Domestic Violence Benchbook

September-December 2009 Updates

Updates have been issued for the Domestic Violence Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 5: Evidence in Criminal Domestic Violence Cases

5.2(A) Former Testimony or Statements of Unavailable Witness

The trial court did not clearly err when it found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, [] lived in Virginia, and [] was unable to fly or travel to Michigan to testify[.]" *People v Garland*, 286 Mich App 1, 7 (2009).

See *People v Garland*, 286 Mich App 1, 9-10 (2009), where the Court found that statements made by a victim of sexual abuse to a nurse were nontestimonial and their admission did not violate the defendant's right of confrontation when the statements were reasonably necessary for the victim's treatment and diagnosis. Specifically, the Court indicated:

> "The victim's statements to the nurse were reasonably necessary for her treatment and diagnosis. The victim went to the hospital for medical care the morning of the assault. She was directed to LACASA, a nonprofit organization in Livingston County that provides free and confidential comprehensive services for sexual assault survivors, for such medical care. The nurse was the first person to take a history from the victim and examine the victim, which she did at 6:00 p.m. on the day of the assault. The police investigation occurred after, and separate from, the nurse's taking of the history and examination. The nurse testified that the patient's history is very important because it tells her how to treat the patient and how to proceed with the examination. Then, considering the victim's history, the nurse provides medical treatment to the victim.
>
> * * *
>
> "Here, unlike in [*People v*] *Spangler*, [285 Mich App 136 (2009),] where the factual record was not developed enough to determine whether the victim's statements were testimonial, we have a factual record that sufficiently indicates that under the totality of the circumstances of the [victim's] statements, an objective witness would

reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency.

"For the same reasons that the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis, we conclude that the victim's statements were nontestimonial. Although the nurse does collect evidence during the course of the examination after taking a patient's history and the nurse is required to report the assault and turn over the evidence to law enforcement officials, the nurse is not involved in the police officer's interview of the victim after the examination and is not personally involved in the officer's investigation of the crime. The victim in this case did not have any outwardly visible signs of physical trauma; therefore, the nurse could not have treated her with antibiotics and emergency birth control unless she knew her history. Thus, we hold that, on these facts, the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant." *Garland*, 286 Mich App at 9, 11 (internal citations omitted).

Previous updates issued since the April 2009 CD was released:

May-August 2009 Updates

Updates have been issued for the Domestic Violence Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 5: Evidence in Criminal Domestic Violence Cases

