



tennessee
coalition
to end domestic & sexual violence

Legal Advocacy Manual

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Chapter 1¹

Analysis of Domestic Violence

I. BEHAVIORAL DEFINITION OF DOMESTIC VIOLENCE

Domestic violence, or battering, is a pattern of violent and coercive behaviors whereby the batterer seeks to control the thoughts, beliefs, or conduct of his or her² intimate partner or to punish the intimate partner for resisting the batterer's control over her or him. Perpetrators and victims of domestic violence can be found in all age, racial, socio-economic, educational, occupational, sexual orientation, and religious groups. Victims may or may not have been abused as children, or in previous relationships.

The behavioral definition of domestic violence focuses on the pattern of abuse and violence in relationships between adults and does not technically include child abuse or neglect. However, in many domestic violence cases, children may be physically injured or emotionally and developmentally damaged as a result of witnessing the violence or of being used as pawns by the batterer against the victim. Sometimes in domestic violence cases, the batterer and/or the victim may be an adolescent rather than an adult. In cases involving adolescents, there is the same pattern of abusive behaviors as that which occurs in adult relationships (Levy, 1991).

¹ This chapter draws heavily on materials prepared by Anne L. Ganley, Ph.D. for *Domestic Violence in Civil Court Cases: A National Model for Judicial Education* published by The Family Violence Prevention Fund in 1992.

² In general, people who use gender-neutral language in discussions of domestic violence do not do so in order to include the experiences of battered lesbians and gay men and the small percentage of heterosexual men who are battered by their female partners. Rather, the purpose is to de-politicize the nature of domestic violence, to mask the role of sexism in causing and perpetuating domestic violence, and to avoid the role of homophobia/heterosexism in causing and perpetuating domestic violence. Therefore, in this manual, I sometimes use gender-neutral language but at other times, I speak of "battered women" and "men who batter".

A. Domestic violence is behavior done in the context of an intimate relationship.

The victim of domestic violence is affected in many of the same ways as victims of violence perpetrated by strangers, but also in unique ways since the batterer is an intimate rather than a stranger. Both intimate violence and stranger violence can result in the victim being traumatized and terrorized. However, the effects of trauma are accentuated, and repeated violence is more likely in domestic violence cases due to the fact that the batterer, unlike most perpetrators of stranger violence, has ongoing access to the victim, knows the victim's daily routine, and can continue to exercise considerable control over the victim's daily life, both physically and emotionally.

The complexity and strength of the intimate relationship create many barriers to dissolution. Domestic violence perpetrators may have good qualities in addition to their abusiveness. Furthermore, perpetrators of domestic violence gain control over victims through their coercive tactics and violence because the intimacy of the relationship gives them social, and sometimes legal, permission to use such abuse.

B. Domestic violence is a pattern of assaultive and controlling behaviors, including physical, sexual, and psychological attacks, that one intimate partner does to another.

Domestic violence consists of a wide range of behaviors, including some of the same behaviors found in stranger violence. Some acts of domestic violence are criminal. Criminal acts of domestic violence might include hitting, choking, kicking, assault with a weapon, shoving, scratching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, stalking, destruction of property, etc. Other behaviors may not constitute criminal conduct. Examples of non-criminal abuse might be degrading comments, interrogating children or other family members, suicide threats or attempts, controlling access to the family resources, as well as controlling the victim's own time and activities. Domestic violence perpetrators often act excessively jealous and possessive in order to isolate the victim. Whether or not there has been a finding of criminal conduct, evidence of these behaviors indicates a pattern of abusive control which has devastating effects on the family.

Violence within lesbian and gay relationships³ may include homophobic control, e.g., telling or threatening to tell family, friends, employers, police, the church community, etc., that the victim is lesbian or gay, telling the victim she or he deserves abusive treatment because of being lesbian or gay, reminding the victim that the homophobic world will not help (Hart,

³ Participants in lesbian and gay relationships may identify themselves as heterosexual, lesbian, gay, bisexual, or transgender. I use the term "lesbian and gay relationship" to indicate someone who is involved in an intimate sexual or romantic relationship with someone of the same sex, regardless of how they would describe their sexual identity.

1986). A bisexual woman may be assaulted by a male partner for her bisexuality and the same types of homophobic controls used against her as are used by same-sex partners.

Immigrant victims are vulnerable to threats related to their immigrant status. The batterer may threaten to report an undocumented victim to the authorities or to have her children removed from her custody. If the victim's facility with the English language is limited, she may be unable to access services or police assistance. The vulnerability of an immigrant victim is particularly acute if the batterer is a U.S. citizen and speaks English well.

Domestic violence is not an isolated, individual event. One battering episode builds on past episodes and sets the stage for future episodes. All incidents of the pattern interact with each other and have a profound effect on the victim. There is a wide range of consequences, some physically injurious and some not; all are psychologically damaging.

Domestic violence is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from and control over the victim. It is directed at circumscribing the life of the victim so that independent thought and action are eliminated and so that the victim will become exclusively devoted to fulfilling the needs and requirements of the batterer. The pattern is not impulsive or out of control behavior. The batterer selectively chooses tactics that work to control the victim.

Some of the acts may appear to be directed against or involve children, property, or pets when in fact the batterer is engaging in these behaviors in order to control or punish the intimate partner (for example, physical attacks against a child, throwing furniture through a picture window, strangling the victim's pet cat, etc.). Although someone or something other than the victim is physically damaged, that particular assault is part of the pattern of abuse directed at the victim.

Not all verbal attacks or insults between intimates are psychological battering. Psychological battering refers to verbal attacks designed to establish control over the victim's thoughts, beliefs, and conduct. The threat or past use of physical violence may give such verbal attacks added force. For example, the batterer's interrogation of a victim about her activities becomes an effective non-physical way to control the victim's activities when the victim has already been hit or the victim knows of the batterer's physical violence against others. Sometimes batterers are able to gain compliance from the victim by simply saying, "Remember what happened the last time?" Because of the past use of physical force, there is an implied threat in the statement.

The psychological control of victims through intermittent use of physical assault along with psychological abuse, such as verbal abuse, isolation, threats of violence, etc., is typical of domestic violence and is similar to control tactics used against prisoners of war and hostages. The verbal abuse includes disparaging, degrading, discrediting language, often obscene. These

verbal attacks are fabricated with particular sensitivity to the victim's vulnerabilities. Batterers are able to control victims by a combination of physical and psychological tactics since the two are so closely interwoven by the batterer.

C. Some mistakenly argue that in some cases both the batterer and the victim are "abusive", one physically and one verbally.

While some victims may resort to verbal insults, the reality is that verbal insults are not the same as a fist in the face. Furthermore, batterers use both physical and verbal assaults. Research indicates that batterers are more verbally abusive than either their victims or other persons in distressed but nonviolent relationships or in non-distressed intimate relationships (Margolin *et al.*, 1987). In addition, what batterers report as "abusive" behaviors of the victim are often acts of resistance by the victim. Victims are not passive recipients of violence, but often engage in strategic survival during which they sometimes resist demands of batterers that they see as immoral or inappropriate. Batterers respond to such resistance with escalating tactics of control and violence. The victim seeking separation is often seen by the batterer as engaging in the ultimate act of resistance. Consequently, the batterer may increase the violence during points of separation.

Some argue that there is "mutual battering" where both individuals are using physical force against each other. Careful fact-finding often reveals that one party is the primary physical aggressor and the other party's violence is in self-defense (e.g., she stabbed him as he was choking her), or one party's violence is more severe (e.g., punching and choking versus scratching) (Saunders, 1986).

Women are unlikely to commit homicide except in self-defense (Ganley, 1992). Research on battered women who kill has found no distinguishing characteristics between battered women who kill and those who do not. The only differences found in comparing these two groups of battered women were found in the batterers (the men who were killed had been more violent against the victim as well as the children than those who were not killed) (Browne, 1989). Effective intervention in domestic violence cases may stop the violence before it becomes a homicide case.

D. The consequences of domestic violence are often lethal.

in 2002, 67 females were murdered by males in Tennessee (Violence Policy Center, 2004). Tennessee ranked 7th in the United States for women murdered by men. For homicides in which the weapon used could be identified, 71 percent of female victims (44 out of 62) were shot and killed with guns. Of these, 73 percent (32 victims) were killed with handguns. There were 7 females killed with knives or other cutting instruments, 2 females killed by a blunt object, and 7 females killed by bodily force. For homicides in which the victim to offender relationship could be identified, 87 percent of female victims (53 out of 61) were murdered by someone they knew. Eight female victims were killed by strangers. Of the victims who knew their offenders, 66 percent (35 victims) were wives, common-law wives, ex-wives, or girlfriends of the offenders. For homicides in which the circumstances could be identified, 100 percent (45 out of 45) were not related to the commission of any other felony. Of these, 58 percent (26 homicides) involved arguments between the victim and the offender.

In a study of murder-suicides, 73.7 percent of all murder-suicides in the study involved an intimate partner. Of these, 93.5 percent were females killed by their intimate partners (Violence Policy Center, 2002). Between 22 and 35 percent of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence (*Journal of the American Medical Association*, 1990). Battering is the single major cause of injury to women, even more significant than the numbers injured in auto accidents, rapes, and muggings combined (O'Reilly, 1983). Without intervention, the pattern of abusive behaviors will most likely escalate in both frequency and severity. The pattern may change with more emphasis on psychological abuse, or physical assault, over time. Regardless of variations in the pattern, damage to the victim may become more severe.

Access to guns, threats to kill, and most of all, unemployment, are the biggest predictors of the murder of women in abusive relationships (Campbell, *et al.*, 2003). The lethality of domestic violence often increases when the batterer believes that the victim has left or is about to leave the relationship (Campbell, 1992). Thus, victims may be at greater risk at the very time they seek legal protection. For this reason it is critical that advocates pursue all available avenues to provide the victim with protection throughout the duration of the court proceedings.

II. CAUSES OF DOMESTIC VIOLENCE

- A. Domestic violence behaviors, as well as the rules and regulations of when, where, against whom, and by whom domestic violence is to be used, are learned through observation.**

Domestic violence is learned not only in the family but also in society. It is learned and reinforced by interactions with all of society's major institutions: familial, social, legal, religious, educational, mental health, medical, and entertainment/media. In all of these social institutions, there are various customs that perpetuate the use of violence as legitimate means of controlling family members at certain times (e.g., religious beliefs that a woman should submit to the will of her husband; laws that do not consider raping intimates a serious crime). These practices reinforce the use of violence to control intimates by failing to hold the batterer accountable and by failing to protect the victim. (For a more complete listing of social practices that condone violence against women, see Dobash and Dobash, 1983.) Until recently, domestic violence was rarely considered a crime and was often discounted as a private matter not worthy of the legal system's attention.

Battering is a gender-specific behavior which is socially constructed. Hence, male violence against women in intimate relationships is a social problem condoned and supported by the customs and traditions of society. We are all socialized in a culture in which the family unit is designed to control and order the private relationships between members of the family. Men are assigned the ultimate power and authority in family relationships. This is true despite the fact that there is nothing inherent in the male gender which would render them the appropriate wielders of power. Rather, this attribution of "legitimate" power is given to men based on a system of beliefs and values that approves and supports men's control over women, i.e., sexism (Hart, 1986).

National crime statistics show that approximately 95 percent of domestic abuse victims are women (Klaus and Band, 1984). A review of arrest statistics in Seattle, Washington (a state which requires arrest when there is probable cause to believe that a misdemeanor domestic violence assault has occurred) reveals the following pattern: 80 percent male to female, 10 percent male to male, 6 percent female to female, and 4 percent female to male (Ganley, 1989). While such research indicates, and the experience of most shelter programs is, that the victim is most likely female and the batterer male, most studies that have attempted to document the incidence of violence in intimate relationships are flawed. Many of them rely on official reports of abuse, thus understating the incidence of violence in lesbian and gay relationships whose victims are reluctant to report, as well as understating violence of women against men, since men are often equally reluctant to admit that they are being abused, although for different reasons. Other studies use a definition of violent behavior that equates a defensive act with a life-threatening beating, making their findings useless.

Women and men in lesbian and gay relationships, like heterosexuals, often desire control over the resources and decisions in family life that violence can assure. The same elements of hierarchy of power, ownership, entitlement, and control exist in lesbian and gay relationships. Largely this is true because lesbians and gay men have also learned that violence works in achieving partner compliance. Further, lesbian and gay communities, like heterosexual communities, have not developed an adequate system of norms and values opposing violence and control over intimate partners (Hart, 1986).

B. In a very small percentage of domestic violence cases, the violence is caused by organic or psychotic impairments and is not part of a pattern of coercive control.

Illness-based domestic violence cases (e.g., Alzheimer's disease, Huntington's Chorea, psychosis, etc.) are rare, but they do happen. It is relatively easy to distinguish illness-based violence from learning-based violence. With illness-based violence, there is usually no selection of a particular victim (whoever is present when the "short circuit" occurs will get attacked, so it may be a helper, family member, etc.). Also, with illness-based violence there is usually a constellation of other clear symptoms of the disease. For example, with an organic brain disease, there are changes in speech, gait, and physical coordination. With psychosis there are multiple symptoms of the psychotic process (e.g., he attacked her "because she is a CIA agent sent by the Pope to spy on him using the TV monitor"). Poor recall of the event alone is not an indicator of illness-based violence.

Knowing in these rare cases that a disease caused the violence will not alter the fact that violence occurred, but it may influence strategies chosen to increase the safety of the victim, the children, and the public. Furthermore, knowing that it is caused by an illness may influence advocacy considerations, since rehabilitation through specialized domestic violence counseling is contraindicated for illness-based violence. In these rare cases, the violence can be more effectively managed by appropriate external constraints and by suitable medical or mental health intervention.

C. Alcohol and most drugs do not *cause* domestic violence.

Alcohol and drugs such as marijuana, depressants, anti-depressants, or anti-anxiety drugs do not cause nonviolent persons to become violent. Many people use or abuse those drugs without ever battering their partners. Alcohol and drugs are often used as the excuse for the battering, although research indicates that the pattern of assaultive behaviors is not being caused by those particular chemicals (Critchlow, 1986). The majority (76 percent) of physically abusive incidents occur in the absence of alcohol use (Kantor & Straus, 1987), and there is no evidence to suggest that alcohol use or dependence is linked to the other forms of coercive behaviors that are part of the pattern of domestic violence. Economic control, sexual violence, and intimidation, for example, are often part of a batterer's ongoing pattern of abuse, with little or no

identifiable connection to his use of or dependence on alcohol (Zubretsky and Digirolama, 1996).

There is contradictory evidence whether certain drugs (PCP, speed, cocaine or its derivative “crack”) may chemically react within the brain to cause violent behavior in individuals who show no abusive behavior except under the influence of those drugs. Further research is needed to explore the cause and effect relationship between these drugs and violence. One of the most confounding variables is that some people who consume these drugs are violent with or without the chemical in their bodies. An addict's violence may be part of a lifestyle where everything including family life is orchestrated around the acquisition and consumption of the drug.

Unlike the relatively low levels of substance abuse among batterers in general, the incidence of substance abuse by batterers seen in criminal justice, mental health, or social service settings is well above 50 percent (Bennett, 1997). For example, a 1995 study of domestic violence calls in Memphis, Tennessee found that 92 percent of assailants had used drugs or alcohol during the day of the assault, as well as about 42 percent of victims, according to reports from victims and family members (Brookoff, 1997). In cases where drug or alcohol use or abuse is present, it is important to focus on the violent behavior and not allow substance use or addiction to become a justification or excuse for the violence. While the presence of alcohol or drugs does not alter the finding that domestic violence took place, it is relevant to the assessment of lethality and in determining case dispositions. The use of or addiction to substances may increase the potential for lethality of domestic violence, and needs to be carefully considered when weighing safety issues concerning the victim, the children, and the community (Browne, 1989).

Legal remedies in cases where the batterer is addicted to alcohol and/or drugs must be directed at both the violence and the substance abuse. For individuals who are addicted to alcohol and drugs, changing domestic violence behavior is impossible without also stopping the substance abuse. However, it is not sufficient for the court to order the substance-addicted perpetrator of domestic violence solely into treatment for substance abuse or domestic violence. Victims with drug-dependent partners consistently report that during their partners' recovery the abuse not only continues but often escalates, creating greater levels of danger than existed prior to their partner's abstinence. In the cases in which victims report that the level of physical abuse decreases, they often report a corresponding increase in other forms of coercive control and abuse – the threats, manipulation, and isolation intensify (New York State Office for the Prevention of Domestic Violence, 1998). Intervention must be directed at both problems either through (a) concurrent treatments for domestic violence and substance abuse or (b) inpatient substance abuse treatment with a mandatory follow-up program for domestic violence or (c) an

involuntary mental health commitment with rehabilitation directed at both the substance abuse and the domestic violence.

D. Perpetrators of domestic violence externalize responsibility for their behavior to others or to factors supposedly outside of their control.

Most domestic violence is not “out of control” behavior, but a pattern of behavior that is used by the batterer because it works. Some batterers will batter only in particular ways, e.g., hit certain parts of the body, but not others; only use violence towards the victim even though they are angry at someone else (their boss, other family members, etc.); break only the victim’s possessions, not their own. They are making choices even when they are supposedly “out of control”. Such decision-making indicates they are actually in control of their behavior.

E. Domestic violence is not caused by “anger”.

Many battering episodes occur when the batterer is not emotionally charged and are done intentionally to gain the victim's compliance. The batterer chooses to use violence to get what he wants or get that to which he feels entitled. Displays of anger by the batterer are often merely tactics employed by the batterer to intimidate the victim. Batterers choose those acts of abuse that work and which subject them to the least risk. They choose acts of abuse or violence which they believe the victim is particularly sensitive or responsive to. They choose times and places that are designed to have the most powerful impact with the least risk.

F. Domestic violence is not caused by “stress”.

We all have different sources of stress in our lives (e.g., stress from the job, stress from not having a job, marital and relationship conflicts, losses, discrimination, poverty, etc.). We can respond to stress in a wide variety of ways (e.g., problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.) (Bandura, 1973). People choose ways to reduce stress according to what has worked for them in the past. It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence. Just as we would not excuse a robbery or a mugging by a stranger simply because the perpetrator was “stressed,” we can no longer excuse the perpetrator of domestic violence. Moreover, as already noted, many episodes of domestic violence occur when the batterer is not emotionally charged or stressed. When we remember that domestic violence is a pattern of behavior consisting of a variety of tactics repeated over time, then citing specific stressors becomes less meaningful in explaining the entire pattern (Pence and Paymar, 1993).

G. Domestic violence is not caused by problems inherent in the relationship between the two individuals or by the victim’s behavior.

People can be in distressed relationships and experience negative feelings about the behavior of the other without responding with violence. Domestic violence is a pattern of control that batterers bring into their intimate relationships. Without intervention, it is likely that they will be violent in each consecutive relationship with an intimate partner (Ganley, 1989). Victims are often assaulted when they are not engaging in any behavior that could be construed as resisting the batterer (e.g., when the batterer assaults while the victim is asleep or when the victim is doing exactly what the batterer wants). Other incidents occur when the victim is resisting the batterer's demands that she engage in unethical or unlawful behavior (e.g., when the batterer is insisting that she buy him illegal drugs or when the victim is protecting her children against the violence of the batterer).

Looking at the relationship or the victim's behavior as a causal explanation for domestic violence takes the focus off the batterer's responsibility for the violence, and supports the batterer's minimization, denial, externalization, and rationalization of the violent behavior. Blaming the victim or locating the problem in the relationship provides the batterer with excuses and justification for the conduct. This reinforces the batterer's use of abuse to control family members and thus contributes to the escalation of the pattern. As a result, the victim is placed at greater risk.

III. IMPACT OF DOMESTIC VIOLENCE ON THE VICTIM

Victims of domestic abuse experience a wide variety of injuries and traumas. Between 1976 and 1997, from 1200 to 1600 women were killed each year by intimates (The Silent Witness National Initiative, 2000). Besides often severe physical injuries, permanent disability, or death, victims of domestic abuse suffer a wide range of other injuries. Victims of intimate partner violence are at greater risk of injury than are victims of stranger violence (Thompson, Simon, et al., 1999). Some victims may be very isolated as a result of the perpetrator's control over the victim's activities, friends, and contacts with family members. Women who experience psychological abuse from an intimate partner face a significantly increased risk of developing chronic neck or back pain, arthritis, migraines, stammering or stuttering, problems seeing even with glasses, sexually transmitted infections, chronic pelvic pain, stomach ulcers, colon problems, and other physical illnesses (Coker, 2000).

A 1990 Ford Foundation study found that 50% of homeless women and children were fleeing abuse (Zorza, 1991). More recently, in a study of 777 homeless parents (the majority of whom were mothers) in ten U.S. cities, 22% said they had left their last place of residence because of domestic violence (Homes for the Homeless, 1998). Women who were victims of intimate partner abuse had higher rates of suicidal behavior than non-victims (Thompson, Kaslow, et al., 1999). The experience of assault plays a significant role in escalating both alcohol and drug use in women, even in women who

did not have a prior history of alcohol or drug abuse. However, women were more likely to turn to alcohol abuse than drug abuse after an assault (Kilpatrick, et al., 1997). The March of Dimes found that women battered during pregnancy have high rates of miscarriages (Zorza, 1994).

A. Some victims of domestic violence may minimize or deny the violence, or rationalize it by blaming themselves for making the batterer angry.

Some victims find it very painful to acknowledge that their intimate partners are battering them. The victim's minimization and denial in certain situations may assist her or him in surviving the abuse. Sometimes victims are not minimizing or denying the violence to themselves but are instead lying because of fear of retaliation by the batterer.

What may appear at first to be "crazy" behavior (i.e., asking for a divorce only after years of abuse or wanting to return to the batterer in spite of severe violence) may in fact be a normal reaction to a "crazy" situation. The primary reason given by victims of domestic violence for staying with the batterer is the realistic fear of the escalating violence. Victims may know from past experience that the violence gets worse whenever they attempt to get help.

B. The impact of domestic violence on lesbian and gay victims may be especially acute.

Many lesbians and gay men fear fueling society's hatred and myths by speaking openly about lesbian and gay violence. Speaking out about their partners' violence may mean losing the support of the lesbian and gay community which has nourished, protected, and supported them in many ways. The realistic fear of a hostile response makes many lesbian and gay victims reluctant to seek help from police, courts, shelters, or counselors. Homophobia within shelter programs makes the provision of adequate services to lesbian and gay victims difficult. Lesbian shelter staff have been pressured to stay closeted, have had their work invalidated, and have been pushed out of shelters or denied promotion. Many have watched with frustration and fear as their co-workers abandoned them in response to lesbian-baiting of funding sources, shelter residents, and community organizations (Benowitz, 1986).

Despite the secrecy often surrounding violence in gay and lesbian relationships, research indicates that such violence may be more common than people once thought. One study of gay men suggested that 15-20% of gay male relationships experience domestic violence, while a similar study among lesbians found slightly more than half had been abused by a woman partner in their lifetimes. A survey of transgender and intersex⁴ individuals found that 50% of

⁴ Intersex people are those who "naturally (that is, without any medical intervention) develop primary or secondary sex characteristics that do not fit neatly into society's definitions of male or female." The

respondents had been raped or assaulted by an intimate partner, though only 62% of these individuals (31% of the total) identified themselves as survivors of domestic violence when asked (National Coalition of Anti-Violence Programs, 2001).

C. Battered women fear both continued abuse if they stay with their batterers and deportation if they attempt to leave.

A 1993 survey noted that 83% of battered immigrants interviewed did not contact law enforcement about the abuse. Cases of domestic violence, sexual assault, and stalking committed against immigrant women and their children involve a variety of intricate advocacy and legal issues. Language barriers may hinder access to services and to the legal system. Victims may be unable to communicate with police officers or judges, or be unable to read and understand their rights, court documents, protective orders, and other legal documents. Often, an immigrant victim's sole source for information and understanding of the legal system comes from the abuser, while many victims are kept isolated and therefore often don't know whom to trust or how to reach out for help.

A key legal issue for immigrant victims is the fear of deportation, a fear which is reinforced by abusers and by victims' lack of knowledge of and access to protection. Abusers of immigrant women may keep them from obtaining work and a "green card," bring them to this country illegally, or threaten to report their illegal immigrant status to an employer. These tactics keep victims oppressed and tied to their abuser for access to basic life needs. Another common weapon used by batterers is a victim's children and her fear of losing custody. The abuser may use the victim's immigrant status against her in court proceedings to remove the focus from the his crime to his relative stability as a U.S. citizen or permanent legal resident.

D. It is not true that victims could easily leave the relationship if they wanted to.

Batterers do not let victims leave their control. Research shows that domestic violence tends to escalate when the victim leaves the relationship. National crime statistics show that in almost 75 percent of reported spousal assaults, the partners were divorced or separated (Klaus and Band, 1984). Batterers may repeatedly tell the victim that she will never be free of him. The victim may believe this as a result of past experience. When she did attempt to leave, the batterer may have tracked her down or abducted the children in an attempt to get the victim back. He may have enlisted help from family, friends, and others to pressure the victim to return.

The reasons for staying in a violent relationship are multiple and vary for each victim. In addition to fear, other reasons why victims stay in the relationship include:

Survivor Project, *Guide to Intersex and Trans Terminologies*, <http://www.survivorproject.org/basic.html>, 2/13/03.

- The lack of real alternatives for employment and financial assistance, especially for victims with children.
- Being unable to afford an attorney necessary to civil court proceedings.
- The lack of affordable, safe housing.
- Being immobilized by psychological and physical trauma.
- Believing in cultural/family values that encourage the maintenance of the family unit at all costs.
- Being told by the batterer, counselors, the courts, police, ministers, family members, friends, etc., that the violence is the victim's fault and that she could stop the abuse just by complying with the batterer's demands.
- Continuing to hope that the batterer will change and stop using violence.

E. Victims sometimes fail to follow through on court proceedings.

Some victims may fail to show for hearings because the batterer has physically prevented them from doing so, either through threats of further violence, or by actual physical injury to the victim. Sometimes victims stop the court process shortly after a temporary order is issued because the violence has temporarily stopped. They may decide that a permanent order is now unnecessary. Victims may be unaware that the batterer has merely switched tactics of control. Rather than use violence or the threat of violence, the batterers are temporarily using good behavior in order to manipulate their way out of the court proceedings.

Some victims fail to show for hearings because either the batterer or others have told them that the order will be dropped if they do not show up for the hearing. Thinking that the violence has stopped and that the order is no longer necessary, the victim may not appear at the next hearing. In other cases, the batterer has intercepted the notification of hearing intended for the victim. Some victims may fail to show at later hearings because the police have failed to enforce the temporary order resulting in the victim's belief that a permanent order will be useless in stopping the violence. Sometimes the victim does not appear because the system fails to provide adequate information or support. The court system can be complicated and full of delays and changes. The victim is too often left alone to navigate an alien and sometimes victim-blaming system.

Many victims follow through with court proceedings. Sometimes we overemphasize the difficult cases where the victim has appeared ambivalent or reluctant. We ignore the many cases where victims are cooperative and persistent. Furthermore, we often ignore the multiple barriers to domestic violence victims and blame them for "their ambivalence" rather than eliminating the barriers.

IV. IMPACT OF DOMESTIC VIOLENCE ON THE CHILDREN

Batterers traumatize children in the process of battering their adult victim. Some batterers physically or sexually abuse the children as well as the adult victim. Researchers estimate the extent of overlap between wife assault and child physical or sexual abuse to be approximately 30 to 40 percent (Jaffe *et al.*, 1990). Pescott and Letko report 43 percent of women in a shelter had children who were victims of abuse by the same batterer. Roy reports 45 percent of the children of battered women are physically abused (both studies in Roy, 1977). Girls are five to six times more likely to be sexually abused by domestically violent fathers than by non-battering fathers. Child abuse usually postdates mother abuse (Ganley, 1992)

Shelters report that the number one reason battered women give for fleeing the home is that the batterer was also attacking the children (based on a survey conducted at New Beginnings, a shelter for battered women in Seattle, Washington, 1990). Sometimes the victim acts in ways that do not effectively protect the children because she is relatively powerless to protect the children from the batterer. Legal protection can realign that power so the victim, once safe, can effectively protect the children (Ganley, 1992).

Some batterers intentionally or unintentionally injure the children during their attacks on the adult victim. Sometimes children are used as a weapon against the victim (e.g., child physically injured when thrown at the victim; or child abused as a way to coerce the victim to do certain things.) Sometimes the children are accidentally injured when the batterer is assaulting the victim.

Some batterers assault the adult victim in front of the children. Children have often either directly witnessed the acts of physical and psychological assaults or have indirectly witnessed it by overhearing the episodes or by seeing the aftermath of the injuries and property damage. Research reveals that children who witness domestic violence are affected in the same way as children who are physically and sexually abused (Goodman and Rosenberg, 1986).

Some batterers use the children to coercively control the intimate partner through, for example,

- Isolating the child along with the abused parent.
- Engaging the children in the abuse and control of the other parent.
- Violence against the children, pets, or other loved objects.
- Interrogating the children about the mother's activities.
- Taking the child away after each violent episode to insure that the victim will not flee the batterer.
- Forcing children to watch the abuse against the victim.
- Insisting that the children take care of all the batterer's emotional needs, or expecting unlimited access to the children in order to avoid being alone.

- Punishing the victim for failure to keep the children “under control.”

Some batterers use the children as pawns to control the victim after the victim and batterer are separated. In these cases, the intent is to continue the abuse of the victim, with little regard for the damage of this controlling behavior to the children (Walker and Edwall, 1987). Batterers may use lengthy custody battles or visitation violations as a way to continue abusing the other parent. Batterers may hold children hostage or abduct the children in efforts to punish the victim or to gain the victim’s compliance. Some visitation periods become nightmares for the children either because of physical abuse by the batterer or because of the psychological abuse that results from the batterer interrogating the children about the activities of the victim. During visitation, some batterers will go into long tirades about the victim’s behaviors or will repeatedly break into sobbing because the victim is “causing” the separation.

Domestic abuse harms children. A summary of twenty-nine studies of children who have witnessed partner assaults (Kolbo, Blakely, and Engleman, 1996, and sources cited therein) reports harm in several areas of functioning: behavioral, emotional, social, cognitive, and physical. Behavioral problems include aggression, cruelty to animals, tantrums, "acting out," immaturity, truancy, delinquency, and attention deficit disorder/hyperactivity. Common emotional problems are anxiety, anger, depression, withdrawal, and low self-esteem. Social problems are poor social skills, peer rejection, and an inability to empathize with others. Cognitive difficulties generally include language lag, developmental delays, and poor school performance. Physical problems include failure to thrive, difficulty sleeping and eating, regressive behaviors, poor motor skills, and psychosomatic symptoms such as eczema and bed-wetting.

There are also long-term effects as these children become adults. Since important developmental tasks are interrupted, children carry these deficits into adulthood. They may never make up getting behind in certain academic tasks or in interpersonal skills. These deficits impact their abilities to maintain jobs and relationships. Male children in particular are affected and have a high likelihood of battering intimates in their adult relationships (Hotelling and Sugarman, 1986). Sometimes the children do not wait to become adults before using violence themselves (e.g., against the victim, the perpetrator, their peers, and other adults). Sixty-three percent of all males in America between the ages of 11 and 20 who are serving time for homicide are incarcerated because they killed their mother’s abuser (Buel, 1992).

Usually, the most effective way to protect the children is to protect and support the non-abusing parent. Holding the perpetrator, not the victim, accountable for the abuse is critical in protecting both the victim and the child.

V. IMPACT OF DOMESTIC ABUSE ON THE COMMUNITY

Domestic abuse ripples out into the community as the perpetrator's violence also results in the death or injury of bystanders or those attempting to assist the victim. The

financial cost of domestic abuse to the community in terms of medical care, days missed from work, and response of the justice system is phenomenal. The National Institute of Justice estimates the annual costs incurred as a result of domestic abuse, including property damage and loss, medical costs, mental health care, police and fire services, victim services, and lost worker productivity to be \$67 billion each year (Miller, *et al.*, 1996). Blue Cross Blue Shield of Tennessee estimates the total health care costs of domestic violence in Tennessee to be \$32,969,848 per year (Harr, 2001).⁵ The cost to the community in lost lives and resources is a constant reminder that domestic abuse is not just a family affair and it is not merely a private affair; it is a community affair demanding a community response.

⁵ Calculated from Blue Cross Blue Shield of Tennessee cost estimates based on National Violence Against Women survey data

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Chapter 2

Analysis of Sexual Violence

I. INTRODUCTION⁶

Sexual violence is a political act. Understanding it as a political act helps us to see that, fundamentally, rape exists because those who rape believe they have the right to rape – and they believe they will get away with it.

Author Judith Herman wrote about rape as a political act nearly two decades ago. “Sexual assault is not simply a personal or individual act. It is a form of terrorism by which men as a group keep women as a group frightened and submissive. It serves the same political function as the lynch threat or the pogrom” (Herman, 1985).

The concept of rape as a political act and a form of terrorism is well documented. Throughout history, the rape of women and children by “the other side” during war has been a military strategy to demoralize the enemy by claiming ownership of his “property.” The rape of black women by white men during slavery and Reconstruction was an act of terrorism intended to assert white supremacy and to deny black people political rights and economic freedom. The rape of a woman by her boyfriend or spouse is his assertion of control or ownership of her. The rape of a woman or child has always been – and is today – a brutal act of control, domination, and power. Victims know this. And the truth is that perpetrators know this; they know the humiliation, the degradation, and the terror sexual violence inflicts on women. That is why sexual violence has become a weapon of choice in their war against women, *the* weapon of choice in attempting to strip women of their power as individuals and as a group.

Throughout the last three decades, the anti-rape movement has gained tremendous knowledge about sexual assault, primarily because of the voices of survivors. Survivors have had the courage to share their experiences, and through them, we have gleaned information and insight about the impact of sexual assault, the recovery process, and perpetrator behavior. Together, survivors, the anti-rape movement, researchers, therapists, and the media have helped raise consciousness about sexual assault and created significant changes. For example, specialized sexual assault crisis centers have been established in large and small communities. Sexual assault counseling

⁶ This section is adapted from “The Politics Of Rape,” by Polly Poskin in *Rape Crisis Advocacy: A Voice for Victims*, published by the Illinois Coalition Against Sexual Assault in October 2000.

services have been prioritized and developed in mental health and social service agencies. Police departments and states attorneys' offices have created special sex crimes units. Books, articles, data sheets, brochures, and newsletters accurately inform us about the many issues surrounding sexual assault. In short, we know more facts than ever. Despite this plethora of data, a critical link is missing: we remain uninformed and not very understanding about how deeply sexual assault scars its victim and society as a whole. Nor have we mobilized communities to prevent sexual violence. The following sections examine the facts, psychological and social impact of sexual violence, and the practice and promise of prevention work.

II. FACTS ABOUT SEXUAL ASSAULT

A. Characteristics of Sexual Assault Crimes⁷

The following subsections discuss common characteristics of rape and sexual assault. These subsections cite numerous studies on "rape" and "sexual assault." The reader should be cautioned that the findings and statistics of these studies are dependent, in many circumstances, upon the definitions of rape and sexual assault used in the studies. The variability in defining "rape" and "sexual assault" can cause variability in the findings and statistics in these and other rape and sexual assault studies.

1. *Acquaintance rape is far more common than stranger rape.*

The overwhelming majority of sex offenders are known to their victims. Seventy five percent (75%) of rape and sexual assault victimizations involve offenders (both single- and multiple-offender situations) who have had a prior relationship with the victim as either a family member, intimate partner, or acquaintance (Greenfeld, 1997). The number of stranger and acquaintance rapes and sexual assaults vary, however, according to whether a single offender or multiple offenders were involved. In single-offender rapes and sexual assaults, strangers accounted for nearly 20% of the victimizations (or, in other words, over 80% of the single-offender rapes are committed by non-strangers). In multiple-offender rapes and sexual assaults, strangers accounted for 76% of the victimizations.

Researchers estimate that between 10% and 14% of married women experience rape in marriage. When researchers have examined the prevalence of different types of rape, they have found that marital rape accounts for approximately 25% of all rapes. Rape in marriage is an extremely prevalent form of sexual violence, particularly when we consider that women who are involved in physically abusive relationships may be especially vulnerable to rape by their partners. Studies using clinical samples of battered women reveal that between one third and one half of battered women are

⁷ This section was adapted from Michigan Judicial Institute (2002), *Sexual Assault Benchbook*, retrieved March 25, 2003, from <http://courts.michigan.gov/mji/resources/sabb/sabb.htm>.

raped by their partners at least once. As research with battered women has previously revealed, women are at particularly high risk of experiencing physical and sexual violence when they attempt to leave their abusers for this represents a challenge to their abusers' control. One study found that two thirds of the women in their sample were sexually assaulted at the end of the relationship. Other researchers have found that women who are separated or divorced from their partners appear to be at high risk for sexual abuse (Bergen, 1999, and sources cited therein).

2. *Rape and sexual assault are underreported crimes.*

According to the FBI, a woman is raped every six minutes in the United States. The Federal Uniform Crime Report indicates that 93,103 sex offenses were reported to law enforcement in 1998. There were 2,186 reported forcible rapes in Tennessee in the year 2000, or 38.4 reported forcible rapes per 100,000 people. These figures made the state fifteenth highest in reported forcible rapes.

According to the Bureau of Justice Statistics, only 32% of sexual assault/rape victims overall reported their crimes to law enforcement (Greenfeld, 1997). However, in a more recent study involving only female victims, 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to the police (Rennison, 2002). This study also showed that, generally, the closer the relationship between the victim and offender, the greater the likelihood that the rape or sexual assault would not be reported to law enforcement. For instance, when the offender was a current (or former) husband or boyfriend of the female victim, 77% of rapes, 77% of attempted rapes, and 75% of sexual assaults were not reported. When the offender was a friend or acquaintance, 61% of rapes, 71% of attempted rapes, and 82% of sexual assaults were not reported. When the offender was a stranger, only 54% of rapes, 44% of attempted rapes, and 34% of sexual assaults were not reported.

Although there are many reasons why victims may not report a sexual assault or rape to law enforcement agencies, including fear of retribution, of not being believed, and of the criminal justice system in general, the most common reason given for non-reporting was that it was considered a personal matter (Greenfeld, 1997). The most common reason given for reporting the sexual assault or rape was to prevent further crimes by the offender against the victim.

Despite underreporting, the Justice Department's annual National Crime Victimization Survey found that sexual assault increased by 33 percent from 1998 to 1999. In fact, over the 1998-1999 time period, rape and sexual assault were the only crimes included in the survey that increased. In August 2000 the U.S. Department of Justice, Bureau of Justice Statistics, found between 1993 and 1999 that "every demographic group considered – gender, race, Hispanic origin and household income – except for one, females, experienced significantly decreasing rates of victimization" (Rennison, 2000).

3. *The overwhelming majority of sexual assaults are perpetrated against women.*

An estimated 91% of victims of rape and sexual assault are women (Greenfeld, 1997). In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99%.

4. *Children are another vulnerable population.*

Every two minutes a child is sexually abused in the United States. Russell, David Finkelhor, and Vincent DeFrancis all conclude in their separate research that at least one in four females will be sexually abused by age eighteen (Urguiz and Keating, 1990). Suzanne Sgroi in her research about child sexual abuse determined that one in six to ten males would be sexually abused by age eighteen (Sgroi, 1978). Research on male victimization reveals that about 70 percent of male victims are abused by men and 83 percent of sexually abused males are under the age of twelve (Urguiza and Keating, 1990). All of these researchers agree that the large majority of child sexual abuse incidents go unreported.

5. *Weapons are not used in a majority of sexual assaults.*

Eighty four percent (84%) of rape and sexual assault victims reported that no weapon was used by the offender (Greenfeld, 1997).

6. *Resistance or self-defense is employed in a majority of sexual assaults and rapes.*

About 7 of 10 victims reported taking some form of self-protective action during the rape or sexual assault—the most common form of self-protective action was to resist by struggling or to chase and try to hold off the offender (Greenfeld, 1997). However, among those victims who took self-protective action, only a little more than half felt that their actions helped the situation. And about 20% of the victims who took such action felt that their actions either made the situation worse or simultaneously helped and worsened the situation.

