictment charging his with violating 18 U.S.C. 922 (g)(9). **The district court granted the motion and held that the statute violated the defendant's right to notice and fair warnings under the due process clause.**

In 1994, defendant entered a pro se plea of no contest to a charge of misdemeanor assault in a domestic violence incident. Defendant was sentenced to six months probation and ordered to complete anger control classes. In 1998, defendant was arrested for an alleged assault against his wife and the police confiscated three firearms at the scene.

Based on the rationale in *Emerson* and Judge Posner's dissent in *Wilson* and the fact that the defendant was convicted of his domestic violence offense before the passage of this specific gun control amendment, the court held that defendant had no notice of this "obscure, hard to find provision, nor would he have had a reasonable opportunity to discover it" and thus his due process rights were violated. (Compare *Beavers* holding the fact that defendant was convicted of a domestic violence offense should put him/her on notice that the government might restrict their firearms possession)

U.S. v. Meade, *175 F.3d 215 (C.A. 1 (Mass), 1999)*
Defendant was convicted of both 18 U.S.C. 922 (g)(8) and 922(g)(9). Defendant appealed claiming that statute violated the 10th Amendment and the due process clause. Additionally, the defendant argued that under 18 U.S.C. 922 (g)(9), the statute requires as an element of the underlying misdemeanor crime of domestic violence that there be a domestic relationship between the misdemeanant and the victim.

The court affirmed both convictions. Importantly the court held that the defendant's state misdemeanor conviction for assaulting his wife was a misdemeanor crime of domestic violence within the meaning of the statute. Just because the state statute for assault does not have a relationship element in the statute does not preclude the misdemeanor assault conviction from being the predicate offense under 18 U.S.C. 922 (g)(9).

Fraternal Order of Police v. U.S., *173 F.3d 898 (D.C. Cir. 1999) (FOP II),), cert. denied by 120 S.Ct. 324, (October 12, 1999)*

The District of Columbia Circuit Court held that a rational basis supported the exclusion of the "official use" exemption from the Section 922(g)(9). While recognizing that the Gun Control Act allows law enforcement personnel convicted of a felony to possess a firearm for official use while prohibiting the same firearm possession for a domestic violence misdemeanant, the Court found that a "special focus on domestic violence misdemeanants, as opposed to other misdemeanants, was not irrational." The Court also rejected substantive due process, Second Amendment, Tenth Amendment and Commercial clause challenges.

APPENDIX D

HOW TO DRAFT A PETITION

(*Notes taken at a NYS Coalition Against Domestic Violence training by Jill Swingruber, Esq.)*

BASIC GUIDELINES FOR ALL PETITIONS

- Be **Concise**, **Accurate** and **Persuasive**.
- Use the **Correct Forms** - ask if the county has its own modified forms or if they use the Unified Court Administration forms.
- No second chance to make a **first impression**.
- Get **legal assistance** - its best if an attorney prepares the Petition.
- Use **legal writing skills**.
- **Heightened standard** and time frame for Custody Petitions.

FAMILY OFFENSE PETITION (Order of Protection Request)

To increase the likelihood that a victim's Petition will be granted, the Petition should contain the following points: (Following this guideline is a sample completed petition).

1. **History of Abuse.**
   This can be a summary but attaching supporting documents will help explain the history.

2. **Information on Aggravating Circumstances.**
   Include information consisting of:
   - batterer's physical or serious physical injury to the victim;
   - batterer's use of a dangerous instrument against the victim;
   - batterer's history of repeated violations of orders of protection;
   - the batterer's prior convictions for crimes against the victim;
   - exposure of any family member or household member to physical injury by the batterer;
   - like incidents, behavior, and occurrences, which to the court, constitute an immediate and ongoing danger to the victim, her family or household.
   - *any factors which make the victim's situation unique.*

NOTE: if the existence of aggravating circumstances is proven, either when the Petition is filed or when the case is decided, the following can be ordered: an immediate arrest warrant instead of a summons and an order of protection up to 3 years.

NOTE: if the victim indicates that other family or household members have been exposed to the abuse, and if these family or household members are her children, the victim may be charged with neglect by the Dept. of Social Services for allowing her children to be subjected to a domestic violence household. Therefore, it is advisable to have an attorney experienced in these matters assist the victim with the Petition.

3. **Family Offenses**
   List the family offenses that were committed.

4. **Relief Sought**
   Provide specifics about what the victim is seeking in the order of protection.

5. **Corroborating Evidence**
   Include photos of injuries, medical records, previous orders of protection, etc.

PRIMARY PETITIONS

The following information is based on the standard Unified Court Administration forms. Victims should verify with their county whether or not the county uses their own forms or the UCA forms. A copy of the UCA form follows this guideline.

FAMILY OFFENSE (Order of Protection)

1. Initial request.
   On Question #3, the Petitioner is asked to circle the applicable family offense crimes committed. The Petitioner should circle as many as apply.

   On Question #5 which refers to aggravating circumstances, if the Petitioner is seeking a 3 year order this question should be completed.

   Questions #8, 9 and 10 pertain to firearms and should be completed.

- Violation petition.
  For Questions #2 and 3, the Petitioner may just write "see attached" and attach any previous orders of protection. If a police report was filed, it should be attached.

  Remember to use key words, topic sentences and detailed but succinct explanations.

CUSTODY

1. Initial request.
   Petitioners should skip Question #10, since this refers to modifications.

2. Modification request.
   There is no separate form for modifications. The initial request form is used, only this time the Petitioner completes Question #10 and 11.

   NOTE: although the modification request form asks for a change in circumstances, the legal standard is actually a *"substantial and significant"* change in circumstances. Therefore, the Petitioner should be very specific about the change in circumstances.

SUPPORT

Please note that the initial request and modification request have now been separated into two separate forms.

F.C.A. 812,818,821

Form 8-2
(Family Offense
Petition) 12/97

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

.....

Docket No: _____

Mary Public DOB: 2/2/75, Petitioner

-against-

P E T I T 1 0 N
TOP

John Q. Public DOB: 3/3/74, Respondent

.....

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that (Delete inapplicable provisions):

1. Petitioner resides at 123 Arsenal St. Rochester, NY. 14601. County of Monroe. State of New York. (Other - specify): and is the spouse of Respondent.

(Petitioner is a representative of _____ a duly authorized agency, association, society or institution which maintains its offices at

_____

(Petitioner is a peace officer of the (County) (City) (Town) of _____ to wit, _____.