5.2(A) Former Testimony or Statements of Unavailable Witness

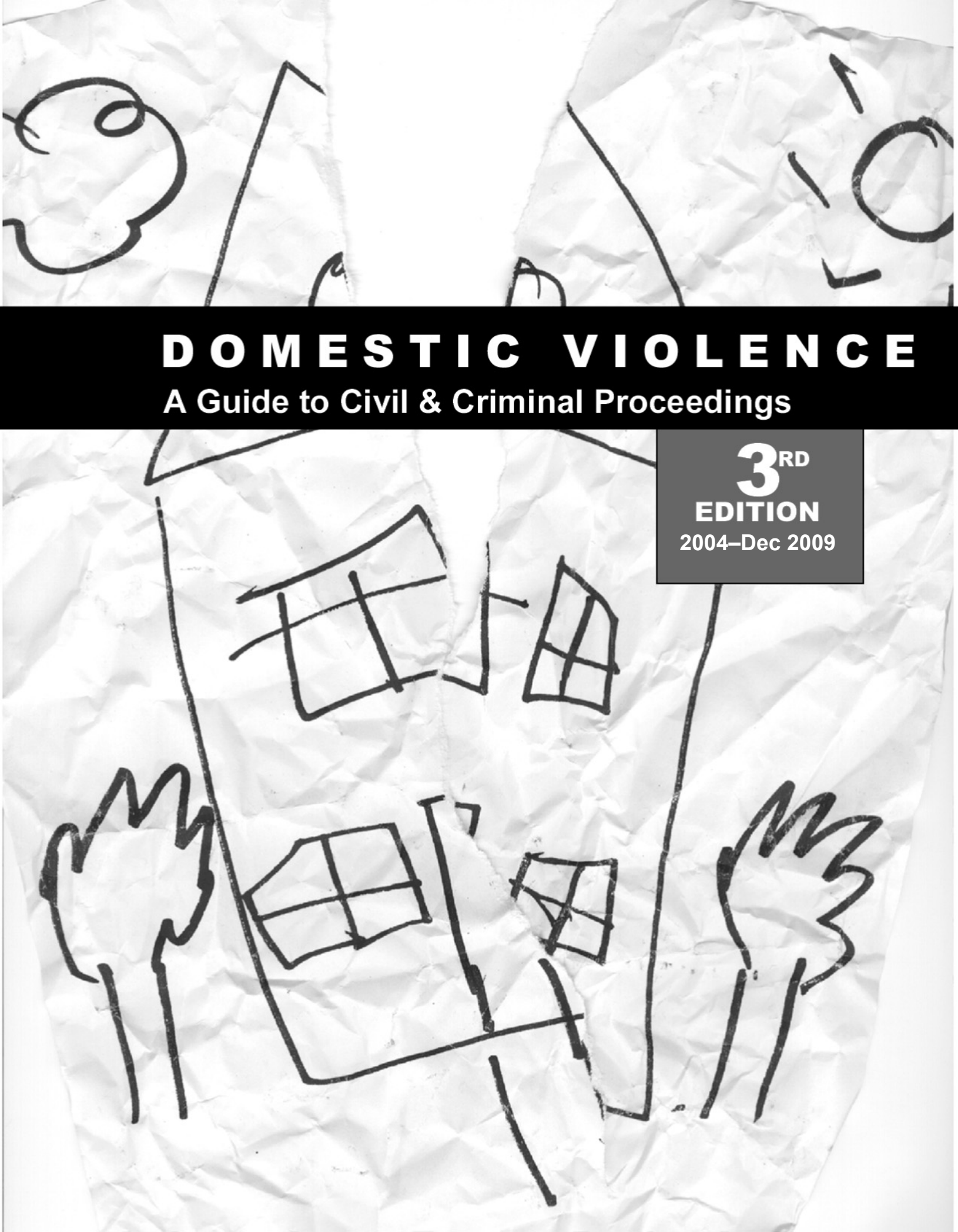
A victim's statements made for the primary purpose of identifying, locating, and apprehending a perpetrator after the crime has already occurred constitute testimonial evidence. *People v Bryant*, 483 Mich 132, 143 (2009). In *Bryant*, the victim was allegedly shot at the defendant's house and drove to a gas station where he was questioned by the police and identified the shooter as the defendant shortly before the victim died from the gunshot wound. *Bryant*, *supra* at 135-136. The Court concluded that the police questioned the victim about past events when they questioned him about a crime that had been committed 30 minutes prior to questioning and six blocks away from where it allegedly took place. *Id.* at 143. In addition, the police officers' actions did not indicate that they "considered the circumstances at the gas station to constitute an 'ongoing emergency,'" as defined by the United States Supreme Court. *Id.* at 144. For these reasons, the Michigan Supreme Court concluded that the victim's statements were testimonial in nature and should not have been admitted against the defendant at trial. *Id.* at 151.

In general, statements made by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) or other examiner may be testimonial or nontestimonial. *People v Spangler*, 285 Mich App 136, 154 (2009). To make that determination, "the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the [examiner]'s questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *Spangler*, *supra* at 154. See *Spangler*, *supra* at 155-156, for a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause.