7. *Most rapes and sexual assaults occur in the victim's home or within one mile of the victim's home at a friend's, a relative's, or a neighbor's home.*

Nearly 6 of 10 rape and sexual assault victims reported that the incident occurred in their home or within one mile of the home in a friend's, relative's, or neighbor's home (Greenfeld, 1997).

B. Impact of Sexual Assault

1. *Physical Injury*⁸

Dr. Ann Wolbert Burgess and Linda Lytle Holmstrom, pioneer workers in rape crisis and recovery, recorded signs and symptoms of trauma from the medical records of 146 victims age five to seventy-three that they assisted at Boston City Hospital in the early 1970's. Signs of physical trauma (trauma visible to the eye) were indicated on 86 (58.9%) of the victims. The face received the greatest number of bruises. Bruises were a result of being hit or slapped with the assailant's hand or fist. Struggles often resulted in abrasions to the back, arms, and limbs (Burgess and Holmstrom, 1979).

A later study by Drs. Judith E. Tintinelli and Marion Hoelzer of the Detroit Receiving Hospital and University Health Center included 372 female sexual assault victims. The age range of the victims was thirteen to seventy-eight years old; 87 percent were over eighteen years of age; of those, 3 percent were age fifty or older. Of the study group, 20 percent had a history of prior sexual assault. There were 148 sites of injury in 118 (32%) patients. Areas of injury were (1) face, head and neck; (2) trunk; (3) extremities; and (4) vaginal/perineal. Injuries to the face, head, and neck were most common, comprising 41% of all injuries. Every case of vaginal or perineal trauma was accompanied by victim statements of pain, bleeding, or both. Of the eleven victims who were over age fifty, 63 percent were injured (*Annals of Emergency Medicine*, 1985).

Some rape victims are murdered. Dr. Mark L. Rosenberg noted in a study, "Homicide and Assaultive Behavior," that of the 170,000 rapes and attempted rapes reported to the FBI in 1980, 200 ended in murder (Rosenberg, 1985). In 1990, there were 305 deaths reportedly connected to sexual victimization. The actual incidence is undoubtedly higher.

Despite the historical myth that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women (Bergen, 1999, and sources cited therein). The physical effects of marital rape may include injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue, and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during

⁸ This section is adapted from "The Politics Of Rape," by Polly Poskin in *Rape Crisis Advocacy: A Voice for Victims*, published by the Illinois Coalition Against Sexual Assault in October 2000.

the sexual violence. One study found that one half of the marital rape survivors in their sample were kicked, hit, or burned during sex. Specific gynecological consequences of marital rape include vaginal stretching, miscarriages, stillbirths, bladder infections, infertility, and sexually transmitted diseases including HIV.

2. Psychological Impact⁹

The psychological cost to the victim is difficult to measure. Burgess and Holmstrom conducted a follow-up study four to six years after the victims' initial contact with Boston City Hospital. The researchers wanted to assess how the victims viewed their victimization experience and how they ranked it as a crisis in their lives. Eighty-one of the 146 victims responded.

Forty percent of the victims ranked the rape as the most upsetting event in their lives. Victims remarked on how the rape "messed up" their lives or changed their lives dramatically. Almost 30 percent of the victims ranked the rape as highly stressful. These women said the rape was worse than: a parent's death, another victimization, a family suicide, a fatal automobile accident, or having a child taken away by a social service agency or other personal family problems.

The majority of victims (74 percent) felt they had recovered by the time of the follow-up study (4-6 years). Of these, thirty-seven percent said recovery had taken a matter of months; the other 37 percent said recovery had taken place "within years." Twenty-six percent of the victims did not feel recovered by the time of the follow-up (Burgess and Holmstrom, 1979).

Similar to other survivors of sexual violence, some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress disorder (Bergen, 1999, and sources cited therein). Compared to women raped by strangers and those whom they don't know well, marital rape survivors report even higher rates of anger and depression. Long-term effects often include disordered eating, sleep problems, depression, problems establishing trusting relationships, and increased negative feelings about themselves. Research has also indicated that the psychological effects are likely to be long lasting—some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.

⁹ This section is adapted from "The Politics Of Rape," by Polly Poskin in *Rape Crisis Advocacy: A Voice for Victims*, published by the Illinois Coalition Against Sexual Assault in October 2000.

Women live in fear of sexual assault all of our lives. This has a profound impact on what we dream for ourselves and how we conduct ourselves in our day-to-day lives. As a result, sexual assault has a profound and immeasurable impact on society. We must acknowledge that rape is terribly devastating and sometimes murderous. We must recognize that there is a social cost when 50 percent of the population lives with the fear and/or the trauma of sexual violence. We must be committed to stopping rape; we must engage our communities in responding to victims and preventing sexual victimization. Communities need to adopt rape prevention strategies that put an end to stereotypical misconceptions about rape (e.g., that young, attractive women are assaulted in alleys by strange, sexually deranged men) and promote equality, respect, and the right of women and children to live free of sexual assault.

Marie Marshall Fortune, Director of the Center for Prevention of Sexual and Domestic Violence in Seattle, Washington and author of *Sexual Violence*, deftly summarizes the physical and psychological impact of rape:

Sexual violence is, first and foremost, an act of violence, hatred, and aggression. Whether it is viewed clinically or legally, objectively or subjectively, violence is the common denominator. Like other acts of violence (assault and battery, murder, nuclear war), there is a violation of and injury to victims. The injuries may be psychological or physical. In acts of sexual violence, usually the injuries are both.

For many, the realization that sexual violence is primarily violent and only secondarily sexual in nature has been difficult to accept. There have been years of indoctrination that in “sex crimes” there are rapists who cannot control themselves and victims who really want to be raped. In this erroneous stereotype, sexual violence is seen as being primarily sexual in nature. In fact, rape and child sexual abuse are acts of violence which are injurious. Any victim of rape knows that she has experienced the most violent act possible short of murder. And any victim of child sexual abuse is haunted by the helplessness she felt at the hands of the molester who sought to control and exploit her (Fortune, 1983).

3. Rape Trauma Syndrome¹⁰

¹⁰ This section is adapted from “Rape Trauma Syndrome,” by Linda Albert in *Rape Crisis*

After a woman is sexually assaulted, those responding to the victim, including family, friends, hospital personnel, and law enforcement officials are often confused by her behavior. They may wonder: “Why can't she remember how long the attack lasted, what the attacker looked like, or where it occurred? Why didn't she scream, fight back, or try to escape? Why doesn't she remember any pain? Why isn't she crying? Why did she wait so long to report?” To answer these questions, we need to understand the trauma of rape and how it affects the victim. Research has shown that there is a range of physical and emotional symptoms commonly experienced by rape victims. This complex series of reactions has come to be known as Rape Trauma Syndrome.

In 1980, the Diagnostic and Statistical Manual of Mental Disorders II (DSMII) of the American Psychiatric Association first included the diagnosis of Post-Traumatic Stress Disorder. Rape Trauma Syndrome is considered a form of Post-Traumatic Stress Disorder. According to the manual, the essential and distinguishing feature of Post-Traumatic Stress Disorder “is the development of characteristic symptoms following a psychologically traumatic event, such as sexual assault, that is generally outside the range of usual human experience”. Victims of other catastrophic events such as earthquakes or war often experience similar crises. Every person is unique, and every person’s experiences are different; however, Rape Trauma Syndrome can be a useful guide to understand the reactions that are common to many people faced with the crisis of sexual victimization.

a. Phases of Rape Trauma Syndrome

Recent research has continued to refine what we know about Rape Trauma Syndrome. In her 1992 book *Trauma and Recovery*, Judith Herman writes about the impact of trauma. She argues that the response to a threatening event such as sexual assault involves a mind-body reaction. The body reacts with an increase in the arousal of the sympathetic nervous system, putting the body in a “state of alert.” Often, during this time, ordinary senses and perceptions such as time, fatigue, pain, and hunger are altered. Intense feelings of fear and anxiety may be experienced. If the victim of a trauma finds herself unable to fight back or flee, the impact of the trauma is multiplied. This combination of physical and psychological helplessness can produce long-standing changes in the victim’s stress response system.

Currently, rape crisis workers use either a two or four stage model of Rape Trauma Syndrome. All models describe the same pattern of reactions to rape, but they differ in

Advocacy: A Voice for Victims, published by the Illinois Coalition Against Sexual Assault in October 2000.

the way they address the temporal stages of the victim's responses. The detailed four-stage model described below draws on the work of Burgess and Holmstrom. The phases detailed occur on a continuum and do not necessarily present themselves in sequential order.

- Phase I: This phase of Rape Trauma Syndrome is experienced during the attack. Once attacked, the victim is unsure of what is happening to her; she is stunned and shocked. At some point during the attack, the victim realizes that something “bad”, “terrible” or “hurtful” is happening. At this point, the victim may become paralyzed by fear, her sense of time may be distorted, and she may dissociate from the fear and/or pain she is feeling. The victim may feel as if she is outside of herself, watching the assault happen. This is a form of dissociation. Her focus is typically on simply trying to survive the assault.
- Phase II: This phase, often referred to as the Acute Phase, typically occurs after the sexual assault. The victim is in a state of shock and disbelief. Her primary concern is getting to a safe place. At this point, it is not unusual for the victim to comply with the perpetrator's demands, behavior that may puzzle those investigating the sexual assault. For instance, victims have been known to drive their perpetrators home after a sexual assault, to acquiesce to the perpetrator's demands that they continue to see him after the assault, even to go to the store and buy items requested by the perpetrator and bring them back to him. This behavior is often motivated by extreme fear on the part of the victim.

It is common for the victim not to tell anyone about the attack. Delayed reporting is also common. The victim may fear that if she tells she will be blamed, or that the attacker will return to hurt her further. Many victims report that their attacker threatened them with dire consequences if they reported the assault to anyone. Adolescent victims seldom report immediately to parents as they often assume the responsibility for the assault and fear parental consequences. During this phase, the victim may be afraid to go to places she usually would frequent. The victim may isolate herself or see danger around every corner. If she chooses to report her assault, the stress and shock she is experiencing may cause her to exhibit behaviors that are surprising to those to whom she reports. For example, she may not cry or seem angry when recounting the details of the assault. In fact, she might laugh or present a flat affect, seeming to show no reaction to the rape.

Intrusive behaviors and thoughts are also common during Phase II. This includes a sense of re-experiencing the attack, nightmares, flashbacks, crying spells, anxiety attacks, and sudden mood fluctuations. The victim may also experience physical illness such as stomachaches, headaches, or body pains. These reactions are often “triggered” by something unknown to the victim. She may be in a relatively safe environment and suddenly have a flashback or

intense anxiety. These intrusive feelings and thoughts can have a significant impact on the victim's ability to function in her daily routine. The victim may also experience a sense of numbness, dissociation, or loss of memory regarding the event. This reaction defends the body and mind from having to process the trauma too quickly for the survivor to handle. This explains why the victim may not remember certain aspects of the assault.

- Phase III: This phase is often referred to as Outward Adjustment. In an attempt to put the sexual assault behind her and move on with her life, the victim may suddenly want to drop out of counseling or stop pursuing legal action. It is also common for the victim to try to convince others that she is no longer affected by the sexual assault. However, most victims are actually experiencing a significant amount of internal stress. Stress may trigger a return of many of the behaviors, thoughts, and emotions experienced during Phase II.
- Phase IV: Typically referred to as the Resolution or Integration Phase, this is where the victim will process the trauma from the sexual assault and begin to integrate the experience into her life. The victim begins to recognize that the sexual assault is only a part of her, rather than the essence of who she is. This is often referred to as becoming a "survivor" as the person understands that she was not responsible for the assault. She places the responsibility on the perpetrator, and commits herself to moving on with her life. She may still experience problems with the physical and emotional symptoms of earlier states, but she has learned to manage them and they become less disruptive to her daily routine. There is a great variety as to when survivors enter this fourth phase. Some may reach it after only several months and others may find it takes years of hard work and courage to emerge as a survivor.

b. Rape Trauma Syndrome and Advocacy

Because of the level of trauma experienced during and after a sexual assault, most survivors state that they are forever changed by the assault. They will never forget it, and they work to manage its impact as they go through life. Having a thorough understanding of Rape Trauma Syndrome can be an important part of their healing process. It can also aid them in understanding why they may have a particular reaction at any point. This understanding can support the victim in continuing with legal remedies or seeking the assistance of a counselor. An advocate's role is to inform the victim about Rape Trauma Syndrome and its effects on her. The advocate can also explain Rape Trauma Syndrome to medical and legal personnel who are confused by the victim's behavior or demeanor after the assault. This intervention is critical to helping victims work with the system and ultimately heal from the trauma of sexual assault.

4. Recognizing the Traumatic Effects of Court Proceedings¹¹

A sexual assault victim's participation in court proceedings can be very stressful. Moreover, testifying in court, especially about such personal and violating circumstances, can be very traumatic. This fear may arise from the proximity of the alleged perpetrator, reactions to testimony and other evidence presented at trial, attacks on the victim's credibility, and a perception that the judge and jury may not believe the victim's testimony (Resick, 1987). This is especially true of facing the alleged perpetrator. Looking at the defendant, or even preparing to do so, may remind the sexual assault victim of the circumstances underlying the alleged crime, and thereby produce psychological trauma (Wiebe, 1996). This traumatic effect may be heightened for a sexual assault victim in a case where the defendant has chosen to represent himself or herself rather than being represented by counsel. In such a case, the encounter with the defendant may be direct: the defendant may choose to cross-examine the victim directly rather than through stand-by counsel. Apart from testifying and recounting extraordinarily personal circumstances, a sexual assault victim's participation in court proceedings may involve missing work, rearranging her daily schedule, waiting for hearings in crowded hallways and courtrooms, and dealing with continuances and delays.

C. Characteristics and Typologies of Sex Offenders¹²

No two sex offenders are exactly alike. In fact, one sexual assault expert said that "sex offenders comprise an extremely heterogeneous population that cannot be characterized by single motivational or etiological factors (Schwartz, 1995)." However, sex offenders often exhibit similar characteristics. As a result, some experts on sex offenders have formed typologies to create a hierarchy of seriousness, and to catalog perpetrator dangerousness and victim impact. One common typology, formed by Dr. A. Nicholas Groth, classifies the act of rape (as opposed to the type of rapist) into three categories, all of which may also be used to describe the motives, behavior, and conduct of the rapist: (1) anger rape; (2) power rape; and (3) sadistic rape.

¹¹ This section was adapted from Michigan Judicial Institute (2002), *Sexual Assault Benchbook*, retrieved March 25, 2003, from <http://courts.michigan.gov/mji/resources/sabb/sabb.htm>.

¹² This section was adapted from Michigan Judicial Institute (2002), *Sexual Assault Benchbook*, retrieved March 25, 2003, from <http://courts.michigan.gov/mji/resources/sabb/sabb.htm>.

Another common typology, formed by the Federal Bureau of Investigation, classifies rapists into four categories: (1) power-reassurance rapist; (2) assertive rapist; (3) angry-retaliatory rapist; and (4) anger-excitement rapist (Schwartz, 1995). Typologies, although a quick and easy reference with condensed information, are not without their drawbacks. For instance, they do not always take into account the personal characteristics of each individual rapist, and they are not usually subjected to validation studies. Moreover, such typologies can cause stereotyping and may often reflect the bias of the originator's professional background.

What follows are some common characteristics of sex offenders.

1. *Sex offenders are overwhelmingly male.*

The great majority of sex offenders are male. Nearly 99% of sex offenders in single victim incidents were male (Greenfeld, 1997). However, the Federal Bureau of Investigation reported in 1997 that females constituted eight percent of all rape and sexual assault arrests for that year. Many of these women are mothers charged with "failing to protect" their children from sexual assault.

2. *Sex offenders typically have access to consensual sex.*

The majority of sex offenders have access to consensual sex during the time that they rape or sexually assault their victims (Groth, 1979).

3. *Sex offenders are not typically mentally ill.*

The majority of sex offenders are not mentally ill; in fact, as a group, sexual assault perpetrators are no more likely than other felons to be mentally ill (Scully, 1990; Groth, 1979).

4. *Most sex offenders were not sexually or physically abused as children.*

In one study of 114 convicted rapists, 91% denied experiencing childhood sexual abuse; 66% denied experiencing childhood physical abuse; and 50% admitted to having nonviolent childhoods (Scully, 1990).

5. *Most sex offenders are recidivists and commit other forms of interpersonal violence.*

A recent study of undetected rapists, i.e., those rapists who escaped notice by the criminal justice system, found that a majority of such rapists were recidivists and committed other acts of interpersonal violence, including battery, child sexual abuse, child physical abuse, and sexual assault short of rape or attempted rape (Lisak and Miller, 2002).

6. *Research on the Undetected Sex Offender*¹³

It is only within the past 20 years that the truth about rape and the sex offender has begun to emerge. Studies of victims reveal that few ever report the crime, and that most are raped by men they know to some degree, including men they met at a party, men who picked them up in a bar, men who escorted them home at night, and men whom they used to date. These studies prompted researchers to begin studying "undetected" rapists, criminals who were flying below the radar screens of the criminal justice system.

By using new research methods, more has been learned about these offenders, the men who are and always have been responsible for the vast majority of sexual assault crimes. The following summary of research findings paints a far more accurate picture of the "typical" sex offender than the one often portrayed by common stereotypes.

¹³ This section is adapted from *Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement*, developed by the National Center for Women and Policing with support provided by the Violence Against Women Office, Office of Justice Programs, May 2001.

a. Premeditation

Sex offenders who attack women they know are sometimes tagged with the misnomer, "date rapist." Often, there is the implication that the man and the woman went out on a date, started having sex, and then "somehow things got out of hand." Actually, these sex offenders typically premeditate the sexual assault with great detail and cunning.

These rapists typically manipulate their victims into positions of vulnerability by getting them alone in a room, a car, or in a secluded area. They ply their victims with alcohol and, increasingly, use so-called "date rape drugs" to disable them entirely.

Perhaps the clearest indicator of the premeditation behind these assaults is the fact that they tend to be repeated. Recent research indicates that, just like incarcerated rapists, undetected rapists are repeat offenders who use violence in many domains.

- One sample of 122 undetected rapists admitted to 386 rapes, 20 other acts of sexual assault, and 264 acts of battery against intimate partners.
- These same 122 rapists also admitted to 365 acts of sexual abuse against children and 91 acts of physical abuse against children.

b. Instrumental Violence

A key characteristic of the "undetected" sex offender is that they tend to use only as much violence as is necessary to intimidate their victim and ensure her submission. They use verbal threats, and often in a more sophisticated manner than simply threatening physical harm. For example, they may tell their victims, "you're drunk, no one will believe you," or "if you tell anyone, it's your reputation that will suffer." These offenders will escalate their level of threat and violence as needed, typically using their body weight and arms to pin down their victims and terrify them into submission.

c. Use of Alcohol

Alcohol is an extremely common ingredient in sexual assaults, often consumed by both the victim and the perpetrator. Many rapists use alcohol to disinhibit themselves and also to render their victim more vulnerable. Many rapes occur when the victim has been rendered either semi-conscious or entirely unconscious from the effects of alcohol.

d. Sexual Behavior

Undetected rapists have consistently been shown to be more sexually active than other men. Apart from their sexually aggressive behavior, they engage in consensual and coercive sex far more often than is typical for men of their age group. Their sexual activity tends to be an important component of their identities. Thus, rather than being a product of greater sex drive, their increased sexual activity appears to be driven by their view that if they are not very active then they are neither “successful” nor adequate as men.

e. Attitudes and Beliefs

Sexually aggressive behavior is typically part of a belief system that views women as sexual objects to be conquered, coerced, and used for self-gratification. Undetected rapists are much more likely to hold stereotyped beliefs about the “proper” roles for women and men in society, and to adhere rigidly to those beliefs. They adhere to “rape myths” that both justify their aggressive acts and foster them. Their adherence to rape myths and rigid stereotypes frequently allows them to distort their perceptions of their victims’ behavior. For example, because they tell themselves “women say no to sex even when they really want it,” they can disregard their victims’ obvious signs of terror and resistance.

f. Underlying Motivations

Undetected rapists have repeatedly been found to harbor chronic, underlying feelings of anger and hostility toward women. They typically feel easily slighted by women, and carry

grudges against them. This underlying hostility is easily evoked and colors their distorted perceptions of women as “teasers” who either “secretly” want to be coerced into sex, or else “deserve” it. These men have also consistently been shown to have strong needs to dominate and to be in control of women, and to be particularly fearful of being controlled by women. This characteristic leads them to view sexual relations as “conquests,” and all women as potential “targets” of conquests. Consistent with their very stereotyped beliefs about sex roles, undetected rapists are shown to be more emotionally constricted than non-aggressive men. They are less able to label their own emotional experience, and much less emotionally expressive. As a consequence, they are also less capable of resonating with the emotional experience of other people, and are therefore less empathic than non-aggressive men.

g. Sexually Violent Subcultures

A consistent finding in the research on “undetected” sexually violent men is that most of this violence emerges either directly or indirectly from what have been termed “sexually violent subcultures.” Examples of such subcultures include fraternities and delinquent gangs. These subcultures are powerful forces that both reflect the rapist’s views about women and sexual conquest and help to shape them. For example, at certain college fraternities the use of violent pornography is a frequent form of “entertainment,” providing explicit images of rape as being acceptable, non-criminal, and a sign of male virility. Within these subcultures, “sexual conquest” – having sex with as many women as possible – becomes a critical measure of how men view themselves and each other. The greater the number of such conquests, the more manly he is. The use of coercion and violence to secure these conquests is normalized in the subculture and becomes simply another part of the man’s “sexual arsenal.”

h. Hyper-masculinity

Consistent with their stereotyped and rigid views about the “proper” roles of men and women in society, undetected rapists tend to adopt highly “gendered” identities; that is, they see themselves as hyper-masculine; they strive to always behave in rigidly and stereotypically masculine ways. They are always on the alert for any perceived slight to their masculine

identities, and they are made very anxious by any situation that might cast doubt on their perceived masculinity.

When such deeply held beliefs are combined with the effects of sexually violent subcultures, as described above, the mixture becomes dangerous. The “power” motivation that underlies the constant striving for sexual conquest mixes with the rapist’s underlying hostility toward women and his hyper-masculine identity. When a woman resists his coercive sexual pressure, he is very likely to perceive this as a challenge and affront to his masculinity and to react with anger and aggression, behaviors that restore his sense of adequacy.

i. Developmental Antecedents

While the traditional view about incarcerated rapists was that they harbored deep-seated anger towards their mothers, the evidence indicates that among undetected rapists, anger and disappointment about their fathers is far more salient. For some of these men, damaged relationships with their fathers appear to feed their need to view themselves as hyper-masculine, and to drive their rigidity and stereotyped beliefs and behaviors. Another developmental factor that has been associated with sexual aggression is child abuse. The rate of child abuse among undetected rapists, particularly childhood physical abuse, is much greater than it is among nonviolent men or among convicted rapists.

III. PREVENTION¹⁴

Sexual assault can stop. For that to happen, men must change how they relate to women. Boys must be taught – and men re-educated – to value themselves and women equally, to share power equally in personal and professional relationships. It is well established that rapists do not view women as equals. Perpetrators understand that the goal of their behavior is to control and hurt others and they know that their behavior, time after time, will go unsanctioned. As stated previously, rapists understand that their actions strip women of their power as individuals and as a group.

Various approaches and prevention strategies have been adopted to stop sexual violence. Some have fallen woefully short of their

¹⁴ This section is adapted from “The Politics Of Rape,” by Polly Poskin in *Rape Crisis Advocacy: A Voice for Victims*, published by the Illinois Coalition Against Sexual Assault in October 2000.

goal because they are premised on false assumptions about sexual assault.

A. Prevention Strategies Focused Solely on the Victim

Some prevention strategies focus on the victim. These programs focus on avoidance hints and falsely suggest that by following certain rules of behavior – “don’t hitchhike,” “don’t wear short skirts,” “don’t go out alone after dark” – a woman could successfully prevent an attack. These approaches fail to guarantee safety, limit women’s independence, and improperly shift the responsibility for the assault from the offender to the victim. Moreover, these false prevention strategies ignore the fact that 70 percent of all rapes are committed by people the victim knows and trusts, perpetuating the myth that rape takes place in a dark alley by strangers. These “tips” amount to mass control of women’s lives under the guise of prevention and simply underscore another dimension of sexual assault as a political act: disempowering women and preventing them from moving about freely and safely in society.

B. Prevention Strategies Focused on Offender Control

This approach relies on prosecution and increased punishment as the keys to stopping rape. Prosecution and punishment of sex offenders is necessary. Victims and their advocates routinely seek prosecution of offenders to restore a sense of safety, to hold the offender accountable and to prevent the future assaults of others. Prosecution can help the victim and her family heal after such a traumatic experience. However, the criminal justice system does not address the root of the problem. Law enforcement and court responses, however successful, are after-the-fact measures that do not eliminate the trauma and pain a victim endures; they redress a wrong that has already occurred instead of focusing on how to prevent sexual assault in the first place. For true prevention to occur, we as a culture must look more deeply.

C. Community Prevention

Community-wide support must be enlisted for prevention work to be successful. Every component of a community must come together. Social service agencies, police, prosecutors, judges, doctors, therapists, teachers, parents, coaches, and neighbors must join forces if we are to eliminate sexual assault. True cooperation and collaboration creates a support network; it is a statement to women and men that rape is a crime against a community and

will not be tolerated. And, when a rape has occurred, true cooperation and collaboration from these groups sends a message to the victim and her family that the community stands with her and not the perpetrator. Former first Lady Hillary Clinton wisely suggested it takes a village to raise a child. Equally so, it takes a community to eradicate violence against women. Community-wide support means information about sexual assault will be accurate when it is shared. It means teachers and school administrators will not tolerate acts of intimidation and violence against girls. It means police officers will respond sensitively and effectively to sexual assault complaints. It means trusted adults will be trained to respond properly to child sexual abuse victims.

Community prevention also requires us to challenge the sexism, racism, classism, ableism, and homophobia that permeate our culture – and that are entangled with the oppression of rape. We must challenge District Attorneys to prosecute rapists, even if the victim is poor or black or deaf. We must insist that schools in poor communities of color have access to sexual assault prevention education programs. We must ensure that survivors who do not speak English are able to communicate with the police officer or emergency room nurse or a sexual assault advocate.

The most critical component to this successful community intervention strategy is individual support. Individuals must come together in groups to participate in community-wide advisory councils, meetings with public officials, and other relentless efforts to change laws and policies and procedures that are harmful to victims. These types of institutional advocacy are critical. Such efforts are about organizing grassroots support and using that support to change how hospitals respond to rape victims, how law enforcement keeps the victim's dignity at the center of its investigation, how prosecutors' use their discretion when deciding to file charges, and how courts balance the defendant's rights with the victim's rights. Institutional advocacy is about creating educational curricula with norms and values that oppose violence and condone non-violence. Finally, it is about community members and organizations coming together and committing themselves to eliminate sexual assault from their streets, homes, schools, and neighborhoods.

IV. CONCLUSION

In her book *Against Our Will*, Susan Brownmiller writes that men never rape their equals in power. Until women have equal status personally, socially, politically, and economically, we will continue to be vulnerable to sexual assault. Our work must be directed at equality and rights for women and children in every facet of society. It must be directed toward eliminating beliefs and practices that deny historically oppressed races and other groups fair treatment, equal justice, and ascribed dignity. Our work must be directed at changing the make-up of male-dominated institutions and organizations, thus restoring equal power to women.

It is undeniable that women remain the vanguard of the stop rape movement and we deserve thanks, support, and credit. As Judith Herman wrote in 1985: “The organized efforts of women in the past ten years have changed rape laws in every state, created rape crisis centers in every major city, established the National Center for the Prevention and Control of Rape, ended secrecy, and raised consciousness about rape. These results, for women, by women, illustrate that ultimately we are the sources of safety and protection” (Herman, 1985).

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Chapter 3

Legal Advocacy

for

Victims of Domestic and Sexual Violence

I. WHAT IS AN ADVOCATE?

By definition, to advocate literally means "to act as the voice of." Like all attempts to express a complex reality in a word, the term "advocate" is not perfect. However, the practice of battered women's and anti-rape advocates has added new layers of meaning to the term. Advocates speak up for women, children, and oppressed people when others won't. Advocates negotiate and strive for systems change. Advocates empower women and children to find and use their own voices. Advocates do not necessarily have professional degrees. "Our credentials should be based on the level of comprehension we have about the work, the compassion for . . . women and their children that we possess, our ability to guide women through systems, and a personal commitment to social change" (*Agents for Change*, 1997).

The movement against domestic and sexual violence is strong when it is made up of women doing our own work, survivors of sexual assault and domestic violence, women who know and love women who are being abused or who have been raped or killed, women who say we are being beaten and we will speak the truth about that violence and we will do something about it

and *we* will no longer allow government officials and the courts and law enforcement and social service agencies who are there to serve *us* to continue to deny the truth of *our* lives and act as if *we* and *our* problems do not exist. As advocates, our work is most effective when we speak *with* survivors as one unified voice, when our lives and our experiences are intertwined with the lives of survivors, when advocates can truthfully speak with survivors as *we* and not as *they*.

II. ADVOCATES AND POWER

The work of advocates is to speak the truth about sexual and domestic violence and to encourage and support survivors to speak the truth about the violence in our lives. The work of advocates is to help women access our own internal power and use it to build the kind of lives we want to have. In order to do this work, advocates must understand our own power, both our own internal power and the power we derive from the women we serve.

It is helpful when talking about power to distinguish between power-over and power-within (Starhawk, 1989). Power-over (we can also use the term "control") is the basic model, the underlying structure of almost all relationships in our culture. Employers have power over their employees. The wealthy have power over the poor. White people have power over people of color. And men have power over women. Violence is one of the ways in which those with power over another group maintain their dominance, for example, imprisoning men of color at higher rates than white men, gay-bashing, and the burning of Black churches. The message of this violence is that members of oppressed groups had better not step out of line and, in many cases, "stepping out of line" means merely existing. The violence of men against women is the way in which men reinforce their power over women. All men benefit from violence against women (in terms of maintaining their power over women) because all women know we can be beaten or raped or murdered, and thus are less likely to do things that might challenge male dominance.

In the same way, advocates have power over the women we serve. Advocates have the power to give or withhold safety, protection, life itself from the women we serve. Blatant abuses such as "sexual harassment, economic exploitation, emotional abuse, racism, homophobia, and other abuses of power of survivors by advocates happen (*Agents for Change*, 1997)." But other more subtle but no less serious abuses occur as well, for example:

- Guiding survivors to make "choices" that reflect the advocate's values rather than the survivors';
- Providing less zealous advocacy to survivors who are considered confrontational, abrasive, demanding, i.e., women who don't defer to the advocate;
- Taking actions "on behalf of survivors" that have the effect of trading one group of women's interests for another's.

As advocates, we have power in the legal system, the power to bring about change. This power is derived from the women we serve. The system confers some limited, often illusory, power on advocates in order to avoid having to deal with survivors. If all the women who have been raped and battered learned to use our power and demand our rights, the walls of the legal system would crumble. So, in many ways, advocates serve as a buffer between the legal system and women who have been abused. Advocates in effect can prevent real change from happening by keeping women who have been abused away from power.

We live in a culture that denies the very existence of power-within. Even God is envisioned as an external authority, existing outside of us and the rest of "creation", ready to mete out judgment, punishment, reward. Within this framework, power is conferred as a gift from the external authority (Koch, 1997) or it is taken from others. But the truth is that power, real power, is inside us. As advocates, we must choose whether we will exercise and work to increase our power over the women we serve or whether we will work to increase our power-within and the power-within of the women we work with.

What is power-within? Power-within is the power to bring things about. It is a creative force. Power-within creates poems and art, builds houses and communities. Power-within is the power to *become* - a writer, a survivor, a teacher, a prophet, an advocate. An advocate helps the women she works with find their own power-within by finding her own power-within "and by example, by invitation, and by incantation, she calls people . . . to find, know, respect, and wield the power they each have within (Koch, 1997)." (For a fuller discussion of power-within as it is experienced by women and by gays and lesbians, see Spretnak, 1994, and Grahn, 1990.)

Individual men batter and rape for two reasons: because it works (i.e., it gets them what they want) and because they can. As advocates we must work to change these two realities. We change the ability of

batterers and rapists to get what they want through violence in two ways: by empowering women and by changing what batterers and rapists want. First, empowering women means that violence cannot be used to control us. Women must have options for survival other than enduring abuse. Women must be allowed to defend and protect ourselves and given the resources to do so.

Second, for those of us who work with batterers and rapists, it means changing what men want. It means helping them find a vision of life in which their intimate partners are truly partners, equal, powerful partners. It means helping them change their image of women as merely potential targets of conquest. It means helping them believe in, find, and access their own power-within so they no longer need or want power over another. It means modeling these new kinds of power relationships in our lives, our work, our organizations. Doing this work effectively means revolutionary change of every institution in our society to replace power-over with power-within.

Advocates for victims of domestic and sexual violence must also work to change the fact that men batter and rape "because they can." Efforts to enforce and expand legal proscriptions against domestic and sexual violence are an important part of this work.

III. SOME PRINCIPLES OF ADVOCACY

Institutions seek uniformity: a uniform solution to a multitude of individual problems. The civil court seeks to "solve" the problem of domestic violence with a singular solution - usually an Order of Protection.

Criminal courts use jail or prison sentences, probation, or sentencing to sex offender treatment or batterers groups. Institutions start with their solution and try to make the solution fit the problems and the problems fit the solution, often ignoring the problems and the goals of victims altogether.

Good advocates seek creative solutions to problems. Good advocates see victims and their problems as

singular and individual, and the possible solutions as multiple. Unfortunately, advocates too often view the problems of the women we work with institutionally; that is, we decide that, as advocates, our job is to help women get Orders of Protection or it is to support and encourage them through the criminal process. This makes the advocate's job easier, more manageable, less complex, but it also means that women may not get the help they need. An Order of Protection or a criminal proceeding is not an appropriate solution in every case, nor is it ever a total solution.

Truly viewing women's problems as an advocate means looking at the problem from the victim's perspective and working from there. Women will seldom state their goal as "I want an Order of Protection." An Order of Protection is not a goal. It is a possible solution. The goal may be "I want to be safe." The goal may be "I want him out of my house." Advocates start with the goal and work with the woman toward solutions. An advocacy model, as opposed to a social service model, means that you coordinate a variety of resources toward the goal of providing safety to women *as they define it*.

Ideally, advocates teach and support women to be their own advocates. Advocates help women talk through their situations to figure out what their goals are and what steps they should take to reach these goals. Advocates work with women to support them in speaking up for themselves.

Ideally, advocates also focus on system-wide changes to benefit all women using the legal system. Not every battered woman or survivor of sexual assault who seeks protection through the legal system will have an advocate. Advocates must work to insure that every woman gets justice whether she has an advocate or not.

Advocates build on the strengths of the women with whom we work. Women have survived abuse because they are strong, capable, and resourceful. It is the work of the advocate to help women recognize those strengths and to put them together with other resources, such as the protection of the legal system, to help women secure the safety we all deserve.

Advocacy for victims of sexual and domestic violence includes advocacy with businesses, churches, schools, and health care providers (physical and mental). Legal advocacy is only one kind of advocacy and will not be what every woman needs.

When we provide legal advocacy for women, we must not limit our advocacy to women seeking Orders of Protection or criminal prosecutions against their perpetrators. We must also advocate on behalf of women in other arenas within the legal system including advocacy on behalf of:

- Women accused of murdering or assaulting their batterers or rapists;
- Battered women charged in juvenile court with failure to protect their children from the batterer;
- Women who have been raped who are applying for victim's compensation or who want to sue their rapists for civil damages;
- Battered women whose batterers are seeking to have them involuntarily committed to a mental hospital or custody of their children taken from them.

When we talk about legal advocacy (except for cases in which women have had legal proceedings brought against them), we are talking about helping women who choose, with full knowledge of available options, to use the legal system to protect themselves. In helping women to decide which options to pursue, we must give them all the information we possess on all options both legal and extra-legal and the pros and cons of all options. We must be honest about the ability of women to get true justice from the legal system, pointing out drawbacks which include inadequacies in enforcement of legal solutions and barriers to legal relief such as:

- Sexism;
- Racism;
- Homophobia;
- Classism;
- Immigrant status;
- Age;
- Disabilities;
- Involvement in activities such as drug or alcohol use or prostitution; and
- Previous experience with the legal system, such as prior arrests.

While acknowledging the limits that exist for many survivors to find justice and protection through the legal system, we must also constantly be working against those limits.

An inherent danger in any advocacy program is the tendency to become more identified with the people within the system than with the women we serve. For example, it is easy for us to see ourselves as allies or even assistants to the prosecutor's office as perpetrators are brought to justice. When this happens, it makes it difficult for us to advocate for women when they are being prosecuted. It requires constant vigilance and self-examination to maintain a distance from the system that will allow us to be advocates rather than just additional players within the system. Maintaining our focus on educating women about their rights and the process helps us to avoid the traditional helping relationship that takes power away from women and doesn't accomplish the goal of securing protection and justice.

IV. STRATEGIES FOR SYSTEMIC CHANGE

Change is possible even in the most intransigent legal system although it may take time, perseverance, and many different strategies. Two key requirements of bringing about change in the legal system are to become an expert in what the laws do and do not say and never to accept less than what the law requires.

It is essential when providing legal advocacy to know exactly what the law requires. Without this knowledge, the advocate can be sidetracked by groundless excuses when delay can be deadly. Also, knowing exactly what the law requires allows you to insist that the system apply the law correctly.

Even when confronted with the requirements of the law, the system may refuse to comply. For example, judges may refuse to issue Orders of Protection in cases where the law clearly provides that they must be issued. Prosecutors may refuse to prosecute cases of acquaintance rape even when the evidence is clear. In these cases, trying many different strategies until you find a successful one may be necessary. Brainstorming about different strategies with others knowledgeable about the law and the local system can help you come up with strategies that take into account the strengths on your side and the system's weaknesses and pressure points. Several simultaneous strategies may be called for depending on the particular systemic problem.

Many advocates have adopted the SARA problem-solving/action approach. SARA is a community-policing strategy that emphasizes critical thinking, survivor participation and leadership, community engagement, and strategic planning. SARA stands for:

- Spot and Study a problem.
- Analyze the problem.
 - Identify attempted and potential solutions.
 - Consider the role of the community in exacerbating or alleviating the problem.
 - Examine the costs and benefits of the array of possible interventions.
 - Figure out who might be willing and able to engage in solution strategies.
- Respond to the problem.
 - Choose the most promising interventions.
 - Develop a detailed plan for implementing the solution.
- Assess the efficacy of the intervention.
 - Evaluate the response.
 - Discuss any problems that arose.
 - Ask:
 - Was the definition of the problem faulty?
 - Were adequate resources (both human and material) applied to the solution?
 - How might the intervention be modified to achieve better success?
 - How might we build the capacity of the victim and the community to maximize interventions? (Hart, 2002).

In carrying out your strategy, you may want to negotiate directly with the authorities about the problem, particularly if the difficulties occur at lower levels of the power structure. The more

you can involve survivors in these negotiations, the stronger they will be. Getting other powerbrokers involved on your behalf may help, too.

Using the local media may be a possibility and so may doing your own publicity about the problem through leafleting, posters, letters to the editor, and other means. It may be necessary to change the laws¹⁵, get involved in the election process¹⁶, or file suit against the system in order to bring about long-term change. The key is to be thoughtful and deliberate in choosing a strategy and carrying it out. You must be willing to re-evaluate your strategies and shift plans when necessary, but not timidly. Your strategies may need to change, but what doesn't change is what women need. Working together, advocates and women do have the power to change the system so that it works for us.