2. Respondent resides at 123 Arsenal St. Rochester, N.Y. 14601, County of Monroe. State of New York. (Other - specify):

3. (Upon information and belief). (O)on or about the 12th day of May, 1999, at approximately 8 p.m. at 123 Arsenal St. Rochester, N.Y., the Respondent committed an act or acts which constitute Menacing 3rd, Harassment 2nd toward Mary Public, who is a spouse of said respondent, in that the Respondent started an argument which he escalated into physical violence upon petitioner. Respondent repeatedly slapped the petitioner three times across the face with an opened hand. The respondent's slaps and hits of the petitioner caused the petitioner to suffer redness of the face, a swollen cheek and a cut lip. Respondent also grabbed petitioner around the throat with one hand and attempted to choke petitioner. Petitioner was able to push respondent away. Respondent said that he would use his gun to shoot the petitioner in his verbal threats. Respondent smelled of alcohol and was observed drinking beer prior to the incident by the petitioner. The three children of the petitioner and the respondent were present when the domestic violence incident occurred. Respondent intimidated petitioner into not calling for police assistance by blocking her access to the phone and taking the phone out of service. Petitioner reports a lengthy history of domestic abuse by respondent that includes respondent breaking petitioner's arm. Wherefore, petitioner fears for her safety and requests that a temporary order of protection be issued.

4(a). The following are the names, ages and relationships to the Petitioner and/or Respondent of each and every child in the family household:

Name of Child	Age/DOB	Relationship to (Petitioner)/(Respondent)
John Public, Jr.	3/4/96	son/son
Lucy Public	8/1/98	daughter/daughter

5. (Upon information and belief) The following aggravating circumstances, if any, are present in this case ("Aggravating circumstances" shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against petitioner by the respondent, a history of repeated violations of orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent, or the exposure of any family or household member to physical injury by the respondent, and like incidents, behavior and occurrences which constitute an immediate and ongoing danger to the petitioner or any member of the petitioner's family or household):

Respondent broke the petitioner's arm in 1998 during a domestic assault in which he repeatedly punched the petitioner in the face with a closed fist, slammed her arm onto the kitchen counter, pulling her hair and pounding her head into the counter and knocking her to the floor. She also suffered severe bruising, lumps on the head, a blackened eye and soreness with the broken arm, and required emergency medical attention at a hospital. Respondent pushes and shoves petitioner during arguments, as well as, uses finger pokes into her body and head areas, which petitioner finds to be intimidating. Respondent abuses alcohol: does not have a treatment history. Respondent references his firearm during verbal arguments which petitioner interprets as meaning he would use it to hurt her. The children are regularly exposed to respondent's verbal and physical abuse towards petitioner.

6. (Upon information and belief, the following criminal, matrimonial or Family Court proceeding(s) involving the respondent (has) (have) been filed (indicate the court, date and status): petitioner is considering pursuing Assault 3rd, Harassment 2nd and Menacing 3rd criminal charges in Rochester City Court; petitioner to consider filing Custody/Visitation, Paternity, Child Support petitions in this Court.

7. Indicate whether a previous application has been made to any court or judge for the relief requested herein and, if so, the relief, if any, granted and the date of such relief. none at this time

8. (Upon information and belief) Respondent is licensed or has a license application pending to carry, possess, repair, sell or otherwise dispose of the following firearms (if known, specify type of firearms, type of license(s), date of issuance of license(s) and expiration date(s), whether license has been suspended or revoked and, if so, the date of such action and, if not currently licensed, whether license application is pending): pistol permit-.22 caliber-handgun.

9. (Upon information and belief) Respondent is in possession of the following licensed and unlicenced firearms (specify number and type of firearms and whether licensed or unlicenced. if

known): .22 caliber handgun

10. (Upon information and belief) There is a substantial risk that the Respondent may use or threaten to use a firearm unlawfully against Petitioner (and members of the Petitioner's family or household) for the following reasons: past verbal threats to use it; waves it around during arguments; references it during arguments

a) (Upon information and belief) Respondent has been convicted of the following violent felony offenses (specify conviction charge and year of conviction, if known): nothing known

b) (Upon information and belief), Respondent has previously been found to have willfully failed to obey an order of protection and such willful failure involved: (infliction of serious physical injury) or (use or threatened use of a deadly weapon or dangerous instrument) or (and) (behavior constituting a violent felony offense) as follows (specify finding or conviction and year, if known; delete inapplicable provision(s): nothing known

c) (Upon information and belief) The following facts and circumstances create a substantial risk that Respondent may use or threaten to use a firearm unlawfully against Petitioner or members of Petitioner's family or household: not certain but fearful-see #10

WHEREFORE, Petitioner prays:

(a) that the Respondent be adjudged to have committed the family offense alleged;

(b) that the Court enter an order of protection, specifying conditions of behavior to be observed by the Respondent in accordance with Section 842 of the Family Court Act: and for such other and further relief as to the Court seems just and proper.

1. vacate the residence with police assistance
2. stay totally away from the petitioner wherever she may be including residence, job site, etc.
3. restrict communication with petitioner to phone calls about child related matters only
4. temporarily deny child visitation until the completion of a mental health evaluation and a substance abuse evaluation deem visits to be safe
5. complete a substance abuse evaluation and follow through on recommendations from it
6. complete a mental health evaluation and follow through on recommendations from it
7. complete the batterer's education program
8. surrender all of his firearms to the police
9. revoke respondent's pistol permit
10. custody/residence of the children be with the petitioner

1. “Violent felony offenses" include: murder. kidnapping in the first and second degrees; arson in the first and second degrees; manslaughter in the first degree; rape in the first degree; course of sexual conduct against a child in the first and second degrees; sodomy in the first degree; aggravated sexual abuse in the first and second degrees; sexual abuse in the first degree; burglary in the first and second degrees; robbery in the first and second degrees; criminal possession of a dangerous weapon in the first, second and third degrees; criminal use of a firearm in the first and second degrees; criminal sale of a firearm in the first and second degrees; criminal sale of a firearm with the aid of a minor; aggravated assault upon a police officer; intimidating a victim or witness in the first and second degrees; assault in the first and second degrees; and attempts of any of the above offenses except assault in the second degree, sexual abuse in the first degree, criminal sale of a firearm in the second degree, criminal sale of a firearm with the aid of a minor, intimidating a witness in the second degree and criminal possession of a weapon in the third degree (unless pled guilty as a lesser included offense of the substantive crime). See Penal Law 70.02(l).

2. "Serious physical injury" means injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ. See Penal Law 10.00(10).

3. "Deadly weapon" means any loaded weapon which may be shot, readily capable of producing death or other serious physical injury, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, or metal knuckles.