5.14(B) Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

- *People v Smelley*, 285 Mich App 314 (2009), rev'd in part on other grounds, ___ Mich ___ (2010) (evidence of then existing mental, emotional, or physical condition)

"[A] victim's state of mind is usually only in issue in a homicide case when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 320-321 (2009). In *Smelley*, the victim's statements showing his fear of being killed by the defendant were inadmissible under MRE 803(3), where the defendant claimed he did not commit the murder. *Smelley*, *supra* at 325-327.



DOMESTIC VIOLENCE

A Guide to Civil & Criminal Proceedings

3RD EDITION

2004–Dec 2009

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Chapter 1: Understanding Domestic Abuse

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1.1 Chapter Overview

Domestic violence can impact proceedings in all of Michigan's courts. It arises in various criminal contexts ranging in seriousness from misdemeanor property offenses to murder. It can also be an important factor in civil proceedings, most notably in the area of domestic relations. In whatever context it occurs, domestic violence presents the court with unique concerns, the foremost of which is the safety of the litigants and of court personnel. These heightened safety concerns arise from the intimate relationship between the perpetrator and victim of domestic violence. This relationship increases the potential for danger in the following ways:

- Separation from an abuser does not always end the abuse. Because perpetrators of domestic abuse seek to control their intimate partners, they may resort to (or escalate) physical violence in order to regain control after a separation. Court intervention in abusive behavior may increase the abuser's sense of losing control and thus the risk of physical violence.

- Domestic abuse perpetrators typically have unlimited access to their intimate partners. A perpetrator may live with the person being abused or share parental responsibilities with that person. The perpetrator's knowledge of a partner's daily routine or whereabouts may provide

opportunities for harassment, intimidation, and physical violence that would not exist in other relationships.

- Domestic abuse typically occurs in the privacy of the home, where the only witnesses are under the abuser's control. The National Crime Victimization Survey reported that from 1993–1998, almost two-thirds of intimate partner violence against women and about half of such violence against men occurred in the victim's home.* This circumstance may make it difficult for the court to determine what events have occurred in a case.

*Rennison & Welchans, *Intimate Partner Violence,* p 5 (Bureau of Justice Statistics Special Report, May, 2000).

- Persons subjected to domestic abuse respond to it in a variety of ways that are expected for victims of trauma. These responses may appear illogical to outside observers who do not have the information to discern such behavior as an expected response to abuse.

To respond to the foregoing concerns, this chapter briefly summarizes some of the research findings on the dynamics of domestic violence, in the assumption that an understanding of this subject will help the court to promote the safety of the parties and of court personnel. The discussion assumes a heterosexual relationship with a male abuser unless otherwise indicated. It has been framed in this way because of the disproportionate number of cases in the criminal justice system involving heterosexual relationships in which the male is the abuser.* Moreover, few studies exist about violence in same-sex relationships. However, the reader should be aware that domestic abuse perpetrators can be men or women involved in heterosexual or same-sex intimate relationships and Michigan's laws against domestic abuse apply regardless of the parties' gender or sexual orientation. The reader is also cautioned that domestic violence research is a relatively new field of study. Accordingly, the reader should be alert for new information that is likely to appear after the publication date of this benchbook.

*The Nat'l Crime Victimization Survey estimates that in 1998, women were victims of intimate partner violence at a rate about five times that of men. *Id.*, p 2.

1.2 Defining Domestic Abuse

Domestic abuse has been variously defined. It is commonly understood as a pattern of actions carried out over a period of time with the aim of controlling an intimate partner. The Batterer Intervention Standards for the State of Michigan define "domestic violence" as follows:

> "Domestic violence is a pattern of controlling behaviors, some of which are criminal, that includes but is not limited to physical assaults, sexual assaults, emotional abuse, isolation, economic coercion, threats, stalking and intimidation. These behaviors are used by the batterer in an effort to control the intimate partner. The behavior may be directed at others with the effect of controlling the intimate partner." Batterer Intervention Standards for the State of Michigan, §4.1 (January 20, 1999).*

*The Batterer Intervention Standards are reproduced at Appendix C. Discussion about them appears at Sections 2.3-2.4.