Systems advocacy isn't easy, as Polly Poskin points out in "The History of the Anti-Rape Movement":

The temptation for a little relief from always being the "hold-out" in a collaborative effort is overwhelming. And, sometimes, after negotiating and debating and holding out for what you know is "right," it would be a relief to simply accept the compromise position. It is not fun to be the conscience of a group, but if you are in the meeting because you are "the rape lady," then you

¹⁵ Calling your own senator or representative about a bill or an issue is not lobbying. Lobbying means contacting other senators and representatives about pending bills to ask them to vote in a certain way, or organizing people on a grassroots level to call their elected representatives. There are limits for tax-exempt organizations on their lobbying activities. 26 U.S.C. § 501(h); 26 U.S.C. § 4911. Anyone (including staff) who is paid by an organization to lobby the Tennessee legislature or the executive branch is required to register as a lobbyist. T.C.A. § 3-6-102(h); T.C.A. § 3-6-104. Rather than avoid all lobbying, however, organizations should familiarize themselves with the limits that apply to their organizations and the activities that are covered, and act within those limits while operating within the scope of their employment. These limits still allow quite a lot of lobbying to be carried on by tax-exempt organizations. For example, organizations which spend less than \$2000 a year on lobbying do not need to report on their lobbying activities. Organizations with budgets under \$500,000 can spend up to \$100,000 a year for lobbying. Organizations with higher budgets can spend more. Some grants may not be used for lobbying. Individuals and separate organizations set up especially for this purpose (and not eligible for tax exemption) can be more active in lobbying efforts.

¹⁶ You should know that participation in the electoral process by non-profit, tax-exempt organizations is grounds for revocation of the federal tax exemption, which can jeopardize funding to the organization. 26 U.S.C. § 501(c)(3). However, individuals and separate organizations set up especially for this purpose (and not eligible for tax exemption) can become involved in elections.

are there as an advocate for the survivor and an agent for social change on the crime of rape (Poskin, 2000).

Justice -- A Search Outside the Law¹⁷

by Barbara J. Hart

In the last fifteen years, the battered women's movement has channeled substantial creative energy into reforming and upgrading the civil and criminal justice systems. Nonetheless, the search for justice by battered women and children has produced uneven results. This paper does not recount the successes. Rather, it examines the failures and poses the question - "What do we do when the law fails?"

Many battered women report that restraining orders do not stop batterers from stalking, harassing, and terrorizing them. Yet, courts have been reluctant to give batterers anything beyond lectures. Thus, battered women suffer acute sleep disruption; they lose jobs because of safety concerns for co-workers due to batterer conduct; they cannot socialize without risking public humiliation by the batterer.

Do we as a movement use extra-legal means to stop the batterer? Do we establish a surveillance crew that watches him, names his abuse, and demands a cessation? Do we contact his boss, his buddies, his parents, his minister to persuade them to take action to stop his tyranny? Do we help battered women relocate? Do we spray-paint his car -- "Stop terrorizing Mary?"

Do we even ask the police to begin tailing the batterer, believing that surveillance may inhibit his harassment? Do we report judges to judicial disciplinary boards when they are endangering battered women? Do we even ask the media to challenge inadequate judicial practices?

¹⁷ "Justice -- A Search Outside the Law" by Barbara J. Hart was previously published in *The Battered Women's Movement: Bringing the Vision Home* (1988) Seattle, WA: National Coalition Against Domestic Violence. It is reprinted here by permission of the author.

Further, when battered women cannot survive economically because of the batterer's failure to pay support, do we ask that employees of county support offices be discharged for failure to diligently pursue support for battered women? Do we hold highly publicized yard sales and rent parties to help battered women through marginal times? Do we picket welfare offices that deal punitively with battered women?

When children are sexually abused and mothers seek to protect them by use of legal process but the judiciary transfers custody to the assailant and penalizes the mother for providing the child with counseling, do we provide sanctuary to the mother and child? Do we continue to provide counseling to the child where the court has barred the mother from seeking counseling for the child? Do we advocate for battered women who are incarcerated for refusing to reveal the whereabouts of their sexually abused children? Do we organize guerilla theatre on incest in social clubs of perpetrators?

Do we even ask child protective services to review the case when they have concluded that abuse is unfounded? Do we even contact significant actors in the child's life -- like school teachers, pediatricians, ministers, babysitters, grandparents -- and educate them about sexual abuse both so they can identify markers of sexual abuse and can fully comprehend the adverse consequences to children as a consequence of unchecked child abuse? Additionally, when treatment programs for batterers are encouraging batterer terrorism, do we stage "sit-ins?" Do we organize a community boycott of the batterer's program?

And when battered women are involuntarily committed to mental hospitals by batterers or their agents, do we voluntarily commit ourselves en masse to the same institutions to protect and support the battered women? Do we initiate a telephone campaign to the superintendent of the hospital when he opposes the habeas corpus petition we have brought on behalf of the battered woman? Do we start a letter-writing campaign to the licensing authority of the hospital enumerating the violations of this woman's and other patients' civil rights? Do we stage a mock trial outside the courthouse where we sentence the committing judge and abuser to incarceration for false imprisonment?

When a battered woman's homeowner's insurance is cancelled because she is the victim of abuse, do we invite a mass cancellation of policies with that company in favor of an insurer that promises not to penalize battered women?

The question is not do we engage in extra-legal activity as a first resort, but when other strategies fail or when advocacy produces justice for only one woman at a time requiring an extensive amount of advocate energy and time for each battered woman, do we step outside politically popular and personally comfortable strategies in pursuit of justice? Or have we become the gatekeepers and apologists for the system that is fundamentally rooted in the subordination and oppression of women?

When battered women kill or assault their abusers after the law has failed them, do we lend our best extra-legal assistance to assure that justice is achieved? Do we undertake a defense fund campaign? And if she is convicted, do we faithfully transport her children to see her in prison? Do we persuade the warden to let us convene our regularly scheduled Tuesday night support group in the prison, and do we provide transportation to all battered women in the community to the prison?

And when battered women have been coerced into crimes by their abusers, do we collectively share with her our own law-breaking experiences so that the accused can understand that many other battered women were similarly coerced and acted under duress in breaking the law? Do a group of us go to the prosecutor and insist that the abuser be charged with crimes of coercion and terrorism related to conduct which propelled the battered woman into crime? Do we raise funds to help her make restitution?

When the law fails and we consider extra-legal action, do we carefully consider the consequences of this action and choose to do nothing? Or do we not consider the consequences and jeopardize ourselves and others perhaps less informed? Or do we consider extra-legal strategies along with mechanisms to protect ourselves or prepare ourselves for the backlash that extra-legal action may bring? Do we regularly conclude that the greater good of the greater number is a rule that frees us from any assistance to battered women that is extra-legal? Which women do we choose to help? What factors should we consider when

contemplating extra-legal action? Do we not have a moral and political commitment to seek justice with battered women when the law fails?

The battered women's movement must consider justice-seeking strategies that involve extra-legal activities because the law of the patriarchy never will adequately protect its victims. To accept the limitations of the law and to retreat from extra-legal action profoundly jeopardizes battered women. As a movement, we must examine our own concerns about stepping outside the bounds of propriety. If our goals are justice and liberation, we must be vigorously creative in forging ahead. Let's talk!

A Herstory of Women's Resistance to Violence

- British writer Mary Wollstonecraft writes *A Vindication of the Rights of Woman* in 1792 in which she states that the rights of men should be extended to women. This social/political manifesto later serves as the “bible” for the early U.S. feminists.
- The birth of an organized women's rights movement in the U.S. can be traced to the anti-slavery and temperance movements in the mid-1800s. Women were active in this movement and learned how to organize themselves in pursuit of their rights. In 1848, in Seneca Falls, New York, women came together in their first organized women's rights meeting. Some of the first-wave feminists include Elizabeth Cady Stanton, Lucy Stone, Sojourner Truth, Mother Jones, Margaret Sanger, Mary Church Terrell, Emma Goldman, Ella Reeve Bloor, the Grimke sisters, Lucrecia Mott, and Jane Addams.
- The Society for the Prevention of Cruelty to Children (SPCC) flourished in the U.S. from the 1870s until the 1950s. Primarily concerned with the welfare of poor, immigrant children, the SPCC attempted to help abused women in the early years of its existence.
- In 1875, a shelter for battered women opened in Belton, Texas.
- In 1911, Chinese women opened centers to help women seeking divorces from their partners.
- After the Russian revolution of 1917, women along the Caspian Sea opened shelters for abused women.
- In the early 1900s in Calcutta, the Muslim Women's Association was formed which provided shelter for widows, abused women, and children.
- The U.S. women's suffrage movement culminated in 1920 when women were guaranteed the right to vote under the U.S. Constitution.
- In the 1950s and 1960s, the U.S. civil rights, anti-war, and black liberation movements directly influenced the rise of the women's liberation movement. It was the women's liberation movement that gave birth to both the anti-rape and battered women's movements.
- In 1965, Haven House (a shelter for battered women) opened in Pasadena, California.
- In 1966, the National Organization for Women was formed during the third National Conference of State Commissions on the Status of Women.
- The consciousness raising groups of the New York Radical Feminists held the first speak-out on rape on January 24, 1971. Over 300 people attended and ten women shared their experiences.
- In 1971, in Chiswick, England, Erin Pizzey opened a women's center. She soon discovered, however, that most of the women and children seeking assistance were fleeing abusive partners. Pizzey converted the center to a battered women's shelter and went on to play an instrumental role in the international battered women's movement. Her book, *Scream Quietly or the Neighbors Will Hear*, was the first written work devoted to the subject of domestic violence.
- In June 1972, the first emergency rape crisis line opened in Washington, D.C. Soon after, rape crisis centers were opened in Michigan and Philadelphia.

- In 1974, the Women's Advocates Collective in St. Paul, Minnesota opened a battered women's shelter. The following year, Women's Center South in Pittsburgh opened its doors. In 1976, Transition House in Boston was formed. Soon after, battered women's shelters began to open across the U.S.
- NOW put the issue of battering on its U.S. National Agenda in 1975.
- That same year, Del Martin's book, *Battered Wives*, was published. It was the first book to illustrate that battering was firmly rooted in sexism and helped to give form and direction to the battered women's movement.
- Susan Brownmiller's landmark book, *Against Our Will: Men, Women, and Rape*, was also published in 1975. Brownmiller was the first author in U.S. history to document the history of rape and to outline the magnitude of rape in our culture.
- In 1976, the first White House Conference on Domestic Violence was held, and individual states began holding public hearings.
- During the 1970s, NOW organized more than 300 local and state rape task forces.
- In 1976, there were approximately 1500 task forces, study groups, and crisis centers targeting rape. Beginning in 1977, thousands of women across the U.S. marched annually in "Take Back the Night" rallies.
- Today there are more than 2,500 battered women's and/or rape crisis centers in the U.S. Both the anti-rape and the battered women's movements are largely responsible for facilitating legislative efforts to develop laws that specifically address sexual assault and domestic violence.

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Chapter 4

Avoiding the Unauthorized Practice of Law

The availability of lay advocates is essential for victims of domestic and sexual violence to achieve full access to the courts. Lawyers are not available to represent every victim in every aspect of her case. In criminal cases, the District Attorney represents not the victim but the State. Even when lawyers do represent victims, lay advocates have an important role to play in educating the lawyer, facilitating communication between the woman and her lawyer, and providing the support women need to persevere through the legal system.

The laws of each state, including Tennessee, limit the practice of law to attorneys licensed by the state. The way the Courts interpret these laws varies from state to state. Tennessee prohibits any person from engaging in the "practice of law" or the "law business".¹⁸

The "law business" is defined as:

- advising or counseling about the law *for money*;
- drawing any legal paper, document or instrument *for money*;
- doing any act *for money* in a representative capacity that secures or tends to secure for a person any property or property rights; or
- soliciting of clients directly or indirectly to provide such services.¹⁹

¹⁸ T.C.A. § 23-3-103(a).

¹⁹ T.C.A. § 23-3-101(1). A "person" means a natural person, individual, governmental agency, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

The "practice of law" means:

the appearance as an advocate *in a representative capacity* or the drawing of papers, pleadings or documents or the performance of any act *in such capacity* in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.²⁰

However, the Tennessee Supreme has held that the activities "enumerated in the definitions, if performed by a non-attorney, constitute the unauthorized practice of law *only* if the doing of those acts requires the '*professional judgment of a lawyer.*' "²¹ Further, in cases where a statute permits certain acts to be performed by non-attorneys, Tennessee courts have generally held that actions pursuant to the statute do not constitute the unauthorized practice of law.²² The Domestic Abuse Act specifically authorizes agencies that provide domestic violence assistance to assist victims in the completion of the form petitions for filing with the clerk.²³

If you engage in the unauthorized practice of law:

- You can be prosecuted for a Class A misdemeanor which carries a penalty of not greater than eleven months, twenty-nine days or a fine not to exceed \$2,500 or both;²⁴
- You can be sued for treble the amount which someone paid you for unauthorized legal services, or for actual damages suffered, whichever is greater, plus the costs of the action including, but not limited to, reasonable attorney fees;²⁵
- The attorney general and reporter may bring an action in the name of the state:
 - to restrain you from violating this law;
 - to obtain a civil penalty in an amount not to exceed \$10,000 per violation;and

²⁰ T.C.A. § 23-3-101(2) (emphasis added).

²¹ *In re Burson*, 909 S.W. 2d 768 (Tenn. 1995) (emphasis added).

²² See, e.g., Burson, supra; Bar Ass'n. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W. 2d 767 (1959).

²³ T.C.A. § 36-3-617.

²⁴ T.C.A. § 23-3-103(b); T.C.A. § 40-35-111(e)(1).

²⁵ T.C.A. § 23-3-103(b).

- to obtain restitution for any person who has suffered an ascertainable loss by reason of the violation of this part;²⁶
- You can be punished for violating any injunction issued against you for unauthorized practice of law by a civil penalty of not more than \$20,000 per violation, in addition to any other appropriate relief;²⁷ and
- A local or statewide bar association may bring a civil action against you.²⁸

However, a trial court may not prohibit the filing of or expunge pleadings or documents prepared by someone other than a licensed attorney or the party.²⁹ Falsely representing yourself as a lawyer is a Class E felony, which carries a penalty of not less than one (1) year nor more than six (6) years and/or a fine of up to \$3,000.³⁰

The function of an advocate is to empower and encourage victims to make decisions on their own. Leaving control of the decisions that must be made in each case with the woman whose case it is, is the best way to avoid unauthorized practice of law. Whether it be in accompanying a woman to the clerk's office, sitting with her in court, or participating in a conference with the district attorney, the advocate must remember that the advocate's role is not to supervise the decisions of the victim or to preside over her legal affairs but to provide a source of information and encouragement.

On the other hand, any advocate, no matter how careful, is subject to charges of unauthorized practice of law by disgruntled defense attorneys, irate rapists or batterers, or judges, prosecutors, or others who resent advocates' efforts to see that the laws protecting women are enforced. The best way to protect yourself and your program is to:

- Think through ahead of time how you will respond if charges are made;
- Find supportive attorneys who will advise you and your program about issues of unauthorized practice of law and represent you and your program if charges are brought; and

²⁶ T.C.A. § 23-3-103(c).

²⁷ T.C.A. § 23-3-103(c).

²⁸ T.C.A. § 23-3-103(d).

²⁹ OAG 94-101 (9/9/94); see also, Old Hickory Eng. & Mach. Co. v. Shepard, 1995 Tenn. App. LEXIS 231 (Ct. App. 1995).

³⁰ T.C.A. § 40-35-111(b)(5).

- Develop a written policy that allows you to provide a wide range of education and advocacy to women while avoiding unauthorized practice of law.

Tips on Avoiding the Unauthorized Practice of Law³¹

1. Never give a battered woman legal *advice*. If she has legal questions, offer her all possible legal *alternatives* and make sure that she makes the final decision herself. This habit not only protects advocates from being accused of practicing law, but it also empowers the woman and helps her know that she took responsibility for herself in court.
2. Understand the difference between an advocate and a lawyer. Consult lawyers on complex legal issues when appropriate and make yourself available even when she is represented by an attorney. We are different, and lawyers can do things we can't, while advocates provide resources, information, and time commitment that attorneys do not always have at their disposition. It may be helpful to incorporate the disclaimer, "I'm not an attorney, I'm an advocate," in our interactions with battered women and people in the system.
3. Do not push her to do something that she doesn't want to do, even if that seems like the best option to you as an advocate. For example, if she wants the criminal court to dismiss charges against her abuser or wants to ignore a subpoena to testify in court, determine her motivation and do not pressure her to go through the process. You can explain to her ways that this legal process will help her or her response could harm her. If she doesn't want her abuser to go to jail (perhaps because she wants to get back with him/her) let her know how the criminal process can still hold her abuser responsible without jail time. If she is afraid of what her abuser will do if she follows through with the criminal process, make sure she knows of ways that she can be safe if she does follow through. But ultimately, the decision will be hers.
4. When filling out legal paperwork, filing court actions, etc. do it step by step with the battered woman. Explain the legal process thoroughly and do not put words in her mouth. Make sure she understands what will be happening in court, that she is representing herself with an advocate at her side, and that you are just helping her understand all of her legal alternatives. Read back to her what you have written on the affidavit portion of an Order of Protection petition to make sure that they are her words and not your interpretation of what happened (of course you can summarize for the sake of the court, but explain to her why you have done that and ask her if your summary is accurate). If appealing a case or taking on a more complicated legal approach, make sure the battered woman knows all of her legal options and that she can take another alternative together with her advocate.
5. Explain to systems people how you are not engaging in the unauthorized practice of law and push to be present with her as an *advocate* during every step of the legal process.
6. Do not allow the threat of being accused of the unauthorized practice of law to prevent you from advocating for her. If there is an opportunity to speak up in court and be helpful, do it, but make sure you are advocating her perspective and not only your own. Keep her constantly informed. Remember, you know the legal process better than she does, and sometimes you will come up with alternatives that were not her original idea. Just make sure that you are doing what she wants.

³¹ Reprinted with permission from *Agents for Change*, 1997, p. 13.

Orders of Protection³²

Orders of Protection can be a powerful tool to reduce domestic and sexual violence. One study found that filing for an Order of Protection resulted in a significant (66%) decline in abuse (Carlson, et al., 1999). They are particularly helpful when seen as part of a comprehensive approach aimed at achieving safety for victims. While generally thought of in the context of domestic violence, Orders of Protection can provide important protection for victims of sexual assault and stalking as well.

I. AUTHORITY TO ISSUE ORDERS OF PROTECTION

The particular court which can issue an Order of Protection varies depending on the population of the county. The statute sets forth specific requirements for certain counties based on population, as follows:

County	Definition	Court(s) with Jurisdiction
Davidson	Metropolitan form of government with a population of more than 100,000	Any court of record with jurisdiction over domestic relation matters and the general sessions court ³³
Hamilton, Knox	Population of not less than 200,000 nor more than 800,000	Any court of record with jurisdiction over domestic relation matters ³⁴
Shelby	Population in excess of 800,000 according	Any court of record with jurisdiction over

³² This chapter draws heavily on materials prepared by Leslye Orloff for the Family Violence Prevention Fund, San Francisco, CA (1992).

³³ T.C.A. § 36-3-601(3)(B)(2015).

³⁴ T.C.A. § 36-3-601(3)(A)(2015).

	to the 1990 federal census or any subsequent federal census	domestic relations matters or the general sessions criminal court ³⁵
All other counties		Any court of record with jurisdiction over domestic relation matters or the general sessions court ³⁶

In general, circuit and chancery courts have domestic relations jurisdiction. There may be a private act which confers domestic relations jurisdiction on other courts in your county.

Judicial commissioners, magistrates, and other officials with the authority to issue an arrest warrant in the absence of a judge may issue ex parte Orders of Protection when a judge of one of the courts listed above is not available.³⁷ The Attorney General for the State of Tennessee has advised that “not available” means that:

the judge cannot carry out the duties of his office due to illness, disability or other cause, when the judge is away from his or her office or when the judge is engaged in the performance of other judicial duties such that he or she would not be able to address the application for an Order of Protection within a reasonable amount of time.³⁸

Judicial commissioners, magistrates, or other officials with the authority to issue an arrest warrant may not conduct a hearing or issue an extended Order of Protection.³⁹ The grant of jurisdiction over Orders of Protection to the general sessions court in Davidson and Shelby Counties does not confer jurisdiction to the general sessions courts in these counties for matters relating to child custody, visitation, or support.⁴⁰

A Tennessee court acquires personal jurisdiction over a non-resident if an incident or threat of domestic abuse, sexual assault, or stalking has occurred in the state.⁴¹ An offense can be considered to have occurred in the state if any part or element of the crime was committed in the state.⁴² Lack of personal jurisdiction must be raised by the

³⁵ T.C.A. § 36-3-601(3)(E)(2015).

³⁶ T.C.A. § 36-3-601(3)(C)(2015).

³⁷ T.C.A. § 36-3-601(3)(D) & (E) (2015).

³⁸ Attorney Gen. Op. 00-120 (2000).

³⁹ Attorney Gen. Op. 01-027 (2001).

⁴⁰ T.C.A. § 36-3-601(3)(B) & (E)(2015).

⁴¹ T.C.A. § 20-2-214 (2013).

⁴² See, e.g., Adair v. United States, 391 A. 2d 288 (D.C. 1978); United States v. Baish, 460 A. 2d 38 (D.C.

respondent and is easily waived by express or implied consent.⁴³

Petitions for an Order of Protection may be filed in any county where domestic abuse, sexual assault, or stalking occurred or in the county where the respondent resides if the respondent is a Tennessee resident.⁴⁴ If the respondent is a non-resident of Tennessee, the petition may be filed in any county where the domestic abuse, sexual assault, or stalking occurred or in the county where the petitioner resides.⁴⁵ Like personal jurisdiction, improper venue must be raised by the respondent and is easily waived.⁴⁶ An Order of Protection is valid and enforceable in any county in Tennessee⁴⁷ and by any court that has jurisdiction over Orders of Protection.⁴⁸

II. GROUNDS FOR ISSUANCE OF AN ORDER OF PROTECTION

A. Domestic abuse victim.

"Domestic abuse" is the term the statute uses to refer to acts against a victim who meets the relationship requirements set forth in the statute.⁴⁹ It includes:

- Inflicting physical injury on a victim by other than accidental means;
- Attempting to inflict physical injury on a victim by other than accidental means;
- Placing a victim in fear of physical harm;
- Physical restraint; or
- Malicious damage to the personal property of the victim, including inflicting, or attempting to inflict, physical injury on any animal owned, possessed, leased, kept, or held by an adult or minor, or placing an adult or minor in fear of physical harm to any animal owned, possessed, leased, kept, or held by such adult or minor.⁵⁰

1983); Anthony T. v. Anthony J., 510 N.Y.S. 2d 810 (N.Y. 1986) (telephone harassment initiated outside but received in the state could serve as basis for Order of Protection); Pierson v. Pierson, 555 N.Y.S. 2d 227 (N.Y. 1990) (appellant's return to New York and his presence and service in New York presented a risk of violence to plaintiff although the acts of violence occurred outside the state).

⁴³ Landers v. Jones, 872 S.W.2d 674, 1994 Tenn. LEXIS 46 (Tenn. 1994).

⁴⁴ T.C.A. § 36-3-602(c) (2015).

⁴⁵ T.C.A. § 36-3-602(c) (2015).

⁴⁶ Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure §5-6(f) (1999).

⁴⁷ T.C.A. § 36-6-606(f) (2015).

⁴⁸ State v. Gray, 46 S.W.3d 749, 2000 Tenn. App. Lexis 677 (Tenn. Ct. App. 2000).

⁴⁹ T.C.A. §36-3-601(4)(2015).

⁵⁰ T.C.A. § 36-3-601 (1)(2015).

“Domestic abuse victim” means any person who falls into one or more of the following relationship categories:

- Adults or minors who are current or former spouses;
- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage; or
- Adult or minor children of a person in a relationship described above.⁵¹

B. Sexual assault victim.

"Sexual assault victim" means any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with or placed in fear of any form of rape, as defined in Sections 39-13-502, 39-13-503, 39-13-506 or 39-13-522, or sexual battery as defined in Sections 39-13-504, 39-13-505, or 39-13-527.⁵²

C. Stalking victim.

"Stalking victim" means any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking as defined in Section 39-17-315.⁵³

D. Filing a petition.

Any domestic abuse victim, stalking victim or sexual assault victim who has been subjected to, threatened with, or placed in fear of, domestic abuse, stalking, or sexual assault, may seek relief by filing a sworn petition alleging such domestic abuse, stalking, or sexual assault by the respondent.⁵⁴

⁵¹ T.C.A. § 36-3-601 (11)(2015).

⁵² T.C.A. § 36-3-601 (9)(2015).

⁵³ T.C.A. § 36-3-601 (10)(2015).

⁵⁴ T.C.A. § 36-3-602(a)(2015).

Any petition filed by an unemancipated person under eighteen (18) years of age shall be signed by one (1) of that person's parents or by that person's guardian. This petition may also be signed by a caseworker at a not-for profit organization which receives funds pursuant to Title 71, Chapter 6, Part 2 for family violence and child abuse prevention and shelters; provided, however, that a petition signed by such a caseworker may not be filed against such unemancipated minor's parent or legal guardian.⁵⁵ In every case, when the petitioner is under eighteen (18) years of age and if the court determines that service on the minor's s parent or legal guardian would not create a threat of serious harm to the minor, a copy of the petition, notice of hearing and any ex parte order of protection shall also be served on the parents of the minor child, or if the parents are not living together and jointly caring for the child, upon primary residential parent.⁵⁶

The criminal code defines an emancipated minor as "any minor who is or has been married, or has by court order *or otherwise* been freed from the care, custody and control of the minor's parents."⁵⁷ Circuit and chancery courts have concurrent jurisdiction to declare a minor emancipated.⁵⁸ An application to declare a minor emancipated must be made in writing by the minor by next friend, and must state:

- The age of such minor;
- The names and places of residence of the minor's parents, or
- If the minor has no parents, the names and places of residence of two of the minor's nearest kin, within the third degree, computed according to the civil law, and
- The reason on which the removal of the disability is sought.

A next friend can be someone other than the minor's parent or guardian. The Supreme Court of Tennessee has held that:

The object of the rule requiring a next friend in the prosecution of suits for the use of persons under disability, is to have some one responsible for costs and liable to judgment therefore, and to have some one upon and against whom the court may make and enforce its orders, and who will be subject to punishment for contempt in case of disobedience to or violation of the mandates of the court, and for the more especial purpose that there may be some one before the court capable of looking after, taking

⁵⁵ T.C.A. § 36-3-602 (b)(2015).

⁵⁶ T.C.A. § 36-3-605 (b)(2015).

⁵⁷ T.C.A. § 39-11-106(10)(2015) (emphasis added).

⁵⁸ T.C.A. § 29-31-101(2015), et. seq.

care of, and protecting the interests of those incapable of understanding and defending their own rights.⁵⁹

E. Orders of protection in sexual assault and stalking cases.

Orders of Protection can provide important relief for women and children who are sexually assaulted or stalked, whether or not they decide to pursue criminal charges. Orders of protection are available for victims of sexual assault and stalking regardless of the relationship. These petitioners are eligible for the same relief as domestic abuse victims.

III. EX PARTE ORDERS

An ex parte order is an order issued by the Court without notice to the respondent and without a hearing. The Court may issue an ex parte Order of Protection immediately upon the filing of a petition and prior to a hearing, for good cause shown, which is met upon a showing of "an immediate and present danger of abuse to the petitioner."⁶⁰ The ex parte Order must be personally served on the respondent.⁶¹ However, if the respondent is not a resident of Tennessee, the ex parte order shall be served by mail through the Secretary of State.⁶² A hearing must be held within fifteen days of the service of the ex parte Order on the respondent. The Court should consider the following factors when determining whether there is an immediate and present danger of abuse:

- A history of violence;
- Petitioner's injuries;
- Respondent's access to weapons;
- Threats to attack the petitioner;
- Threats to attack or abduct the children;
- Threats or attacks on family or household members;
- Respondent's drug and alcohol abuse;
- Respondent's history of a mental disorder;
- Respondent's threats of suicide.

⁵⁹ Rankin v. Warner, 70 Tenn. 302, 304-305, 2 Lea 302 (1879).

⁶⁰ T.C.A. § 36-3-605(a)(2015).

⁶¹ T.C.A. § 36-3-605(c)(2015).

⁶² T.C.A. § 36-3-605(c)(2015).

The respondent is not entitled to notice and hearing before an ex parte Order is entered. The petitioner need not testify other than by petition prior to the issuance of an ex parte Order.⁶³

Ex parte Orders of Protection are intended to protect the petitioner until a full hearing on the petition. A hearing on the ex parte Order must be held within fifteen days of service of the Order,⁶⁴ but the ex parte Order must be served upon the respondent at least five days prior to the hearing.⁶⁵ If the hearing cannot be scheduled within the fifteen-day time period and the immediate and present danger of abuse continues, the Court should issue another ex parte Order of Protection.⁶⁶

If the petitioner has visible injuries, the judge should include written findings concerning those injuries in the Order granting temporary relief. Recording this information may become important for use in the subsequent hearing on the extended Order of Protection, since the evidence of the injuries may have healed.

Ex parte Orders of Protection are not generally appealable, since they are interlocutory in nature and subject to an expeditious hearing on the merits.⁶⁷

A defendant can be arrested for violation of Ex Parte order if the defendant has notice or actual knowledge of the order regardless of the nature of the violation.⁶⁸

A. Mutual Ex Parte Orders of Protection.

Courts should not issue a mutual Ex Parte Order of Protection against a petitioner unless the respondent has filed a petition and demonstrated an immediate and present danger of abuse. The National Council of Juvenile and Family Court Judges recommends that judges not issue mutual no-contact orders (NCJFCJ, 1990). The Court lacks jurisdiction over the victim who is not a party to the criminal action. In some states, orders prohibiting both parties from contacting each other have been held

⁶³ T.C.A. § 36-3-602(2015).

⁶⁴ T.C.A. § 36-3-605(b)(2015).

⁶⁵ T.C.A. § 36-3-605(c)(2015).

⁶⁶ See Kite v. Kite, 22 S.W.3d 803, 1997 Tenn. Lexis 284 (Tenn. 1997).

⁶⁷ See Tenn. R. App. P. 9 (interlocutory orders can be appealed only with permission of trial court).

⁶⁸ T.C.A. § 36-3-611(2015) and Attorney Gen Op. No. 06-094.

unconstitutional in civil cases.⁶⁹ In addition, mutual no-contact orders are often difficult for law enforcement to enforce.

B. If no Ex Parte Order is issued, the case should be scheduled for a hearing before the judge.

When someone requests an Order of Protection, the office of the clerk must file the Petition for Orders of Protection whether or not an Ex Parte Order is granted. Even if the judge, judicial commissioner, or magistrate denies an Ex Parte Order, the Petition must be filed and the judge must hold a hearing to determine, after presentation of sworn testimony and any documentary or other physical evidence, whether or not grounds exist for issuance of an Order of Protection.

If the judge or other official finds that there is no immediate and present danger of abuse and no Ex Parte Order is issued, the following steps must be taken:

- The Petition must be filed;
- The case must be set for hearing;
- Process must be served on the respondent; and
- A hearing must be held at which the petitioner and the respondent (if he or she appears) can give sworn testimony, examine other witnesses to the abuse, and introduce documentary and other physical evidence⁷⁰ or at which the parties may announce their agreement in the case, subject to the approval of the judge.⁷¹

IV. RELIEF AVAILABLE THROUGH AN ORDER OF PROTECTION

A. In general.

Relief granted in an ex parte Order may include only the following:

⁶⁹ Fitzgerald v. Fitzgerald, 406 N.W. 2d 52 (Minn. 1987).

⁷⁰ T.C.A. § 36-3-605(b)(2015).

⁷¹ An Agreed Order signed by counsel for both parties, or by the parties themselves if they are unrepresented, and approved by the judge has the same force and effect as an order entered after a hearing.

- Directing the respondent to refrain from committing domestic abuse, stalking or sexual assault or threatening to commit domestic abuse, stalking or sexual assault against the petitioner or the petitioner's minor children.⁷²
- Prohibiting the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly..⁷³
- Prohibiting the respondent from stalking the petitioner.⁷⁴

The magistrate may order the respondent to leave the shared residence while the order of protection petition is pending a hearing.⁷⁵

The ex parte order prohibitions require that the respondent leave the shared residence.⁷⁶

Relief that may be granted only after the petitioner and respondent have been given an opportunity to be heard by the Court includes:⁷⁷

- Granting to the petitioner possession of the residence or household to the exclusion of the respondent by evicting the respondent, by restoring possession to the petitioner, or by both;
- Directing the respondent to provide suitable alternate housing for the petitioner when the respondent is the sole owner or lessee of the residence or household;
- Awarding temporary custody of or establishing temporary visitation rights with regard to any minor children born to or adopted by the parties;
- Awarding financial support to the petitioner and such persons as the respondent has a duty to support (except in cases of paternity, the Court shall not have the authority to order financial support unless the petitioner and respondent are legally married);
- Directing the respondent to attend available counseling programs that address violence and control issues or substance abuse problems.
- Directing the care, custody, or control of any animal owned, possessed, leased, kept, or held by either party or a minor residing in the household. In no instance shall such animal be placed in the

⁷² T.C.A. § 36-3-606(a)(1)(2015).

⁷³ T.C.A. § 36-3-606(a)(2)(2015).

⁷⁴ T.C.A. § 36-3-606(a)(3)(2015). See T.C.A. § 39-17-315(2011).

⁷⁵ T.C.A. § 36-3-606 (a)(10) (2015); Attorney General No. 10-06 (2010).

⁷⁶ Attorney General No.10-06(2010).

⁷⁷ T.C.A. § 36-3-606(a)(4) - (9)(2015).

care, custody, or control of the respondent but shall instead be placed in the care, custody, or control of the petitioner or in an appropriate animal foster situation.

- Direct the respondent to pay the petitioner all costs, expenses and fees pertaining to the petitioner's breach of a lease or rental agreement for residential property if the petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the petitioner or the petitioner's children. This language does not alter the terms, liability for the lease agreement.⁷⁸
- The respondent must surrender any weapons to a third party as outlined in T.C.A. 36-3-625. There is no exemption for law enforcement officers.⁷⁹

The Court is not limited to the relief specifically enumerated in the statute.⁸⁰ Such provisions in abuse statutes have been interpreted very broadly. The legislative intent of the Act is that "the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated."⁸¹ To be effective, Orders of Protection must include all necessary protection against future abuse, given the needs of the victim. Victims of domestic abuse need a high level of protection if they are to be able to live a life safe and separate from the perpetrator because the perpetrator often has ready access to his victim (Finn and Colson, 1990). For example, where the petitioner is in hiding, the Court may want to order the respondent not to attempt to discover the location of the petitioner's residence and not to enlist the assistance of others in locating the petitioner. In addition the Court may want to specify a minimum distance that respondent must keep from the petitioner.⁸² Either of these provisions would be permissible under the statute.

The relief provided should be explained fully and the terminology of the Order of Protection should be highly specific so that parties, law enforcement officers, and other judges will know exactly what is intended. Otherwise, enforcement will be difficult (Finn and Colson, 1990). Any Order of Protection must include a statement of the maximum penalty that may be imposed.⁸³ The petitioner's right to relief is not affected by petitioner's leaving the residence to avoid abuse or by her use of physical force to defend herself or others.⁸⁴

⁷⁸ Tenn. Code Ann. § 36-3-606(9)(a)(4)-(8)(2015).

⁷⁹ T.C.A. 36-3-625 (2015).

⁸⁰ T.C.A. § 36-3-606(a)(2015).

⁸¹ T.C.A. § 36-3-618(2015).

⁸² See, e.g., State v. Sutley, LEXIS 5520 (Ohio App. Ct. 1990) (order requiring defendant to stay away from petitioner, her family members, and the quadrant of the city where she resided did not violate the defendant's freedom of association rights where the restrictions related to his offenses and would help insure future compliance with the court order).

⁸³ T.C.A. § 36-3-606(c)(2015).

⁸⁴ T.C.A. § 36-3-613(2015).

B. Property.

Additional relief the victim may want to request when seeking a vacate Order are ordering the respondent:

- To surrender forthwith any keys to the home to the petitioner;
- To not damage any of the petitioner's belongings or those of any other occupant;
- To not shut off or cause to be shut off any utilities or mail delivery to the petitioner.

If the respondent is allowed to retrieve personal property from the residence, the Court should specify in the Order those items to be retrieved and a time and date for the retrieval. The Court should also consider requiring that a law enforcement officer be present to insure that no violence occurs. The Court should specify how the petitioner may obtain property from the home, including:

- Specific property to be removed;
- Procedures for law enforcement officer to accompany petitioner;
- Time the property may be retrieved (i.e., consider specifying that the property may be removed during respondent's work hours);
- Order that respondent is not to be present when the petitioner retrieves property or to follow petitioner in the process of removing property.

A petitioner may not seek possession of the residence by eviction or ask that the respondent be required to provide suitable alternate housing if the petitioner is seeking relief based on a current or former dating or sexual relationship.⁸⁵ No Order of Protection shall in any manner affect title to any real property.⁸⁶

C. Weapons.

⁸⁵ T.C.A. § 36-3-606(e)(2015).

⁸⁶ T.C.A. § 36-3-606(d)(2015).

Any person who is under an Order of Protection will not be granted a permit to carry a handgun.⁸⁷ Furthermore, federal and Tennessee law prohibits any person who is under an Order of Protection from possessing a weapon.

It is a federal and state offense for any person who is subject to an Order of Protection to ship, transport, possess, or receive any firearm or ammunition, if such shipping, transport, possession, or receipt is in or affects interstate or foreign commerce.⁸⁸ Federal and Tennessee law prohibit the transfer (or return) of firearms to anyone currently subject to a protection order.⁸⁹ This weapon surrender applies as long as the Order of Protection meets two requirements:

- The order was issued after a hearing with actual notice and an opportunity to participate;⁹⁰
- The order restrains the person from harassing, stalking, or threatening an intimate partner or child of that intimate partner, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.⁹¹

Under the federal law, the Order is required to:

- Include "a finding that the [respondent] represents a credible threat to the physical safety of the intimate partner or child"; OR
- By its terms, explicitly prohibit the "use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury."⁹²

An intimate partner is defined as:

- A spouse or former spouse;

⁸⁷ T.C.A. § 39-17-1351(c)(8)(2015).

⁸⁸ 18 U.S.C.A. § 922(g)(8)(B),(C) (2012); T.C.A. 36-3-606(g)(2015).

⁸⁹ 18 U.S.C.A. § 922(d)(8)(2012); T.C.A. 36-3-606(g)(2015).

⁹⁰ 18 U.S.C.A. § 922(g)(8)(A)(2015); T.C.A. 36-3-606(g)(2015).

⁹¹ 18 U.S.C.A. § 922(g)(8)(B)(2015).

⁹² 18 U.S.C.A. § 922(g)(8)(C)(i-ii)(2015).

- A parent of the respondent's child;
- A person who is cohabiting or has cohabited with the respondent; or
- Someone similarly situated to a spouse who is covered by state protection laws⁹³.

Federal law allows law enforcement officers and members of the active duty military may carry firearms that are issued to them in the course of their employment.⁹⁴ This exception applies only to Orders of Protection. If these persons are convicted of any domestic abuse crime, the firearms restriction applies to them as well. This section has been held constitutional.⁹⁵ There is no exemption for law enforcement or members of the active duty military under Tennessee law.⁹⁶

Tennessee law mandates that after the issuance of an order of protection that fully complies with the provisions of 18 U.S.C. § 922(g)(8), the respondent is required to dispossess himself or herself by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms, of all firearms the respondent possesses within forty-eight (48) hours of the issuance of the order. The respondent may reassume possession of the dispossessed firearm at such time as the order expires or is otherwise no longer in effect.⁹⁷

The Court must provide the following notices to the respondent:

1. To terminate his or her physical possession of the firearms in the respondent's possession by any lawful means, such as transferring possession to a third party who is not prohibited from possession firearms, within forty-eight (48) hours.
2. To complete and return the Affidavit of Firearm Dispossession form, which the court may provide the respondent or direct the respondent to the administrative office of the courts' Web site.

⁹³ 18 U.S.C.A § 921(a)(32)(2015).

⁹⁴ 18 U.S.C.A. § 925(a)(2015).