4. "Dangerous instrument" means any instrument, article or substance, including a vehicle, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury. See Penal Law 10.00(12).(13)

5. See footnote 1above

APPENDIX E

ORDER OF PROTECTION "VALIDITY" CHECKLIST

For a order of protection to be considered "valid" under federal and state Full Faith and Credit provisions, judges, attorneys and advocates should ensure the following items are listed on the order of protection:

1. Statement that 18 USC § 2265 requirements are met;

2. Statement to respondent/defendant that failure to comply with the order may result in his/her arrest in the issuing state and other states;

3. Statement that respondent/defendant was given actual notice of the order (specifics about how the order was served);

4. Statement that respondent/defendant was provided a hearing at which respondent/defendant had opportunity to be heard regarding the petition/order;

5. Typed name of judicial officer;

6. Contact number for the issuing court;

7. Statutory citation from state code;

8. Whether the order is an ex-parte or permanent order;

9. Issuing date of order;

10. Expiration date of order;

11. Statement that respondent/defendant refrain from assaulting, harassing, intimidating, threatening, or otherwise interfering with the victim of the alleged offense and such members of the victim's family or household;

12. Specifically name who is protected by the order (if any children are protected, name the children and state their ages);

13. Specifically state the type of activity the batterer is to refrain from doing;

14. Specifically state any gun restrictions and/or whether any guns were removed;

15. UCCJA applicability and whether other custody orders apply.

16. Statement that 18 U.S.C. § 922 (g)(8) requirements are met. (For Family Offense Orders)

ORI No:_____Court County of_____
Order No:_____(address)_____State of New York

ORDER OF PROTECTION
C.P.I. 530. 12 (*Family Offense)*

Present Hon._____

_____ Docket No. _____
People of the State of New York Indictment No._____

- against - ❒ Ex Parte
(check if applicable)

_____
Defendant Part_____Charges _____

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST, CRIMINAL PROSECUTION, AND AFTER COURT HEARING, RESULT IN YOUR INCARCERATION FOR UP TO FOUR YEARS FOR CONTEMPT OF COURT. IF THIS IS A TEMPORARY ORDER OF PROTECTION AND YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND CONTINUE IN EFFECT UNTIL YOU REAPPEAR IN COURT.

❒**TEMPORARY ORDER OF PROTECTION** - Whereas good cause has been shown for the issuance of a temporary order of protection [as a condition of ❒ recognizance ❒ release on bail ❒ adjournment in contemplation of dismissal]

❒**ORDER OF PROTECTION** - Whereas defendant has been convicted of [specify crime or violation]

And the Court having made a determination in accordance with section ___of the Criminal Procedure Law,
It is hereby ordered that the above-named ☐ plaintiff/petitioner ☐ defendant/respondent observe the following conditions of behavior: **Check Paragraphs Which Apply**

❒Stay away from ❒[name(s) of protected persons] _____
and/or from the ❒ home of _____
❒ school of _____
❒ business of _____
❒ place of employment of _____
❒ other _____

❒ Abstain from (offensive conduct _____
against [specify child(ren), parent's), custodial person(s)] _____
_____

❒ Refrain from assaulting, harassing, intimidating, threatening or otherwise interfering with the victim or victims of the alleged offense and such members of the family or household of such victim or victims as shall be specifically named:
_____

❒ Permit [specify parent(s)] _____ to visit with [specify child(ren)] _____ during the following periods of time [specify] _____

❒ Specify other conditions _____

❒ Defendant is directed to surrender immediately to _____ (local law enforcement agency that will accept firearms) any and all firearms, rifles, or shotguns.

Defendant is further prohibited from purchasing, acquiring or possessing any firearms, rifles or shotguns for the duration of this order. The possession, shipping, transportation, or receipt of any firearm, rifle or shotgun, by the above named defendant, while this order remains in effect is a felony under federal law punishable by up to ten years in prison and/or a $250,00 fine. 18 U.S.C. § 922 (g)(8).

It is further ordered that this order of protection shall remain in effect until_____

DATED_____ _____

JUDGE/JUSTICE
COURT (COURT SEAL)

❒ Defendant advised in Court if issuance of Order.

Received by Defendant _____
(signature)

❒ Service Executed Date: _____ Time: _____

The Criminal Procedure Law provides that presentation of a copy of this order of protection to any Police officer or peace officer acting pursuant to his or her special duties shall authorize and in some situations may require, such officer to arrest a defendant who has violated its terms and to bring him or her before the Court to face whatever penalties may be imposed therefore.

Federal law provides that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if it is established that the person against whom the order is sought has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C. 2265).

ORI No:_____Court County of_____
Order No:_____(address)_____State of New York

ORDER OF PROTECTION
C.P.I. 530. 13 (Non-Family Offense)

Present Hon._____

_____ Docket No. _____
People of the State of New York Indictment No._____

- against - ❒ Ex Parte
(check if applicable)

_____
Defendant Part_____Charges _____

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST, CRIMINAL PROSECUTION, AND AFTER COURT HEARING, RESULT IN YOUR INCARCERATION FOR UP TO FOUR YEARS FOR CONTEMPT OF COURT. IF THIS IS A TEMPORARY ORDER OF PROTECTION AND YOU FAIL TO APPEAR IN COURT WHEN YOU ARE REQUIRED TO DO SO, THIS ORDER MAY BE EXTENDED IN YOUR ABSENCE AND CONTINUE IN EFFECT UNTIL YOU REAPPEAR IN COURT.

❒**TEMPORARY ORDER OF PROTECTION** - Whereas good cause has been shown for the issuance of a temporary order of protection [as a condition of❒ recognizance ❒ release on bail ❒ adjournment in contemplation of dismissal]

❒**ORDER OF PROTECTION** - Whereas defendant has been convicted of [specify crime or violation]

And the Court having made a determination in accordance with section ___of the Criminal Procedure Law,
It is hereby ordered that the above-named □ plaintiff/petitioner □ defendant/respondent observe the following conditions of behavior: **Check Paragraphs Which Apply**

❒Stay away from ❒[name(s) of protected persons] _____
and/or from the ❒ home of _____

❒ school of _____
❒ business of _____
❒ place of employment of _____
❒ other _____

❒ Refrain from assaulting, harassing, intimidating, threatening or otherwise interfering with the victim or victims of the alleged offense and such members of the family or household of such victim or victims as shall be specifically named [specify victims or persons] _____
_____

❒ Specify other conditions_____
_____

❒ Defendant is directed to surrender immediately to _____
(local law enforcement agency that will accept firearms) any and all firearms, rifles, or shotguns.

❒ Defendant is further prohibited from purchasing, acquiring or possessing any firearms, rifles or shotguns for the duration of this order.

It is further ordered that this order of protection shall remain in effect until_____

DATED_____ _____

JUDGE/JUSTICE
COURT (COURT SEAL)

❒ Defendant advised in Court if issuance of Order.