According to this definition, domestic abuse is more than an occasional incident of angry name-calling, or an isolated, one-time slap or shove between a husband and wife who are frustrated with one another. Moreover, domestic abuse is not "out-of-control" behavior. Domestic abuse is one person's effort to control another using a variety of tactics that may involve both criminal and non-criminal acts. Criminal acts may include: hitting, choking, kicking, assaulting with a weapon, shoving, scratching, biting, raping, kidnapping, threatening violence, stalking, destroying property, and harming pets. Non-criminal acts may include: making degrading comments, interrogating children or other family members, threatening or attempting to commit suicide, controlling access to money, and monitoring an intimate partner's time and activities. These actions may be directed at persons other than the intimate partner (e.g., at children or associates) for the purpose of controlling the partner.

MCL 400.1501(d), which is contained in the act creating the Michigan Domestic Violence Prevention and Treatment Board, defines "domestic violence" for purposes of that act as follows:

> "(d) 'Domestic violence' means the occurrence of any of the following acts by a person that is not an act of self-defense:
>
> > "(*i*) Causing or attempting to cause physical or mental harm to a family or household member.
> >
> > "(*ii*) Placing a family or household member in fear of physical or mental harm.
> >
> > "(*iii*) causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
> >
> > "(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

MCL 400.1501(e) defines "family or household member" to include any of the following:

> "(*i*) A spouse or former spouse.
>
> "(*ii*) An individual with whom the person resides or has resided.
>
> "(*iii*) An individual with whom the person has or has had a dating relationship.
>
> "(*iv*) An individual with whom the person is or has engaged in a sexual relationship.

> "(*v*) An individual to whom the person is related or was formerly related by marriage.
>
> "(*vi*) An individual with whom the person has a child in common.
>
> "(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)."

"Dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 400.1501(b).

In this benchbook, the terms "domestic abuse" and "domestic violence" will be used interchangeably.

> **Note:** In using this benchbook, the reader should understand that Michigan statutes contain different definitions of domestic abuse that apply in particular contexts. These definitions have been cited where applicable and should be consulted in appropriate cases. In addition to MCL 400.1501(d) cited above, the following statutes should be consulted:
>
> - MCL 600.2950 regarding domestic relationship personal protection orders. See Section 6.3(A) for more information.
> - MCL 750.81 and 750.81a regarding criminal domestic assault. See Sections 3.2-3.3 for more information.

1.3 Causes of Domestic Abuse

Many researchers have suggested that domestic abuse is influenced by a combination of social and individual factors. Most characterize it as a pattern of behavior that is learned and chosen by the abuser, and encouraged or discouraged by the abuser's social environment. This section explores the role that various social factors play in the abuser's choice to use violence.

A. The Environment of Violence

This discussion addresses three circumstances noted in the research that are generally present in an environment where domestic violence is occurring.

> **Note:** This discussion is taken from the following resources: Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases,* Appendix C, p 9–14, in Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes* (Family Violence Prevention Fund, 1995); Merrill,

Ruling the Exceptions: Same-Sex Battering and Domestic Violence Theory, p 14–17, in *Violence in Gay and Lesbian Domestic Partnerships* (Renzetti and Miley, ed, Harrington Park Press, 1996); and Farley, *A Survey of Factors Contributing to Gay and Lesbian Domestic Violence*, p 36–41, in *Violence in Gay and Lesbian Domestic Partnerships, supra*.

1. The Perpetrator Has Learned to Abuse

Domestic violence perpetrators have learned that violence is an effective, legitimate means of controlling their partners. Some perpetrators have been abused as children by their parents. Others may have learned to abuse by observing violent behavior in others or by behaving violently on a trial-and-error basis, and discovering that violence is tolerated or even rewarded. Violent behavior is tolerated in various private and public settings. Familial and societal attitudes that devalue women can contribute to an environment that teaches abuse. The criminal justice system also teaches that abuse is acceptable when it fails to impose appropriate sanctions on violent behavior.