⁹⁵ U.S. v. Emerson, No. 99-10331 (5th Cir., revised November 2, 2001) [Online.]

Available:<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=5th&navby=case&no=>

9910331cr0. [June 12, 2002]; U.S. v. Pierson, 139 F.3d 501 (5th Cir. 1998); U.S. v. Smith, 964 F.Supp. 286 (N.D. Iowa, 1997).

⁹⁶ T.C.A. 36-3-625(2015).

⁹⁷ T.C.A. 36-3-625(a)(2015).

3. That if he or she possesses firearms as business inventory or that are registered under the National Firearms Act, there are additional statutory provisions which apply and shall include these additional provisions in the content of the order.⁹⁸

Upon issuance of the order of protection, its provisions and date and time of issuance shall be transmitted to the sheriff and all local law enforcement agencies in the county where the respondent resides.

Lawful means of dispossession is:

1. If the possession, including, but not limited to, the transfer of weapons registered under the National Firearms Act that requires the approval of any state or federal agency prior to the transfer of such firearm, the respondent may comply with the dispossession requirement by having the firearms or firearms placed into a safe or similar container which is securely locked and to which the respondent does not have the combination, keys or other means of normal access.
2. If the respondent is licensed as a federal firearms dealer or a responsible party under a federal firearms license, the determination of whether such an individual “possesses” firearms that constitute the business inventory under such federal license shall be determined based upon the applicable federal statutes or the rules, regulations and official letters, rulings and publications of the Bureau of Alcohol, Tobacco, Firearms and Explosives. The order of protection shall not require the surrender or transfer of any such inventory if there are one or more individuals who are responsible parties under the federal license who are not the respondent subject to the order of protection.⁹⁹

A person subject to an order of protection that fully complies with 18 U.S.C. § 922(g)(8) who knowingly fails to surrender or transfer all firearms commits a Class A Misdemeanor.¹⁰⁰ Failure to comply with the weapons surrender, including submission of the Affidavit of Surrender is considered a violation of the protective order.¹⁰¹ Additionally, if a person possesses a firearm and is, at the time of the possession, subject to an order of protection that fully complies with the provisions of 18 U.S.C. § 922(g)(8) commits a Class A misdemeanor.¹⁰² Tennessee law allows for a respondent to be punished for each of these crimes as separate offenses.¹⁰³

⁹⁸ T.C.A. 36-3-625(b)(2015).

⁹⁹ T.C.A. 36-3-625(f)(2015).

¹⁰⁰ T.C.A. 36-3-625(h)(2015).

¹⁰¹ T.C.A. 39-13-113(h)(2015).

¹⁰² T.C.A. § 39-17-1307(e)(2015).

¹⁰³ T.C.A. § 36-3-625(h)(3)(2015).

Tennessee law forbids sales of firearms to persons who have been convicted of the offense of stalking or are addicted to alcohol, and sales to persons ineligible to receive them under 18 U.S.C. § 922, which includes people under Orders of Protection and those convicted of a “misdemeanor crime of domestic violence.”¹⁰⁴ A person’s handgun permit shall be suspended or revoked upon showing by its records or other sufficient evidence that the permit holder has been convicted of domestic assault as defined in T.C.A. § 39-13-111 or any other misdemeanor crime of domestic violence and is still subject to the disabilities of such a conviction or is subject to a current order of protection that fully complies with the provision of 18 U.S.C. § 922(g)(8).¹⁰⁵

A “misdemeanor crime of domestic violence” is a misdemeanor under Federal, State, or Tribal law and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. Tennessee law considers the offense of violation of a protective order as a “misdemeanor crime of domestic violence.”¹⁰⁶

D. Counseling.

The Court may include in its Order a requirement that the perpetrator seek substance abuse treatment or participate in a program that addresses violence and control issues. Many judges and victims favor outpatient or voluntary inpatient chemical dependency treatment programs. However, because these programs do not address the issues of violence or control, they should not be viewed as an effective substitute for programming that addresses these issues. Addiction counseling may be needed first with a program that addresses violence and control issues to follow (Finn and Colson, 1990).

A study by the National Institute of Justice suggests the following concerning couples counseling or counseling for victims:

¹⁰⁴ T.C.A. § 39-17-1316 (2015).

¹⁰⁵ T.C.A. § 39-17-1352 (2015).

¹⁰⁶ T.C.A. § 39-17-1316 (2015).

- Victims should not be required to participate in court-mandated treatment programs intended for perpetrators, nor should they be required to participate in family counseling or individual counseling.
- Requiring the victim to enter counseling may put the victim in increased jeopardy by suggesting to the perpetrator that the perpetrator is not responsible for the violence, thereby giving the perpetrator an excuse to continue the abuse. Couples counseling improperly conducted may have the same effect; furthermore it may create a setting in which the victim is at an inherent disadvantage given the victim's fear of the perpetrator (Finn and Colson, 1990).

E. Custody and Visitation.

Victims who have children with their perpetrator are particularly vulnerable to continued abuse. In one study, women with children were four times more likely to report re-abuse than were women of childless couples (Carlson, et al., 1990). Perpetrators often ask for custody or unrestricted visitation rights as a way to threaten or control the victim. The Court must consider evidence of physical or emotional abuse to the child, to the other parent, or to any other person in making any custody determination.¹⁰⁷ If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation, or contact with the child, or restricted in custody, visitation, or contact, based solely on that belief or the reasonable actions taken based on that belief.

This year the Tennessee legislature passed the Uniform Child Abduction Prevention Act. This act permits a court on its own motion to order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child. It also allows a party to a child-custody determination or another individual or entity having a right under the law in Tennessee or any other state to seek a child-custody determination to file a petition seeking abduction prevention measures to protect the child. In making a determination of whether there is a risk of abduction, the court must consider, prior abductions or attempts to abduct, threats to abduct, activities indicating a planned abduction (abandoning employment, selling primary residence, and terminating lease, closing bank account, applying for a passport, seeking to obtain the child's birth certificate or school or medical records), has engaged in domestic violence, stalking, child abuse or neglect, refused to follow a child-custody determination, lacks ties to the United States, has strong ties with another state or country, or demonstrates other indicators that the respondent would take the child to another state or country. The court can consider evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent

¹⁰⁷ T.C.A. § 36-6-106(8)(2015).

and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

There is an emerging national trend toward presuming that it is in the best interests of the child to be placed in the custody of the non-abusive parent.¹⁰⁸ The legislature has created the presumption that custody shall not be awarded to a parent who has been convicted of a sex crime against a child under the age of 18.¹⁰⁹

Perpetrators tend to minimize or deny physically abusing their victims. Since most incidents occur in the privacy of the home, generally there are no witnesses to the incident, other than the parties' children. Thus, evaluating the testimony to decide the truth of the matter becomes a necessity for the trial court. Victims are often reluctant to call the police, so there may not be incident reports for the Court to rely on. Many victims will not seek medical help or when they do, they will not tell the medical provider about the abuse. Victims are often isolated from friends and family and may not have witnesses to their injuries. Simply because the victim does not have any corroborating evidence, the Court cannot discount the testimony. Courts should consider this before bringing contempt charges against victims in divorce cases who raise valid allegations of sexual abuse of the children against the other party.¹¹⁰

The legislature prohibits a permanent modification of custody or visitation if the parent is a member of the armed forces and is called to active duty or receives orders for duty that is outside the state or country.¹¹¹ Additionally, the existing residential schedule cannot be changed prior to a final hearing unless the parents agree to the modification or the court finds that the child will suffer substantial harm absent a temporary modification. If a temporary modification of the existing residential schedule is granted ex parte, the respondent shall be entitled to an expedited hearing within fifteen days of the entry of the temporary modification order.¹¹²

¹⁰⁸ H.Con.Res. 172, 101st Cong., 2d Session.

¹⁰⁹ T.C.A. § 36-6-101(2)(A)(ii)(2015).

¹¹⁰ Tenn. Code Ann. § 36-6-605 (b) (2012) allows the judge to bring contempt charges and assess litigation expenses, including attorney fees and discretionary fees for defending the allegation against a party who has knowingly brought false allegations of sexual abuse in furtherance of the divorce case.

¹¹¹ T.C.A. § 36-6-113(2015).

¹¹² T.C.A. § 36-6-405 (2015).

Research reveals that there is a high correlation between ineffective custody and visitation provisions and contempt of protective orders (D.C. Courts, 1992). It is not enough to separate the parties; nor is it enough to order the perpetrator to stop abusing the victim. The latter does not work without effective enforcement. The former – keeping the parties separated – does not work unless other issues, such as custody, visitation, possession of the parties' residence, and financial support, are resolved. Addressing custody as part of an Order of Protection can reduce the incidence of parental kidnapping and clarify for the prosecutor whether prosecution for parental kidnapping is warranted.

Mediation is prohibited in divorce, child custody, and visitation cases in which there is a prior court finding of domestic abuse, unless:

- Mediation is agreed to by the victim;
- Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- The victim is permitted to have an attorney or non-attorney advocate present.¹¹³

The filing with the court of a properly executed marital dissolution parenting plan also removes any requirement that the parties attend mediation.¹¹⁴

Nowhere is the potential for renewed violence greater than during visitation (Finn and Colson, 1990). To reduce the potential for renewed violence, the Court can do the following:

- Craft Orders of Protection to eliminate the need for any contact between the parties.
- Make specific and detailed orders regarding visitation. Ordering reasonable rights of visitation or ordering that visitation will be arranged later may place the petitioner in constant contact with the perpetrator and subject the petitioner to the perpetrator's control and harassment (Finn and Colson, 1990).
- Order that visitation be supervised by a responsible adult or agency, the costs to be primarily borne by the perpetrator. The propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation (NCJFCJ, 1990).
- Order the perpetrator to complete successfully a program that addresses violence and control issues prior to any visitation.
- Order the perpetrator to undergo a psychiatric evaluation before visitation is authorized.

¹¹³ T.C.A. § 36-4-131(2015); T.C.A. § 36-6-107(2015); T.C.A. § 36-6-305 (2015).

¹¹⁴ T.C.A. § 36-4-103(g) (2015) and T.C.A. 36-4-131 (2015).

- Where the perpetrator has a history of alcohol or other drug abuse, order that a treatment program for alcohol and/or drugs and violence be completed prior to any visitation.
- Where treatment is ordered and completed, order that the perpetrator not consume alcohol or other drugs before or during the visit, and that the victim may refuse visitation if the perpetrator appears to have violated this condition.
- Order that the address of the child and the victim be kept confidential (Finn and Colson, 1990).¹¹⁵

¹¹⁵ See also T.C.A. § 36-6-107(b)(2015).

F. Support.

Possible monetary relief available in an Order of Protection includes:

- Financial support and maintenance for petitioner and children;¹¹⁶
- Payment of rent, mortgage, or alternate housing costs;¹¹⁷
- Payment of utilities;
- Cost of replacement of locks;
- Child care costs;
- Medical, dental, and/or counseling bills, for the victim and/or the children;
- Insurance premiums;
- Restitution for property damage;
- An award of attorney's fees to the petitioner if, after a hearing, the Court issues or extends an Order of Protection.¹¹⁸

Father's rights groups were successful in getting shared-income child support guidelines adopted based on an income-shares model. In general, these rules benefit non-residential fathers and their new families at the expense of mothers and their children. Free automated calculators are now available. The calculators decrease the time it takes to determine child support orders under the new guidelines (from approximately 25 minutes to two minutes to calculate an order once the fields are filled in). The current version of the calculator and more information is available at the Tennessee Department of Human Services' website.¹¹⁹

Advocates need to familiarize themselves with the guidelines so they can assist victims in calculating the amount of child support due. Because of the complexity of the new rules some judges have responded by refusing to order child support in Order of Protection cases. This practice puts victims and their children at risk and forces them to choose between support for their children and continued violence. The legislature appointed an advisory committee to review the child support guidelines and advocacy efforts are ongoing to revise the guidelines to minimize their negative impact on victims and their children. To participate in these efforts, contact the Coalition office.

¹¹⁶ T.C.A. § 36-3-606(a)(7)(2015).

¹¹⁷ T.C.A. § 36-3-606(a)(5)(2015).

¹¹⁸ T.C.A. § 36-3-617. See also In Re C.M. v. Phillips, 2001 Tenn. App. LEXIS 590 (Tenn. Ct. App. 2001).

¹¹⁹ Retrieved July 28, 2005 at <http://www.tennessee.gov/humanserv/is/incomeshares.htm>.

The failure of the respondent to contest paternity in an Order of Protection proceeding shall not be construed as an admission of paternity by the respondent; the failure to contest paternity is not admissible in evidence in a paternity proceeding.¹²⁰ Where paternity is contested in an Order of Protection proceeding, the Court may grant an Order of Protection pending the outcome of paternity tests.¹²¹

Child support can also be awarded to the primary residential parent for an adult child in the following circumstance: "if such severely disabled child living with a parent was disabled prior to this child attaining the age of eighteen (18) years and if such child remains severely disabled at the time of entry of a final decree of divorce or legal separation, then the court may order child support regardless of the age of the child at the time of entry of such decree."¹²²

V. PRE-TRIAL ISSUES

A. Filing deadlines.

There is no limitation on the time within which a petitioner must file for an Order of Protection. There is no disqualification due to prolonged delay.

B. Filing fees.

Notwithstanding any other provision of law to the contrary, no victim shall be required to bear the costs, including any court costs, filing fees, litigation taxes or any other costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an ex parte order of protection, order of protection, or a petition for either such order, whether issued inside or outside of the state. If the court, after the hearing, issues or extends an order of protection, all court costs, filing

¹²⁰ T.C.A. § 36-3-614(a)(2015).

¹²¹ See T.C.A. § 24-7-112(2015).

¹²² T.C.A. § 36-5-101(k)(2015).

fees, litigation taxes and attorney fees shall be assessed against the respondent.¹²³ There is no initial fee for a petition to the court for any action on an order of protection.

If the court does not issue or extend an order of protection, the court may assess all court costs against the petitioner if the court finds by clear and convincing evidence: (a) the petitioner is not a victim and that such determination is not based on the petitioner's request to dismiss the order, failure to attend the hearing or incorrectly filled out the petition; AND (b) the petitioner knew that the allegations were false at the time the petition was filed.

The Court shall not require the petitioner to execute a bond to issue an Order of Protection.¹²⁴

C. Forms.

The administrative office of the courts, in consultation with the Domestic Violence State Coordinating Council, has developed a "Petition for Orders of Protection" form, an "Order of Protection" form, an "Ex Parte Order of Protection" form, a "Dismissal Order," and the Affidavit of Firearms Dispossession" form. **These forms shall be used exclusively in all courts exercising jurisdiction over orders of protection.**¹²⁵ These forms were designed to comply with Tennessee law and to be uniform with those of surrounding states so that Tennessee forms may be afforded full faith and credit. The forms have been sent to the courts in Tennessee which handle Order of Protection cases and are available on the website of the Administrative Office of the Courts at <http://www.tsc.state.tn.us/>.

The petitioner is not limited to the use of these forms and may file any legally sufficient petition in whatever form.¹²⁶ The office of the clerk of court is required to provide forms for this purpose to the petitioner.¹²⁷ The respondent is responsible for accessing the Affidavit of Firearms Dispossession form.¹²⁸

D. Assistance by court personnel.

¹²³ T.C.A. § 36-3-617 (2015)

¹²⁴ Tenn. Code Ann. § 36-3-607 (2015).

¹²⁵ T.C.A. § 36-3-604(c)(2015).

¹²⁶ T.C.A. § 36-3-604(a)(2015).

¹²⁷ T.C.A. § 36-3-604(a)(2015).

¹²⁸ T.C.A. § 36-3-625(b)(d)(2015).

The petitioner has a right to proceed pro se, that is, without an attorney.¹²⁹ The office of the clerk must assist a petitioner who is not represented by counsel by filling in the name of the Court on the petition, by indicating where the petitioner's name shall be filled in, by reading through the petition form with the petitioner, and by rendering any other assistance as is necessary for the filing of the petition.¹³⁰ All such petitions which are filed pro se shall be liberally construed in favor of the petitioner.¹³¹ The clerk of court may provide Order of Protection petition forms to agencies that provide domestic violence assistance. Any agency that meets with a victim in person and recommends that an Order of Protection be sought shall assist the victim in the completion of the form petition for filing with the clerk. No agency shall be required to provide this assistance unless the clerk has provided it with the appropriate forms.¹³²

E. Discovery.

The Tennessee Rules of Civil Procedure apply to Orders of Protection, subject to the Court's authority to preclude discovery where necessary to prevent unreasonable annoyance, embarrassment, or undue burden or expense.¹³³ In view of the threat of continued violence, the Court should adopt procedures for discovery that prevent delays in court proceedings. Methods other than depositions such as subpoenas for documents to be brought to the hearing are favored. Documents that may be typically subpoenaed or requested include: medical records, documentation of income of the parties for purposes of determining support and other forms of monetary relief, and any other documentary evidence that will not improperly restrict case preparation or expose the victim to greater danger.

The records of domestic violence shelters and rape crisis centers shall be treated as confidential by the records custodian of such shelters or centers unless:

- The individual to whom the records pertain authorizes their release; or

¹²⁹ T.C.A. § 36-3-604(2015).

¹³⁰ T.C.A. § 36-3-604(a)(2015).

¹³¹ T.C.A. § 36-3-604(a)(2015); see also T.C.A. § 36-3-618(2015).

¹³² T.C.A. § 36-3-617(2015).

¹³³ Tenn. R. Civ. P. 26.03.

- A court approves a subpoena for the records, subject to such restrictions as the court may impose, including in camera review.¹³⁴

F. Confidentiality of Court Records.

Any document required for filing in an Order of Protection case, other than the forms promulgated by the Administrative Office of the Courts (see subsection C above), shall be treated as confidential and kept under seal except that the clerk may transmit any such document to the Tennessee Bureau of Investigation, 911, or emergency response agency or other law enforcement agency.¹³⁵ Information that, if obtained by the respondent, may endanger the victim or the children, including the victim's address, telephone number, the name of the children's school or day care provider, and domestic violence shelter's address, should be protected by the Court.

Furthermore, identifying information compiled and maintained by a utility service provider or a governmental entity concerning a person who has obtained a valid protection document shall be treated as confidential and not open for inspection by the public. A protective document is:

- An order of protection issued pursuant to title 36, chapter 3, part 6, that has been granted after proper notice and an opportunity to be heard.
- A similar order of protection issued by the court of another jurisdiction.
- An extension of an ex parte order of protection pursuant to T.C.A. § 36-3-605(a).
- A similar extension of an ex parte order of protection granted by a court of competent jurisdiction in another jurisdiction.
- A restraining order issued by a court of competent jurisdiction prohibiting violence against the person to whom it is issued.

¹³⁴ T.C.A. § 36-3-623(2015).

¹³⁵ T.C.A. § 10-7-504(15)(A)(2015).

- A court order protecting the confidentiality of certain information issued upon the request of a district attorney general to a victim or witness in a criminal case, whether pending or completed; and
- An affidavit from the director of a rape crisis center or domestic violence shelter certifying that an individual is a victim in need of protection; provided, that such affidavit is on a standardized form to be developed and distributed to such centers and shelters by the Tennessee Coalition Against Domestic & Sexual Violence.

Identifying information means the home and work addresses and telephone numbers, social security number, and any other information that could reasonably be used to locate the whereabouts of an individual. For these provisions to apply, a copy of the protection document must be presented during regular business hours of the records custodian and such person must request that all identifying information about such person be maintained as confidential. The law does allow governmental entities to exercise some discretion in accepting the protective document and keeping the identifying information confidential.¹³⁶

G. Case scheduling.

Tennessee requires a hearing on the Order of Protection within fifteen days of service of the ex parte Order.¹³⁷ The Court is required to insure that the respondent is served with a copy of the petition, notice of the date set for the hearing, and a copy of the ex parte Order of Protection at least five days prior to the hearing.¹³⁸ Since the ex parte Order must give notice of the hearing date, the Court must guess at the approximate date of service in order to comply with the statute. Where service is not made prior to the date set for the hearing, a new Order, giving a new hearing date, may need to be issued. When the hearing date falls within the five-day limit, the Court may be required to continue the hearing on the petition.

¹³⁶ T.C.A. § 10-7-504 (16)(A)(2015)

¹³⁷ T.C.A. § 36-3-605(b)(2015).

¹³⁸ T.C.A. § 36-3-605(c)(2015).

The statute is silent on the issue of the granting of a continuance. A hearing must be held within fifteen days of service, "at which time the Court shall either dissolve any ex parte Order that has been issued, or shall, if the petitioner has proved the allegation by a preponderance of the evidence, extend the Order of Protection."¹³⁹ Despite this language, it would appear to be consistent with the Court's authority to grant a continuance on the application of either party. If a continuance is granted at the request of either party, the Court should issue a new ex parte Order of Protection to protect the petitioner until the full hearing.

The notice of the date set for hearing must notify the respondent that the respondent may be represented by counsel.¹⁴⁰ If the respondent appears without counsel and requests time to obtain counsel, the Court may grant a continuance for that purpose, again with appropriate consideration for continued protection for the petitioner.

VI. TRIAL ISSUES IN CIVIL ORDER OF PROTECTION CASES

A. In general.

Both the petitioner and respondent have a right to present testimony and other evidence at the hearing.¹⁴¹ Either party may be represented by an attorney but neither has a right to a court-appointed attorney. The burden is on the petitioner to prove the allegations of domestic abuse, sexual assault, or

¹³⁹ T.C.A. § 36-3-605(b)(2015).

¹⁴⁰ T.C.A. § 36-3-605(c)(2015).

¹⁴¹ Drake v. Drake, 1997 Tenn. App. LEXIS 279 (Tenn. Ct. App. 1997).

stalking by a preponderance of the evidence.¹⁴² Preponderance of the evidence means that, given the evidence as a whole, it is more likely than not that the abuse occurred. A petitioner cannot be required to pay any fee in advance for a witness subpoena.¹⁴³ The respondent is not entitled to a jury trial prior to the issuance of an Order of Protection.¹⁴⁴

Service upon a party or counsel the final Order of Protection shall be made by delivering to such party or counsel a copy of the Order of Protection, or by the clerk mailing it to the party's last known address.¹⁴⁵ In the event the party's last known address is unknown and cannot be ascertained upon diligent inquiry, the certificate of service shall so state. Service by mail is complete upon mailing. The Order of Protection does not have to be personally served on and read to the respondent. The Ex Parte Order still has to be personally served on the respondent, but it does not have to be read to him. Any Ex Parte Order that has been issued will continue in effect after the hearing until the final Order of Protection is entered.

A copy of any Order of Protection and any subsequent modifications or dismissal shall be issued to the petitioner, the respondent, and the local law enforcement agencies having jurisdiction in the area where the petitioner resides.¹⁴⁶ However, an Order of Protection is valid and enforceable in any county in Tennessee.¹⁴⁷ An arrest for a violation of an Order of Protection may be with or without a warrant.¹⁴⁸ However, no ex parte Order of Protection can be enforced by arrest until the respondent has been served with the Order of Protection or otherwise has acquired actual knowledge of the Order.¹⁴⁹

B. When the petitioner or respondent fails to appear at the hearing on the Order.

The National Institute of Justice concluded that there are a variety of reasons why a petitioner may not appear at a hearing for the Order of Protection (Finn and Colson, 1990):

¹⁴² T.C.A. § 36-3-605(b)(2015).

¹⁴³ 42 U.S.C. § 3796gg-5(a)(2015).

¹⁴⁴ *Clark v. Crow*, 37 S.W.3d 919 (Tenn. Ct. App. 2000).

¹⁴⁵ T.C.A. § 36-3-609(a)-(d)(2015).

¹⁴⁶ T.C.A. § 36-3-609(e)(2015).

¹⁴⁷ T.C.A. § 36-6-606(f)(2015).

¹⁴⁸ T.C.A. § 36-3-611(a)(2015).

¹⁴⁹ T.C.A. § 36-3-611(b)(2015).

- The victim is intimidated by threats of greater violence from the respondent as a result of pursuing court action.
- The victim is physically unable to appear for the hearing due to injuries.
- The victim does not understand that a second hearing is required.

Prior continuances or procedural delays may also discourage the victim from appearing at the hearing. The more expeditiously a case is handled, the more likely the petitioner is to pursue remedies (Finn and Colson, 1990).

Advocates may need to educate judges on the reasons why petitioners fail to appear and suggest responses that will protect victims' safety. For example, where the respondent requests dismissal and the reason for the petitioner's failure to appear is uncertain, the Court should continue the case, notify the petitioner of the continuation date, and inform the respondent that the case will not be dismissed unless the petitioner comes to court to request it in person. When the respondent fails to appear after having been served with notice of the hearing, the Court should issue an Order of Protection.

C. Other court proceedings.

Parties should disclose the existence of any pending cases. With certain exceptions, parties in a custody proceeding must declare under oath certain information concerning the minor children.¹⁵⁰ The required information includes:

- The child's present address, the places where the child has lived within the past five years, and the names and present addresses of the persons with whom the child has lived during the last five years;
- Whether the party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or in any other state;
- If the party has information of any custody proceeding concerning the child pending in a court of this or any other state; and
- Whether the party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

A petition for an Order of Protection that requests an award of custody would require compliance with this statute. However, if the health, safety, or liberty of a party or child would be jeopardized by

¹⁵⁰ T.C.A. § 36-6-224(a)(2015).

disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.¹⁵¹

A petitioner may request relief available under the Order of Protection statute in a divorce action.¹⁵² In cases where an Order of Protection is entered and a subsequent divorce action is filed, the Order of Protection shall remain in effect until the Court in which the divorce action is filed modifies or dissolves the Order.¹⁵³

Where child support, custody, or divorce actions precede the Order of Protection action, knowledge of those proceedings may be important to a judge seeking to craft an Order that will prevent further violence. Relevant information could include:

- Whether the respondent is in arrears in child support;
- Whether there is a pre-existing divorce decree awarding custody to the victim;
- Whether the divorce action contains an already existing visitation provision (the judge issuing the Order of Protection might want to change this provision if it does not work in the context of the domestic abuse case).

Tennessee law does not address the modification of existing custody orders but does provide that the Order of Protection may award temporary custody of or establish temporary visitation rights with regard to any minor children born to or adopted by the parties.¹⁵⁴

Nothing in the Tennessee statutes prohibits a petitioner from seeking an Order of Protection because the petitioner is protected under an order entered in a criminal proceeding. However, when conflicting orders are issued involving the same parties, serious enforcement problems are created for police. Which order controls will depend on a number of variables, including which case is being heard first, what laws are applied to each specific case, and the statutory purpose of the competing orders in light of the Act.

¹⁵¹ T.C.A. § 36-6-224(e)(2015).

¹⁵² T.C.A. § 36-3-603(b)(2015).

¹⁵³ T.C.A. § 36-3-603(a)(2015).

¹⁵⁴ T.C.A. § 36-3-606(a)(6)(2015).

If a custody order is pending in a juvenile case when the petitioner requests an Order of Protection, the Court issuing the Order of Protection would appear to have jurisdiction to enter an Order of Protection that governs custody or visitation despite jurisdiction having attached in Juvenile Court.¹⁵⁵

D. Record and findings by the Court.

In Tennessee, there is no requirement that hearings be recorded or that oral or written findings be made. However, it is advisable for the Court to make explicit findings as to which incidents of violence the Court is relying on to issue its Order of Protection and findings concerning the credibility of witnesses, where appropriate. Written findings will be helpful to courts hearing the case in the future as well as to judges who may hear other cases involving the same parties.

When the Court denies an Order of Protection or denies specific remedies requested, the National Council of Juvenile and Family Court Judges urges judges to provide reasons for the denial (NCJFCJ, 1990).

E. Mutual Orders of Protection.

Judges should not issue mutual Orders of Protection or restraining orders as a matter of course (NCJFCJ, 1990). Mutual Orders of Protection are not appropriate unless

- Both parties file pleadings;
- Both parties receive prior notice; and
- Both parties prove violence or abuse.

Mutual Orders of Protection can create the following problems:

¹⁵⁵ See T.C.A. § 37-1-104(d)(1),(2) (2015).

- They deny the due process rights of the petitioner when a mutual Order of Protection is issued against a petitioner without prior notice, written application, and a finding of good cause.
- They create significant problems of enforcement that render them ineffective in preventing further abuse. Police have no way of determining whose conduct is enjoined. This confusion may result in both parties being arrested, or in no arrests being made.
- They signal to the perpetrator that such behavior is excusable, was perhaps provoked, and that the perpetrator will not be held accountable for the violence.

F. Modifications of Orders of Protection.

Tennessee law allows either party to request to modify an Order of Protection. The party requesting a modification must file a motion together with an affidavit showing a change in circumstances sufficient to warrant the modification.¹⁵⁶ If there has been new abuse, the petitioner may request expanded remedies that may have been denied or were not requested at the initial hearing. Judges hearing modifications of Orders of Protection should be well acquainted with the history of the relationship between the parties before entering a modification.¹⁵⁷ Orders should not be modified without notice and an opportunity to be heard absent exigent circumstances or provided by law.¹⁵⁸

Victims should also return to court for modification of their orders if they reunite with the perpetrator, removing stay-away provisions but leaving the no-abuse provision in full effect. Leaving the no-abuse provision in effect will assure that police continue enforcing the no-abuse provisions of the Order of Protection.

G. Extensions/reissuance of Orders.

¹⁵⁶ T.C.A. § 36-3-608(b)(2015).

¹⁵⁷ See N.J. 2D:25-13g (modifications can only be heard by judges who have the full record of the prior hearing before them).

¹⁵⁸ See In re Penny R., 509 A. 2d 338 (Pa. 1986) (court may not modify an award of visitation granted to defendant in an Order of Protection proceeding based on a letter from a mental health professional without offering the father an opportunity to defend).

All Orders of Protection shall be effective for a fixed period of time, not to exceed one year.¹⁵⁹ Extensions of the Order of Protection, each extension not to exceed a further definite period of one year may be granted after a hearing on the continuation of the Order.¹⁶⁰

At an extension hearing, courts should hear evidence of any order violations not previously reported. Victims may not report violations immediately for several reasons, including:

- The victim may be reluctant to come to court due to intimidation by the respondent.
- The victim received some level of protection from the Order despite the violations and therefore wishes the Order to continue.
- The respondent succeeded in preventing the victim from filing for contempt.
- The victim does not believe that the Court will act to enforce the Order of Protection.

Tennessee law provides that “within the time the order of protection is in effect, any court of competent jurisdiction may modify the order of protection, either upon the court’s own motion or upon motion of the petitioner. If a respondent is properly served and afforded the opportunity for a hearing pursuant to § 36-3-612, and is found to be in violation of the order, the court may extend the order of protection up to 5 years. If the respondent is properly served and afforded the opportunity for a hearing, and is found to be in a second or subsequent violation of the order, the court may extend the order of protection up to 10 years. No new petition is required to be filed in order for a court to modify an order or extend an order pursuant to this subsection.”¹⁶¹

H. Dismissals and withdrawals of Orders.

Dismissals should be carefully considered. Upon a request from the petitioner to dismiss or withdraw the Order, the Court may wish to question the petitioner outside the presence of the respondent to ascertain whether the respondent is coercing the petitioner into this request. If the Court is not convinced that the petitioner is requesting dismissal voluntarily, the Court can continue the matter for a period of time. Advantages of a continuance include:

¹⁵⁹ T.C.A. §§ 36-3-605(b); 36-3-608(a)(2015).

¹⁶⁰ T.C.A. § 36-3-605(b)(2015).

¹⁶¹ T.C.A. § 36-3-605 (2015).

- The continuance has a deterrent effect on some perpetrators.
- The petitioner need not wait for a new incident of violence in order to return to court to obtain an Order of Protection.
- If a new incident of violence occurs, the victim needs only to file a supplemental petition to be served along with the original petition to have a new hearing set.

The petitioner may want to dismiss the case for a number of reasons:

- Fear of facing the respondent in court to make what may be the first public accusation of the abuse;
- Confusion about how to represent herself in court;
- Fear of hostile questioning by respondent's counsel;
- Economic dependence on respondent;
- Lack of support or direct opposition from family, community, clergy;
- Hostile or indifferent treatment by police, prosecutors, court personnel and judges;
- Intimidation through threats and retaliatory assaults by respondent at home or in court waiting rooms or parking lots;
- Violence has stopped (at least temporarily).

I. Practices to improve court effectiveness in Order of Protection proceedings.

The National Council of Juvenile and Family Court Judges makes several recommendations. These include:

- Courts must provide secure separate waiting areas for victims in family violence cases.
- Courts must examine their facilities, procedures, personnel, attitudes, and training agendas to identify and remove barriers to victims.
- All court personnel with responsibility for initial contact and intake in family violence cases should, at a minimum, have special training including sensitivity to victims; insuring the safety of the victims; and referring the victim and family members to needed services (NCJFCJ, 1990).

Enforcement of the Order can be facilitated by suggesting that the petitioner do the following:

- Keep personal possession of the Order at all times.
- Notify the local police immediately of any violation.
- Request that a police report be made, and obtain its number and information on how to receive a copy.
- Obtain the name and badge number of the officer who responds to the call.

- File a contempt motion with the Court.

VII. Enforcement of Civil Orders of Protection

A. Civil or criminal contempt.

An Order of Protection is valid and enforceable in any county in Tennessee¹⁶² and by any court that has jurisdiction over Orders of Protection.¹⁶³ Upon violation of the order of protection or a court-approved consent agreement, the court may hold the defendant in civil or criminal contempt and punish the defendant in accordance with the law.¹⁶⁴ A judge of the general sessions court shall have the same power as a court of record to punish the defendant for contempt when exercising jurisdiction pursuant to this part or when exercising concurrent jurisdiction with a court of record. A judge of the general sessions court who is not a licensed attorney shall appoint an attorney referee to hear charges of criminal contempt.

Punishment of contempt may be by fine, imprisonment, or both.¹⁶⁵ The fine is limited to \$50.00, where there is no other special provision; any court other than chancery, circuit, and the appellate courts is limited to a fine of no more than \$10.00. Imprisonment may not exceed 10 days. If the contempt consists of an omission to perform an act that is yet in the power of the person to perform, the person may be imprisoned until the act is performed.

When an Order of Protection is violated as to child support, the respondent may be punished as follows:

¹⁶² T.C.A. § 36-3-606(f)(2015).

¹⁶³ State v. Gray, 46 S.W.3d 749, 2000 Tenn. App. Lexis 677 (Tenn. Ct. App. 2000).

¹⁶⁴ T.C.A. § 36-3-610(a)(2015).

¹⁶⁵ T.C.A. § 29-9-103(2015).

Any person, ordered to provide support and maintenance for a minor child or children, who fails to comply with the order or decree, may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six months.¹⁶⁶

The judge may further order that any support payment made pursuant to an order of protection or a court approved consent agreement be made under an income assignment to the clerk of court.

In addition to the authorized punishments for contempt of court, the judge may assess a civil penalty of \$50.00 against a person who violates an Order of Protection or a court-approved consent agreement.¹⁶⁷ This money is deposited into the state domestic violence community education fund to be used by the Tennessee Coalition Against Domestic and Sexual Violence for the purpose of providing education, training, and technical assistance to communities on domestic violence.¹⁶⁸

Classification of contempt as civil or criminal depends on the purpose for which the power is exercised.¹⁶⁹ When the primary purposes of the finding of contempt are to provide a remedy for an injured party and to coerce compliance with an order, the contempt is civil. Civil contempt is imposed to compel compliance with an order and parties in contempt may purge themselves by compliance.¹⁷⁰ When the primary purpose of the finding of contempt is to preserve the Court's authority, the contempt is criminal. Criminal contempt is punishment for failing to comply with an order, and the contemptuous party cannot be freed by eventual compliance with the order.¹⁷¹ In an Order of Protection case, failure to pay child support ordered by the Court would be civil contempt. An assault in violation of the Order, for example, would be criminal contempt.

¹⁶⁶ T.C.A. § 36-5-104(a)(2015).

¹⁶⁷ T.C.A. § 36-3-610(b)(2015).

¹⁶⁸ T.C.A. § 36-3-610(c) (2015); T.C.A. § 36-3-616(2015).

¹⁶⁹ Garrett v. Forest Lawn Memorial Gardens, 588 S.W. 2d 309, 315 (Tenn. Civ. App. 1979).

¹⁷⁰ Crabtree v. Crabtree, 716 S.W. 2d 923, 925 (Tenn. Civ. App. 1986); Shiflet v. State, 217 Tenn. 690, 693, 400 S.W. 2d 542, 543 (1966).

¹⁷¹ Id.

Under Tennessee law, if the contempt is criminal contempt, as determined by the nature of the remedy, the contemnor is entitled to due process rights similar to those of the criminal defendant.¹⁷² In a criminal contempt proceeding, the contemnor has the right of confrontation¹⁷³ and the right to remain silent.¹⁷⁴ The notice must fairly and completely apprise the respondent of the events and conduct constituting the alleged contempt.¹⁷⁵ Guilt must be proved beyond a reasonable doubt.¹⁷⁶ The prosecutor may not appeal an acquittal.¹⁷⁷ However, the respondent does not have a right to a trial by jury.¹⁷⁸

The provisions of Tenn. Code Ann. § 40-35-103(4), which require that the sentence be the least severe measure necessary to achieve the purpose for which the sentence is imposed, apply in criminal contempt cases.¹⁷⁹ This means that the Court must be careful to specify why the particular sentence being imposed is appropriate to the violation.

A respondent may be entitled to assistance of counsel during even a civil contempt proceeding where the respondent faces incarceration.¹⁸⁰ Tennessee law does not provide for appointment of counsel for petitioner, even though the respondent may be entitled to court-appointed counsel. There is some support that the Court may have inherent authority to enforce its orders by means of appointment of state's counsel to prosecute contempt.¹⁸¹

¹⁷² See Tenn. R. Crim. P. 42.

¹⁷³ See Guthrie v. Oldham, No. 85-118-II (Tenn. Crim. App., filed May 9, 1985).

¹⁷⁴ See Gompers v. Bucks Stove, 221 U.S. 418 (1911) and Kornick v. Kornick, 3 Tenn. Civ. App. 41 (1931).

¹⁷⁵ See United States v. United Mine Workers of America, 330 U.S. 258 (1947), and Storey v. Storey, 835 S.W. 2d 593 (Tenn. Civ. App. 1992).

¹⁷⁶ State v. Stephen Bart Wood, No. M2001-00872-COA-R3-CD, 2002 Tenn. App. LEXIS 330 (Tenn. Ct. App. May 7, 2002), citing Shiflet v. State, 217 Tenn. 690, 400 S.W.2d 542 (Tenn. 1966).

¹⁷⁷ State v. Stephen Bart Wood, supra, citing Archer v. Archer, 907 S.W.2d 412 (Tenn. Ct. App. 1995).

¹⁷⁸ State v. Stephen Bart Wood, supra n.108, citing Pass v. State, 181 Tenn. 613, 184 S.W.2d 1 (Tenn. 1944); Ahern v. Ahern, 15 S.W.3d 73 (Tenn. 2000); cf. State v. Dusina, 764 S.W.2d 766 (Tenn. 1989).

¹⁷⁹ State v. Stephen Bart Wood, supra n.108.

¹⁸⁰ See Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984); Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D. Ohio 1981) (practice of domestic relations court of incarcerating indigent persons for contempt without appointing counsel violated due process).

¹⁸¹ See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987); Marcisz v. Marcisz, 357 N.E. 2d 477 (Ill. 1976) [contempt action based on divorce Order of Protection was an action "in which the people of the state may be concerned" under Ill. Rev. Stat. 1990 34 3-9005(1)]. See also In re

The standard of proof for criminal contempt is the same as for criminal charges, i.e., beyond a reasonable doubt.¹⁸² The standard of proof for civil contempt is clear and convincing evidence.¹⁸³

B. Arrest for violation of protection order

An arrest for violation of an order of protection issued pursuant to this part may be with or without warrant.¹⁸⁴ Any law enforcement officer shall arrest the respondent without a warrant if:

- The officer has proper jurisdiction over the area in which the violation occurred;
- The officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection; and
- The officer has verified whether an order of protection is in effect against the respondent. If necessary, the police officer may verify the existence of an order for protection by telephone or radio communication with the appropriate law enforcement department.