Received by Defendant _____
(signature)

❒ Service Executed Date: _____ Time: _____

The Criminal Procedure Law provides that presentation of a copy of this order of protection to any Police officer or peace officer acting pursuant to his or her special duties shall authorize and in some situations may require, such officer to arrest a defendant who has violated its terms and to bring him or her before the Court to face whatever penalties may be imposed therefore.

Federal law provides that this order must be honored and enforced by state and tribal courts, including courts of a state, the District of Columbia, a commonwealth, territory or possession of the United States, if it is established that the person against whom the order is sought has or will be afforded reasonable notice and opportunity to be heard in accordance with state law sufficient to protect that person's rights (18 U.S.C. 2265).

APPENDIX F

STATE & FEDERAL FIREARMS CHECKLIST

Firearm Provisions in State and Federal Law	Official Use Exemption?	When does restriction on possession or transfer end?
18 U.S.C. 922 (g)(8) and (d)(8) Possession of a firearm while subject to an Order of Protection and Transfer of a firearm while subject to an Order of Protection	**YES**, but only while on-duty. Personal firearms do not fall within this exemption.	With surrender of firearms, once the order is lifted, firearms will be returned.
18 U.S.C. 922 (g)(9) & (d)(9) Possession of a firearm after conviction of Misdemeanor crime of domestic violence and Transfer of a firearm to person convicted of a Misdemeanor crime of domestic violence	**NO**, law enforcement officers and military personnel who have been convicted of a qualifying misdemeanor will not be able to possess or receive firearms for any purpose, including fulfilling their official duties. Statute is retroactive. *Qualifying misdemeanor= must have as an element the use or attempted use of physical force or the threatened use of a deadly weapon.	Once convicted of a qualifying misdemeanor, the restriction on possession and transfer is permanent unless the conviction has been expunged or set aside or due process requirements were not met.
NYS Law - Family Court Act 842-a and Criminal Procedure Law 530.14 - provisions apply when issuing Family and Criminal Court orders of protection - allow the court to suspend or revoke a license and order the surrender of firearms upon certain findings.	**NO**.	The suspension order issued, as well as the surrender order, is effective for the duration of the temporary or permanent order of protection.

University of Buffalo Family Violence Clinic 1999

APPENDIX G

STATEWIDE ORDER OF PROTECTION REGISTRY

As a result of the passage of the Family Protection and Domestic Violence Intervention Act of 1994, the NYS Unified Court System Information Technology Department established the Family Protection Registry Center (FPRC). The FPRC, located in Troy, is responsible for the computerized entry into a state registry of orders of protection, violations and warrants in connection with family offense cases.

The statewide computerized registry contains all orders of protection issued by the courts: Family Court (including youthful offender cases); City Court; Supreme Court; and Town and Village Courts. Orders are submitted on prescribe forms.

The registry is integrated with the NYS Police Information Network (NYSPIN). That system is a "hot file" repository, storing only active orders of protection information. The NYSPIN registry is specially designed for inquiry purposes by law enforcement, and is a tool for the mandatory arrest statute. Local law enforcement agencies update the repository with the associated service information upon serving orders of protection.

The FPRC receives data from courts throughout the state. Some courts have the capability to transmit the information electronically while others send data by fax or courier.

The Domestic Violence System compliments the NYS Police Order of Protection Registry mandated by the Family Protection and Domestic Violence Intervention Act of 1994. The system collects and stores all family offense orders of protection and warrant information issued by the courts of NYS - including Family, Criminal, Supreme, Town and Village. The order data will be held for up to 15 years after the orders becomes inactive, thus providing for inquiry into the domestic violence history of individuals. Judges, courts and other qualified agencies, such as probation, may access the system through the courts.

SEARCHES AND USES

Searches into the system may be made by made by: name, docket number, social security number, NYSID or license plate number. They may be done on a statewide basis or limited to a given court or county. On-line "person summaries" which summarize a person's history and "order recaps" which print all order information for a given order, are available to judges to assist in the adjudication of domestic violence cases. This information can be used, for example, by a Criminal Court judge to modify an existing Family Court order of protection; or to validate that an active order of protection actually exists in another court; who is protected by the order; and what the terms and conditions of the order are. The system has not been installed in all court rooms throughout the state.

National Crime Information Center (NCIC)
Available since 1997, NCIC has developed a database for protection orders that provides criminal justice agencies access to all protection orders entered in the system. Common data elements and prohibited acts can alert police to the existence and enforcement of an order anywhere the victim is. These elements include:

- Brady indicator - any gun restrictions;
- Specific court;
- Respondent/defendant name, date of birth, race, sex and social security number;
- Expiration date;
- Issuing date;
- Case number;
- Orders conditions;
- Protective order number;
- Victim's name, date of birth, race, sex;
- If the order is temporary or permanent.

APPENDIX H

SAFETY PLANNING
AND
INTERVIEW TECHNIQUES FOR ATTORNEYS

SAFETY PLANNING

If a victim chooses not to utilize either Criminal Court or Family Court, it is important to advise victims of community resources and options, such as a local shelter or hotline number. Some agencies can assist a victim in creating what is commonly called a safety plan. A safety plan assists the victim in knowing what her options are and what to do in the event of an emergency. Some agencies recommend that the victim call the local shelter to create a safety plan with an experienced counselor. However, in doing so, there is a risk that the victim may not place the call. Therefore, the following general safety information can be provided to a victim:

- Try to put aside some money;
- Have a spare set of keys hidden;
- Have spare sets of clothes available for yourself and any children;
- Have a list of emergency numbers available;
- Have children trained to dial 911 and provide pertinent information;
- Know where the closest pay phone is located and have quarters available in an accessible place;
- Have important documents hidden in a safe place (social security cards, insurance information, marriage license, birth certificates, medical records, etc);
- Keep a record of all past medical injuries and the names of the treating physicians. Take photographs when possible;
- Keep copies of any protective orders, custody orders, divorce decrees in a safe place;
- Have a secret code for children and family that will alert them to call police in an emergency.

SCREENING AND INTERVIEW TECHNIQUES FOR ATTORNEYS

(Information taken from "The Impact of Domestic Violence on Your Legal Practice" by the American Bar Association Commission on Domestic Violence)

BEGINNING CHECKLIST

During a client interview, it is essential that the following checklist be utilized in order to effectively screen your clients for domestic violence.

- Assure a client that all information obtained during the interview is confidential;
- Screen your clients for a history of domestic violence;
- If your client reveals to you that he/she was abused, tell the client you believe him/her;
- Use a calendar to assist the client to pinpoint days and times of abuse;
- Validate the abused person's experience;
- Define what you mean by domestic violence to your client and ask questions about physical, sexual, psychological and economic abuse;
- Question your client with candor and directness, avoid legal terms and ask simple, direct questions that will allow your client to provide you with all necessary details;
- Do not accept any excuses for violent acts and communicate to your client that no person deserves to be abused.