Courts can create an environment that tolerates domestic violence when they:

- Fail to identify cases where domestic violence is present.
- Fail to address safety concerns in cases where domestic violence is identified.
- Fail to impose consequences for violations of court orders.
- Blame the abused party for the abuse rather than holding the abuser accountable for it.
- Issue orders that conflict with orders issued by courts in other proceedings.
- Issue mutual protection orders.
- Issue orders that reward abusive behavior.
- Require mediation without regard to the imbalances of power and safety concerns that arise when domestic violence is present.
- Issue vague custody or parenting time orders that can be easily manipulated, or that allow the abuser to exercise control over a former partner and the parties' children.
- Require the parties to cooperate in carrying out their parental responsibilities without regard to the imbalances of power and safety concerns that arise when domestic violence is present.

2. The Perpetrator Has Found the Opportunity to Abuse

Although violent behavior can be learned from violent family members, most children who witness violent behavior do not become abusive adults. Likewise, the vast majority of men who are exposed to social attitudes that devalue women do not commit acts of violence against their domestic partners. For violence to occur, the perpetrator must also find the opportunity and social permission to "get away with it" and choose to act abusively. Opportunities for domestic violence occur in environments where it is tolerated. Abusers who believe that they will "get away with" violence against their domestic partners will have no motivation to change their behavior, particularly if they have learned that violence is effective to get them what they want in their intimate relationships. Indeed, social tolerance for domestic violence reinforces the lessons of violence by allowing abusers to succeed in controlling their intimate partners without suffering negative consequences. The criminal justice system plays a critical role in ending opportunities for abuse by treating violence against an intimate partner at least as seriously as it treats violence against a stranger.

Courts can end opportunities for abuse by:

- Restricting abusers' access to identifying information about their partners who are in hiding.
- Providing a safe environment for persons who come to the courthouse.
- Requiring the abusive party to bear the financial consequences of abuse.
- Issuing custody and parenting time orders with specific provisions that promote safety, including supervised parenting time orders.
- Requiring the abusive party to complete appropriate intervention and demonstrate change before modifying more restrictive orders for parenting time.

3. The Perpetrator Has Chosen to Abuse

Learning and opportunity alone do not produce domestic violence. The third prerequisite to violent behavior is the perpetrator's choice to engage in it. Domestic violence is a choice; it is not "out-of-control" behavior. Common abusive behavior patterns illustrate how abusers calculate their actions to avoid risk to themselves, while maximizing control over their intimate partners. Some abusers injure only those parts of their partners' bodies that are not readily seen by others. Others batter their partners instead of other people over whom they have no control, such as their employers. Many abusers will destroy their partners' possessions, while leaving their own intact. These behaviors evidence choice, not loss of control.

Courts can play a critical role in discouraging domestic abuse by treating violence between domestic partners at least as seriously as violence between

strangers. Indeed, domestic violence may be a more serious threat to the victim and society than stranger violence, for it entails an increased risk of repeat assault on the victim and the potential for long-term harm to children who witness it. When a court consistently and fairly enforces the laws against domestic violence it helps to remove opportunities for violence. When a court's orders hold abusers accountable for the harm they inflict, the court contributes to an environment in which domestic violence is just as unacceptable as any other type of violence.

B. Factors That May Accompany Domestic Violence

Domestic violence is often accompanied by circumstances such as alcohol and drug use, stress, unresolved anger, or problems with the relationship. The following discussion briefly explores the complex relationships between these factors and domestic violence.