An arrest can be made on an ex parte Order of Protection once the respondent has been served with the Order or otherwise has actual knowledge of the Order.¹⁸⁵

C. Misdemeanor violation of a protective order.

Marshall, 549 A. 2d 311 (D.C.App. 1988) (judge not strictly prohibited from prosecuting contempt); State v. Rudolph, 240 Iowa 726, 37 N.W. 2d 483 (1949) (generally, contempt proceedings may be brought either by a party or in the name of the state).

¹⁸² See O'Brien v. State ex rel. Bibb, 26 Tenn. App. 270, 170 S.W. 2d 931 (1943); State ex rel. Anderson v. Daugherty, 137 Tenn. 125, 191 S.W. 974 (1917).

¹⁸³ See Oriel v. Russell, 278 U.S. 358 (1929). See also Wright, Federal Practice and Procedure (Criminal) 701-13 (2nd ed. 1982).

¹⁸⁴ T.C.A. § 36-3-611(a)(2015).

¹⁸⁵ T.C.A. § 36-3-611 (b)(2015).

A person who knowingly violates an order of protection issued pursuant to this part or a restraining order issued to a party who is a victim as defined in Section 36-3-601(11) (the relationship categories defined in the statute) commits the offense of violation of a protective order.¹⁸⁶

In order to be found guilty under this section:

- The person must have received notice of the request for an order of protection or restraining order;
- The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- The court made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse, sexual assault, or stalking.

Any act that constitutes the offense of violation of a protective order shall be subject to arrest with or without a warrant, as outlined above.

A person who is arrested for violation of a protective order shall be considered within the provisions of Section 40-11-150(a) (requiring that bond conditions be set) and subject to the twelve-hour hold period authorized by Section 40-11-150(h). At the time the issue of bond is being determined, the magistrate shall notify or cause to be notified the victim of violation of a protective order that the defendant has been arrested. Neither an arrest nor the issuance of a warrant or *capias* for the offense of violation of a protective order shall in any way affect the validity or enforceability of any order of protection or restraining order.

Violation of a protective order is a Class A misdemeanor and any sentence imposed shall be consecutive to any other offense that is based in whole or in part on the same factual allegations (for example, a finding of contempt or conviction of aggravated assault) unless the sentencing judge or magistrate specifically makes the sentences for any such offenses arising out of the same facts to be concurrent with one another.

A defendant can be charged and convicted of both the Violation of a Protective Order and criminal contempt.¹⁸⁷ Additionally, a respondent may be charged with the Violation of a Protective Order if the respondent failed to surrender any firearms.¹⁸⁸

¹⁸⁶ T.C.A. § 39-13-113(2015).

D. Performance Bond Required for Order of Protection Violations

Respondents, who have been convicted of violating an order of protection, are required to post a bond in an amount of no less than \$2500.¹⁸⁹ This bond is in addition to any other penalties provided by law. The bond must be at least \$2500, but the court can set a reasonable amount greater than \$2500 to assure the safety of the petitioner. If the respondent does not post the bond, the respondent may be held in contempt of court.

If the respondent fails to comply with the bond requirements, the court must enter an order declaring the bond forfeited. The clerk must mail notice of the order indicating that the bond has been forfeited to the respondent at the respondent's last known address. The respondent has 30 days to show compliance with the conditions of bond. If the respondent cannot satisfy to the court compliance with the bond conditions, then the court shall enter a judgment in favor of the state against the respondent in the amount of the bond and costs of the court proceedings. The clerk may enforce the judgment as in other civil actions.

The proceeds of a judgment for the amount of the bond would be paid quarterly to the Administrative Office of the Courts and would be allocated equally on an annual basis in the following manner:

- (1) To provide legal representation to low-income Tennesseans in civil matters in such manner as determined by the Supreme Court. One fourth of such funds would be allocated to an appropriate statewide nonprofit organization capable of providing continuing legal education, technology support, planning assistance, resource development and other support to organizations delivering civil legal representation to indigents. The remainder would be distributed to organizations delivering direct assistance to clients with Legal Services Corporation funding;
- (2) To the Domestic Violence State Coordinating Council;
- (3) To the Tennessee Court Appointed Special Advocates Association (CASA); and
- (4) To Childhelp.

E. Monitoring compliance with Orders of Protection.

¹⁸⁷ Attorney General Opinion 06-085.

¹⁸⁸ T.C.A. § 39-13-113 (h)(1)(2015).

¹⁸⁹ Public Chapter 1094: T.C.A. 36-3-610(2015)

The following mechanisms to monitor compliance with Orders of Protection have been developed by other jurisdictions:

- Encourage police to arrest on violations of court orders and to report violations directly to the Court.
- Coordinate administrative mechanisms for registry of Orders of Protection with all local law enforcement agencies.
- Inform victims of their right to file a motion for contempt of the Order of Protection.
- Initiate enforcement hearing for violations of Orders without waiting for the victim to ask the judge to enforce the Order.

Procedures recommended by the National Council of Juvenile and Family Court Judges for courts issuing Orders of Protection after trial or after a finding of contempt or a misdemeanor violation of a protective order are to:

- Retain the case to monitor compliance;
- Arrange for formal supervision of all violations through probation and court social services;
- Monitor compliance by requesting that court social services and/or probation agencies actively monitor the case and swiftly issue sua sponte orders (orders on the Court's own motion) to show cause on any contempt violations brought to the Court's attention by police, probation, social services, counselors, or the petitioner;
- Conduct hearings promptly on violations; and
- Sentence persons found in violation to increasingly severe penalties with each subsequent violation (NCJFCJ,1990).

F. Enforcement of Orders of Protection from other states.

The full faith and credit section of the Violence Against Women Act¹⁹⁰ requires that when a victim goes to a new state, any valid Order of Protection issued in the old state must be enforced by the new state as if it were issued by the new state. In other words, whatever the implications of violating an Order of Protection in the new state, these apply to enforcement of the Order from the old state. In addition, if the victim is ineligible for an Order of Protection in the new state but she was eligible for the Order of Protection in the old state, the new state must still enforce the out-of-state Order. Full faith and credit extends to both temporary and final Orders of Protection. It also applies to both civil and criminal

¹⁹⁰ 18 U.S.C. § 2265. T.C.A. § 36-3-622 (2015) provides guidance and procedures to assist in implementation of the full faith and credit provisions of the Violence Against Women Act.

Orders of Protection. However, full faith and credit does not extend to "mutual Orders of Protection" where no cross- or counter-petition was filed against the petitioner and where the judge did not make a finding that the petitioner had committed domestic abuse. The full faith and credit section does not require that the Order of Protection from the old state be registered in the new state to be enforceable. However, the section does require that (1) the court that issued it had personal and subject matter jurisdiction and (2) the opposing party had reasonable notice and opportunity to be heard.

G. Defenses to the violation of the Order.

The respondent may attempt to raise the victim's alleged permission and participation in the prohibited contact as a defense to the violation of the Order. While no Tennessee case has addressed this issue, the U.S. Attorney General's Task Force recommends that the Court admonish the perpetrator that any contact with the protected party, even if initiated by the protected party, may constitute a violation of the no contact order (*Attorney General's Task Force on Family Violence: Final Report, 1984*). Many states hold that reunification of the parties is not a defense to contempt.¹⁹¹

H. Double jeopardy.

Often the violence that prompts a contempt hearing is criminal conduct as well. For example, any assault done in contempt of an Order of Protection is an aggravated assault. Similarly, breaking into a petitioner's home to commit an assault is burglary. The Tennessee Supreme Court has held that "neither the Double Jeopardy Clause of the United States Constitution nor that of the Tennessee Constitution bars separate proceedings and punishments for contempt and the substantive offense underlying the contempt."¹⁹²

Furthermore, punishment of the respondent for multiple violations of the Order of Protection does not constitute double jeopardy if different evidence was used to establish the multiple convictions for

¹⁹¹ See, e.g., Cole v. Cole, 556 N.Y.S. 2d 217 (1990) (wife who reunited for two months with husband against whom she had an Order of Protection did not waive right to enforce the order); State v. Kilponen, 737 P. 2d 1024 (Wash. 1987) (plaintiff who had divorced, reconciled, and separated again could not change court's order that defendant not approach or communicate directly or indirectly with the plaintiff and that he not go to the family residence).

¹⁹² State v. Winningham, LEXIS 632 (Tenn. 1997) [citing State v. Denton, 938 S.W.3de 373, 378 (Tenn. 1996)].

violating the Order of Protection and if the offenses consisted of separate and distinct acts. For example, in Cable v. Clemmons, in which the court found the respondent guilty of three separate violations of an Order of Protection, the evidence to establish the first conviction occurred when an argument began and Clemmons grabbed Cable and pushed her head against the car window. The evidence of the second conviction was that Clemmons produced a knife and threatened to kill Cable. Finally, the evidence of the third conviction was that after Cable pulled over and fled from the scene, Clemmons vandalized her car by kicking it and striking it with a knife. With respect to the distinctness of the acts, Clemmons first abused Cable physically; then produced a knife and threatened to kill her; and then vandalized Cable's personal property.¹⁹³

A conviction of criminal contempt and the misdemeanor violation protective order does constitute a double jeopardy violation.¹⁹⁴

I. Vulnerable Adults

The Tennessee Legislature passed a law permitting a relative to file an order of protection on behalf of an “adult” as defined under the Adult Protection Act T.C.A. § 71-6-101, who is the victim of willful abuse, neglect or exploitation (T.C.A. § 71-6-117). The statute does not include a person while in the custody of intermediate care facilities for persons with mental retardation (ICFs/MR) and a person while receiving residential services or other services from a community provider through contracts with the division of intellectual disability services, department of finance and administration.

The relative filing the petition must be a spouse, child, including stepchild, adopted child or foster child; parents (stepparents, adoptive parents or foster parents); siblings of the whole or half-blood; step-siblings, grandparents, grandchildren, of any degree, and aunts, uncles, nieces and nephews.

Jurisdiction, venue and service of this order of protection are the same as other orders of protection in Tennessee. At the time of the hearing, if the judge finds by a preponderance of the evidence that the allegations are true, then the court may issue an order of protection for a definite period of time not to exceed 120 days. The court has the discretion to appoint a guardian ad litem under T.C.A. § 34-1-107.

An order of protection pursuant to this section may: (1) (A) Order the respondent to refrain from committing a violation of this part against the adult, T.C.A. § 71-6-117; (B)

¹⁹³ Cable v. Clemmons, 36 S.W.3d 39, 2001 Tenn. Lexis 1 (Tenn. 2001).

¹⁹⁴ Attorney Gen. Op. 06-085 (2006).

Refrain from threatening to misappropriate or further misappropriating any monies, state or federal benefits, retirement funds or any other personal or real property belonging to the adult; (C) Order the return to the adult or the adult's caretaker or conservator or to the fiduciary any monies or benefits misappropriated from the adult. The court may also enter a judgment against the respondent for repayment. If the amount in question exceeds ten thousand dollars, the court may require the caretaker or custodian of funds appointed under this subsection to post a bond. (2) Enjoin the respondent from providing care for an adult on a temporary or permanent basis; (3) Prohibit the respondent from telephoning, contacting, or otherwise communicating with the adult, directly or indirectly, and any other necessary relief to protect the adult.

Any violation of the order of protection shall be treated as an order of protection issued under the Order of Protection Act. This would include contempt (T.C.A. § 36-3-610) and the violation of the order of protection (T.C.A. 39-13-113). The Tennessee firearms prohibition may apply depending on the relationship between the respondent and the adult.¹⁹⁵

¹⁹⁵ T.C.A. § 71-6-124 (2015).

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Chapter 6

Advocacy in the Criminal Courts

I. CRIMINAL CHARGES IN DOMESTIC VIOLENCE AND SEXUAL ASSAULT CASES¹⁹⁶

A. Domestic violence charges.

Almost any crime that can be committed against a victim can be and has been committed in a context of domestic violence. Most of these crimes have the same elements and carry the same penalties whether they are committed against strangers or intimates. Domestic assault and custodial interference are the only criminal statutes that have a relationship requirement since the repeal of the spousal rape exemption in 2005. The relationship requirement for domestic assault is consistent with the definition of domestic abuse victim defined in T.C.A. § 36-3-601(11).

A person commits domestic assault who commits assault against:

- Adults or minors who are current or former spouses;
- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have joer had a sexual relationship but does not include fraternization between two individuals in a business or social context;

¹⁹⁶ The companion volume to this manual, *Domestic and Sexual Violence Laws 2003*, contains the full text of many domestic and sexual violence related charges. That information will not be repeated here.

- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage;
- Adults or minor children of a person in a relationship described above.¹⁹⁷

The penalties for domestic assault are as follows:

(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101 (a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in

subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than three hundred fifty dollars (\$350) nor more than three thousand five hundred dollars (\$3,500), and by confinement in the county jail or workhouse for not less than thirty (30) consecutive days, nor more than eleven (11) months and twenty-nine (29) days. (3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars (\$1, 1 00) nor more than five thousand dollars (\$5,000), and by confinement in the county jail or workhouse for not less than ninety (90) consecutive days, nor more

than eleven (11) months and twenty-nine (29) days.

“For purposes of this section, a person who is convicted of a violation of § 39-13-111, committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of 39-13-111, committed in a manner prohibited by § 39-13-101 (a)(1), that resulted in a conviction for such offense.”

¹⁹⁷ T.C.A. § 39-13-111(2015).

The domestic assault law provides that the sentencing judge has discretion to order the defendant to complete available counseling programs that address violence and control issues, including batterer's intervention programs certified by the domestic violence state coordinating council or any court-ordered drug or alcohol treatment program. Failure of the defendant to complete the program is considered a violation of the defendant's alternative sentencing program and the judge may revoke the defendant's participation in such program and order execution of the sentence.¹⁹⁸ The law specifically states that:

As part of a defendant's alternative sentencing for a violation of this section, The sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a non-certified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or non-certified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's

alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

Additionally, a person convicted of domestic assault shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by T.C.A. § 36-3-625.¹⁹⁹ There is no crime called aggravated domestic assault. A person who commits aggravated assault against a person in a relationship described above would be charged with aggravated assault.²⁰⁰

The criminal offense of aggravated assault has the following elements:

- (a) A person commits aggravated assault who: (1) Intentionally or knowingly commits an assault as defined in T.C.A. § 39-13-101, and (A) causes serious bodily injury to another; (B) uses or displays a deadly weapon; or (C) attempts or intends to cause bodily injury to another by

¹⁹⁸ T.C.A. § 39-13-111(2015).

¹⁹⁹ T.C.A. § 39-13-111(c)(3)(2015).

²⁰⁰ T.C.A. § 39-13-102(2015).

- strangulation; or (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) causes serious bodily injury to another; or (B) uses or displays a deadly weapon. "Strangulation" means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.
- (b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.
- (c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.
- (d) A person commits aggravated assault who, with intent to cause physical injury to any public employee or an employee of a transportation system, public or private, whose operation is authorized by title 7, chapter 56, causes physical injury to the employee while the public employee is performing a duty within the scope of the public employee's employment or while the transportation system employee is performing an assigned duty on, or directly related to, the operation of a transit vehicle.²⁰¹

B. Sexual assault charges.

Most of Tennessee's sexual assault crimes are contained in Title 39, Chapter 13, Part 5 of the Tennessee Code. The crimes listed there are²⁰²:

- Aggravated rape.
- Rape.
- Aggravated sexual battery.
- Sexual battery.
- Statutory rape.
- Statutory Rape by an Authority Figure.²⁰³
- Public indecency.²⁰⁴

²⁰¹ Tenn. Code Ann. § 39-13-102 (2015).

²⁰² The complete text of these crimes and their citations are included in the companion volume to this manual, *Domestic and Sexual Violence Laws 2007*.

²⁰³ T.C.A. § 39-13-532 (2015).

²⁰⁴ T.C.A. § 39-13-511 (2015).

- Indecent exposure.
- Prostitution.
- Patronizing prostitution.
- Promoting prostitution.
- Aggravated prostitution.
- Rape of a child.²⁰⁵
- Sexual battery by an authority figure.²⁰⁶
- Solicitation of a minor.
- Sexual Contact with Prisoner and Inmates²⁰⁷
- Child Rape Protection Act of 2006²⁰⁸
- Aggravated Rape of a Child²⁰⁹

Two more offenses that sometimes have a sexual component are included in Chapter 13, Part 6:

- Unlawful photographing in violation of privacy.²¹⁰
- Observation without consent.²¹¹

Sexual offenses included elsewhere in the Code include:

- Incest.²¹²
- Sexual exploitation of a minor.²¹³
- Aggravated sexual exploitation of a minor.²¹⁴
- Especially aggravated sexual exploitation of a minor.²¹⁵

Because these last offenses are not included in Chapter 13 of Title 39, the following protections for victims of domestic abuse would not apply to them, even if the victim and perpetrator fall within the relationship requirements of the Order of Protection Act:

²⁰⁵T.C.A. 39-13-522 (2015).

²⁰⁶T.C.A. § 39-13-527 (2015).

²⁰⁷ T.C.A. § 39-16-408 (2015).

²⁰⁸ T.C.A. § 39-15-210 (2015).

²⁰⁹ T.C.A. § 39-13-531 (2015).

²¹⁰ T.C.A. § 39-13-605 (2015).

²¹¹ T.C.A. §39-13-607 (2015).

²¹² T.C.A. § 39-15-302 (2015).

²¹³ T.C.A. § 39-17-1003 (2015).

²¹⁴ T.C.A. § 39-17-1004 (2015).

²¹⁵ T.C.A. § 39-17-1005 (2015).

- The 12-hour hold (see section II-A below);
- Conditions of release (see section II-B below)
- Victim notification of release (see section II-D below); and
- Special probation considerations (see section IV- D below)

Rape, aggravated rape, sexual battery, and aggravated sexual battery have a requirement that force or coercion be used in commission of the offense. Force, as defined in the statute, “means compulsion by the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title.”²¹⁶ Coercion, except in the case of sexual battery, is defined as a “threat of kidnapping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age.”²¹⁷ For purposes of establishing sexual battery, coercion means “the threat of kidnapping, extortion, force or violence to be performed immediately or in the future.”²¹⁸

Each of these definitions sets a standard that is much easier to meet than the historical standard which held that rape could only be committed using physical force and the victim must have resisted physically to the utmost of her ability. In State v. McKnight, for example, in prosecutions for rape and sexual battery, the Court of Criminal Appeals held that evidence that the defendant threatened to tell people that the victim was a homosexual if he did not cooperate was sufficient for the jury to find the element of coercion.²¹⁹ With the repeal of the limited spousal exemption formerly contained in T.C.A. § 39-13-507, perpetrators of rape or sexual battery against a spouse should be charged and punished in the same way as perpetrators of rape and sexual battery against a non-spouse.²²⁰

Child Rape Protection Act

The Child Rape Protection Act provides that “when a physician has reasonable cause to report the sexual abuse of a minor pursuant to § 37-1-605, because such physician has been requested to perform an

²¹⁶ T.C.A. § 39-11-106(a)(2015).

²¹⁷ T.C.A. § 39-13-501(1) (2015).

²¹⁸ T.C.A. § 39-13-505(b) (2015).

²¹⁹ 900 S.W.2d 36 (Tenn. Crim. App. 1994).

²²⁰ T.C.A. § 39-13-501 (8) (2015).

abortion on a minor who is less than thirteen (13) years of age, the physician shall, at the time of the report, also notify the official to whom the report is made of the date and time of the scheduled abortion and that a sample of the embryonic or fetal tissue extracted during such abortion will be preserved and available to be turned over to the appropriate law enforcement officer conducting the investigation into the rape of such minor.” The first two violations of this act result in civil penalties of \$500 and \$1000, and a third violation is a Class A misdemeanor.²²¹

Polygraph Use

No law enforcement officer shall require any victim of a sexual offense, as defined in § 40-39-202, or a violent sexual offense, as defined in § 40-39-202, to submit to a polygraph examination or any other test designed to detect deception or verify the truth of statements through instrumentation or by means of a mechanical device, as a condition of the officer proceeding with the investigation of the offense.²²²

Mandatory Reporting of Certain Crimes

Health Care providers are not required to report injuries to adult victims of sexual abuse or domestic abuse if the victim objects to the release of any identifying information to law enforcement. This exception shall not apply if the injuries are considered life threatening or if the victim is being treated for injuries inflicted by strangulation, knife, pistol, gun, or other deadly weapon.²²³

C. Stalking.

Women who are sexually assaulted or battered are also often victims of stalking, either before and/or after their assaults. Stalking is especially dangerous to women and raises particular legal issues. Effective July 1, 2005, Tennessee’s stalking law has been completely re-written.²²⁴ Under the re-written act, a person commits a Class A misdemeanor who intentionally engages in stalking. “Stalking” means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested

²²¹ T.C.A. § 39-15-210 (2015).

²²² T.C.A. § 38-3-123 (2015).

²²³ T.C.A. § 38-1-101(d)(2015).

²²⁴ T.C.A. § 39-17-315 (2015).

and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. The act defines the terms used in the statute as follows:

- “Course of conduct” means a pattern of conduct composed of a series of two (2) or more separate noncontinuous acts evidencing a continuity of purpose.
- “Emotional distress” means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.
- “Harassment” means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.
- “Unconsented contact” means any contact with another person that is initiated or continued without that person’s consent or in disregard of that person’s expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:
 - Following or appearing within the sight of that person;
 - Approaching or confronting that person in a public place or on private property;
 - Appearing at that person’s workplace or residence;
 - Entering onto or remaining on property owned, leased, or occupied by that person;
 - Contacting that person by telephone;
 - Sending mail or electronic communications to that person;
 - Placing an object on, or delivering an object to, property owned, leased, or occupied by that person.
- “Victim” means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

Stalking is a class A misdemeanor. Stalking becomes a Class E felony if the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202 (2012).

A person commits Aggravated Stalking who commits the offense of stalking and:

- In the course and furtherance thereof, displays a deadly weapon; or
- The victim of the offense was less than eighteen (18) years of age at any time during the person’s course of conduct and the person is five (5) or more years older than the victim; or
- The person has previously been convicted of stalking within seven (7) years of the instant offense; or
- Makes a credible threat to the victim, the victim’s child, sibling, spouse, parent, or dependents with the intent to place any such person in reasonable fear of death or bodily injury; or

- At the time of the offense, such person was prohibited from making contact with the victim under a restraining order or injunction for protection, an order of protection, or any other court-imposed prohibition of conduct toward the victim or the victim's property and the person knowingly violates such injunction, order or court imposed prohibition.

Aggravated stalking is a Class E felony.

A person commits Especially Aggravated Stalking who:

- Commits the offense of stalking or aggravated stalking and has previously been convicted of stalking or aggravated stalking involving the same victim of the instant offense; or
- Commits the offense of aggravated stalking and intentionally or recklessly causes serious bodily injury to the victim of such offense or to the victim's child, sibling, spouse, parent or other dependent.

Especially aggravated stalking is a Class C felony.

Also under the act, if the court grants probation to a person convicted of stalking, aggravated stalking, or especially aggravated stalking, it may keep such person on probation for a period not to exceed the maximum punishment for the appropriate classification of offense. Regardless of whether a term of probation is ordered, the court may, in addition to any other punishment otherwise authorized by law, order the defendant to do the following:

- Refrain from stalking any individual during the term of probation;
- Refrain from having any contact with the victim of the offense or the victim's child, sibling, spouse, parent or dependent;
- Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological or social counseling at the defendant's own expense;
- If as the result of such treatment or otherwise, the defendant is required to take medication, the court may order that the defendant submit to drug testing or some other method by which the court can monitor whether the defendant is taking the required medication; and
- Submit to the use of an electronic tracking device with the cost of such device and monitoring the defendant's whereabouts to be paid by the defendant.

In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated nonconsensual contact with the victim after having been

requested by the victim to discontinue such conduct or a different form of nonconsensual contact, and to refrain from any further nonconsensual contact with the victim, is prima facie evidence that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

If a person is convicted of aggravated or especially aggravated stalking, or another felony offense arising out of a charge based on this section, the court may order an independent professional mental health assessment of such defendant's need for mental health treatment. The court may waive the assessment if an adequate assessment was conducted prior to the conviction. If the assessment indicates that the defendant is in need of and amenable to mental health treatment, the court may include in the sentence a requirement that the offender undergo treatment and that the drug intake of such defendant be monitored in the manner best suited to the particular situation. Such monitoring may include periodic determinations as to whether the defendant is ingesting any illegal controlled substances as well as determinations as to whether the defendant is complying with any required or recommended course of treatment that includes the taking of medications. The court shall order the offender to pay the costs of this assessment unless the offender is indigent under § 40-14-202.

Any person who reasonably believes they are a victim of an offense under this section, regardless of whether the alleged perpetrator has been arrested, charged or convicted of a stalking-related offense, shall be entitled to seek and obtain an order of protection in the same manner and under the same circumstances as is provided for victims of domestic abuse by the provisions of Tennessee Code Annotated, Title 36, Chapter 3,

Part 6.

When a person is charged and arrested for the offense of stalking, aggravated stalking or especially aggravated stalking, the arresting law enforcement officer shall inform the victim of such offense that the person arrested may be eligible to post bail for the offense and be released until the date of trial for the offense.

If a law enforcement officer or district attorney general believes that the life of a possible victim of stalking is in immediate danger unless and until sufficient evidence can be processed linking a particular person to the offense, the district attorney general may petition the judge of a court of record having criminal jurisdiction in that district to enter an order expediting the processing of any evidence in a particular stalking case. If after hearing the petition, the court is of the opinion that the life of the victim may be in immediate danger if the alleged perpetrator is not apprehended, it may enter such an order

directed to the Tennessee bureau of investigation or any other agency or laboratory which may be in the process of analyzing evidence for that particular investigation.

Stalking is considered a continuous offense. That is, it consists of multiple or repeated acts. This means that if a stalker calls his or her victim 347 times, sends her 876 emails, drives by her apartment 53 separate times, he has committed one act of stalking. Being charged with stalking “breaks the continuous course of conduct underlying the charge and . . . subsequent following or harassing of the victim relates to a new offense.”²²⁵ Under T.C.A. § 39-17-315, for purposes of determining if a course of conduct amounting to stalking is a single offense or multiple offenses, the occurrence of any of the following events breaks the continuous course of conduct, with respect to the same victim, that constitutes the offense:

- The defendant is arrested and charged with stalking, aggravated stalking or especially aggravated stalking;
- The defendant is found by a court of competent jurisdiction to have violated an order of protection issued to prohibit the defendant from engaging in the conduct of stalking; or
- The defendant is convicted of the offense of stalking, aggravated stalking or especially aggravated stalking.

If a continuing course of conduct amounting to stalking engaged in by a defendant against the same victim is broken by any of these events, any such conduct that occurs after that event commences a new and separate offense.

D. Misdemeanor violation of a protective order.

A person who knowingly violates an order of protection or a restraining order issued to a party who is a victim as defined in Section 36-3-601(8) (the relationship categories defined in the Order of Protection statute) commits the offense of violation of a protective order.²²⁶

In order to be found guilty under this section:

²²⁵ *State v. Vigil*, 65 S.W.3d 26, 2001 Tenn. Crim. App. Lexis 453 (Tenn. Ct. Crim. App. 2001).

²²⁶ T.C.A. § 39-13-113 (2015).

- The person must have received notice of the request for an order of protection or restraining order;
- The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- The court made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse, sexual assault, and stalking as defined in this part.

Any act that constitutes the offense of violation of a protective order shall be subject to arrest with or without a warrant, as outlined above.

A person who is arrested for violation of a protective order shall be considered within the provisions of Section 40-11-150(a) (requiring that bond conditions be set) and subject to the twelve-hour hold period authorized by Section 40-11-150(h). At the time the issue of bond is being determined, the magistrate shall notify or cause to be notified the victim of violation of a protective order that the defendant has been arrested. Neither an arrest nor the issuance of a warrant or capias for the offense of violation of a protective order shall in any way affect the validity or enforceability of any order of protection or restraining order.

Violation of a protective order is a Class A misdemeanor and any sentence imposed shall be consecutive to any other offense that is based in whole or in part on the same factual allegations (for example, a finding of contempt or conviction of aggravated assault) unless the sentencing judge or magistrate specifically makes the sentences for any such offenses arising out of the same facts to be concurrent with one another.

A defendant can be charged and convicted of both the Violation of a Protective Order and criminal contempt.²²⁷ Additionally, a respondent may be charged with the Violation of a Protective Order if the respondent failed to surrender any firearms.²²⁸

E. The Christina Robinson Act of 2006

In a prosecution of 2nd Degree Murder, if the defendant knowingly engages in multiple incidents of domestic abuse, assault or the infliction of bodily injury against a single victim, the trier of fact may infer that the defendant was aware that the cumulative effect of such conduct was reasonably certain to

²²⁷ Attorney General Opinion 06-085.

²²⁸ T.C.A. § 39-13-113 (h)(1)(2015).

result in the death of the victim regardless of whether any single incident would have resulted in such death.²²⁹

F. Criminal Penalties of Abuse and Neglect of a Child

Any person who knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor; provided, that, if the abused or neglected child is six (6) years of age or less, the penalty is a Class E felony.²³⁰

G. Criminal Penalties for Failure to Report to Department of Children's Services

When a doctor or other medical personnel makes an initial diagnosis of pregnancy of an unemancipated minor, this individual must provide to the parent with consent of the minor available information on how to report to the Department of Children's Services any occurrence of sex abuse which may have resulted in the pregnancy of the minor unless such a disclosure would violate the federal Health Insurance Portability and Accountability Act of 1996. Failure to provide the information constitutes a Class A misdemeanor.²³¹

H. Impersonation of a Legal Guardian or Parent

Anyone who impersonates the parent or legal guardian of unemancipated minor in order for the minor to obtain an abortion commits a Class A misdemeanor. The person performing the abortion must obtain written documentation, other than the consent itself, which establishes the relationship of the parent or guardian to the minor. This documentation and the signed consent shall be kept for one year. If the person performing the abortion does not keep this information, it is a Class B misdemeanor, punishable

²²⁹ T.C.A. § 39-13-210 (b) (2015).

²³⁰ T.C.A. § 39-15-401 (b) (2015).

²³¹ T.C.A. § 37-1-403(g) (2015).

by a fine. But if the person failed to obtain the required information due to the fact that there was a medical emergency and the abortion had to be performed, there is no violation.²³²

I. Failure to Report the Date and Time of an Abortion on a Minor Under Age 13

If a doctor has a reasonable belief that minor has been sexual abused because the doctor has been requested to perform an abortion on a minor who is under the age of 13, the doctor shall report the date and time of the abortion and provide a sample of the embryonic or fetal tissue extracted during the abortion to law enforcement. The first violation of this act is a civil penalty, carrying a fine of \$500.00. A second violation is a fine of not less than \$1000.00. A third or subsequent violation is a Class A Misdemeanor. If the person performing the abortion is a licensed doctor, a violation will be considered unprofessional conduct, which will also subject the doctor to disciplinary action.²³³

J. Prevent Placement of 911 Call

An individual commits an offense if the individual knowingly prevents another individual from placing a telephone call to 911 or from requesting assistance in an emergency from a law enforcement agency, medical facility, or other agency or entity the primary purpose of which is to provide for the safety of individuals. An individual commits an offense if the individual intentionally renders unusable a telephone that would otherwise be used by another individual to place a telephone call to 911 or to request assistance in an emergency from a law enforcement agency, medical facility, or other agency or entity, the primary purpose of which is to provide for the safety of individuals. An offense under this section is a Class A misdemeanor.(d) In this section, "emergency" means a condition or circumstance in which any individual is or is reasonably believed by the individual making a telephone call to be in fear of imminent assault or in which property is or is

²³² T.C.A. § 37-10-303 (2015).

²³³ T.C.A. § 39-15-210 (2015).

reasonably believed by the individual making the telephone call to be in imminent danger of damage or destruction.²³⁴

K. Kidnapping and Custodial Interference

In the case of the abduction of a child by a family member, certain aggravating factors (such as use of a deadly weapon, ransom demands, serious bodily injury to the victim, with intent to terrorize the victim or other person) must be present before the defendant can be charged with kidnapping or aggravated kidnapping. Otherwise, only custodial interference (a Class E felony unless the person taken from lawful custody is returned voluntarily by the defendant, in which case custodial interference is a Class A misdemeanor) can be charged.²³⁵ Kidnapping carries a penalty of three to fifteen years and aggravated kidnapping a penalty of eight to 30 years, while custodial interference carries a penalty of either 11 months, 29 days, or 30 days or less, depending on whether the defendant voluntarily returned the child.²³⁶

L. Decision to charge.

The victim has no formal authority to prevent a prosecutor from pursuing or to force a prosecutor to pursue a formal charge (Beloof, 1999). The prosecutor has great discretion in deciding whether or not and with what offenses to charge an individual. “Although there are various statutes which assign duties to the elected constitutional office of district attorney general, there are no statutory criteria governing the exercise of the prosecutorial discretion traditionally vested in the officer in determining whether, when, and against whom to institute criminal proceedings.”²³⁷ In discussing the extent of discretion possessed by a district attorney general in Tennessee, the Tennessee Supreme Court in an opinion authored by Chief Justice Henry stated:

He or she is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense. No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very

²³⁴ T.C.A. § 65-21-117 (2015)

²³⁵ T.C.A. § 39-13-306 (2015).

²³⁶ T.C.A. § 39-13-303;39-13-304; 39-13-306 (2015).

²³⁷ State v. Superior Oil, Inc., 875 S.W.2d 658, 1994 Tenn. Lexis 110 (Tenn. 1994)

real sense this is the most powerful office in Tennessee today. Its responsibilities are awesome; the potential for abuse is frightening.²³⁸

Despite this broad discretion, however, the victim can exercise some influence in decisions to charge or not to charge. The Crime Victim's Bill of Rights (see section III-A below) gives the victim the right to confer with the prosecutor. As elected officials, District Attorneys must be responsive to some extent to the wishes of constituents. One of the roles of the advocate is to support the victim in voicing her interests, needs, and wishes at all stages of the criminal proceeding.

II. ARREST

A. Arrest for violation of an Order of Protection.²³⁹

An arrest for a violation of an Order of Protection may be with or without a warrant. Any law enforcement officer shall arrest the respondent without a warrant if:

- The officer has proper jurisdiction over the area in which the violation occurred;²⁴⁰
- The officer has reasonable cause to believe the respondent has violated or is in violation of an order of protection; and
- The officer has verified whether an order of protection is in effect against the respondent. If necessary, the officer may verify the existence of an order by telephone or radio communication.

An Ex Parte Order of Protection can be enforced by warrantless arrest if the respondent has been served with the Order of Protection or otherwise has acquired knowledge thereof.

B. Arrest for violation of out-of-state Order of Protection.²⁴¹

²³⁸ Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978), (quoting Pace v. State, 566 S.W.2d 861, 866 (Tenn. 1978) (Henry, C.J., concurring)).

²³⁹ Tenn. Code Ann. § 36-3-611 (2015).

²⁴⁰ Officers can enforce orders issued by other counties if violated in their jurisdiction, Tenn. Code Ann. § 36-3-606(f)(2012).

Any valid protection order issued by a court of another state, tribe, or territory shall be afforded full faith and credit by the courts of this state and enforced as if it were issued in this state. A petitioner may present a certified copy of a foreign order of protection to a court in the county in which the petitioner believes enforcement may be necessary. The clerk shall keep a copy of the order on file and forward a copy of such to the local law enforcement agency which shall enter the foreign order into the Tennessee Criminal Information System (TCIC).²⁴² Filing or entry of the foreign order in the TCIC system shall not be prerequisites for enforcement of the foreign protection order. Regardless of whether a foreign order of protection has been filed in this state, a law enforcement officer may rely upon a copy of any such protection order which has been provided to the officer by any source and may also rely upon the statement of any person protected by a foreign order that the order remains in effect. A law enforcement officer acting in good faith shall be immune from civil and criminal liability in any action in connection with a court's finding that the foreign order was for any reason not enforceable.

C. Arrest for a crime involving domestic abuse.²⁴³

If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or a felony or was committed within or without the presence of the officer, the preferred response of the officer is arrest. The arrest may be without a warrant.²⁴⁴ Preferred response is defined as requiring that law enforcement officers shall arrest a person committing domestic abuse unless there is a clear and compelling reason not to arrest.²⁴⁵ A domestic abuse crime means any crime committed where the relationship between the victim and the perpetrator is:

- Adults or minors who are current or former spouses;
- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage; or
- Adult or minor children of a person in a relationship described above.²⁴⁶

²⁴¹ Tenn. Code Ann. § 36-3-622 (2015).

²⁴² Tenn. Code Ann. § 36-3-609 (2015).

²⁴³ Tenn. Code Ann. § 36-3-619 (2015).

²⁴⁴ Tenn. Code Ann. § 40-7-103(a)(7)(2015).

²⁴⁵ Tenn. Code Ann. § 36-3-601(4)(2015).

²⁴⁶ Tenn. Code Ann. § 36-3-601(8)(2015).

Offenders should be charged with appropriate violations of the law, such as assault, domestic assault, or aggravated assault.

If an officer has probable cause to believe that two or more persons committed a misdemeanor or a felony, or if two or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor. Arrest is not the appropriate response for persons who were not the primary aggressor. If the officer believes that all parties are equally responsible, arrest is not the preferred response for any party, and the officer shall exercise his or her best judgment in determining whether to arrest all, any, or none of the parties.

In determining the primary aggressor, the officer shall consider:

- History of domestic abuse between the parties;
- Relative severity of injuries inflicted on each person;
- Evidence from the persons involved in the domestic abuse;
- The likelihood of future injury to each person;
- Whether one of the persons acted in self- defense; and
- Evidence from witnesses.

An officer shall not threaten, suggest, or otherwise indicate the possible arrest of all parties to discourage future requests for intervention by police or base the decision of whether to arrest on:

- The consent or request of the victim; or
- The officer's perception of the willingness of the victim or a witness to testify or participate in a judicial proceeding.

When investigating an alleged domestic abuse incident, the officer shall make a complete report and file the report with his or her supervisor. If the officer decides not to make an arrest, or decides to arrest two or more parties, the officer must include the grounds for the decision in the report. If the officer seizes any weapons, an inventory shall be attached to the report. Every month, the officer's supervisor shall forward the compiled data on domestic abuse cases to the administrative director of the courts.

A law enforcement officer may arrest a person if the officer has probable cause to believe that the person has committed the offense of stalking. An officer who has probable cause to believe that a crime

has been committed involving domestic abuse shall seize all weapons that are alleged to have been used or threatened to be used by the abuser in the commission of a crime.²⁴⁷ An officer may seize a weapon that is in plain view or discovered pursuant to a consensual search, if necessary for the protection of the officer or other persons. An officer is not required to remove a weapon that the officer believes is needed by the victim for self defense.

When arrest is for assault, domestic assault, or aggravated assault, the arresting officer shall inform the victim that the person arrested may be eligible to post bond for the offense and be released until the date set for trial for the offense.²⁴⁸

D. Issuance of a criminal summons in lieu of arrest.

If a law enforcement officer does not make an arrest or if law enforcement is not called, a victim may request a warrant from a magistrate.²⁴⁹ The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county executives in such officers' respective counties, are magistrates for this purpose.²⁵⁰ In addition, clerks of courts of general sessions and their duly sworn deputies have jurisdiction and authority, concurrent with that of the judges thereof, to issue warrants for the arrest of persons.²⁵¹

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In determining whether to issue an arrest warrant pursuant or a criminal summons pursuant to § 40-6-215, the following shall apply: If a single or multiple affiants are seeking a warrant of arrest for a felony or misdemeanor offense, and at least one (1) or more of the affiants is a law enforcement officer, as defined by § 39-11-106, the magistrate shall issue an arrest warrant unless the law enforcement officer

²⁴⁷ Tenn. Code Ann. § 36-3-620 (2015).

²⁴⁸ Tenn. Code Ann. § 36-3-615 (2015).

²⁴⁹ Tenn. Code Ann. § 40-6-203 (2015).