SAFETY PLANNING FOR ATTORNEYS CHECKLIST

The following checklist provides basic safety planning information that all attorneys should provide to clients that are victims of domestic violence.

- Take safety precautions when calling or writing your client;
- Keep your client's information confidential;
- Inform your client in advance of any legal developments in the case;
- Be prepared to assess the batterer's lethality and assist your client in going into shelter if necessary;
- Arrive in court before your client and advise your client to wait near a security guard;
- In court, position yourself between your client and batterer and do not allow the batterer to speak to your client;
- Take any precautions necessary with the batterer's family members;
- Do not leave the courthouse until assuring your client is safe when leaving court.

PROTECTING CONFIDENTIALITY CHECKLIST

The following information provides a checklist on confidentiality issues that all attorneys should be aware of when working with domestic violence victims.

- Keep shelter address confidential in all records, including court records;
- Obtain an order of protection that protects a victim's home, work and school addresses and telephone numbers;
- Assist the victim in obtaining a new telephone number or extension at work to prevent an abuser's access;
- Advise your client to tell all day care workers, schools and health care providers to keep information confidential;
- Instruct the post office to keep address and change of address information confidential
  (See Selected State and Federal Protective Measures next in the appendix);
- Notify banks and credit card companies to keep victim's address confidential and to contact the victim if requested;
- Ask motor vehicle registry to keep personal information confidential;
- If necessary, notify the State Department of custody order to prevent the issuance of children's passport to the abuser;
- Consider seeking a change of name and social security number or admission to a witness protection program *(please note: these are only available in limited circumstances and eligibility requirements are lengthy, time consuming and stiff)*;
- Consider not establishing paternity when a child is born out of wedlock and the father is abusive.

APPENDIX I

SELECTED STATE AND FEDERAL PROTECTIVE MEASURES

(Information provided by: Amy Schwartz, Esq.
S.U.N.Y. Buffalo School of Law Family Violence Clinic Student)

Below is a description of various legal protective measures ranging from lower to higher level degrees of security. Appropriate safety measures are case-specific, so attorneys should take the necessary time to interview the client, acquaint himself/herself with the client's relationship history and the safety measures previously implemented. A range of options should be presented and discussed thoroughly before any legal action is undertaken. Safety plans should be continuously evaluated and revised to comport with the victim's changing safety needs.

Remember: these cases are extremely challenging. Attorneys should take advantage of available community resources (and domestic violence advocates) and should develop a comprehensive safety plan with the assistance and support of a coordinated safety planning team.

1. **Address Protection During Order of Protection Proceedings** *(FCA § 154-b).*
   As of 1997, where a protective order is requested under FCA Articles 4, 5, 6 and 8, the Court (upon its own motion or upon the motion of any party) *may* authorize the abused party to keep his/her address confidential. The Court will need to make a finding of whether address disclosure may "substantially increase the risk of violence to the party for whom confidentiality is requested." Because this potentially impacts service of process issues during a proceeding, the Court can designate the Clerk of the Court or another disinterested person as the abused party's agent of service. There is no case law available under this statute yet.

2. **Shelter and Shelter Resident Address Confidentiality Laws** *(Social Services Law § 459-g)*
   Under this statute, the street address of a residential domestic violence program shall be confidential and may only be disclosed to person/agencies authorized under the Department of Social Services, such as courts or law enforcement *(18 NYCRR § 452.10)*. *See* also People v Ramsey, 174 Misc. 2d 304, 665 N.Y.S. 2d 501 (1997) where a domestic violence program was required by the trial court to disclose a shelter resident's address and telephone number to the NYC District Attorney's Office.

   Under the corresponding regulations, shelters are required to have both a business mailing and a street address *(18 NYCRR § 452.10 (c))*. Only the shelter's business address is to be used when the address of a shelter resident is to be disclosed. These regulations are in compliance with federal law that makes funding for domestic violence shelters contingent upon the shelter's address confidentiality rules *(42 U.S.C. § 10402 (a) (2) (E))*.

3. **U.S. Postal Service Laws**
As a result of VAWA, domestic violence victims with current protection orders can have their new addresses remain confidential with the Postal Service *(42 USCA § 13951; 39 CFR § 265.6 (d)(1))*. This legislation also allows a domestic violence shelter similar address protection. Disclosure, however, may be allowed for certain State or Federal agencies with a "legitimate law enforcement or governmental purpose."

4. **Public Assistance and Confidentiality**
Applicants with domestic violence issues may be referred to the DSS Office's Domestic Violence Liaison for assessment, referrals, safety planning, crisis intervention and case management services *(18 NYSCRR § 351.2 (k)(4)(1)(2)(i)(a-j))*. Applicants may be able to obtain waivers from employment/training (such as Workfare and Learnfare), alcohol and substance abuse screening, or other requirements that would endanger the client/the client's children or create obstacles which would prevent escape from the abusive relationship *(SSL § 349-a(5); 18 NYCRR § 351.2)*. Information with respect to victims may not be released to any outside party or other governmental agency, unless disclosure is either required by law or authorized by the client *(SSL § 349-a(7))*. This legislation brings New York into compliance with the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

5. **New York's Uniform Child Custody Jurisdiction Act** *(DRL § 75-j)*.
This law requires all parties to interstate custody proceedings to give information under oath as to the child's present address and past addresses within the last five years *(DRL § 75-j(1))*. However, as of 1996, if the party seeking custody has resided or presently resides in a domestic violence program, the addresses may not be revealed *(DRL § 75-j(4)(c))*. However, notice of this hearing must be given to the adverse party *(DRL § 75-j(5))*. As of yet, there is no case law on these recent provisions.

6. **New York's Uniform Interstate Family Support Act** *(FAC § 580-312)*.
This federal interstate child support law was adopted by New York in 1997. This legislation contains a confidentiality provision which requires courts to protect identifying information about a child or a party (contained in pleadings or other documents) if there is a finding that disclosure would endanger the safety, liberty, or health of a party or child. As of yet, there is no case law on these provisions.

7. **Federal Driver Privacy Protection Act** *(18 USC § 2725)*.
As per federal law, individuals are no longer able to get the photograph, name, address, social security number, telephone number, driver identification number or any other identifying information of a New York State driver. However, the constitutionality of this law is currently being debated across the country.