♦ Alcohol and drug use

Although studies show a high correlation between alcohol and drug use and domestic violence, researchers have rejected a causal connection between them. Studies have found that alcohol abuse by men is associated with an increased likelihood of injury as a result of domestic violence and that abusers with a history of heavy drug or alcohol use tend to engage in intensified violence toward their domestic partners. Alcohol and drug use can lower the abuser's inhibitions and provide an excuse for "losing control." Indeed, some abusers admit to using alcohol in certain situations in order to give themselves permission to batter.*

*See Ganley, *supra*, p 11–12; Kyriacou, et al, *Risk Factors for Injury to Women from Domestic Violence,* 341 New England J of Medicine (Dec 16, 1999).

Because alcohol and drug use do not cause domestic violence, effective intervention in cases where the abuser is drug or alcohol dependent must be directed at *both* the violence and the substance abuse. See Batterer Intervention Standards for the State of Michigan, §5.1 (January 20, 1999), stating that "[t]reatment for drug/alcohol . . . problems shall not be substituted for [batterer intervention services]." Because it may intensify the severity of violence, drug and alcohol use is one of the factors to consider in assessing whether the abuser is likely to kill or seriously injure an intimate partner.*

*The Batterer Intervention Standards are reproduced at Appendix C. Discussion about them appears at Sections 2.3-2.4. See Section 1.4(B) for more discussion of lethality factors.

♦ Stress and anger

Researchers do not agree on the relationship between stress and anger and domestic violence. However, there is consensus among batterer intervention service providers that it reinforces an abuser's denial of responsibility for the abuse to emphasize lack of anger management, stress management, or communication skills as the primary cause of domestic abuse. The Batterer Intervention Standards for the State of Michigan acknowledge that abusers may benefit from learning stress or anger management skills but require batterer intervention programs teaching these skills to do so as part of a broader program that regards violence as a choice for which abusers must be held accountable. Batterer Intervention Standards for the State of Michigan, *supra*, §§7.1, 7.3(d).

♦ **Problems inherent in the relationship**

*Ganley, *supra,* p 13–14.

Abusers frequently escape responsibility for their violent choices by blaming the abuse on their intimate partners. Blaming the relationship is a variation on this theme because it gives the intimate partner at least partial responsibility for the abuse. However, most people who experience relational difficulties respond to them without violence.* Safe, effective domestic violence interventions recognize that only the abuser has the power to stop the abuse.

Stordeur & Stille, Ending Men's Violence Against Their Partners,* p 25–26 (Sage Publications, 1989); Walker, *The Battered Woman Syndrome*, p 118 (Springer, 1984).

Persons subject to domestic abuse are endangered by traditional couples counseling and family therapy modalities that require them to share responsibility for the abuse by working cooperatively with the abuser to resolve the difficulties with the relationship. These treatment methods are dangerous insofar as they place abused individuals in the position of self-disclosing information that may later be used against them by their abusers. Moreover, couples or family counseling may create opportunities for abuse by physically bringing the abuser to the same location as an intimate partner. Finally, where an abused individual is expected to work cooperatively to resolve the difficulties in the relationship, the blame for the abuse may be fixed implicitly on that individual. An abuser may feel justified in using abuse as "punishment" when the couple's difficulties continue; indeed, many domestic violence victims report assaults following couples therapy sessions.* See also Batterer Intervention Standards for the State of Michigan, *supra,* §7.3(b), discussed at Section 2.4(B).

*For more discussion of concerns with mediation, see Section 10.6.

For similar reasons, many domestic violence and batterer intervention service providers assert that mediation, community dispute resolution, and arbitration are not appropriate when domestic violence is present.* Because these interventions require equal bargaining power between the parties, they cannot operate fairly in situations involving domestic violence, where the abuser is in control. Furthermore, domestic violence cannot be a subject for negotiation or settlement between the abuser and an intimate partner because the partner has no responsibility for changing the abuser's behavior. This is particularly true where the abuse rises to a criminal level; mediation between a crime victim and perpetrator is just as inappropriate in cases involving domestic violence as it is in cases involving stranger violence. See Batterer Intervention Standards for the State of Michigan, *supra,* §7.3(c).