²⁵⁰ Tenn. Code Ann. § 40-1-106 (2015).

²⁵¹ Tenn. Code Ann. § 40-6-214 (2015).

²⁵² Tenn. Code Ann. § 40-6-203 (2015).

²⁵³ Tenn. Code Ann. § 40-1-106 (2015).

²⁵⁴ Tenn. Code Ann. § 40-6-214 (2015).

requests a summons be issued instead. If a single or multiple affiants are seeking a warrant of arrest for a misdemeanor offense, as defined in § 39-11-110, and none of the affiants is a law enforcement officer, as defined by § 39-11-106, there is a presumption that the magistrate shall issue a criminal summons. The presumption is overcome if: (A) The affiant or affiants request a warrant, submit sufficient information demonstrating the need for a warrant, and the magistrate agrees that an arrest warrant should be issued instead of a summons; or (B) The magistrate finds an arrest warrant is necessary to prevent immediate danger to a victim of domestic abuse, sexual assault or stalking as defined in § 36-3-601.²⁵⁵

In most instances of domestic abuse, the issuance of an arrest warrant rather than a criminal summons will be necessary, and magistrates should inquire into the circumstances and make findings accordingly. Judges and magistrates should also work with their local Domestic Abuse Coordinating Council to insure that law enforcement officials in their jurisdictions are making arrests or requesting warrants when appropriate in domestic abuse cases and that officials responsible for issuing arrest warrants or criminal summonses are properly educated on the law and on domestic violence.

III. PRE-TRIAL RELEASE

A. Mandatory Holding.

Any offender arrested for the offense of stalking, aggravated stalking, or especially aggravated stalking, as defined in § 39-17-315, or any criminal offense defined in title 39, chapter 13, in which the alleged victim is a victim as defined in § 36-3-601, shall not be released within twelve (12) hours of the time of arrest. The magistrate or other official duly authorized to release the offender may, however, release the offender in less than twelve (12) hours if the official finds that the offender is not a threat to the alleged victim.

The findings shall be reduced to writing. The written findings must be attached to the warrant and shall be preserved as a permanent part of the record. The arresting officer shall make official note of the time of the arrest in order to establish the beginning of the twelve-hour period required by this subsection.

If the offender is released prior to the conclusion of the twelve-hour period, the official shall make all

²⁵⁵ T.C.A. § 40-6-205(b)(3) (2015).

reasonable efforts to directly contact the victim and inform the victim that the person charged with the offense will be released prior to the conclusion of the twelve-hour period mandated in subdivision.²⁵⁶

B. Bail and Conditions of Release.

In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider the following:

- The defendant's length of residence in the community;
- The defendant's employment status and history and the defendant's financial condition;
- The defendant's family ties and relationships;
- The defendant's reputation, character and mental condition;
- The defendant's prior criminal record and record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;
- The nature of the offense and the apparent probability of conviction and the likely sentence;
- The defendant's prior criminal record and the likelihood that because of such record the defendant will pose a risk of danger to the community;
- The identity of responsible members of the community who will vouch for the defendant's reliability; however, no such member of the community may vouch for more than two defendants at any time while charges are still pending or a forfeiture is outstanding; and
- Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.²⁵⁷

However, if the defendant is charged with the offense of child abuse, child neglect, or child endangerment, as defined in § 39-15-401, the offense of aggravated child abuse, aggravated child neglect, or aggravated child endangerment, as defined in § 39-15-402, the offense of stalking, aggravated stalking or especially aggravated stalking, as defined in § 39-17-315, any criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a victim as defined in § 36-3-601(5), (10) or (11), or is in violation of an order of protection as authorized by title 36, chapter 3, part 6, the magistrate shall review the facts of the arrest and detention of the defendant and determine whether the defendant is:

- Is a threat to the alleged victim or other family or household member;
- Is a threat to public safety; and
- Is reasonably likely to appear in court.²⁵⁸

²⁵⁶ T.C.A. § 40-11-150(h)(1)(2015); see Attorney General Opinion No. 97-069 (1997) (holding mandatory hold provision constitutional).

²⁵⁷ T.C.A. § 40-11-118(b)(2015).

If the magistrate deems the defendant to be a threat to the victim or other family members or a threat to public safety, bail should be set higher. Before releasing the defendant, the Court shall make findings on the record if possible concerning its determination with respect to the three factors listed above.

C. Conditions of release.

Before releasing a person arrested for or charged with an offense as specified above, or a violation of an order of protection, the magistrate shall make findings on the record, if possible, concerning the determination made, and shall impose one (1) or more conditions of release or bail on the defendant to protect the alleged victim of any such offense and to ensure the appearance of the defendant at a subsequent court proceeding. The conditions may include:

- An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- An order prohibiting the defendant from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly;
- An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;
- An order prohibiting the defendant from possession or consumption of alcohol or controlled substances; a
- An order requiring the defendant to carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that device and electronic receptor device provided to the victim, pursuant to T.C.A. § 40-11-152.
- Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court.²⁵⁹

Before a judge or magistrate imposes the condition of the global positioning monitoring system device, the magistrate or judge must consider the likelihood that the defendant's participating will deter the defendant from seeking to kill, physically injure, stalk, or

²⁵⁸ T.C.A. § 40-11-150(a) (2015).

²⁵⁹ T.C.A. § 40-11-150(b) (2015).

otherwise threatened the victim before trial. The magistrate or judge must also provide the victim with the following notifications:

1. The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the magistrate terminate the victim's participation.
2. The manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements.
3. Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.
4. Any sanctions that the magistrate may impose on the defendant for violating a condition of bond imposed related to the global positioning monitoring system.
5. The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails.
6. Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence.
7. The fact that the victim's communications with the magistrate concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

In addition to the information described above, the magistrate or judge shall provide the victim who participates in a global positioning monitoring system with the name and phone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond related to the global positioning monitoring system.

When conditions of release are imposed, the Court must:

- Issue a written order for conditional release containing the conditions of release on a form prepared by the administrative office of the courts;

- Immediately distribute a copy of the order of release to the law enforcement agency having custody of the defendant, which agency shall file and maintain such order in the same manner as Orders of Protection; and
- Provide such law enforcement agency with any available information concerning the location of the victim in a manner that protects the safety of the victim.²⁶⁰

The law enforcement agency having custody of the defendant shall provide a copy of the conditions to the defendant upon his or her release. Failure to provide the defendant with a copy of the conditions of release does not invalidate the conditions if the defendant has notice of such conditions.²⁶¹

If conditions of release are imposed without a hearing, the defendant may request a prompt hearing before the court having jurisdiction of the offense for which the defendant was arrested or is charged to review the conditions. Upon such a request, the Court shall hold a prompt hearing to review the conditions.²⁶²

A defendant who violates a condition of release imposed pursuant to this section shall be subject to immediate arrest with or without a warrant. Such a violation shall be punished as contempt off the court imposing the conditions and the bail of such violator may be revoked.²⁶³ Furthermore, if a violation constitutes a violation of a protective order under T.C.A. § 39-13-113, the defendant can be charged with this violation.²⁶⁴

If a defendant upon whom conditions of release have been imposed pursuant to this section is for any reason discharged or released from such conditions, the discharging or releasing court shall notify all law enforcement agencies within its jurisdiction that such defendant is no longer subject to the conditions originally imposed.²⁶⁵

D. Notification of release.

²⁶⁰ T.C.A. § 40-11-150(c)(2015).

²⁶¹ T.C.A. § 40-11-150(d)(2015).

²⁶² T.C.A. § 40-11-150(e)(2015).

²⁶³ T.C.A. § 40-11-150(i) (2015).

²⁶⁴ T.C.A. § 40-11-150 (i)(2) (2015).

²⁶⁵ T.C.A. § 40-11-150(j) (2015).

When a defendant who is arrested for or charged with a crime against the person committed against a victim as defined in the Order of Protection Act or with a violation of an Order of Protection is released from custody, the law enforcement agency having custody of the defendant shall:

- Use all reasonable means to immediately notify the victim of the release and of the address and telephone number of the nearest source of assistance to victims of domestic violence, including, but not limited to, shelters, counseling centers or other appropriate community resources; and
- Furnish the victim at no cost a certified copy of any conditions of release.²⁶⁶

Release of a domestic abuse defendant shall not be delayed because of the victim notification requirements.²⁶⁷

At the time the issue of bond is being determined, the magistrate shall notify or cause to be notified the victim of a misdemeanor offense of violation of a protective order that the defendant has been arrested.²⁶⁸

When a person is charged and arrested for the offense of stalking, aggravated stalking or especially aggravated stalking, the arresting law enforcement officer shall inform the victim of such offense that the person arrested may be eligible to post bail for the offense and be released until the date of trial for the offense.²⁶⁹ The Tennessee Coalition Against Domestic & Sexual Violence has implemented an automated victim's notification system to permit a crime victim to register or update the victim's registration for the system using a toll free telephone number and to permit a registered crime victim to receive the most recent status report for an offender.

IV. TRIAL CONSIDERATIONS IN CRIMINAL DOMESTIC ABUSE CASES

A. Crime victim's bill of rights.

²⁶⁶ T.C.A. § 40-11-150(f) (2015).

²⁶⁷ T.C.A. § 40-11-150(g) (2015). See T.C.A. § 36-3-615 (2015).

²⁶⁸ T.C.A. § 36-3-612 (2015).

²⁶⁹ T.C.A. § 39-17-315 (i) (2015).

Article I, Section 35 of the Tennessee Constitution adopted certain rights of victims of crimes in order to preserve and protect the rights of victims of crime to justice and due process. These rights are:

- The right to confer with the prosecution.
- The right to be free from intimidation, harassment, and abuse throughout the criminal justice system.
- The right to be present at all proceedings where the defendant has the right to be present.
- The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.
- The right to be informed of all proceedings, and of the release, transfer, or escape of the accused or convicted person.
- The right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction or sentence.
- The right to restitution from the offender.
- The right to be informed of each of the rights established for victims.

The general assembly has enacted substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section.²⁷⁰

B. Victim testimony.

The victim's testimony is important, although not always essential in the prosecution of domestic and sexual violence cases. With regard to the identity of an accused in a rape case, "the testimony of a victim, by itself, is sufficient to support a conviction."²⁷¹

If the victim is reluctant to testify, the reasons underlying the reluctance should be assessed in order to determine the best course of action. Victim advocates can give accurate information regarding the court process and can assist the victim in setting up a safety plan. This assistance will often remedy reluctance which stems from fear of the defendant, belief that there is no alternative but to return home, or inaccurate information regarding possible outcomes of the criminal court process. Reducing the victim's reluctance reduces the perpetrator's ability to control the victim. If the victim is still unwilling to testify, previous statements or testimony may be admissible if qualified as exceptions to the

²⁷⁰ T.C.A. § 40-38-301(2015), *et seq.*

²⁷¹ State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993) (citation omitted).

hearsay rule. If the case has been adequately investigated and documented by law enforcement, the prosecution may be able to prove its case without the testimony of the victim.

C. Expert testimony on the experience of battered women or rape trauma syndrome.

Trial attorneys may sometimes offer testimony concerning the experience of battered women or rape victims for the purpose of establishing one of the following:

- The specific effects of abuse on battered women or rape victims;
- Whether or not a particular victim suffers from the collection of specific effects of violence collectively known as the "battered woman syndrome" or "rape trauma syndrome."

There are no Tennessee cases which directly address the issue of admissibility of testimony on battered women's syndrome by the prosecution. Tennessee courts have held that evidence of "child sex abuse syndrome" is not admissible to show that a child has been raped, and have indicated a willingness to extend the same ruling to adults.²⁷² However, the evidence may be useful and would probably be admissible to explain to the jury why a victim engaged in behavior that seemed odd or counter-productive, such as not reporting the abuse right away, or agreeing to her rapist's demands. The courts have also held that a defendant may not introduce expert testimony on rape trauma syndrome to show that a victim has *not* been raped because her or his behavior is not consistent with rape trauma syndrome.²⁷³

Testimony of an expert in domestic violence on whether a battered woman defendant had a reasonable fear of imminent danger and thus acted in self-defense should be admitted, even though the testimony embraces the ultimate issue of fact.²⁷⁴ In capital cases involving indigent defendants, the Court may determine that investigative or expert services or other similar services are necessary to insure that the constitutional rights of the defendant are properly protected.²⁷⁵

²⁷² State v. Schimpf, 782 S.W. 2d 186 (Tenn. Crim. App. 1989).

²⁷³ State v. Ashburn, 914 S.W.2d 108, 1995 Tenn. Crim. App. Lexis 558 (Tenn. Crim. App. 1995).

²⁷⁴ State v. Furlough, 797 S.W. 2d 631 (Tenn. Crim. App. 1990). But see State v. Leaphorn, 673 S.W. 2d 870 (Tenn. Crim. App. 1983) (unless evidence that defendant was in imminent danger of death or bodily harm is introduced, court is not required to charge the jury on self-defense).

²⁷⁵ T.C.A. 40-14-207(b) (2015).

D. Admissibility of character evidence.

In a criminal case, the State may not introduce, as part of its case in chief, evidence that the defendant possesses a character trait such as a turbulent, quarrelsome, or violent disposition.²⁷⁶ The defendant may present evidence of his good character as tending to show that he would not commit a crime. In addition, if testifying as a witness, he may show good character and reputation in support of the proposition that his testimony is entitled to be credited by the jury.²⁷⁷ When character evidence is introduced by the defense, the prosecution may rebut this proof by calling witnesses who will testify that the reputation of the defendant for the particular trait at issue is bad.²⁷⁸ The prosecutor may also cross-examine the defense character witnesses so as to test their knowledge of the defendant by asking whether the witness has heard or knows of various unsavory things about the defendant that are relevant to the trait of his character that is in question.²⁷⁹ This rule is subject to the restriction that the question may be asked only if there is a good faith basis to support the question.²⁸⁰

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- The evidence may refer only to character for truthfulness or untruthfulness; and
- The evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

²⁷⁶ Tenn. R. Evid. 608.

²⁷⁷ McKinney v. State, 552 S.W. 2d 787 (Tenn. Crim. App. 1977).

²⁷⁸ Michelson v. United States, 335 U.S. 469 (1948). See also Crawford v. State, 197 Tenn. 411, 273 S.W. 2d 689 (1954) (character or reputation can be proved only by evidence of general reputation in the community and not by specific acts nor from personal knowledge of the witness).

²⁷⁹ Correll v. State, 4 Tenn. Crim. App. 676, 475 S.W. 2d 209 (1971) (prior convictions); Crawford v. State, *supra*.

²⁸⁰ State v. Hicks, 618 S.W. 2d 510 (Tenn. Crim. App. 1981). See also State v. Sims, 746 S.W. 2d 191 (Tenn. 1988).

The State cannot support the character trait of its witnesses or the victim until it is at issue through some action of the defendant.²⁸¹ The defendant may introduce proof through witnesses to establish that the victim or other state's witness has a bad reputation for truth and veracity.²⁸² When this occurs, the State may then call witnesses to support the character of the victim.²⁸³ The State is clearly permitted to present evidence of the victim's good character to rebut defendant's suggestion that the defendant acted in self-defense.²⁸⁴

E. Admissibility of prior conduct evidence to attack or support credibility.

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's credibility, other than convictions of crime, may not be proved by extrinsic evidence.²⁸⁵ They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

- The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
- The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this criterion is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the

²⁸¹ State v. Lee, 631 S.W. 2d 453 (Tenn. Crim. App. 1982) (reputation of victim admissible when defendant raised issue of self-defense even where defendant did not first raise claims of prior bad acts).

²⁸² State v. Davis, 656 S.W. 2d 406 (Tenn. Crim. App. 1983).

²⁸³ Howard v. State, 506 S.W. 2d 951 (Tenn. Crim. App. 1973).

²⁸⁴ State v. West, 844 S.W. 2d 144 (Tenn. 1992). See Tenn. R. Evid. 404(a)(2).

²⁸⁵ See McGowen v. State, 221 Tenn. 442, 427 S.W. 2d 555 (1968).

court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.²⁸⁶

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to credibility. Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.²⁸⁷

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

- The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, other evidence may establish identity.
- The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.
- If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines

²⁸⁶ Tenn. R. Evid. 608(b).

²⁸⁷ Tenn. R. Evid. 404(c).

in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

Evidence of a conviction is not admissible under this rule if:

- The conviction has been the subject of a pardon based on a finding of the rehabilitation of the defendant convicted and that defendant has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or
- The conviction has been the subject of a pardon based on a finding of innocence.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination. The pendency of an appeal of a conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

F. Admissibility of prior conduct evidence to show intent, knowledge, identity, completion of the story, opportunity, preparation, motive, or a common scheme or plan, or to rebut a defense of accident or mistake.

Evidence of a defendant's prior crimes, wrongs or acts may be admissible to show such other things as intent, knowledge, identity, completion of the story, opportunity, and preparation.²⁸⁸ A prior bad act may also reveal a defendant's motive, show a common scheme or plan, or rebut a defendant's theory that the charged offense was an accident or mistake.²⁸⁹ The conditions which must be satisfied before allowing such evidence are:

- The court upon request must hold a hearing outside the jury's presence.

²⁸⁸ State v. Nelson, 1998 LEXIS 922 (Tenn. Crim. App. 1998).

²⁸⁹ State v. Smith, 868 S.W. 2d 561 (Tenn. 1993) (violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim); State v. West, 844 S.W. 2d 144 (Tenn. 1992). See Tenn. R. Evid. 608(b).

- The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.²⁹⁰

The Tennessee Supreme Court has rejected a sex offense exception to the rule regarding the state's ability to admit evidence of prior crimes or bad acts against the defendant.²⁹¹ The court stressed that the "general rule excluding evidence of other crimes is based on the recognition that such evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial."²⁹² Thus, evidence of sex crimes and acts by the defendant not charged in the charging instrument, if admissible at all, must be relevant to identity, motive, common scheme or plan, intent or the rebuttal of accident or mistake defenses.

G. Admissibility of victim's prior sexual history in sexual assault cases.

The Tennessee Rules of Evidence set out special rules for the admissibility of evidence of a victim's past sexual behavior in a criminal trial, preliminary hearing, deposition, or other proceeding in which a defendant is accused of aggravated rape, rape, aggravated sexual battery, sexual battery, spousal sexual offenses, rape of a child, incest, statutory rape, sexual battery by an authority figure, solicitation of minors for sexual acts, or the attempt to commit any such offense.²⁹³

In this rule "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures set out in the Rule and required by the Tennessee or United States Constitution. Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures set out in the Rule, and the evidence is:

- Required by the Tennessee or United States Constitution, or
- Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or
- If the sexual behavior was with the accused, on the issue of consent, or
- If the sexual behavior was with persons other than the accused,
 - To rebut or explain scientific or medical evidence, or
 - To prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

²⁹⁰ Tenn. R. Evid. 404(b).

²⁹¹ State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994) (holding that the "general rule, which excludes evidence of other crimes or bad acts as irrelevant and prejudicial when the defendant is on trial for a crime or act of the same character remains sound"); State v. Burchfield, 664 S.W.2d 284, 287 (Tenn. 1984).

²⁹² Rickman, *supra*, 876 S.W.2d at 828.

²⁹³ Tenn. R. Evid. Rule 412.

- To prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

If expert testimony of hymenal injury is offered in a sexual assault case involving a child complainant, rebuttal proof of prior sexual experience has been held by the courts to be critical to the defense since it offers the jury an alternative explanation for the hymenal injury, even if the evidence offered is hearsay and does not meet any of the exceptions to admissibility of hearsay.²⁹⁴

If a defendant accused of an offense covered by this Rule intends to offer reputation or opinion evidence or specific instances of conduct of the victim, the following procedures apply:

- The defendant must file a written motion to offer such evidence.
- The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.
- The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.
- The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

When such a motion is filed and found by the court to comply with the requirements of this rule, the court shall hold a hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of:

- Facilitating appellate review;
- Assisting the court or parties in their preparation of the case; and
- To impeach the credibility of the defendant if the defendant elects to testify at the preliminary hearing, trial, or other proceeding.

At this hearing:

- The victim may attend in person,
- The parties may call witnesses, including the alleged victim, and offer relevant evidence, and
- The accused may testify but the testimony during this hearing may not be used against the accused in the preliminary hearing, trial, or other proceeding, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify at the preliminary hearing, trial, or other proceeding.

If the court determines that the evidence which the accused seeks to offer meets the criteria of the rule and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

A prior false accusation of rape does not constitute sexual behavior as contemplated under Rule 412 and is not subject to exclusion under the rape shield law.²⁹⁵

H. Admissibility of hearsay in domestic and sexual violence cases.

²⁹⁴ State v. Brown, 29 S.W.3d 427, 2000 Tenn. LEXIS 24 (Tenn. 2000).

²⁹⁵ State v. Wyrick, 2001 Tenn. Crim. App. LEXIS 330, (Tenn. Crim. App., 2001).

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²⁹⁶ The declarant is the person making the statement. A statement is

- An oral or written assertion; or
- Nonverbal conduct of a person if it is intended as an assertion.²⁹⁷

The State must establish that the statement bears sufficient "indicia of reliability" in order not to violate the defendant's Sixth Amendment right of confrontation. In many cases, laying the proper foundation for hearsay exceptions may satisfy confrontation requirements.²⁹⁸

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible as an exception to the hearsay rule.²⁹⁹ As a prerequisite to admission it must be established that the declarant was present at the event and that the declaration arose from personal observation.³⁰⁰ The event itself must have been sufficiently startling to create the excitement necessary to insure the trustworthiness of the related declaration.³⁰¹ The statement must also be spontaneous although not necessarily contemporaneous with the event.³⁰² Normally, statements made during the crime itself or soon thereafter are sufficiently spontaneous to be

²⁹⁶ Tenn. R. of Evid. 801(c).

²⁹⁷ Tenn. R. of Evid. 801(a).

²⁹⁸ See White v. Illinois, 502 U.S. 346 (1992) (no requirement to call declarant as witness or to find declarant is unavailable before admitting hearsay statements under spontaneous declarations or statements for medical purposes exception in child sexual abuse case).

²⁹⁹ Tenn. R. Evid. 803(2); State v. Smith, 868 S.W. 2d 561 (Tenn. 1993) (victim's statements to her sister describing the defendant's assaults against her shortly after they occurred were admissible as excited utterances).

³⁰⁰ Underwood v. State, 604 S.W. 2d 875 (Tenn. Crim. App. 1979).

³⁰¹ State v. Meadows, 635 S.W. 2d 400 (Tenn. Crim. App. 1982).

³⁰² State v. Milton, 673 S.W. 2d 555 (Tenn. Crim. App. 1984); (accusations made to officer in "midst of argument" with defendant); State v. Meadows, supra (victim made statements after regaining consciousness).

considered admissible.³⁰³ However, absent other factors, a lapse of time may remove the required "excitement," and the exception would not apply.³⁰⁴ The United States Supreme Court's recent decision in Crawford v. Washington³⁰⁵ held that admission of hearsay statements that were "testimonial" in nature would violate the Confrontation clause.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed is admissible as an exception to the hearsay rule.³⁰⁶ In addition to declarations of mental state, this provision also governs declarations of present ("then existing") physical condition. The declaration need not be made to a doctor; any witness who overheard the hearsay statement could repeat it in court under this exception.

Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment are admissible.³⁰⁷ The declaration must be for both diagnosis and treatment. It is important to distinguish declarations of bodily condition, admissible as substantive evidence, from similar declarations used by a physician to support an expert opinion. The latter are not evidence, but rather give weight to the opinion - which is the evidence.³⁰⁸ Hearsay statements may be introduced when made for the purpose of medical diagnosis and treatment. Statements made to psychologists are not admissible under this exception.³⁰⁹

Under certain circumstances, the prior testimony of a witness may be introduced in a later proceeding.³¹⁰ For this exception to apply:

³⁰³ See, e.g., Burns v. State, 591 S.W. 2d 780 (Tenn. Crim. App. 1979).

³⁰⁴ State v. Williams, 598 S.W. 2d 830 (Tenn. Crim. App. 1980).

³⁰⁵ 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

³⁰⁶ Tenn. R. Evid. 803(3).

³⁰⁷ Tenn. R. Evid. 803(4); White v. Illinois, 502 U.S. 346 (1992); State v. Rucker, 847 S.W. 2d 512 (Tenn. Crim. App. 1992).

³⁰⁸ T.C.A. § 24-7-114 (2008); State v. Holt, 222 Tenn. 721, 440 S.W.2d 591 (1969); see Tenn. R. Evid. 703.

³⁰⁹ State v. Barone, 852 S.W. 2d 216 (Tenn. 1993).

³¹⁰ Tenn. R. Evid. 804. See C. McCormick, Evidence, 254-261 (3d ed. 1984).

- The testimony must have been given as a witness at another hearing
- of the same or a different proceeding or in a deposition
- taken in compliance with law
- in the course of the same or another proceeding,
- if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.³¹¹

Further, the witness must be unavailable to testify in the present trial.³¹² A party must use due diligence to procure the witness.³¹³ If these criteria are not met, the defendant's constitutional right of confrontation may be violated.³¹⁴

Under certain circumstances a hearsay statement may be introduced to establish a state of mind.³¹⁵ For example, hearsay statements of the victim relating threats against the defendant were admissible to establish the state of mind of the victim to determine who was the aggressor.³¹⁶ Similarly, statements regarding a plan to kill the victim were admissible to establish a co-defendant's state of mind and to establish knowledge on her part.³¹⁷ Only the declarant's state of mind, not some third party's, is provable by this hearsay exception.³¹⁸

Hearsay statements made by a victim soon after an assault are admissible as going to the credibility of the victim³¹⁹ and to corroborate her testimony.³²⁰ While it is clear that the complaint must be of the

³¹¹ Tenn. R. Evid. 804(b)(1); Dykes v. State, 589 S.W. 2d 384 (Tenn. Crim. App. 1976).

³¹² Tenn. R. Evid. 804(a); see D. Raybin, Criminal Practice and Procedure, 27.310 (1985) and cases cited therein.

³¹³ Hicks v. State, 490 S.W. 2d 174 (Tenn. Crim. App. 1972).

³¹⁴ State v. Armes, 607 S.W. 2d 234 (Tenn. 1980).

³¹⁵ Tenn. R. Evid. 803(3); see C. McCormick, Evidence, 294-296 (3d ed. 1984).

³¹⁶ State v. Butler, 626 S.W. 2d 6 (Tenn. 1981).

³¹⁷ State v. Ward, 663 S.W. 2d 805 (Tenn. Crim. App. 1983).

³¹⁸ Tenn. R. of Evid. 803(3).

³¹⁹ King v. State, 210 Tenn. 150, 357 S.W. 2d 42 (1962).

³²⁰ Phillips v. State, 28 Tenn. (9 Humph.) 246 (1848); State v. Sanders, 691 S.W. 2d 566 (Tenn. Crim. App. 1984) (the witness may testify as to the details stated by the victim).

assault, just how fresh the complaint must be is not clear.³²¹ Such statements are not original evidence³²² and the jury should be instructed as to the limited purpose of admissibility.³²³ The fresh complaint exception applies only if the victim testifies during the trial. Where the victim does not testify, particulars of the complaint, especially those details incriminating the defendant, are not admissible.³²⁴

³²¹ State v. Lewis, 803 S.W. 2d 260 (Tenn. Crim. App. 1990); State v. Myers, 764 S.W. 2d 214 (Tenn. Crim. App. 1988); State v. Willis, 735 S.W.2d 818 (Tenn. Crim. App. 1987); State v. Lockhart, 731 S.W. 2d 548 (Tenn. Crim. App. 1986), overruled on other grounds, 876 S.W. 2d 824 (Tenn. 1994); State v. Anderson, 748 S.W. 2d 201 (Tenn. Crim. App. 1985).

³²² See State v. Williams, 598 S.W. 2d 830 (Tenn. Crim. App. 1980).

³²³ State v. Lewis, 803 S.W. 2d 260 (Tenn. Crim. App. 1990).

³²⁴ Idaho v. Wright, 497 U.S. 805 (1990); State v. Williams, *supra*.

I. Double jeopardy.

The Tennessee Supreme Court has held that a defendant can be convicted of three separate counts of rape for three acts of sexual penetration occurring within a three-hour time period and part of a single criminal episode.³²⁵ In another case, the Court upheld convictions for both rape and incest arising from the same act. In neither of these cases were double jeopardy principles violated. However, since the defendant may be charged with multiple offenses, if he is not, the prosecutor is required to elect the particular offense upon which it seeks a conviction.³²⁶ The purpose of this rule is to preserve jury unanimity and to avoid a situation where some jurors convict the defendant because they believe, for example, he committed an act of vaginal penetration and others because they believe he committed an act of anal penetration but not all the jurors agree on either one of the offenses. It makes it even more important that a prosecutor carefully consider what to charge the defendant with and how to present the case at trial.

The Tennessee Supreme Court has held that “neither the Double Jeopardy Clause of the United States Constitution nor that of the Tennessee Constitution bars separate proceedings and punishments for contempt of an Order of Protection and the substantive offense underlying the contempt.”³²⁷ Courts must look at the evidence required to prove the charges. If the same evidence is not required to prove each offense, “then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes.”³²⁸

V. DISPOSITIONS IN CRIMINAL DOMESTIC ABUSE CASES

A. In general.

The objectives of a disposition in a domestic violence or sexual assault case should be to:

³²⁵ State v. Phillips, 924 S.W.2d 662, 1996 Tenn. Lexis 376 (Tenn. 1996).

³²⁶ State v. Kendrick, 38 S.W.3d 566, 2001 Tenn. Lexis 144 (Tenn. 2001).

³²⁷ State v. Winningham, LEXIS 632 (Tenn. 1997) [citing State v. Denton, 938 S.W.3d 373, 378 (Tenn. 1996)].

³²⁸ Denton, 938 S.W.2d at 380.

- Stop the violence.
- Protect the victim.
- Protect the children, and other family members.
- Protect the public.
- Uphold the legislative intent that domestic violence and sexual assault be treated as serious crime, and to communicate that intent to the perpetrator and to the victim.
- Hold the perpetrator accountable for the violent behavior and for stopping that behavior.
- Rehabilitate the perpetrator.
- Provide restitution for the victim.

Traditionally the community has looked to the victim to do these things. Victims of sexual assault are expected to prevent the sexual assault from occurring by restricting their movements, dress, or other behavior. Too often, victims of domestic violence are told just to leave the situation or to stand up for themselves, to protect the children from the perpetrator, or to go to marriage counseling. Instead of expecting the victim to intervene with the perpetrator, stop the violence, and deal with its aftereffects, the community, through the criminal justice system, must play that role.

The criminal justice system can provide effective intervention with perpetrators by:

- Holding the perpetrator, not the victim, accountable for the violence;
- Providing multiple experiences that hold the perpetrator accountable (e.g., jail time, restitution, community service, fines);
- Holding perpetrators accountable for changing their behavior and making restitution to their victims;
- Providing clear and consistent consequences to perpetrators for engaging in violent criminal behavior;
- Providing the above on a consistent basis.

B. Victim impact statements.

The sentencing judge shall solicit and consider a victim impact statement before sentencing a convicted offender who has caused physical, emotional, or financial harm to a victim.³²⁹ Victim includes an immediate family member of a minor victim or a homicide victim.³³⁰ Before imposition of sentence in a felony case, the department of correction shall prepare a written victim impact statement as part of the pre-sentence report on the defendant.³³¹ The statement shall include applicable information obtained during consultation with the victim or the victim representative. If the victim or victim representative cannot be located or declines to participate in the preparation of the statement, the department shall include a notation to that effect in the statement. If there are multiple victims and preparation of individual

³²⁹ T.C.A. § 40-38-202 (2015).

³³⁰ T.C.A. § 40-38-203 (2015).

³³¹ T.C.A. § 40-38-205 (2015).

victim impact statements is not feasible, the department may submit one or more representative statements.

Any victim impact statement submitted to the court shall be considered as evidence in determining whether the enhancing or mitigating factors apply in sentencing.³³² A victim's statement at sentencing is not limited to determining the applicability of the enhancement and mitigating factors.³³³ A victim is not required to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.³³⁴

The Tennessee Supreme Court has held that victim impact evidence is permissible under both the United States and Tennessee Constitutions.³³⁵ The court said that:

- Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, such as the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.
- Trial courts may exclude victim impact evidence which threatens to render the trial fundamentally unfair or which poses a danger of unfair prejudice
- Evidence of the emotional impact of a murder on the victim's family should be most closely scrutinized.
- The State should provide pretrial notice of its intent to offer victim impact evidence to enable trial courts to carefully supervise admission of such proof.
- Upon receiving notification, trial courts must hold a hearing outside the presence of the jury to determine the admissibility of the evidence.
- Victim impact evidence should not be admitted until the trial court has determined that evidence of one or more aggravating circumstances is present in the record.

The Court suggested a jury instruction for use in all subsequent cases involving victim impact proof. The Court also upheld the constitutional permissibility of victim impact argument by prosecutors, but cautioned prosecutors to exercise restraint and admonished that reversal may result if prosecutors engage in victim impact argument which is little more than an appeal to emotions and vengeance.

C. Pre-trial diversion.

³³² T.C.A. § 40-38-207(2015).

³³³ *State v. Blackhurst*, 2001 Tenn. Crim. App. LEXIS 682 (Tenn. Crim. App. 2001).

³³⁴ T.C.A. § 40-38-208 (2015).

³³⁵ *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998).

The National Council of Juvenile and Family Court Judges recommends that judges should not accept civil compromises, deferred prosecutions, reduced charges, or dismissals where justice is not served by these devices. Alternative dispositions and diversion in family and domestic violence cases are frequently inappropriate. In cases of crimes committed against intimate partners or family members, such dispositions may send a message to both the victim and the perpetrator that the crime is less serious than comparable crimes against non-family members.

Perpetrators who have been convicted of a sexual offense are not eligible for pre-trial diversion. In this context, sexual offense means conduct which constitutes:

- Aggravated prostitution;
- Aggravated rape;
- Aggravated sexual battery;
- Aggravated sexual exploitation of a minor;
- Especially aggravated sexual exploitation of a minor;
- Rape;
- Rape of a child;
- Sexual battery by an authority figure; or
- Attempt, solicitation, or conspiracy, to commit any of these offenses.
- Sexual exploitation of a minor
- Statutory Rape by an Authority Figure³³⁶

In cases where diversion is deemed appropriate, the Court should insure that conditions of the diversion address the victim's safety, as well as the rehabilitation of the perpetrator. If a perpetrator is ordered to attend treatment aimed at preventing a recurrence of sexual or domestic violence as a condition of diversion, the Court should insure that the perpetrator's progress in the treatment program is effectively monitored, and that any re-offense results in a reinstatement of criminal charges. The Court may order a perpetrator to attend and pay for (based on his ability to pay) treatment for domestic violence, sexual violence, substance abuse, or other behaviors as a condition of a pre-trial diversion program.³³⁷ A diversion agreement may also require the defendant to make restitution to the victim.³³⁸

D. Probation.

³³⁶ T.C.A. § 40-35-313 (a)(1)(B)(ii)(2015).

³³⁷ Id.

³³⁸ Id.

In cases of:

- Domestic assault;
- Assault, vandalism, or false imprisonment, where the victim of any such offense is a person identified in § 36-3-601(8);
- Violation of a protective order; and
- Stalking;

the judge may sentence a defendant to a period of probation not to exceed two years if the judge finds that such period of probation is necessary:

- For the defendant to complete any appropriate treatment program or programs, including, but not limited to, a sanctioned batterer's intervention program, an anger management program or any court-ordered drug or alcohol treatment program;
- To make restitution to the victim of the offense;
- To protect and better ensure the safety of the victim or any other member of the victim's family or household; or
- To otherwise effect a change in the behavior of the defendant including, but not limited to:
 - Meet the offender's family responsibilities;

Devote the offender to a specific employment or occupation;

Perform without compensation services in the community for charitable or governmental agencies;

Undergo available medical or psychiatric treatment, and enter and remain in a specified institution whenever required for that purpose by voluntary self-admission to the institution pursuant to § 33-6-201;

Pursue a prescribed secular course of study or vocational training;

Refrain from possessing a firearm or other dangerous weapon;

Remain within prescribed geographical boundaries and notify the court or the probation officer of any change in the offender's address or employment;

Submit to supervision by an appropriate agency or person, and report as directed by the court;

Satisfy any other conditions reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience, or otherwise prohibited by this chapter; or

Make appropriate and reasonable restitution to the victim or the family of the victim involved pursuant to § 40-35-304.

Undergo an alcohol and drug assessment, treatment, or both an assessment and treatment, if the court deems it appropriate and such licensed treatment service is available.³³⁹

In other cases in which probation is granted, the length of probation must be no less than the minimum sentence specified for the crime and no longer than the maximum sentence specified.³⁴⁰

In all felony and misdemeanor cases, the Court shall make the providing of a biological specimen for the purpose of DNA analysis a condition of probation or community correction if either is granted.³⁴¹

In determining whether a defendant convicted of an offense against the person against a victim as defined in the Order of Protection Act or of stalking, aggravated stalking, or especially aggravated stalking should be granted probation, the Court shall consider the safety and protection of the victim of the offense and of any other member of the victim's family or household.³⁴² If the Court grants probation to such a defendant, it may condition such probation on compliance with one or more orders of the Court, which are not limited to those outlined in the statute.³⁴³ In cases where probation is granted, the Court should consider the conditions listed in the following checklist:

- Supervised probation whereby the Court receives regular progress reports from a probation officer.
- Court ordered domestic violence treatment program.
- No-contact orders.³⁴⁴
- Alternative interventions through community service.

³³⁹ T.C.A. § 40-35-303 (2015).

³⁴⁰ T.C.A. § 40-35-303(c)(1) (2015).

³⁴¹ T.C.A. § 40-35-321(d)(1)(2015).

³⁴² T.C.A. § 40-35-303(m)(2015); T.C.A. § 39-17-315 (2015).

³⁴³ T.C.A. § 40-35-303(n)(2015).

³⁴⁴ T.C.A. § 40-35-303(n)(1)-(3)(2015). *See, e.g., Willis v. U.S.*, 250 A. 2d 569 (D.C. 1969) (stay-away order from victim's mother-in-law upheld in assault case); *People v. Hazelwonder*, 485 N.E. 2d 1211 (Ill. 1985) (stay-away order from child added when probationer violated stay-away order from ex-wife); *but see State v. Ferre*, 734 P. 2d 888 (Ore. 1987) (order to stay out of county where victim resided too broad).

- No-weapons orders.³⁴⁵
- Restitution to the victim (requiring that restitution be a condition of probation).
- Probation with county jail time.
- Order to pay attorney’s fees and costs.
- Community service.
- Prohibiting the perpetrator from possessing or consuming alcohol or controlled substances.³⁴⁶

The Court should revoke a perpetrator’s probation if he commits any subsequent offenses against the same victim or another victim.³⁴⁷

Johnia Berry Act

This act provides that when a person is arrested on or after January 1, 2008, for the commission of a violent felony, as defined in subdivision (3), such person shall have a biological specimen for the purpose of DNA analysis taken to determine identification characteristics specific to the person as defined in subsection (a). After a determination by a magistrate or a grand jury that probable cause exists for the arrest, but prior to such person’s release from custody, the arresting authority shall take the sample using a buccal swab collection kit for DNA testing. The biological specimen shall be collected by the arresting authority in accordance with the uniform procedures established by the Tennessee Bureau of Investigation, pursuant to § 38-6-113, and shall be forwarded by the arresting authority to the bureau, which shall maintain the sample as provided in § 38-6-113. The court or magistrate shall make the providing of such a specimen a condition of the person’s release on bond or recognizance if bond or recognizance is granted.

The clerk of the court in which the charges against a person described in subdivision (1) are disposed of shall notify the bureau of final disposition of the criminal proceedings. If the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, then the bureau shall destroy the

³⁴⁵ T.C.A. § 40-35-303(n)(5)(2015).

³⁴⁶ T.C.A. § 40-35-303(n)(4)(2015).