8. **Court's Orders of Relocation** *(Case Law).*
Since the decision in Tropea v Tropea, 87 N.Y.2d 727 (1996), several courts have explicitly considered domestic violence as a factor when making the child's best interest determination for relocation. *Note that not all of these case have justified relocation for parties in abusive relationships*:

A. Anthony S v Kimberly S., 1998 WL 425464 (N.Y. Fam. Ct. 1988) - a well reasoned opinion from the fact finder.

B. In the Matter of Jennifer O., 1998 WL 947824 (4th Dept. 1998) - justified mother's relocation because of domestic violence.

C. Lukaszewicz v. Lukaszewicz., 682 N.Y.S.2d 696 (1988) - note that this case allowed the abused mother's relocation, but also the batterer to retain joint custody.

D. Hilton v. Hilton., 665 N.Y.S.2d 203 (4th Dept. 1997) - justified mother's relocation because of domestic violence.

E. Burnham v. Basta., 659 N.Y.S.2d 945 (1997) - court would not allow mother to relocate with the child (partially) because of domestic violence situation with her new
husband in New Jersey.

F. Harder v. Yandoh., 644 N.Y.S.2d 83 (1996) - court would not allow the mother to relocate with children (partially) because she occasionally engaged in violent confrontations in their presence.

9. **Relocation to a State in Possession of an Address Confidentiality Program**
Washington State, Florida, and New Jersey have all passed legislation allowing domestic violence victims to apply for participation in a state-run address confidentiality program (ACP). These programs allow victims and children the opportunity to: 1) list their mailing address as that of ACP; 2) have the ACP accept service of process on their behalf; 3) have the ACP forward all first-class mail to their actual addresses. These statutes also allow victims to use the ACP address when registering to vote or allow victims to have their addresses removed from public voter registration lists.

10. **Federal Parent Locator Service** (FPLS)
This is not really a specific measure, but it is legislation to be aware of. If your abused client is being investigated by any of the below named agencies, it is important that the agencies be aware of the domestic violence and all the federal restrictions regarding disclosure.

The FPLS is a computerized national location network run through the Department of Health and Human Services. It provides address, employment, asset, and social security number information on person to assist state and local child support enforcement agencies. The information received by the service is used for establishment of paternity, child support, parental kidnaping, custody, foster care, or adoptions. The FPLS, upon request, can search the databases of the SSA, IRS, Dept of Defense, Federal Office of Personal Management, FBI, and Dept of Veterans Affairs. This service is restricted to authorized individuals in order to safeguard the confidentiality of personal information.

Disclosure to authorized individuals/courts is restricted in domestic violence cases and the FPLS may not disclose if there is reasonable evidence of domestic violence or child abuse and if disclosure of identifying information could harm the custodial parent or child. The FPLS may disclose information about domestic violence cases to courts or court agents, as long as appropriate protection against further disclosure are imposed *(42 USC § 653 (b) and 654 (26)(E)).*

APPENDIX J

OFFICE OF COURT ADMINISTRATION
MANUAL

(Revised 1/98)
Selected sections pertaining to Responsibilities and Procedures When Family Court is Not in Session.

VIII. RESPONSIBILITIES AND PROCEDURES WHEN FAMILY COURT IS NOT IN SESSION

A Arraignment of an Adult for a Family Offense (NO Warrant or Order of Protection Has Been Issued):

1. When Family Court is not in session and an adult is arrested for a family offense, arraignment is before the "most accessible magistrate". FCA V 55.

2. If the victim is present at this first appearance, the magistrate is to advise the victim of the right to proceed in Family Court or criminal court, or both simultaneously. CPL §530-11(2) (h), (2-a). The court is to provide the victim with a "Notice of Rights"

3. Right to Counsel :The parties must also be advised that they have a right to counsel in Family Court and, if indigent, a right to appointed counsel. FCA §262(a)(ii); CPL §530.11(6); County Law Art.. 18-B. All family offenses are included in the right to counsel statutes. County Law Art. I8-B, §722-a.

4. The magistrate shall permit the complainant to file an information, accusatory instrument or swom affidavit[5] FCA § 155(2). The magistrate shall thereupon commit such respondent/defendant to the custody of the sheriff, admit to, fix or accept bail, or ROR him or her for a hearing before the Family Court and/or criminal court. FCA §155(2).

---

[5]The affidavit must allege that: (a)Family Court is not in session; (ii)that a family offense has been committed; (iii) that a family offenses petition has been or will be filed in Family Court the next day the court is in session; and (iv) good cause has been shown for issuance of a TOP. The victim will later be assisted in completing a family offense petition by the Probation Department, Family Court Intake Unit, which handles these cases on an emergency basis during regular business hours. (Probation Department Intake Unit: 496-2650).

5. Where petitioner requests that the matter proceed in Family Court[6] the magistrate, in addition to the arraignment responsibilities under the Criminal Procedure Law, has the power to issue a Family Court TOP "for good cause shown". FCA §821(2); CPL §530.11(2)(j).

6. The local court must inquire as to existence of any other orders of protection between the parties. CPL§530.12(6-a).

7. Where petitioner has requested that the matter be returnable in Family Court, upon issuance of a TOP, the local court shall transfer the matter, forthwith, to the Family Court, (See Section VII, Transmittal of Case to Family Court) and shall make it returnable on the next day that the Family Court is in session, or as soon thereafter as practicable, **but in no event more than four calendar days after issuance of the TOP**. FCA §154-d(l).

8. The Family Court TOP form should be utilized by the local criminal court when issuing or modifying a Family Court Order. **The petitioner need not be present for the magistrate to issue a TOP.**

a. The TOP may contain any Of the provisions authorized for a POP under FCA §828(l) and §842,

b. The local court must make a determination in writing (if no stenographer is present to make a record) of whether to impose conditions, and whether these conditions will achieve their purpose. Among the factors the local judge should consider are prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons. FCA §828(1). (See Section IV, Firearms).

c. The TOP must plainly state the date upon which it expires. FCA§ 154-c. If the matter is returnable in Family Court, the TOP shall not be valid for more than 4 calendar days after issuance, unless the victim files a petition in Family Court on or before the return date and the Family Court issues a TOP. FCA §154-d

d. The petitioner, if present, must be given a copy of the TOP and in a case where a Family Court petition has not been filed, petitioner must be

[6]Although the petitioner may not be present at the arraignment, she may have informed the arresting officer(s) of his or her request to proceed in Family Court. The police officer(s) should then inform the arraigning judge of this request. However, in exceptional circumstances, law enforcement may elect to also proceed criminally.

advised that the TOP will expire in 4 calendar days, unless the petitioner files a petition in Family Court on or before the return date and that Family Court issues a TOP.

e. If the petitioner is not present, the court should arrange to provide her or him with a copy of the TOP and notification of the Family Court return date.

f. A copy of the TOP must be filed with the law enforcement agency where the complaint originated and, if it is not open 24 hours a day, file it with a police department that is so opened.

g. It is the responsibility of the issuing court to transmit the TOP to the Family Protection Registry Center (See, Section V).

h. The magistrate should have the respondent acknowledge service of the TOP by signing it. Copies should then be given to the respondent and the police noting on the police copy that respondent has been personally served in court.

i. The court is to deliver or fax all required documents, to the appropriate Family Court by 9: 00 A.M. of the next Family Court session, or as soon thereafter as is practicable, to ensure arrival of the papers before the return date. If the TOP and affidavit are transmitted by FAX, the originals must be sent to the Family Court immediately thereafter. (See, Section VII, Transmittal of Case to Family Court).

j. The local court should advise the petitioner and respondent of the return date in Family Court.