C. Illness-based Violence

*Stordeur & Stille, *supra,* p 24–26; Ganley, *supra,* p 11.

Most researchers regard domestic abuse as a learned, chosen pattern of behavior, rejecting the notion that it is a form of psychological or biological illness over which the abuser lacks control. In some cases, however, domestic violence may be the product of a mental illness such as psychosis or Alzheimer's Disease. Unlike cases where the violence is learned, chosen behavior, these cases truly involve a loss of control by the abuser. Illness-based violence can be distinguished from learning-based violence in several ways:*

- The perpetrator of illness-based violence does not usually select a particular, consistent victim; instead, abuse is directed at any person present when the violent impulses arise.
- Illness-based violence is often accompanied by other symptoms of disease, such as changes in speech or gait, or delusional thinking.
- Poor recall of the abuse does not necessarily indicate illness-based violence. Abusers who are not mentally ill often deny or minimize their behavior.

1.4 Understanding the Abuser — The Potential for Lethality

This section will explore some common characteristics of domestic abusers, as well as factors that are often present in situations when an abuser is more likely to kill or inflict serious physical harm.

A. Characteristics of the Abuser

Domestic violence occurs in all social groups. It is not restricted to the ranks of the impoverished, unemployed, or substance-dependent. Because it often occurs within the privacy of the home, domestic violence may be well-hidden from outside observers, including family members who are not living in the household where the abuse occurs. Indeed, many abusers appear to be devoted to their families and have positive characteristics that mask the injuries they inflict.*

*Rygwelski, *Beyond He Said/She Said*, p 11, 20–24 (Mich Coalition Against Domestic Violence, 1995).

Although there is no "typical" abuser, domestic violence perpetrators commonly exhibit certain characteristics. Some of these characteristics include:

- **Dependency and jealousy**

  Many abusers are extremely jealous and possessive of their intimate partners. Possessive abusers are emotionally dependent on their partners, which makes them susceptible to a number of conflicting emotions, including fear of abandonment, and anger at their dependence. In the context of these feelings, an abuser's behavior may be seen as an effort to prevent abandonment, or as a means of denying the need for the partner's companionship. Extremely jealous abusers may be so possessive that they are willing to kill their partners rather than face losing control over them.*

*Stordeur & Stille, *Ending Men's Violence Against Their Partners,* p 44–46 (Sage Publications, 1989). See Section 1.4(B) on other lethality factors.

- **Belief in men's entitlement to dominate women**

  Male abusers may subscribe to a rigid ideal of men's dominant role, with the accompanying belief in men's entitlement to control persons and events in the household.*

*Stordeur & Stille, *supra,* p 51–52.

- **Isolation**

Id., p 49–50.

Some abusers are psychologically and socially isolated. Isolated abusers tend to be distrustful of others, afraid of intimate relationships, and unable to share or recognize emotions other than anger. While they may have numerous contacts and acquaintances within the community, these tend to be superficial. An isolated abuser may have increased dependence on the intimate partner, along with the attendant jealous, possessive behavior.*

- **"Jekyll and Hyde" personality**

Id., p 48–49.

Most abusers are not violent all the time — their intimate partners and others often describe them as charming and lovable. The loving, caring facet of an abuser's behavior can be one means of convincing an intimate partner to stay involved in the relationship after a violent incident.*

- **Poor interpersonal skills**

*See *Id.*, p 38–41.

Many abusers may appear to be charming and lovable on the surface level, especially to those outside the family. Within the family, however, they do not demonstrate the same level of interpersonal relational skills. Abusers often use anger and violence to manage conflict or express feelings. They may confuse assertiveness with aggression and misperceive neutral communications or interactions as being threatening or insulting to them; for example, a partner's brief delay in meeting him may cause an abuser to assume that she is having an affair.*

- **Refusal to accept responsibility for the violence**

When confronted with their violent behavior, abusers commonly avoid responsibility by denying that it occurred, lying about it, minimizing its nature or significance, or blaming it on outside factors such as stress, drunkenness, or provocation from their partners. The court may hear such statements as:

*See Ganley, *Domestic Violence: The What, Why & Who, as Relevant to Civil Court Cases,* App C, p 14–16, in Lemon, *Domestic Violence & Children: Resolving Custody & Visitation Disputes* (Fam Violence Prev'n Fund, 1995).