³⁴⁷ See, e.g., State v. Hunt, 475 P. 2d 752 (Ariz. 1970) (revoked due to further harassment/domestic violence); State v. Sims, 772 P. 2d 1145 (Ariz. 1989) (same); Nasworthy v. State, 314 S.E. 2d 446 (Ga. 1984) (same); People v. Whitfield, 498 N.E. 2d 262 (Ill. 1986) (same).

sample and all records thereof, provided there is no other pending qualifying warrant or *capias* for an arrest or felony conviction that would otherwise require that the sample remain in the data bank.³⁴⁸

E. Community Supervision for Life.

In addition to the punishment authorized by the specific statute prohibiting the conduct, any person who, on or after July 1, 1996, commits rape, aggravated rape, aggravated sexual battery, rape of a child, or aggravated rape of a child, or attempts to commit one of these offenses shall receive a sentence of community supervision for life.³⁴⁹ The sentence of community supervision for life commences immediately upon the expiration of the term of imprisonment imposed upon the person by the court or upon the person's release from regular parole supervision, whichever first occurs. A person on community supervision shall be under the jurisdiction, supervision, and control of the board of probation and parole in the same manner as a person under parole supervision. The board can establish such conditions of community supervision as are necessary to protect the public from the person committing a new sex offense as well as promoting the rehabilitation of the person.

F. Incarceration.

The U.S. Attorney General's Task Force on Family Violence concluded in its final report that in all cases when the victim has suffered serious injury, the convicted perpetrator should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition. In serious incidents of violence, incarceration is the punishment necessary to hold the perpetrator accountable for his crime. It also clearly signals the seriousness with which the offense is viewed by the community and provides secure protection to the victim (*Attorney General's Task Force on Family Violence: Final Report, 1984*).

Violence against wives or female intimates has long been tolerated and even condoned by our social norms and institutions. This violence has been viewed as a private family matter which, if left alone, will be resolved without intervention. It is notable that perpetrators who victimize their spouses routinely receive lighter sentences than perpetrators committing similar offenses against strangers. For example,

³⁴⁸ T.C.A. § 40-35-321(2015).

³⁴⁹ T.C.A. § 39-13-524(2015).

in 1987, felons convicted of spousal rape and spousal battery in California received significantly shorter sentences than perpetrators convicted of rape and felonious assault against strangers.

Tennessee's sentencing statute specifies a range of sentence for each offense, but allows the Court to deviate from the range if certain mitigating or enhancement factors are present. Some of the factors that might lead to an enhancement of the defendant's sentence in a domestic or sexual violence case include:

- The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.
- The defendant was a leader in the commission of an offense involving two or more criminal actors.
- The offense involved more than one victim.
- A victim of the offense was particularly vulnerable because of age or physical or mental disability.
- The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense.
- The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great.
- The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement.
- The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.
- The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense.
- The defendant had no hesitation about committing a crime when the risk to human life was high.
- The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury.
- During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim.
- The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:
 - Bail, if the defendant is ultimately convicted of such prior felony;
 - Parole;
 - Probation;
 - Work release; or
 - Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority.
- The felony was committed on escape status or while incarcerated for a felony conviction.

- The crime was committed under circumstances under which the potential for bodily injury to a victim was great.
- A victim, in the case of aggravated child abuse and neglect, suffered permanent impairment of either physical or mental functions as a result of the abuse inflicted, or the lack of immediate medical treatment would have probably resulted in the death of the victim.
- The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult.
- The defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the:
 - Race,
 - Religion,
 - Color,
 - Disability,
 - Sexual orientation,
 - National origin,
 - Ancestry, or
 - Gender
 of that person or of the owner or occupant of that property. However, this provision may not be construed so as to permit the enhancement of a sexual offense based on gender selection alone.

When the trial court departs from the minimum sentence, it is limited to these enhancement factors.³⁵⁰

The United States Supreme Court in Blakely v. Washington³⁵¹ and United States v. Booker³⁵², held in 2004 and 2005, respectively, that criminal defendants are entitled to a jury trial on enhancement factors. The Tennessee Supreme Court upheld the Tennessee Criminal Sentencing Act and its use of enhancement factors in April 2005.³⁵³ The Court said that Tennessee's criminal sentencing laws do not violate the Sixth Amendment guarantee of a jury trial. The majority explained that, unlike the statutes in Booker and Blakely, Tennessee's sentencing statute does not mandate an increased sentence when a judge finds an enhancement factor. Even after a judge finds an enhancement factor, the judge retains discretion to select any sentence within the statutory range, including the presumptive minimum sentence. The Tennessee statute, Drowota wrote, "does not provide a system which requires or even allows judicial power to infringe upon the province of the jury."

1. *Toll free line for victims.*

³⁵⁰ State v. Anderson, 985 S.W.2d 9 (Tenn. Crim. App. 1997).

³⁵¹ 524 U.S.296, 124 S. Ct. 2531 (2004).

³⁵² 543 U.S.220, 125 S. Ct. 738 (2005).

³⁵³ State v. Gomez and Londono, Retrieved July 31, 2005 at <http://www.tsc.state.tn.us./OPINIONS/TSC/PDF/052/GomezLondonoOPN.pdf>.

In 1997, Tennessee established a toll free line for victims whose perpetrators are incarcerated. This toll free system, which operates twenty-four hours a day, is called V.O.I.C.E. V.O.I.C.E. stands for "Victim Offender Information Caller Emissary," a computerized system that allows victims to receive the latest information about the offender who committed crimes against them.³⁵⁴

V.O.I.C.E. provides registered victims with the following information about the offender:

- Current location;
- When the offender's sentence went into effect;
- When the offender's sentence expires;
- When the offender can first come up for a parole hearing; and
- The earliest date an offender could be released under executive order if there is overcrowding (most violent offenders, sex offenders, and offenders with escape histories are excluded from this provision.)

To have access to this 24-hour toll free telephone line, a victim must register with the Tennessee Department of Correction or the Board of Probation and Parole. These agencies have coordinators specified to assist victims with registration and other information. For purposes of the V.O.I.C.E. system, a victim is defined as an individual who suffers direct or threatened physical harm or suffers from emotional or financial setbacks as a result of a crime committed against them or family members.

To register to access the V.O.I.C.E. system, victims must fill out a form providing certain information. The registered victims are then given a toll free number and their own special identification numbers to receive updated information about the offenders.

Another toll-free service is the Statewide Automated Victim Information and Notification System (SAVIN). The purpose of SAVIN is to increase safety of victims of crime by providing access to timely and reliable information about the custody status of offenders in county jails. The system is available 24 hours a day over the telephone, through the internet, or by email. Victims of crime and other concerned citizens can register to be notified immediately in the event of an offender's release, transfer, or escape. Live operators are available 24 hours a day. To register by phone: 1-888-868-4631. To register on line: www.vinelink.com.

2. *Victims' rights concerning their perpetrators' parole.*³⁵⁵

Victims and interested parties will be notified by the Board of Probation and Parole if they have submitted a written request either by letter or by marking the appropriate box(es) on a victim impact statement form for such notification and have furnished a current mailing address. Victims can be notified of:

- The parole hearing date;
- The final decision of the Board; and

³⁵⁴ Tennessee Department of Correction (2000). *Tennessee Victims Have A Voice.....* [Online.] Available: <http://www.state.tn.us/correction/victims.html> [June 12, 2002].

³⁵⁵ Tennessee Board of Probation and Parole (undated). *Victim Services.* [Online.] Available: http://www2.state.tn.us/bopp/bopp_bo_vs.htm [August 5, 2004].

- The offender release on parole.

Notification of the parole hearing date and time is mailed thirty days before the hearing.

Victims can also voice their opposition to the perpetrator's parole through:

- Victim impact statement form (available for victims and their immediate family members). The Victim Impact Statement gives the Board a description of the effects of the crime committed, and the physical, financial, and emotional effects on the victim and family members.
- Letter of opposition.
- Petition (this includes a brief paragraph containing the offender's name, prison number and a description of why opposed along with the public's signatures).
- Videotape (in order to submit a videotape, the distance of the parole hearing must be more than 200 miles from the victim or the submission is necessary due to illness or work commitments).
- Cassette tape.
- Attendance at parole hearing (hearings are open to the public).
- In-person testimony meeting (at a Probation/Parole office near the victim). In-person testimony meetings must be scheduled at least two weeks before the hearing date.

3. *Collection of biological specimen as condition of parole.*

No one who has been convicted of aggravated rape, rape, sexual battery, aggravated sexual battery, rape of a child, or incest shall be released on parole or otherwise unless and until that person has provided a biological specimen for the purpose of DNA analysis.³⁵⁶

G. Work release, weekend incarceration.

In some cases, work release or weekend incarceration programs may be more feasible than extended incarceration and may offer an experience that serves as a deterrent against future violence. These programs may meet the need for adverse consequences while incorporating concern for the family's

³⁵⁶ T.C.A. § 40-35-321(c) (2015).

continued economic support. However, a perpetrator should never be placed in such a program without a thorough assessment of the threat posed to the victim and her family by the perpetrator.³⁵⁷

H. No-contact orders.

The Court should issue no-contact orders even in those cases where the perpetrator's sentence includes a period of incarceration. This can prevent the perpetrator from calling the victim from jail, or contacting her or him by mail or through third parties during the period of incarceration. A no-contact order can be issued as a term of probation.³⁵⁸

I. Disposition of confiscated weapons.

Any weapon, except a weapon that may be evidence in an official proceeding or a weapon that has been stolen or borrowed from its owner and the owner was not involved in the offense for which the weapon was confiscated, that is possessed, used or sold in violation of the law shall be confiscated by a law enforcement officer and declared to be contraband by a court of record exercising criminal jurisdiction. The sheriff or chief of police for the jurisdiction where the weapon was confiscated, the commissioner of safety, or the director of the Tennessee Bureau of Investigation may petition the court for permission to dispose of the weapon.³⁵⁹

If a law enforcement officer has probable cause to believe that a criminal offense involving domestic abuse against a victim has occurred, the officer shall seize all weapons that are alleged to have been used by the abuser or threatened to be used by the abuser in the commission of a crime. The provisions outlined above relative to the disposition of confiscated weapons shall govern all weapons seized at the time of arrest that were used or threatened to be used by the perpetrator to commit the crime. If multiple weapons were seized, the Court shall have authority only to confiscate the weapon or weapons actually used or threatened to be used by the perpetrator to commit the crime, unless those weapons are possessed, used, or sold in violation of the

³⁵⁷ See also State v. Shield, 368 N.W. 2d 721(Iowa 1985).

³⁵⁸ T.C.A. § 40-35-303(n)(2015).

³⁵⁹ T.C.A. § 39-17-1317 (a)(2015).

law. The state statute requires that all other weapons seized shall be returned upon disposition of the case.³⁶⁰ However, compliance with this provision in cases of convicted domestic abuse defendants would require that the judge or law enforcement officer violate both state and federal law, which prohibits transfer of firearms to any person convicted of a domestic abuse offense.³⁶¹ Firearms which must be returned should be transferred to a third party who is duly warned that transfer of the firearms back to the perpetrator is a federal offense.

It is a federal offense for any person who has been convicted of a misdemeanor domestic violence offense to ship, transport, possess, or receive any firearm or ammunition, if such shipping, transport, possession, or receipt is in or affects interstate or foreign commerce.³⁶² Law enforcement officers and members of the active duty military are not excepted from the firearms restrictions.³⁶³ Tennessee law forbids sales of firearms to persons who have been convicted of the offense of stalking or are addicted to alcohol, and sales to persons ineligible to receive them under 18 U.S.C. § 922 (which includes people under Orders of Protection and those convicted of a misdemeanor crime of domestic violence).

J. Victim restitution.

In Tennessee a sentencing court may direct a perpetrator to make restitution to the victim of the offense as a condition of probation.³⁶⁴ Whenever the Court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the Court shall order the pre-sentence service officer to include in the pre-sentence report documentation regarding the nature and amount of the victim's pecuniary loss. The Court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The Court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense. In

³⁶⁰ T.C.A. § 36-3-620 (2015).

³⁶¹ 18 U.S.C. §922(d)(8) prohibits the transfer (or return) of firearms to anyone currently subject to a protection order. 18 U.S.C. §922(d)(9) prohibits the transfer (or return) of firearms to anyone ever convicted of a misdemeanor crime of domestic violence.

³⁶² 18 U.S.C.A. § 922(g)(9)(2015).

³⁶³ 18 U.S.C.A. § 925(a)(2015).

³⁶⁴ T.C.A. § 40-35-304 (2015).

determining the amount and method of payment or other restitution, the Court shall consider the financial resources and future ability of the perpetrator to pay or perform. In this context, pecuniary loss means:

- All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the perpetrator; and
- Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

K. Victim compensation program.

Tennessee law provides compensation for victims of violent crimes.³⁶⁵ There is no prohibition against domestic and sexual abuse victims receiving compensation. They are subject to the same conditions as other victims:

- That they have cooperated with investigation and prosecution; and
- Have not contributed to or participated in the conduct which led to the bodily injury.

However, a victim of a sexually-oriented crime is entitled to forensic medical examinations without charge and without being required to report to law enforcement officers or to cooperate in the prosecution of the crime in order to be eligible for payment of forensic medical examinations.³⁶⁶

Compensation for personal injury or loss incurred as a result of pain and suffering is available for victims of rape and of crimes involving sexual deviancy, including minors who are victims of certain sexual crimes.³⁶⁷

A victim of a sexually-oriented crime shall be entitled to forensic medical examinations without charge to the victim. T.C.A. § 29-13-118 provides that no bill for the examination shall be submitted to the victim. The claim must be filed no later than one (1) year after the date of the examination. The amount

³⁶⁵ T.C.A. § 29-13-101, et seq.

³⁶⁶ T.C.A. § 29-13-118 (2015).

³⁶⁷ T.C.A. § 29-13-106(c) (201).

of compensation must not exceed \$750, and the payment does not prohibit the victim from receiving other benefits.³⁶⁸

Law enforcement officers are required to submit kits to TBI for testing within 60 days of receipt. T.C.A. §39-13-519 establishes the process for collection and storage of “hold kits,” a kit that is coded with a number rather than a name pending the victim’s report to law enforcement. Law enforcement officers must store the “hold kit” for up to 3 years. If an adult victim reports the alleged offense to the police, or the victim is a minor, the healthcare provider shall attached the victim’s name to the kit to TBI for DNA testing. Once the victim makes the report, the law enforcement agency shall have 60 days from the date of the police report to send the sexual assault evidence collection kit to the state crime lab for DN testing. Hold kits are not tested until victim makes a report. To provide implementation of the protocols and uniform policy for handling, maintenance, and testing of sexual evidence kits and hold kits, the domestic violence state coordinating council has developed a model policy for law enforcement agencies.³⁶⁹

L. Court-mandated education for domestic violence perpetrators.

Court-ordered treatment for domestic violence perpetrators can be a valuable tool in some cases. On the other hand, significant concerns exist regarding the effectiveness of court-mandated treatment. These include that it:

- Is sometimes used as a substitute for court actions designed to protect the safety of the victim and/or children;
- Is a calendar management tool used to relieve overcrowded calendars;
- Often has inadequate guidelines regarding the number and content of sessions the perpetrator must attend;
- Is inadequately monitored by counselors, probation departments, and courts;
- Communicates the message that domestic violence is less serious than crimes against strangers;
- Does not take into account that many perpetrators who appear to be first-time perpetrators have often committed unreported domestic violence assaults; and
- May teach the perpetrator more effective battering or control strategies from other group members.

In light of these concerns, it is important that the following areas be addressed before ordering domestic violence perpetrators to attend treatment:

³⁶⁸ T.C.A. § 29-13-118 (2015).

³⁶⁹ T.C.A. §39-13-519 (2015).

- Ensuring that the victim's safety is addressed through development of a safety plan, including issuance of court Orders of Protection in cases where the perpetrator is ordered to attend treatment;
- Determination whether an appropriate domestic violence treatment program exists in the community, i.e., one which will specifically address the violent behavior in the context of its root causes (i.e., behavior learned in a familial and social context used to maintain control over the victim). This poses problems with non-English-speaking perpetrators.

It is recommended that the Court order the perpetrator to successfully complete the program, since it is difficult to predict how long the rehabilitation process will take with a particular perpetrator. This approach leads to the lower rate of recidivism (Sonkin, 1986). There is growing consensus among domestic violence experts that a minimum of one year is required for treatment to be effective. If the perpetrator successfully completes treatment sooner, a perpetrator can seek early termination of the probation or diversion period. Experts in treating domestic violence perpetrators believe that battering represents a complex, long-term behavior pattern that is not easily changed (Klein, 1989).

The Court's order for a domestic violence perpetrator to attend treatment should mandate that the perpetrator attend a treatment program which specifically focuses on the violent behavior and not on concurrent problems, such as substance abuse, relationship problems, etc. The Court should consider issuing a criminal court no-contact order in cases where the victim appears to be in danger of intimidation or assault from the perpetrator. Where the perpetrator appears to have a substance abuse problem, the Court should consider ordering concurrent treatment for substance abuse. Domestic violence and substance abuse are separate problems that require separate solutions. Any court-ordered treatment should be accompanied by an admonition that failure to follow through will result in revocation of probation and reinstatement of criminal charges.

Victims should not be required to participate in court-mandated treatment programs intended for perpetrators. Perpetrators must take responsibility for their violent behavior in order for treatment to be successful. Requiring victim participation in the same program as the perpetrator serves only to remove the focus of the treatment from the perpetrator, thereby reinforcing the perpetrator's tendency to externalize the cause of the violence onto others. In most cases, the victim is not a party to the criminal action so the Court lacks jurisdiction to make such an order.

Experts in treating domestic violence perpetrators have identified the following standards for batterer's treatment programs.³⁷⁰ The program's philosophy should:

- Clearly define domestic violence as a crime, rather than as a pathology or mental disorder;
- Define domestic violence as a learned and socially sanctioned set of behaviors, which can be changed by the perpetrator;
- Hold the perpetrator accountable for the violence in a manner that does not collude with the perpetrator in blaming the victim's behavior for the violence or the perpetrator's use of alcohol or drugs as the cause;
- Make stopping the violence the primary goal of the program, taking priority over keeping the couple together or resolving other relationship issues;
- Define violence as part of a pattern of coercive control that includes physical, emotional, sexual and economic abuse.

The program components should include:

- Initial and on-going assessments of the danger posed to the victim by the perpetrator and procedures for alerting both the victim and appropriate authorities should the victim's safety become a concern;
- Adequate initial assessment of significant factors that may influence the perpetrator's ability to benefit from treatment (i.e., psychosis, organic impairment);
- A minimum of one year of weekly sessions, with additional sessions available within the program or through referrals when indicated;
- The use of group counseling as the treatment of choice. This approach decreases the perpetrator's isolation and dependency on the victim and insures the perpetrator is accountable to the group;
- Procedures for conducting an ongoing assessment of the perpetrator's violent propensities throughout the course of treatment, such as informing the perpetrator at the beginning of the program that the victim and others will be contacted periodically to assess whether the violence has stopped;
- Demonstrated ability to submit progress reports to the probation department once a month;
- Require perpetrators with substance abuse problems to attend group substance-free, and to seek concurrent treatment for substance abuse;
- Procedures for reporting any new offense committed by a court-mandated client during treatment to appropriate court authorities;
- Language capabilities sufficient to treat a monolingual non-English-speaking perpetrator;
- A limited confidentiality policy whereby the victim is entitled to information from the program regarding the acceptance or rejection of the perpetrator into the program, whether the perpetrator is attending the program, termination, cause for termination, and warnings about anticipated violence.

³⁷⁰ This list was adapted from the County of Los Angeles Domestic Violence Council's publication, "Batterer's Treatment Program Guidelines," June 1988.

In most states, monitoring of the perpetrator's progress is a shared responsibility between the probation department, the treatment program, and the Court. The most successful treatment in domestic violence cases occurs when the counselor and probation officer work collaboratively (Ganley, 1986).

The importance of effective monitoring of a domestic violence perpetrator's progress in court-mandated treatment cannot be overstated. If the Court orders the perpetrator to attend treatment for the violence, and then fails to insure that the conditions of the order are met, the victim often finds herself in an even more dangerous situation than before the criminal court's intervention. If the Court does not have a process for holding the perpetrator accountable for the violence, then his belief that He is above the law, and that he has a right to use violence within the family is reinforced.

Failure by the Court to monitor the perpetrator's progress in treatment also reinforces the victim's belief that the perpetrator is more powerful than the legal system and may result in some victims becoming reluctant to call the police when they are re-assaulted. Without adequate monitoring of the perpetrator's attendance and progress in the treatment program, both the Court and the victim have to rely solely on the perpetrator's self-report regarding his follow-through with the treatment program's mandates. This may lead the victim to make false assessments regarding the perpetrator's willingness to take responsibility for the violence and to change the behavior. In addition, the Court is asked to make a decision regarding case disposition without adequate information.

The judge can preserve the integrity of the monitoring process by requiring that the Court be given specific information concerning the perpetrator's progress. Some judges have scheduled regular "case monitoring" docket days, where files are reviewed for communications from the perpetrator, attorney, and batterer's program administrator that the perpetrator is complying with the order.

To preserve the integrity of court-mandated treatment, the Court should vigorously enforce any conditions imposed on the perpetrator during the treatment period. If the Court finds that the perpetrator is not performing satisfactorily in the assigned program, or that he has re-offended, the Court should reinstate criminal proceedings. Giving the perpetrator "another chance" conveys the same message as when the victim gives him or her "another chance." It reinforces the perpetrator's belief that by manipulating both the victim and the criminal justice system, the consequences of the violent behavior can be avoided.

If the perpetrator fails to comply with the conditions of the treatment program, the Court should consider not re-referring the perpetrator to the same or a different treatment program. Re-referral may well reinforce the perpetrator's belief that he can manipulate and control the Court's response to the violence. The program administrators may recommend whether the Court order re-enrollment or not. The Court can take a leading role in ensuring that procedures for handling noncompliance with court-mandated treatment are coordinated between the treatment program, the probation officer, and the Court. If the Court terminates the perpetrator from court-ordered treatment due to unsuccessful completion of the program, or noncompliance with court orders, the judge should insure that this information is added to the perpetrator's criminal history.

M. Sex offender treatment programs.³⁷¹

This subsection briefly discusses sex offender treatment programs. The intent of this subsection is to provide general background information on treatment programs, their goals, and their general effectiveness (i.e., offender recidivism rates).

1. The Principal Types and Goals of Sex Offender Treatment

Most convicted sex offenders are managed by the criminal justice system through a combination of methods, including incarceration, parole, probation, and some form of specialized sex offender treatment. Sex offender treatment can be administered while the sex offender is incarcerated in jail or prison, or after he or she is released into the community (or both). About 60% of convicted sex offenders in the United States are under some form of conditional supervision in the community (Greenfeld, 1997). All sex offender treatment programs, i.e., therapeutic interventions for sex offenders, share the same goals: deterring (or reducing) subsequent victimization and protecting society (Schwartz, 1995).

The National Institute of Justice explained sex offending and the aim of sex offender treatment programs as follows:

³⁷¹ This section was adapted from Michigan Judicial Institute (2002), *Sexual Assault Benchbook*, retrieved March 28, 2003, from <http://courts.michigan.gov/mji/resources/sabb/sabb.htm>.

A 'cure' for sex offending is no more available than is a cure for epilepsy or high blood pressure. But use of a variety of interventions can help manage these disorders. A realistic objective of treatment is to provide sex offenders with the tools to manage their inappropriate sexual arousal and behavior. A therapist can, in many cases, teach offenders self-management by developing skills for avoiding high-risk situations through identification of decisions and events that precede them and through correction of their thought distortions. Treatment focuses on recognizing and managing deviant sexual behavior and offenders' thoughts and attitudes that promote it.

Research reveals that deviant thoughts and fantasies by sex offenders are precursors to sexual assault and, therefore, are an integral part of the assault pattern. By instilling in offenders the dictum that deviant attitudes and fantasies reinforce deviant behavior and are not acceptable, treatment providers and supervising officers are prepared to intervene—set limits—at the incipient stages of reoffending patterns. Although such thoughts and feelings are not crimes, they are signals that constitute good reasons—based on empirical research and clinical experience—to increase supervision and 'tighten the reins' on an offender. This increased surveillance often results in detecting preassault behaviors that can be interrupted or, conversely, lead to revocation (English, et al., 1997).

Most sex offender treatment programs in the United States use a combination of cognitive-behavioral treatment and relapse prevention techniques. Cognitive-behavioral treatment, which is typically used on people with addictive behaviors (e.g., alcoholics and drug users), is also used on sex offenders by focusing on their sexual issues. It uses a technique called relapse prevention to minimize recidivism. Relapse prevention has three main goals:

- To increase the sex offender's awareness and range of choices concerning his or her behavior.
- To develop specific coping skills and self-control capacities.
- To create a general sense of mastery or control over his or her life.

It is clear from these goals that the aim of relapse prevention is not to eliminate

a sex offender's deviant desires:

If the [sex] offender believes that all treatment is successful only if it eradicates any vestige of deviant desires, the effects of a momentary loss of control may be devastating. In contrast, an offender who accepts that there are no 'cures' for sexual offenders and views lapses as opportunities to enhance self-management skills through inspection of acceptable mistakes, lapses may even give such an offender a more accurate perception of the need to be vigilant for the earliest signs of a relapse process (Schwartz and Cellini, 1997).

The Center for Sex Offender Management identified the following monitoring tools in sex offender treatment programs that may assist in treatment and in reducing recidivism:

- Polygraph examinations.
- Use of the penile plethysmograph.³⁷²
- Drug and alcohol testing.
- Electronic monitoring (Gilligan and Talbot, 2000).

2. Sex Offender Recidivism

The United States Supreme Court recently wrote the following regarding sex offender treatment programs and sex offender recidivism:

Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. See U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ("[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals").³⁷³

It should be noted that studies vary considerably in their findings of recidivism rates for sex offenders. This variability is caused in part by the variability in defining "recidivism." While "recidivism" is commonly understood to mean the "commission of a subsequent offense," some studies define it variously as a subsequent arrest, conviction, or incarceration. Other factors leading to variability are the length of the follow-up period and the sample of sex offender types.

³⁷² A penile plethysmograph is "a physiological instrument that measures [a male] offender's erectile response to various stimuli." Because most sex offender treatment programs focus on "impulse" control and management, and not on eradicating sexually deviant thoughts, penile plethysmographs are sometimes deemed to have limited utility.

³⁷³ McKune v. Lile, 536 US 24 (2002).

N. Sexual offender registry.

Tennessee’s Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act was re-written in 2008.³⁷⁴ The Act applies to “sexual offenses,” “violent sexual offenses,” and “juvenile violent sexual offenses.”

“Sexual offense” means³⁷⁵:

- Sexual battery, under § 39-13-505;
- Statutory rape, under § 39-13-506, if the defendant has one (1) or more prior convictions for mitigated statutory rape under § 39-13-506(a), statutory rape under § 39-13-506(b) or aggravated statutory rape under § 39-13-506(c), or if the judge orders the person to register as a sexual offender pursuant to § 39-13-506(d);
- Aggravated prostitution, under § 39-13-516, provided the offense occurred prior to July 1, 2010;
- Sexual exploitation of a minor, under § 39-17-1003;
- False imprisonment where the victim is a minor, under § 39-13-302, except when committed by a parent of the minor;
- Kidnapping, where the victim is a minor, under § 39-13-303, except when committed by a parent of the minor;
- Indecent exposure, under § 39-13-511, upon a third or subsequent conviction;
- Solicitation of a minor, under § 39-13-528 when the offense is classified as a Class D felony, Class E felony or a misdemeanor;
- Spousal sexual battery, for those committing the offense prior to June 18, 2005, under former § 39-13-507 [repealed];
- Attempt, under § 39-12-101, to commit any of the offenses enumerated in this subdivision (20)(A);
- Solicitation, under § 39-12-102, to commit any of the offenses enumerated in this subdivision (20)(A);

³⁷⁴ T.C.A. § 40-39-201(2015).

³⁷⁵ T.C.A. § 40-39-202 (2015).

- Conspiracy, under § 39-12-103, to commit any of the offenses enumerated in this subdivision (20)(A);
- Criminal responsibility, under § 39-11-402(2), to commit any of the offenses enumerated in this subdivision (20)(A);
- Facilitating the commission, under § 39-11-403, to commit any of the offenses enumerated in this subdivision (20)(A);
- Being an accessory after the fact, under § 39-11-411, to commit any of the offenses enumerated in this subdivision (20)(A);
- Aggravated statutory rape, under § 39-13-506(c);
- Soliciting sexual exploitation of a minor -- exploitation of a minor by electronic means, under § 39-13-529;
- Promotion of prostitution, under § 39-13-515;
- Patronizing prostitution where the victim is a minor, under § 39-13-514;
- Observation without consent, under § 39-13-607, upon a third or subsequent conviction;
- Observation without consent, under § 39-13-607 when the offense is classified as a Class E felony; or
- Unlawful photographing under § 39-13-605 when the offense is classified as a Class E or Class D felony.
- Sexual battery, under § 39-13-505

The following offenses committed prior to November 1, 1989:

- Sexual battery, under § 39-2-607 [repealed];
- Statutory rape, under § 39-2-605 [repealed], only if the facts of the conviction satisfy the definition of aggravated statutory rape;
- Assault with intent to commit rape or attempt to commit sexual battery, under § 39-2-608 [repealed];
- Incest, under § 39-4-306 [repealed];
- Use of a minor for obscene purposes, under § 39-6-1137 [repealed];
- Promotion of performance including sexual conduct by a minor, under § 39-6-

- 1138 [repealed];
- Criminal sexual conduct in the first degree, under § 39-3703 [repealed];
- Criminal sexual conduct in the second degree, under § 39-3704 [repealed];
- Criminal sexual conduct in the third degree, under § 39-3705 [repealed];
- Kidnapping where the victim is a minor, under § 39-2-303 [repealed], except when committed by a parent of the minor;
- Solicitation, under § 39-1-401 [repealed] or § 39-118(b) [repealed], to commit any of the offenses enumerated in this subdivision (20)(B);
- Attempt, under § 39-1-501 [repealed], § 39-605 [repealed], or § 39-606 [repealed], to commit any of the offenses enumerated in this subdivision (20)(B);
- Conspiracy, under § 39-1-601 [repealed] or § 39-1104 [repealed], to commit any of the offenses enumerated in this subdivision (20)(B); or
- Accessory before or after the fact, or aider and abettor, under title 39, chapter 1, part 3 [repealed], to any of the offenses enumerated in this subdivision (20)(B);

“Violent sexual offense” means

- Aggravated rape, under § 39-2-603 [repealed] or § 39-13-502;
- Rape, under § 39-2-604 [repealed] or § 39-13-503;
- Aggravated sexual battery, under § 39-2-606 [repealed] or § 39-13-504;
- Rape of a child, under § 39-13-522;
- Attempt to commit rape, under § 39-2-608 [repealed];
- Aggravated sexual exploitation of a minor, under § 39-17-1004;
- Especially aggravated sexual exploitation of a minor under § 39-17-1005;
- Aggravated kidnapping where the victim is a minor, under § 39-13-304, except when committed by a parent of the minor;
- Especially aggravated kidnapping where the victim is a minor, under § 39-13-305, except when committed by a parent of the minor;
- Sexual battery by an authority figure, under § 39-13-527;
- Solicitation of a minor, under § 39-13-528 when the offense is classified as a Class B or Class C felony;
- Spousal rape, under § 39-13-507(b)(1) [repealed];
- Aggravated spousal rape, under § 39-13-507(c)(1) [repealed];
- Criminal exposure to HIV, under § 39-13-109(a)(1);
- Statutory rape by an authority figure, under § 39-13-532;
- Criminal attempt, under § 39-12-101, § 39-12-501 [repealed], § 39-605 [repealed], or § 39-606 [repealed], to commit any of the offenses enumerated in this subdivision (30);

- Solicitation, under § 39-12-102, to commit any of the offenses enumerated in this subdivision (30);
- Conspiracy, under § 39-12-103, to commit any of the offenses enumerated in this subdivision (30);
- Criminal responsibility, under § 39-11-402(2), to commit any of the offenses enumerated in this subdivision (30);
- Facilitating the commission, under § 39-11-403, to commit any of the offenses enumerated in this subdivision (30);
- Being an accessory after the fact, under § 39-11-411, to commit any of the offenses enumerated in this subdivision (30);
- Incest, under § 39-15-302;
- Aggravated rape of a child under § 39-13-531;
- Aggravated prostitution, under § 39-13-516; provided, that the offense occurs on or after July 1, 2010;
- Trafficking for a commercial sex act, under § 39-13-309; or
- Promotion of prostitution, under § 39-13-515, where the person has a prior conviction for promotion of prostitution.³⁷⁶

"Violent juvenile sexual offense" means an adjudication of delinquency, for any act committed on or after July 1, 2011, that, if committed by an adult, constitutes the criminal offense of:

(i) Aggravated rape, under § 39-13-502;

(ii) Rape, under § 39-13-503;

(iii) Rape of a child, under § 39-13-522, provided the victim is at least four

(4)years younger than the offender;

(iv) Aggravated rape of a child, under § 39-13-531; or

(v) Criminal attempt, under § 39-12-101, to commit any of the offenses enumerated in this subdivision (28)(A);

(B) "Violent juvenile sexual offense" also means an adjudication of delinquency, for any act committed on or after July 1, 2014, that, if committed by an adult, constitutes the criminal offense of:

(i) Aggravated sexual battery, under § 39-13-504;

(ii) Criminal attempt, under § 39-12-101, to commit any of the offenses enumerated in this subdivision (28)(B)

³⁷⁶ T.C.A. § 40-39-202 (2015).

Under the Act, within forty-eight hours of establishing or changing a primary or secondary residence, establishing a physical presence at a particular location, or becoming employed or practicing a vocation or becoming a student in this state, the offender shall register in person.³⁷⁷ An offender who resides and is registered in this state who intends to move out of this state shall, within forty-eight (48) hours after moving to another state or within forty-eight (48) hours of becoming reasonably certain of such intention to move to another state, report to such offender's designated law enforcement agency the address at which the offender will reside in the new jurisdiction.³⁷⁸

Likewise, within forty-eight hours of release on probation or any other alternative to incarceration, excluding parole, the offender shall register in person as required by the provisions of this part.³⁷⁹ An offender who is incarcerated in this state in a local, state, or federal jail, or a private penal institution shall, within forty-eight hours prior to such offender's release, register in person, completing and signing a TBI registration form, under the penalty of perjury.³⁸⁰ An offender from another state, jurisdiction, or country, who has established a primary or secondary residence within this state or has established a physical presence at a particular location, shall, within forty-eight hours of establishing such residency, register in person with the designated law enforcement agency, completing and signing a TBI registration form, under the penalty of perjury.³⁸¹ An offender from another state, jurisdiction, or country, who is not a resident of this state, shall within forty-eight hours of employment, commencing practice of a vocation or becoming a student in this state, register in person, completing and signing a TBI registration form, under the penalty of perjury.³⁸² Regardless of an offender's date of conviction, adjudication, or discharge from supervision, an offender whose contact with this state is sufficient to satisfy the requirements of subdivision (a)(1) is required to register as any form of sexual offender, juvenile offender or otherwise, in another jurisdiction prior to such offender's presence in this state.³⁸³ Within three (3) days, excluding holidays, of an offender changing his or her electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use, whether within or without the State of Tennessee, the offender shall report the change to the offender's designated law enforcement agency.³⁸⁴

Offenders who do not maintain either a primary or secondary residence shall be considered homeless, and are subject to the registration requirements. Such offenders, who are considered homeless, shall

³⁷⁷ T.C.A. § 40-39-203(a)(1)(2015).

³⁷⁸ T.C.A. § 40-39-203(a)(3)(2015).

³⁷⁹ T.C.A. § 40-39-203(a)(5)(2015).

³⁸⁰ T.C.A. § 40-39-203(b)(1)(2015).

³⁸¹ T.C.A. § 40-39-203(c)(2015).

³⁸² T.C.A. § 40-39-203(d)(1)(2015).

³⁸³ T.C.A. § 40-39-203(a)(2)(2015).

³⁸⁴ T.C.A. § 40-39-203(a)(5)(2015).

be required to report to their registering authority monthly.³⁸⁵ An offender who indicates to a designated law enforcement agency on the TBI registration form such offender's intent to reside in another state, jurisdiction, or country, and then who decides to remain in this state shall, within forty-eight hours of the decision to remain in the state report in person to the designated law enforcement agency and update all.

TBI registration forms shall require the registrant's signature and disclosure of the following information under the penalty of perjury:³⁸⁶

- Complete name and all aliases(pseudonyms, ethnic/tribal names, marital names);
- Date and place of birth;
- Social security number;
- State of issuance and identification number of any valid driver license or licenses, or if no valid driver license card is held, any state or federal government issued identification card;
- For an offender on supervised release, the name, address, and telephone number of the registrant's probation or parole officer, or other person responsible for the registrant's supervision;
- Sexual offenses or violent sexual offenses for which the registrant has been convicted and the county and state of each conviction;
- Name of any current employers and length of employment, including physical addresses and phone numbers;
- Current physical address and length of residence at such address, which shall include any primary or secondary residences. For the purpose of this section, a post office box number shall not be considered an address;
- Mailing address, if different from physical address;
- Any vehicle, mobile home, trailer, or manufactured home, used or owned by an offender, including descriptions, VIN, and license tag numbers;
- Any vessel, live-aboard vessel, or houseboat used by an offender, including the name of the vessel, description, and all other identifying numbers;
- Name and address of each institution of higher education in this state where the offender is employed or practices a vocation, or is a student;
- Race and gender;
- Name, address, and phone number of offender's closest living relative;
- Whether victims of the offender's convictions are minors or adults, and the correct age of the victim or victims and of the offender at the time of the offense or offenses, if such ages are known;
- Whether any minors reside in the primary or secondary residence;
- Verification by TBI or the offender that TBI has received the offender's DNA sample;
- Any electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use;

³⁸⁵ T.C.A. § 40-39-203(f)(2015).

³⁸⁶ T.C.A. § 40-39-203 (i)(1-19)(2015).

- Copies of all passports and immigration documents;
- Professional licensing information that authorizes an offender to engage in an occupation or carry out a trade or business; and
- Any other registration, verification, and tracking information, including fingerprints and a current photograph of the offender, vehicle(s) and vessel(s), as may be required by rules promulgated by the TBI in accordance with the provisions of the Uniform Administrative Procedures Act. The TBI must create and disseminate to all applicable law enforcement agencies, correctional institutions and any other agency that may be called upon to register an offender, rules establishing standardized specifications for the photograph of the offender required by statute.³⁸⁷

No later than the third day after an offender's initial registration, the registration agency shall send by the U.S. postal service the original signed TBI registration form containing the information required to TBI headquarters in Nashville.³⁸⁸ The offender's signature on the TBI registration form creates the presumption that such offender has knowledge of the registration, verification, and tracking requirements of this part.³⁸⁹

The TBI shall maintain and make available a connection to the Sex Offender Registry, for all criminal justice agencies with Tennessee Information Enforcement System capabilities by which registering agencies shall enter original, current, and accurate data required by this part. TBI will provide viewing and limited write access directly to the Sex Offender Registry through Tennessee Information Enforcement System to registering agencies for the entry of record verification data, changes of residence, employment, or other pertinent data required by this part and to assist in offender identification. Registering agencies should immediately, within twelve hours, enter all data received from the offender as required by the TBI into the Tennessee Information Enforcement System for the enforcement of this part by TBI, designated law enforcement agencies, TDOC, private contractors with TDOC, and the Tennessee Board of Probation and Parole.

Violent sexual offenders shall report in person during the months of March, June, September, and December of each calendar year to the designated law enforcement agency, on a date established by the agency, to update such offender's fingerprints, palm prints and photograph, as determined necessary by the agency, and to verify the continued accuracy of the information in the TBI registration form. Offenders who reside in nursing homes and assisted living facilities and offenders committed to mental health institutions or continuously confined to home or health care facilities due to mental and/or physical disabilities are exempt from the in-person reporting and fingerprinting. during the March reporting, the violent sexual offender shall pay the specified administrative costs not to exceed

³⁸⁷ T.C.A. § 40-39-203(i)(17) (2015).