B. Arraignment for Violation of a Family Court Order of Protection:

1. When the Family Court is not in session, an adult arrested for an alleged violation of an outstanding Family Court TOP or POP shall forthwith be brought before a local criminal court in the county of arrest for arraignment. FCA §155(l); CPL §530-11(4).

2. A copy of the order of protection or a record of such order from the statewide computer registry shall be evidence of the filing of an information, petition, or sworn affidavit. FCA § 155(l).

3. At this first appearance, the magistrate must advise the complainant, if present, of the options to proceed in Family Court or local criminal court, or both simultaneously. CPL §530.11(2-a).

4. The magistrate must also advise the parties that they have a right to counsel in Family Court, and, if indigent, a right to appointed counsel. FCA §262(a)(ii); CPL §530.11(6), County Law Art. 18-B. All family offenses are included in the right to counsel statutes. County Law Art. 18B, §722-a.

5. Options for the victim when there is an alleged violation of a Family Court TOP or POP:

a) Treat the violation as a new offense and have the matter referred Family Court. FCA § 847;

b) File a petition alleging a violation of the Family Court TOP or POP and have the matter referred to Family Court. FCA §947;

c) File an affidavit asking the court to modify a TOP or POP to add and/or change the conditions. FCA §821(2); CPL §530.12(3-b),

d) File an accusatory instrument based on the new incident and/or criminal contempt (PL§§ 215.50; 215.51) and proceed in local criminal court. FCA §847.

6. Options for the local court (See, CPL §S30,11(4)):

a) Commit the defendant to the custody of the sheriff;

b) Fix and accept bail. FCA §155(l);

c)ROR the defendant for a hearing before the next session of the Family Court and/or local criminal court. FCA §155(1)j

d) Issue any order authorized under CPL §530.12(11), after a hearing;

e) Issue a criminal court TOP, if appropriate, ONLY if an accusatory instrument has been filed, and schedule further criminal court proceedings. CPL §530.12(l);

f) Modify a Family Court TOP or POP, at the request of the petitioner, upon the filing of an affidavit requesting modification. FCA §§154-d(2); 821(2); CPL §530.12(3-b). See, Section E, below, *Emergency Powers to Modify a Family Court T0P or POP*

7. Unless the victim requests otherwise, in addition to scheduling further criminal proceedings, if any, the court shall make such matter returnable in Family Court, on the next day such court is in session. CPL §530.11(4). The court is to deliver or fax all relevant documents to the Family Court by 9 A.M. of the next day Family Court is in session, or as soon thereafter as is practicable, to ensure receipt prior to the retum date. (See. Section V11, Transmittal of Case to Family Court)

Advise the parties of when to appear in Family Court.

C. Arraignment on a Family Court Warrant:

1. An adult arrested pursuant to a Family Court warrant shall forthwith be taken to the most accessible magistrate and arraigned. Family Court Act § 55(l).

2. The production of the warrant, certificate of warrant, or record of such warrant from the statewide computer registry is evidence of a previously filed petition. The warrant is based an a previously filed petition and is deemed to be sufficient evidence that there is a properly filed petition. There is no need for the victim to execute an additional petition or accusatory instrument. FCA§155(1).

3. Upon consideration of the bail recommendation, if any, made by the Family Court and indicated on the warrant, the magistrate shall thereupon commit such respondent to the custody of the sheriff, fix or accept bail, or ROR the respondent for a hearing before the Family Court. FCA §155(l).

4. **It should, be noted that the Family Court judge's bail recommendation is based on the court's knowledge of the entire family history, including any prior proceedings.**

5. The original warrant, if available, must be returned to Family Court

6. A person arrested on a Family Court warrant may be released by the "desk officer in charge at a police station" on paying cash bail for his or her appearance before the appropriate court the next morning. FCA §155-a.

D. Victim Seeks an <u>Ex Parte Family Court</u> Temporary Order of Protection upon the filing of an accusatory Instrument or sworn affidavit and Family Court is not in session.

1. The local criminal court has emergency powers, upon the request of a petitioner, to issue an *ex parte* temporary order of protection, pending a hearing in Family Court, provided that a sworn affidavit is submitted which alleges that:

(i) the Family Court is not in session;

(ii) a family offenses has been committed,

(iii) a family offense petition has been filed or will be filed in Family Court on the next day the court is in session; and

(iv) showing good cause. FCA§l54-d(l);CPL 530.12(3-a).

2. When the victim appears before the local magistrate based upon a family offense when Family Court is not in session, and seeks an ex parte Family Court order of Protection, the magistrate is to:

a. Advise the victim of the right to proceed in Family Court or criminal court, or both simultaneously and provide the victim with a "Notice of Rights". CPL §§530-11(2)(h). (2-a).

b. Advise the victim of the right to counsel in Family Court, and, if indigent, the right to appointed counsel. FCA §262(a)(ii); CPL§ 1530.11(6); County Law Art.18-13. All family offenses are included in the right to counsel statutes. County Law Art. 18-B, 722-A

c. An arrest need not precede issuance of the TOP as long as an affidavit or accusatory instrument has been filed.

d. The police or district attorney can request a TOP on behalf of the complainant. **The complainant need not be present for the magistrate to issue a TOP.**

e. The local court must inquire as to existence of any other orders of protection between the parties. (CPL 530.12(6-a)).

f. The TOP may contain any of the provisions authorized for a POP under FCA §§828(1) and 842, and must be on the official form.

g. The local court must make a determination in writing (if no stenographer is present to make a record) of whether to impose conditions, and whether these conditions will achieve their purpose. Among the factors the local judge should consider are prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons. FCA §828(1). (See Section IV, Firearms).

h. Where petitioner has requested that the matter be returnable in Family Court, upon issuance of a TOP, the local court shall transfer the matter, forthwith, to the Family Court, (See Section VII, Transmittal of Case to

Family Court) and shall make it returnable oil the next day that the Family Court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the TOP. FCA §154-d(l).

i. The TOP must plainly state the date upon which it expires. FCA §I 54-d. If the matter is returnable in Family Court, the TOP shall not be valid for more than 4 calendar days after issuance, unless the victim files a petition in Family Court on or before the return date and the Family Court issues a TOP.

j. The petitioner, if present, must be given a copy of the TOP and must be advised that the TOP will expire in four calendar days, unless the petitioner files a petition in Family Court on or before the return date and that Family Court issues a TOP. The petitioner is to be referred to Family Court for appearance an the return date.

k. If the petitioner is not present, the court should arrange to provide her or him with a copy of the TOP and notification of the Family Court return date.

l. A copy of the TOP must be filed with the law enforcement agency where the complaint originated and, if it is not open 24 hours a day, file it with a police department that is so opened.

m. It is the responsibility of the issuing court to transmit the TOP to the Family Protection Registry Center. (See, Section V).

n. Deliver or fax the TOP and all required attachments, to the appropriate Family Court to ensure arrival of the papers before the return date. If the Top and Affidavit are transmitted by FAX, the originals must be sent to the Family Court immediately thereafter. (See Section VII, Transmittal of Case to Family Court).

E. Emergency powers to modify a Family Court Top or POP at request of victim:

a. The local criminal court may on an ex parte basis modify a Family Court POP or TOP, provided that the petitioner has submitted a sworn affidavit alleging that:

(i)the Family Court is not in session and (ii) showing good cause, including a showing that the existing order is insufficient for the protection of the victim, the victim's child or children or other members of the victims family or household. FCA §154-d(2); CPL §S30.12(3-b).

b. The matter regarding modification shall be made returnable in Family Court on the next day the Family Court is in session, or as soon thereafter as is practicable, but in no event more than four calendar days after issuance of the modified order.

c. The court shall immediately forward the modified order and sworn affidavit to the Family Court, in a manner to ensure arrival before the return date. If the modified order and affidavit are transmitted by FAX, the originals must be sent to tin Family Court immediately thereafter. (See, Section VII, Transmittal of Case to Family Court).

d. The petitioner shall be given a copy of the modified order and the affidavit.

e. A copy of the modified order shall be served on the respondent and filed with the law enforcement agency where the complaint originated and, if it is not open 24 hours a day, filed also with a police department that is so opened.

f. Except as provided above, any application to vacate or modify a TOP or POP shall be on notice to the non-moving party. CPL §530,12(15).

F. Service of the Family Court TOP:

When the respondent is not present in court, any TOP which requires removal of the respondent from the victim's home, removal of firearms or otherwise requires police intervention, should be given to the police for service.

Office of Court Administration Memorandum
regarding violations of orders of protection

STATE OF NEW YORK
OFFICE OF
COURT ADMINISTRATION

MEMORANDUM

January 8, 1997

TO: Judge Lippman

FROM: Michael Colodner

SUBJECT: Arrest and prosecution for violations of orders of protection issued by city, town and village courts

In recent months questions have been raised regarding arrest and prosecution for violations of orders of protection issued by city, town and village courts. Apparently a number of courts, law enforcement agencies and others have been interpreting a provision of the State Constitution as prohibiting the arrest and prosecution of a defendant for violation of an order of protection issued by a city, town or village court when the act of violation occurs outside the county or an adjoining county of the issuing court. It is Counsel's view that the State Constitution does not create such a bar.

The constitutional provision in question, Article 6, §1(c), provides as follows (emphasis supplied):

> All processes, warrants and other mandates of the court of appeals, the supreme court including the appellate division thereof, the court of claims, the county court, the surrogate's court and the family court may be served and executed in any part of the state. All processes, warrants and other mandates of the courts or court of civil and criminal jurisdiction of the city of New York may, subject to such limitations as may be prescribed by the legislature, be served and executed in any party of the state. The legislature may provide that processes, warrants and other mandates of the district court may be served and executed in any part of the state and that processes, warrants and other mandates of town, village and city courts outside the city of New York may be served and executed in any party of the county in which such courts are located or in any part of any adjoining county.

In our view, this provision imposes no limitations on the arrest and prosecution of a defendant for violating an order of protection issued by a city, town or village court. Apparently, some are reading the prohibition set forth in section 1(c) on executing processes, warrants and mandates as

extending to the arrest and prosecution of a defendant for violating the court's order. However, these two concepts - executing a court process, warrant or mandate, and arresting and prosecuting a defendant for violating a court order - involve entirely separate and discrete actions. Execution of a court process, warrant or mandate requires a designated individual to carry out an act that is specifically directed in the court's process, warrant or mandate. The most common example of this in the criminal context is a police officer's execution of an arrest warrant, which involves the taking of the defendant into custody as explicitly directed by the court in the warrant. Section 1(c) is clear that when a warrant is issued by a city, town or village court it may be executed, or carried out, only in the county in which the court is situated or in an adjoining county. By contrast, the acts of arresting and prosecuting a defendant for violation of an order of protection are not carried out pursuant to and explicit direction in the order of protection; rather, these acts are the result of law enforcement's separate and independent obligation to enforce the criminal laws of this State (here, criminal contempt under the Penal Law).

Accordingly, section 1(c) imposes no limitation on the arrest and prosecution of a defendant for violating an order of protection issued by city, town or village courts. Thus, if a local criminal court in Westchester County issues an order of protection, and the defendant subsequently violates that order in Erie County, the defendant may be arrested in Erie County and prosecuted for criminal contempt either in the Westchester local criminal court that issued the order or in the appropriate Erie County local criminal court where the act of violation occurred. See CPL §20.40 (1)(a) & (1)(c)(geographical jurisdiction lies in locality where an element of the offense charged occurred or in locality affected by the criminal conduct); see also People v. Ortega 152 Misc. 2d 84 (N.Y.C. Crim. Ct. 1991)(court in New York County that issued order of protection had geographical jurisdiction to adjudicated criminal contempt prosecution even though act of violation of order occurred in Bronx County).

Furthermore, under the federal Violence Against Women Act of 1994, New York courts now must afford "full faith and credit" to orders of protection issued in domestic violence case by courts of other states. See 18 U.S.C. §§2265-2266. If section 1(c) were interpreted as imposing geographical limitations on the arrest and prosecution for violations of orders of protection issued by city, town and village courts, that would mean that orders issued by courts of other states would receive greater recognition in New York than would certain orders issued by New York's own courts; it also would mean that certain orders issued by New York courts would receive greater recognition in other states' courts than they would receive in New York. Section 1(c), which by its very terms imposes limitations only on service and execution of court processes, warrants and mandates, and not on arrest and prosecution for violations of court orders, should not be so broadly interpreted as to produce these anomalous results.