³⁸⁸ T.C.A. § 40-39-203(k)(2015).

³⁸⁹ T.C.A. § 40-39-203(l)(2015).

\$150.00 which shall be used to defray personnel and maintenance costs, and/or any other expenses incurred as a result of the implementation of this part.³⁹⁰

Once a year, all sexual offenders shall report in person, no earlier than seven calendar days before and no later than seven calendar days after the offender's date of birth, to the designated law enforcement agency to update such offender's fingerprints, palm prints and photograph, as determined necessary by the agency, to verify the continued accuracy of the information in the TBI registration form, and to pay the specified administrative costs not to exceed \$150.00.³⁹¹

Within three days after the offender's verification, the designated law enforcement agency with whom the offender verified shall send by U.S. postal service the original signed TBI registration form containing the information required to TBI headquarters in Nashville. The TBI shall be the state central repository for all original TBI registration forms and any other forms required by the Act, which are deemed necessary for the enforcement of this Act. The designated law enforcement agency shall retain a duplicate copy of the TBI registration form as a part of the business records for that agency.³⁹²

If a person required to register under this part is re-incarcerated for another offense or as the result of having violated the terms of probation, parole, conditional discharge, or any other form of alternative sentencing, the offender shall immediately report such offender's status as a sexual offender or violent sexual offender to the facility where such offender is incarcerated or detained and notify the offender's appropriate registering agency, if different, that the offender is currently being detained or incarcerated. Registration, verification, and tracking requirements for such persons are tolled during the subsequent incarceration.³⁹³ Within forty-eight hours of the release for any subsequent re-incarcerations, the offender shall register with the appropriate designated law enforcement agency. Likewise, if a person who is required to register under this part is deported from this country, the registration, verification and tracking requirements for such persons are tolled during the period of deportation. Within forty-eight hours of the return to this state after deportation, the offender shall register with the appropriate designated law enforcement agency.³⁹⁴

Offenders who reside in nursing homes and assisted living facilities and offenders committed to mental health institutions or continuously confined to home or health care facilities due to mental and/or physical disabilities shall be exempted from the in-person reporting, fingerprinting, and administrative

³⁹⁰ T.C.A. § 40-39-204(b)(1)(2015).

³⁹¹ T.C.A. § 40-39-204(c)(2015).

³⁹² T.C.A. § 40-39-204(a) and (d) (2015).

³⁹³ T.C.A. § 40-39-204(e) (2015).

³⁹⁴ T.C.A. § 40-39-204(e) (2015).

cost requirements.³⁹⁵ However, it shall be the responsibility of the offender, the offender’s guardian, the person holding the offender’s power of attorney, or in the absence thereof, the administrator of the facility, to report any changes in the residential status to TBI headquarters in Nashville by U.S. postal service.³⁹⁶

The statute mandates that all information contained in the Sex Offender Registry be verified by the offender’s designated registering agency, its representatives and designees, including any district attorney general’s criminal investigator, to verify the accuracy and completeness of all information contained in the offender’s SOR.³⁹⁷

The Act includes requirements for the following to notify offenders of their reporting obligations and enter all data received from the offender into the Tennessee Information Enforcement System:

The officer or employee responsible for supervising an offender who has been released on probation, parole, or any other alternative to incarceration;

The warden of the correctional facility or the warden’s designee or sheriff of the jail or the sheriff’s designee.³⁹⁸

If the offender is placed on unsupervised probation, the court shall fully explain to the offender on the court record the registration, verification, and tracking requirements, and sanctions of the Act.³⁹⁹ The court shall then order the offender to report within forty-eight hours in person to the appropriate registering agency to register as required by the provisions of this part.⁴⁰⁰

Through press releases, public service announcements, or through other appropriate public information activities, the TBI shall attempt to ensure that all offenders, including those who move into this state, are informed and periodically reminded of the registration, verification, and tracking requirements, and sanctions of this part.⁴⁰¹

³⁹⁵ T.C.A. § 40-39-204(f) (2015).

³⁹⁶ T.C.A. § 40-39-204(f) (2015).

³⁹⁷ T.C.A. § 40-39-205(b) (2015).

³⁹⁸ T.C.A. § 40-35-205(d)(2015).

³⁹⁹ T.C.A. § 40-35-205(e)(2015).

⁴⁰⁰ T.C.A. § 40-35-205(e)(2015).

⁴⁰¹ T.C.A. § 40-35-205(f)(2015).

Using information received or collected pursuant to this part, the TBI shall establish, maintain, and update a centralized record system of offender registration, verification, and tracking information. The TBI may receive information from any credible source and may forward such information to the appropriate law enforcement agency for investigation and verification. The TBI shall promptly report current sexual offender registration, verification, and tracking information to the identification division of the Federal Bureau of Investigation.⁴⁰²

Whenever there is a factual basis to believe that an offender has not complied with the provisions of this part, the TBI shall make such information available through the Sex Offender Registry to the district attorney general, designated law enforcement agencies, and the probation officer, parole officer, or other public officer or employee assigned responsibility for the offender's supervised release.⁴⁰³

For all sexual offenses, and offenses now defined as violent sexual offenses, committed prior to July 1, 1997, except as otherwise provided, information reported on the TBI registration form shall be confidential; provided that the TBI, a local law enforcement agency, or a law enforcement agency of any institution of higher education may release relevant information deemed necessary to protect the public concerning a specific offender who is required to register pursuant to this part. Notwithstanding the provisions of any law to the contrary, officers and employees of the TBI, local law enforcement, law enforcement agencies of institutions of higher education, courts, probation and parole; the district attorneys general and their employees; and other public officers and employees assigned responsibility for offenders' supervised release into the community shall be immune from liability relative to their good faith actions, omissions, and conduct pursuant to this part. For any violent juvenile sexual offender who is adjudicated for a violent juvenile sexual offense, the information concerning the violent juvenile sexual offender shall be confidential.⁴⁰⁴ Violent juvenile sexual offenders who are registered and who receive a subsequent adjudication in juvenile court or a court having juvenile court jurisdiction for a crime requiring registration, the information concerning the juvenile sexual offender shall be deemed public information once the offender reaches eighteen years of age.⁴⁰⁵

For any offender convicted in this state of a sexual offense and violent sexual offense as defined by this part, that requires the offender to register pursuant to this part, the following information concerning a registered offender shall be considered public information:

⁴⁰² T.C.A. § 40-35-206(a)(2015).

⁴⁰³ T.C.A. § 40-35-206(b)(2015).

⁴⁰⁴ T.C.A. § 40-39-206 (2015).

⁴⁰⁵ T.C.A. § 40-39-207 (2015).

- Complete name and all aliases, including, but not limited to, any names that the offender may have had or currently has by reason of marriage or otherwise, including pseudonyms and ethnic or tribal names;
- Date and place of birth;
- Social security number;
- A photocopy of a valid driver license, or if no valid driver license has been issued to the offender, a photocopy of any state or federal government issued identification card;
- For an offender on supervised release, the name, address and telephone number of the registrant's probation or parole officer or other person responsible for the registrant's supervision;
- Sexual offenses or violent sexual offenses for which the registrant has been convicted, the date of the offenses and the county and state of each conviction; or the violent juvenile sexual offense for which the registrant has been adjudicated delinquent, the date of the act for which the adjudication was made and the county and state of each adjudication;
- Name of any current employers and length of employment, including physical addresses and phone numbers;
- Current physical address and length of residence at that address, which shall include any primary or secondary residences. For the purpose of this section, a post office box number shall not be considered an address;
- Mailing address, if different from physical address;
- Any vehicle, mobile home, trailer or manufactured home used or owned by an offender, including descriptions, vehicle information numbers and license tag numbers;
- Any vessel, live-aboard vessel or houseboat used by an offender, including the name of the vessel, description and all identifying numbers;
- Name and address of each institution of higher education in this state where the offender is employed or practices a vocation or is a student;
- Race and gender;
- Name, address and phone number of offender's closest living relative;
- Whether victims of the offender's convictions are minors or adults, the number of victims and the correct age of the victim or victims and of the offender at the time of the offense or offenses, if the ages are known;
- Verification by the TBI or the offender that the TBI has received the offender's DNA sample;
- A complete listing of the offender's electronic mail address information, including usernames, any social media accounts the offender uses or intends to use, instant message, other Internet communication platforms or devices, and the offender's username, screen name, or other method by which the offender accesses these accounts or web sites;
- Whether any minors reside in the primary or secondary residence;
- Any other registration, verification and tracking information, including fingerprints and a current photograph of the offender, vehicles and vessels, as referred to in subdivisions (i)(10) and (i)(11), as may be required by rules promulgated by the TBI, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5; By January 1, 2007, the TBI shall promulgate and disseminate to all applicable law enforcement agencies, correctional institutions and any other agency that may be called upon to register an offender, rules establishing standardized specifications for the photograph of the offender required by subdivision (i)(19)(A). The rules shall specify that the photograph or digital image submitted for each offender must conform to the following compositional

specifications or the entry will not be accepted for use on the registry and the agency will be required to resubmit the photograph:

- Head Position: The person being photographed must directly face the camera; The head of the person should not be tilted up, down or to the side; and
- Head Coverings and Hats: Photographs of applicants wearing head coverings or hats are only acceptable due to religious beliefs, and even then, may not obscure any portion of the face of the applicant; and photos of applicants with tribal or other headgear not specifically religious in nature are not permitted;
- Copies of all passports and immigration documents; and
- Professional licensing information that authorizes an offender to engage in an occupation or carry out a trade or business..⁴⁰⁶

In addition to making such information available in the same manner as public records, the TBI shall prepare and place the information on the state's Internet homepage.⁴⁰⁷ This information shall become a part of the Tennessee Internet criminal information center when such center is created within the TBI. The TBI shall also establish and operate a toll-free telephone number, to be known as the "Tennessee Internet Criminal Information Center Hotline," to permit members of the public to call and inquire as to whether a named individual is listed among those who have registered as offenders as required by this part. The Sex Offender Registry Hotline number is 1-888-837-4170.⁴⁰⁸

No sooner than ten years after termination of active supervision on probation, parole, or any other alternative to incarceration or no sooner than ten years after discharge from incarceration without supervision, an offender required to register under this act may file a request for termination of registration requirements with TBI headquarters in Nashville.⁴⁰⁹ Upon receipt of the request for termination, the TBI shall review documentation provided by the offender and contained in the offender's file and the Sex Offender Registry to determine whether the offender has complied with the provisions of the Act. In addition, the TBI shall conduct fingerprint-based state and federal criminal history checks to determine whether the offender has been convicted of any additional sexual offenses or violent sexual offenses.⁴¹⁰ If it is determined that the offender has not been convicted of any additional sexual offenses or violent sexual offenses during the 10-year period and the offender has substantially complied with the provisions of the Act and any previous versions thereof, the TBI shall remove the offender's name from the Sex Offender Registry and notify the offender that such offender is no longer required to comply with the provisions of this part.⁴¹¹ If it is determined that the offender has been convicted of any additional sexual offenses or violent sexual offenses during the 10-year period or has not substantially complied with the provisions of this part and the previous versions thereof, the TBI shall not remove the offender's name from the Sex Offender Registry and shall notify the offender

⁴⁰⁶ T.C.A. § 40-39-206(2015).

⁴⁰⁷ Available at http://www.ticic.state.tn.us/SEX_ofndr/search_short.asp.

⁴⁰⁸ T.C.A. § 40-39-206(e)(2015).

⁴⁰⁹ T.C.A. § 40-39-207(a)(1)(2015).

⁴¹⁰ T.C.A. § 40-39-207(b)(2015).

⁴¹¹ T.C.A. § 40-39-207(c)(2015).

that such offender has not been relieved of the provisions of this part. The offender may appeal a denial of removal.⁴¹²

Any offender required to register because such offender was convicted of the offense of statutory rape under § 39-13-506, and such offense was committed prior to July 1, 2006, may file a request for termination of registration requirements with TBI headquarters in Nashville if such offender would not be required to register if such offense was committed on or after July 1, 2006.⁴¹³ The TBI has the authority to review such applications for approval or denial. If the application is approved the offender's name will be removed for the registry. If the application is denied the offender has the right to appeal the decision to the Chancery Court of Davidson County or where the offender resides.⁴¹⁴

Violent juvenile sexual offenders who reach the age of twenty-five, and who have not been adjudicated or convicted of a subsequent qualifying offense shall be eligible for termination from the Sex Offender Registry. Upon reaching the age of twenty-five, the violent juvenile sexual offender may apply for removal from the Sexual Offender Registry. If the violent juvenile sexual offender has not been convicted or adjudicated delinquent in any of the prohibited crimes, the violent juvenile sexual offender shall be removed from the Sexual Offender Registry.⁴¹⁵

A violation of the Act is a Class E felony. No person violating this part shall be eligible for suspension of sentence, diversion or probation until the minimum sentence is served in its entirety. The first such violation of this part is punishable by a fine of not less than \$350.00 and imprisonment for not less than ninety days. A second violation is punishable by a fine of not less than \$600.00 and imprisonment for not less than 180 days. A third or subsequent violation of this part is punishable by a fine of not less than one thousand one hundred dollars (\$1,100.00) and imprisonment for not less than one (1) year. A violation of this part is a continuing offense. If an offender is required to register pursuant to this part, venue lies in any county in which the offender may be found or in any county where the violation occurred.⁴¹⁶

⁴¹² T.C.A. § 40-39-207(d)(2015).

⁴¹³ T.C.A. § 40-39-207(h)(2015).

⁴¹⁴ T.C.A. § 40-39-207 (g)(2015).

⁴¹⁵ T.C.A. § 40-39-211 (j)(3-5)(2015).

⁴¹⁶ T.C.A. § 40-39-208(2015).

Upon receipt of notice of the death of a registered offender, the TBI shall remove from the Sex Offender Registry all data pertaining to the deceased offender.⁴¹⁷

While mandated to comply with the requirements of this chapter, no sexual offender or violent sexual offender whose victim was a minor shall knowingly establish a primary or secondary residence or any other living accommodation, or knowingly obtain sexual offender treatment or attend a sexual offender treatment program, or knowingly accept employment within one thousand feet of the property line on which any public school, private or parochial school, licensed day care center, or any other child care facility, public park, playground, recreation center or public athletic field available for the use by the general public is located.⁴¹⁸ No sexual offender or violent sexual offender shall knowingly reside within one thousand feet of the property line on which the offender's former victims, or the victims' immediate family members, reside nor shall such offender knowingly come within one hundred feet of any of the offender's former victims, except as otherwise authorized by law.⁴¹⁹ These provisions do not apply to violent juvenile sex offenders unless otherwise ordered by a court of competent jurisdiction.⁴²⁰

While mandated to comply with the requirements of this chapter, no sexual offender or violent sexual offender whose victim was a minor shall knowingly establish a primary or secondary residence or any other living accommodation where a minor resides except that such an offender may reside with a minor if the offender is the parent of the minor, unless one of the following conditions applies:

- The offender's parental rights have been or are in the process of being terminated as provided by law, or
- Any minor or adult child of the offender was a victim of a sexual offense or violent sexual offense committed by the offender.⁴²¹

Changes in the ownership or use of property within one thousand feet of the property line of an offender's primary or secondary residence or place of employment which occur after an offender establishes residence or accepts employment shall not form the basis for finding that an offender is in violation of the residence restrictions of this section. A violation of these provisions is a Class E felony.⁴²²

⁴¹⁷ T.C.A. § 40-39-210(2015).

⁴¹⁸ T.C.A. § 40-39-211 (a) (2015).

⁴¹⁹ T.C.A. § 40-39-211 (a) and (b) (2015).

⁴²⁰ T.C.A. § 40-39-211 (i) (2015).

⁴²¹ T.C.A. § 40-39-211(c)(2015).

⁴²² T.C.A. § 40-39-211(f)(2015).

Victims of Trafficking, Domestic Abuse, and Sexual Assault

A person who is mandated to comply with the requirements of the sex offender registry may petition the sentencing court for termination of the registration requirements based on the person's status as a victim of human trafficking, sexual offense, or domestic abuse. At the hearing, the court shall call such witnesses, including a psychologist or psychiatrist and the district attorney, to make a decision on the petition. If the person has been convicted of a sexual offense or violent sexual offense while mandated to comply with the SOR, then the petition is automatically dismissed.⁴²³

⁴²³ T.C.A. § 40-39-218(2015).

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Chapter 7

Legal Advocacy for Immigrant, Trafficked, & Refugee Victims of Domestic & Sexual Violence⁴²⁴

II. INTRODUCTION⁴²⁵

Tennessee is home to more than 160,000 immigrants. According to the Federation for American Immigration Reform, for the past 10 years, Tennessee ranked sixth in the nation for the rate of increase in its foreign-born population. Since 1990, the state has experienced a 169-percent increase (according to the 2000 Census) and ranks fourth in the nation for the rate of change in foreign-born population from 1960 to 2000.

Domestic and sexual violence programs across the state are feeling the impact of this dramatic increase and have repeatedly contacted the Coalition requesting more training, technical assistance and services for assisting immigrant victims. Across Tennessee, there is a tremendous lack of resources and services available to help meet the unique needs of immigrants who have been victimized by domestic violence, sexual assault, stalking, and trafficking. Uncertainties in immigration status, unfamiliarity with U.S. laws and services, and language difficulties can make immigrant women particularly vulnerable to domestic and sexual violence. Linguistic barriers, service providers' lack of knowledge about a victim's culture, and inaccessibility of information about existing services are just a few factors that make the effective provision of services to immigrant women difficult.

⁴²⁴ This chapter presents an overview of legal advocacy for immigrant, refugee, and trafficked victims of domestic and sexual violence. For more detailed information, please consult the manual published by the Coalition in May 2005, *Advocacy for Immigrant, Refugee, and Trafficked Victims of Domestic and Sexual Violence*.

⁴²⁵ This section is adapted from Leslye E. Orloff and Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women*, published by Ayuda, Inc. in 1999 and relies upon the work of Carolyn Seugling when she was a law student at Vanderbilt University and a volunteer for the Tennessee Coalition Against Domestic and Sexual Violence.

A. Battered immigrant women.

Immigrant women arrive in this country alone or with their spouses in the hope of creating a better life for themselves and their children. Many flee political repression, severe poverty, domestic violence, unemployment, or war. In their home countries, they may have faced rape or torture for their political beliefs. They may have been forced into prostitution, state-sponsored sterilization programs, or may have been subjected to female genital mutilation. They may bear physical and psychological scars from this abuse and may still be fighting the effects of post traumatic stress disorder (PTSD).

Crossing the U.S. border can be a harrowing experience as women and children risk being robbed, raped, or detained. Others face possible mistreatment by the U.S. Border Patrol. Once they are in the United States, they may experience discrimination, unemployment, and isolation. Many fear being removed by the U. S. Citizenship and Immigration Services (USCIS), formerly, Immigration and Naturalization Services (INS). Immigrant women may also have difficulty obtaining employment in the United States because they lack basic job or language skills. If they are able to find work, they may face low wages, sexual harassment, dangerous working conditions, or long hours because they work "under the table" and their immigration status prevents them from seeking the protection of U.S. labor laws. They may be under considerable pressure to work hard and send money to support their children and other family members back in their home countries.

If immigrant women are married to military personnel or met and married their spouses through an international matchmaking organization, they may be extremely isolated from their cultures and unable to access traditional sources of support. They may be further stigmatized by the use of the term "mail order bride." Farmworker migrant women live a very transient lifestyle and are often even more isolated. They are generally paid significantly less than men, work very long hours in hazardous conditions, and are often forced to turn over their paychecks to their husbands. These pressures result in very difficult lives for immigrant women, particularly those who are undocumented. If an immigrant woman is trapped in an abusive relationship, these factors make the flight from violence even more problematic. As a result, battered immigrant women are among the most marginalized victims of domestic violence in this country. Through the activism of immigrant survivors of domestic violence and service providers, the domestic violence advocacy community has become more aware of immigrant women's stories and this population's need for accessible domestic violence services.

Cases of battered immigrants are ultimately complicated by their abuser's use of immigration status as a tool of control. Research on domestic violence conducted among immigrants indicates that immigrant

women are very often victims of domestic violence due to vulnerability related to their immigration status. In a survey of immigrant women conducted by Ayuda, 62% of the respondents reported that they were subjected to weekly physical or emotional abuse. Thirty-one percent of respondents reported an increase of abuse with immigration to the United States. Another 9% reported that abuse began with immigration. One-fifth of the respondents reported that their spouses use threats of deportation⁴²⁶, of not filing immigration papers, or of withdrawing these papers as a power and control tactic in abusive relationships. One-fourth of the participants stated that fear relating to their immigration status prevented them from leaving the abusive relationship. This survey highlights the relationship between domestic violence and immigration status. It further illustrates some of the specific problems battered immigrant women face in their efforts to stop the violence. Congress relied on this research in deciding to include special protection for battered immigrant women in the Violence Against Women Act (VAWA).

Fears surrounding deportation are often aggravated because abusers convince immigrant victims that they will lose custody and be permanently severed from any relationship with their children through deportation. Abusers believe and often try to prove in custody cases that the victim's lack of lawful immigration status outweighs and shifts the "best interest of the child analysis" toward this unlawful status and away from the abuser's violence. This position is contrary to recommendations from experts on domestic violence and children. Moreover, where the judicial system condones these tactics, battered immigrants are more likely to return to their batterers and subject their children to further effects of domestic violence. If an abuser raises this issue in a custody case, the battered immigrant woman will need the assistance of an attorney who can counter these charges using current evidence from the "ABA Report on The Impact of Domestic Violence on Children" and other resources.

Language, culture, social isolation, a lack of understanding about the U.S. legal system, and immigration status are factors that complicate a battered immigrant woman's ability to leave an abusive relationship. To work with battered immigrant women, advocates need to become familiar with the special immigration and public benefits laws available to assist battered immigrants. Additionally, they must be able to anticipate the special problems that can arise in family and criminal court cases because of the intersection of family, criminal, and immigration law. The extent to which you can apply this information to the operation of your program will depend on the nature of the immigrant communities in the region that you serve. With large, established immigrant populations, there are usually immigration-based nonprofit agencies, community-based organizations, church groups, and community leadership. This existing base can serve as a valuable support network as you begin to implement training and outreach programs. Where an immigrant community is smaller, transient, or where immigrant women are extremely isolated (as is often the case in rural areas, on military bases, or with

⁴²⁶ "Deportation" is the term previously used to describe the removal of an alien from the United States. The USCIS now uses the term "removal," but since immigrants and advocates are more familiar with the term "deportation," this chapter uses that term instead.

women in rural communities who met their husbands through international matchmaking agencies), your efforts to reach these women will be more challenging.

B. Trafficking.⁴²⁷

Trafficking of people involves moving men, women, and children from one place to another and placing them in conditions of forced labor. The practice includes forced prostitution, domestic servitude, unsafe agricultural labor, sweatshop labor, construction or restaurant work, and various forms of modern-day slavery. This global violation of human rights occurs within countries and across borders, regions, and continents. Because trafficking is illegal, it is difficult to find reliable estimates of the problem. However, those involved in combating trafficking agree that it is a large and growing practice. According to the Congressional Research Service (CRS) and the U.S. State Department, 700,000 to 2 million people, the majority of them women and children, are trafficked each year across international borders. Thirty-five percent are under the age of 18. The figure above provides estimates of the number of people trafficked by region; the destinations of trafficked individuals are large cities, vacation or tourist areas, or military bases in Asia, the Middle East, Western Europe, and North America.

Trafficking has turned into a big business: According to CRS, trafficking in people represents the third-largest source of profits for organized crime after drugs and guns, generating billions of dollars each year. Organized crime groups operating within and across borders often run trafficking networks. But traffickers can also be friends, family members, or neighbors. Having lured their victims with the promise of employment or—as is often the case with children—adoption, traffickers typically maintain subservience through debt-bondage, passport confiscation, physical and psychological abuse, rape, torture, threats of arrest and deportation, and threats to the trafficked person’s family. Victims often find themselves cut off from the outside world. They are often unable to speak the local language and fearful of police, who they believe might send them home to face residual smuggling debt, public humiliation, and further victimization.

With passage of global anti-trafficking legislation the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, adopted by the UN General Assembly in November 2000, trafficking is increasingly being recognized as a serious international problem. The Protocol was adopted by UN GA resolution A/RES/55/25 of 15 November 2000, entered into force 25 December 2003. There

⁴²⁷ This section relies on information contained in an article by Melanie Orhant, “Human Trafficking Exposed,” in *Population Today*, retrieved August 1, 2005 at http://www.prb.org/Content/NavigationMenu/PRB/AboutPRB/Population_Today1/PTjan02.pdf.

were 128 State parties and 117 signatories (as of 2008). Combating trafficking involves national and international cooperation among nongovernmental organizations; social agencies; and judicial, law enforcement, and migration authorities. Together these groups can limit the ability of traffickers to operate freely and can provide options to potential victims to prevent them from being trafficked. They can also influence legislation, policies, and programs to enable governments to penalize traffickers and to aid victims.

Outreach to trafficking victims is not easy, and may be dangerous, given the sometimes huge financial stakes at risk for the traffickers. Establishing cooperative working relationships through education with local law enforcement is one method that has worked for some programs. When immigrant women are arrested for prostitution, law enforcement should be on the alert for possible trafficking, and may want to make referrals to the local domestic or sexual violence program.

It is important to be able to distinguish between victims of trafficking and other forms of domestic and sexual violence against immigrant women because victims of trafficking are eligible for immigration relief and social services that other victims of domestic and sexual violence are not. However, attempting to access these services for victims who are not victims of trafficking may call unnecessary attention to the victim that could result in deportation. The following questions may help you identify trafficked persons:

- Did the person come to the U.S. for a specific job?
- What was the promised job?
- Was she forced to do different work? What?
- How was she recruited?
- Who organized the travel?
- Does she have identification papers?
- Where did she originally get the papers?
- Does the employer have the documents?
- Did she sign a work contract?
- Does the person owe money to the employer?
- Has the person been threatened with harm if she tries to leave?
- Have family members been threatened?
- Does she live in the same place?
- How many hours a day/week does she work?
- Does she get paid?
- Is freedom restricted in any way?

C. Immigrant victims may have several different possible statuses.

Lawful Permanent Resident (LPR) –A “green card” holder; one who has attained “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.”

Conditional (Permanent) Resident –A status conferred on an alien SPOUSE and CHILD(ren) at the time of obtaining LAWFUL PERMANENT RESIDENT status, such status having been obtained: on the basis of a marriage to a U.S. citizen (USC) or permanent resident (LPR) spouse entered into less than two years prior to obtaining said status.

Asylee - A person granted asylum.

Asylum – A status sought by a person PHYSICALLY PRESENT in the U.S. or who is requesting admission at a U.S. port of entry who has a well-founded fear of persecution if forced to return to his or her country of nationality or last habitual residence because of race, religion, nationality, membership in a particular social group, or political opinion.

Non-Immigrant Visa Holder – Nonimmigrant is a person coming to the U. S. temporarily, such as a visitor or a student. If visa holders have overstayed their visa, they are deportable.

Undocumented Immigrant – A person without status in the U.S. They are immediately deportable unless they take an affirmative or defensive action to prevent their deportation.

D. Immigration protections for victims of domestic and sexual violence.

Immigrant victims have certain legal protections and means of obtaining legal status to remain in the U.S. These remedies are considered either affirmative (the immigrant woman initiates the process to remain in the U.S.) or defensive (she uses legal protections as a way to halt her deportation). If an immigrant is not successful in her defensive application, she will be ordered deported. Therefore, it is extremely important to consult an immigration attorney or expert immediately if deportation proceedings have been initiated against her.

Battered Spouse Waiver – If an immigrant spouse had not been married for two years when she immigrated to the U.S., she was given conditional lawful permanent residence instead of full lawful permanent residence (LPR) status. Usually, to obtain LPR status, she would be required to remain in the marriage for at least two years. Generally, both spouses must file a joint petition to remove the conditions within two years after the foreign spouse obtains conditional residence. The Battered Spouse Waiver allows the immigrant wife who can prove she had a valid good faith marriage and has been abused to waive the two-year requirement and joint petition without her husband’s knowledge, consent, or cooperation..

Violence Against Women Act (VAWA) Self-Petition – allows battered immigrants to petition for legal status without relying on abusive U.S. citizens or legal permanent resident spouses, parents, or children to sponsor their adjustment of status, I-485 (green card) applications. The purpose of the VAWA program is to allow victims who have suffered from battery or extreme cruelty during marriage by a U.S. citizen or legal permanent resident to apply for permanent residence without the knowledge, cooperation, or participation of the abusive spouse, parent, or child.

U-Nonimmigrant Visa, Crime Victim Visas - A victim of crime, including rape, torture, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, or being held hostage, who is helpful in the investigation and/or prosecution of the crime and has suffered substantial physical or emotional injury as a result of such crime may qualify for a U-Nonimmigrant Visa and work authorization. These victims will become eligible to apply for legal permanent residence after maintaining 3 years of continuous presence in U Nonimmigrant status.

T-Nonimmigrant Visa, Trafficking Visas – Victims of severe trafficking may obtain T Nonimmigrant status if they can show,severe trafficking, the reason for their presence in the U.S. is on account of trafficking, they have complied with reasonable requests for assistance from law enforcement, and removal would cause extreme hardship involving unusual and severe harm.

Asylum - Asylum applicants must prove they are unable or unwilling to return to a country because of past persecution or fear of future persecution on account of race, nationality, religion, political opinion, or membership in a particular social group. Battered women may be able to show that her home government does not or can not protect her from persecution. Other claims may include coercive family planning, female genital mutilation, sexual violence, rape, and severe domestic violence.

Cancellation of Removal (Suspension of Deportation) - Immigrants who are in removal or deportation proceedings may be able to have those proceedings cancelled and granted LPR status if they can show, among other requirements, that they were subject to battery or extreme cruelty by a U.S. citizen or LPR and they, or a qualifying family member, would suffer exceptional and extremely unusual hardship if returned to their home country.

II. DO'S AND DON'TS OF ADVOCACY WITH IMMIGRANT, REFUGEE, AND TRAFFICKED VICTIMS.

Never contact USCIS (formerly INS) without first contacting an immigration lawyer or trained immigration expert. Even when an immigrant is self-petitioning for a VAWA claim, an immigration attorney should be contacted.

Never contact USCIS to verify immigration status of the victim. This could lead to arrest/deportation of the victim.

Communicating with the immigrant victim is essential. Speaking with the immigrant victim to understand her needs and fears is one of the most important, yet difficult, aspects of immigrant clients.

Try not to use a victim's children or companion as interpreters. The victim may be more reticent to speak freely. Furthermore, the child or companion might not interpret accurately because of loyalty to the perpetrator. If a woman brings an interpreter with her to your program, try to verify that this person will interpret accurately and will not repeat what the victim says to the perpetrator. Have the interpreter sign a confidentiality agreement.

If the victim does not have an interpreter and cannot communicate with you, you must try to find an interpreter or use a service like AT&T Language Line. For long term advocacy, work with social service agencies that serve language minority programs.

If the victim speaks limited English, speak slowly and repeat back what she has said. Ask her to repeat her understanding of what you are telling her. Ask short and simple questions that are not open ended. For example, What do you want? What are you afraid of? Do you want to leave?

Do not ask right away about the victim's immigration status. Asking right away about the victim's immigration status might make her less trusting of you as an advocate. Explain that everything you discuss will be kept completely confidential from USCIS. Repeat this main message and that you will not report her to USCIS but are here to help her be safe. Have bilingual materials for her to read that might help her understand if communication is a problem. Try to understand the support network of the victim and if the community she is in recognizes abuse as a crime. Look for ways she will be less isolated.

If she is a Lawful Permanent Resident or Citizen make sure she knows that USCIS cannot take her status away from her without due process of law. Threats the perpetrator has made of taking away her status are usually wrong.

See if the victim understands what counseling is. Explain that counseling is not only for mentally disturbed persons but is good evidence used to support her claim of domestic and/or sexual violence.

Explain the court and police system in the United States to the victim. The immigrant victim might have views of corrupt police from a previous country or may have had a negative view of U.S. enforcement officials from border encounters. Furthermore, the immigrant might fear that by calling the police, the police will report her to USCIS. Explain that the police are an important part of documenting the violence. Make sure the victim knows about 911. Tell the victim to get the names and badge numbers of the police officers who respond. Explain that police reports help document the violence. However, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 does say that any officer or employee of a state or political subdivision may communicate with the Attorney General regarding immigration status. As an advocate, you should know if the police in your area routinely report an immigrant's status and whether 287(g) has been implemented in your area. If you notice excessive reporting, advise the police and community that although they are allowed to report undocumented immigrant statistics to USCIS, IIRAIRA does not require them to. Advise them that holding perpetrators accountable is more important than the pursuit of undocumented immigrants. Realize that if the victim doesn't speak English, and the police have already been involved, they might have deferred to the perpetrator and filed an erroneous police report.

Ask her about her expectations of the US legal system first. Then explain the legal system in general and any differences between her expectations and reality. Also explain what will happen during any hearing or court proceeding. Prepare her for likely questions. Go with her to court. If possible take her to court before the hearing to familiarize her with the court room. Explain to her that her testimony is an important part of the proceeding and the importance of credibility. Let her know what types of legal

relief are available. Explain that seeking orders of protection, custody, child support, and divorce from civil courts should not result in deportation. But make sure to note that an immigration attorney should be contacted first.

Explain the choice options available to immigrant victims of domestic violence and what the possible ramifications of certain actions have on the perpetrator and the children involved. For a non-U.S. citizen perpetrator, if the perpetrator is convicted of certain crimes related to domestic violence or violation of an order of protection this can result in his deportation. Let her decide if she can survive economically if this happens.

If the immigrant victim should be deported, she needs to know that the abuser might automatically gain custody of her children. Assure the victim that you will help her whether or not she chooses to leave or reconcile. The victim needs to choose for herself when she is ready and it is safe to leave the batterer. This decision cannot be made by you.

Realize that if an immigrant does not have work authorization papers and has not obtained work without them, then she will be very economically disadvantaged. Explain what a shelter is. If she chooses to go, ask if she has any eating or sleeping requirements based on her culture or religious values. Explain that the shelter is open to all people regardless of immigration status. Explain that shelters are exempt from reporting her immigration status and that they are not required to inquire into it. Even if undocumented, shelter residents qualify for federally funded emergency, short-term housing programs.

III. SAFETY PLANNING FOR BATTERED IMMIGRANT WOMEN

Safety planning is a crucial aspect of assisting any battered woman. A battered immigrant woman needs the ability to choose options she is most comfortable with. Advocates should assist battered immigrant women with the typical safety plans such as having a planned place to go and having money set aside in the event that she and her children need to leave quickly. However, one of the most important parts of a safety plan for battered immigrant women, regardless of whether she is leaving her abuser or not, is having the documentation that will support her immigration claims in a safe and accessible place.

Advocates should assist the victim in securing a safe place to keep her important documents. These documents are vital. If a friend, other family member, or shelter cannot assist in securing the

documents, then opening a safe deposit box is a great option so that the abuser cannot destroy her documents and make proving affirmative or defensive applications possible.

Important information for an immigrant victim to store for herself and her children include but are not limited to:

- Green Cards for her and her children
- Passports for her and her children
- Marriage Certificate
- Abuser's birth certificate
- Abuser's Social Security Number
- Wedding Invitations
- Income Tax Forms
- Wedding Pictures
- Police Reports
- Documentation of Dates when Police were called
- Medical/Hospital Records
- Names of Shelters and other Victim Services Programs where she has stayed or called
- Names and Addresses of people who saw her bruises
- Copies of Spouse's Immigration Papers
- Order of Protection
- Bills in Her Name
- Employer letter listing the abuser as an emergency contact person
- Documents listing her as residing with the abuser
- Addresses of places she has lived with the abuser and telephone numbers of landlords
- Her and her children's Birth Certificates
- Work Permits
- Joint Checking or Savings Account Numbers and Books
- Any mail showing it was sent in her and her spouse's name
- Photographs of injuries
- Social Security cards for her and her children
- Divorce Papers from previous marriages for her and her spouse
- Diaries or Journals of the abuse

IV. ORDER OF PROTECTION PROVISIONS

A 1999 study found that filing for an Order of Protection resulted in a significant decline (66%) in abuse over a two year follow up period.⁴²⁸ Obtaining a civil Order of Protection for an immigrant victim may protect her from further abuse and assist her in her immigration claims if she chooses to proceed with them. Orders of Protection should include the general relief provisions as well as specific provisions tailored to the battered immigrant victim's needs. Here are some answers to frequently asked questions about obtaining an Order of Protection for battered immigrant victims.

- **Are there any special requirements for immigrant victims to obtain an Order of Protection?**
 - No. The victim does not need to be a lawful permanent resident (LPR) or U.S. citizen to obtain an Order of Protection. Moreover, Orders of Protection should be sought for victims who choose to leave their abusers as well as those who do not wish to separate.

- **Should an immigrant victim get a mutual Order of Protection or consent order?**
 - An Order of Protection that does not require an admission or finding of abuse is never helpful. Consent Orders of Protection should only be used when the abuser admits to the abuse or the judge bases issuance of the Order of Protection on the petitioner's affidavit. Otherwise, the immigrant petitioner should have a full Order of Protection hearing. This hearing is important so that immigrant victims are not limited in their immigration relief claims and public benefits they might be eligible for. Furthermore, if the immigrant victim is found to be in violation of a mutual Order of Protection, even if in self defense, this could lead to her deportation.

- **Are there any special rules or procedures for immigrant victims to obtain an Order of Protection?**
 - No. The same rules and procedures that apply to other abused women apply to immigrant women. The same types of relief available should also be included.

- **What are the most important types of relief for an immigrant victim?**
 - Most importantly, the victim should petition for temporary custody. Temporary custody can be awarded to the victim until further notice. Many immigrant women believe that

⁴²⁸ Carlson, M., Harris, S., and Holden, G. (1999). Protective orders and domestic violence: Risk factors for re-abuse. *Journal of Family Violence*, 14, 205-226.

custody will be awarded to the father. Failure to obtain custody reinforces control over her and may pressure her to return to her abuser to be with her child/ren.

- Child and spousal support are also important relief for immigrant victims who do not have work papers. These types of relief need to be specifically requested for her support.

Some specific provisions helpful to immigrant victims should also be included under the catch-all provisions which allow additional relief to be granted as necessary.⁴²⁹ After discussing the victim's situation, some of the following may be applicable:

- The respondent shall give petitioner access to, or copies of, any documents supporting petitioner's immigration application.
- The respondent shall not withdraw the application for permanent residency which has been filed on petitioner's behalf.
- The respondent shall not contact USCIS about petitioner's immigration petition. (Although USCIS is statutorily barred from using any information from the abuser, the abuser should be prevented from informing USCIS of her immigration status and thereby placing her in a defensive position.)
- The respondent shall take any and all action necessary to ensure that the petitioner's application for residency is approved.
- The respondent shall pay any and all fees associated with the petitioner's and/or children's immigration cases.
- The respondent shall immediately relinquish possession and/or use of and transfer to the petitioner the following items:
 - Petitioner's property such as culturally important items and things needed to prove or attain legal status.
 - Copies of information or documents of the respondent that the victim needs for her immigration claim.
 - Evidence of good faith marriage.
 - Other materials needed by USCIS that establish that the parties have resided together and that the petitioner currently resides in the U.S.
- The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden, or claimed to be missing by the respondent, including the petitioner's or the children's passports, social security cards, alien registration cards, birth certificates, work permits, bank cards, or driver's licenses.
- The respondent shall under oath sign a document in open court stating whether or not he has been previously married and identifying the jurisdiction in which each prior marriage was terminated, including the date each prior divorce was issued.
- The respondent shall not remove the children from the court's jurisdiction and/or the U.S. absent a court order and shall relinquish the children's passports to the petitioner or the court.

⁴²⁹ T.C.A. § 36-3-606: "A protection order granted under this part to protect the petitioner from domestic abuse may include, *but is not limited to*" the relief specified in the statute (emphasis added).

- The respondent shall sign a statement that will also be signed by petitioner and the judge informing an embassy or consulate that it should not issue visitor's visas or any other visa to the child of the parties absent an order of the court.