- "It was an accident."
- "I didn't hurt anyone — I didn't even use my fist."
- "The kids didn't see it."
- "The cop didn't like me."
- "I couldn't take the nagging anymore."
- "I was drunk."
- "I've been under a lot of pressure lately, and I lost control."
- "She's having an affair. I just want to save my family."
- "I'm the real victim here."*

B. Lethality Factors

Although the National Crime Victimization Survey reports that intimate partners committed fewer murders in each of the three years 1996, 1997, and 1998 than in any other year since 1976, domestic violence perpetrators still kill their victims with alarming frequency. In 1998, the Survey reported 1830 murders attributable to intimate partners (down from 3000 murders in 1976). Fifty-three percent of these 1998 murder victims were killed by their spouses (down from 75% in 1976). Women are more likely than men to be the victims of domestic homicide. The Survey reports that women were nearly three out of four victims of the 1830 murders attributed to intimate partners in 1998.* This deadly potential requires vigilance in all cases involving domestic violence.

*Rennison & Welchans, *Intimate Partner Violence,* p 1, 3 (Bureau of Justice Statistics, May, 2000).

Assessing the lethality of a situation involving domestic violence is difficult. Domestic violence is often unpredictable. In some cases, an abuser may not "intend" to use lethal force but may miscalculate with fatal consequences. Lethal violence may occur unexpectedly without any advance warning from the abuser's behavior, or it may be preceded by one or more circumstances that serve as danger signals. In the latter case, researchers have found that certain factors can often accompany an abuser's potential for serious violence. While it is impossible to predict with certainty what a given abuser will do, the presence of the following factors can signal the need for extra safety precautions — the more of these factors that are present in a situation, the greater its danger:*

*More discussion of lethality factors appears in Batterer Intervention Standards for the State of Michigan, Appendix A (Jan 20, 1999). See Appendix C of this benchbook for the full text of the Standards.

- The couple has recently separated. Separation may cause the abuse to escalate as the abuser attempts to maintain control in the relationship.
- The abused partner (who is familiar with the abuser's behavior) believes the abuser's threats may be lethal.
- The abuser threatens to kill an intimate partner or other persons.
- The abuser threatens or attempts suicide.
- The abuser fantasizes about homicide or suicide.
- Weapons are accessible and/or the abuser has a history of using weapons.
- The abuse involves strangling, choking, or biting the intimate partner.
- The abuser has easy access to the intimate partner or to the intimate partner's family.
- The couple has a history of prior calls to the police for help.
- The abuser exhibits stalking behavior.
- The abuser is jealous and possessive or imagines the intimate partner is having affairs with others.

- The abuser is preoccupied or obsessed with the intimate partner.
- The abuser is isolated from others and the intimate partner is central to the abuser's life.
- The abuser is assaultive during sex.
- The abuser makes threats to the intimate partner's children.
- The abuser threatens to take the intimate partner hostage or has a history of hostage-taking.
- The severity or frequency of violence has escalated.
- The abuser is depressed or paranoid.
- The abuser or intimate partner has a psychiatric impairment.
- The abuser has experienced recent deaths or losses.
- The abuser was beaten as a child or witnessed domestic violence as a child.
- The abuser has killed or mutilated a pet, or threatened to do so.
- The abuser has started taking more risks or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the abuser suddenly begins to behave abusively in public settings).
- The abuser has a history of assaultive behavior against others.
- The abuser has a history of defying court orders and the judicial system.
- The intimate partner has begun a new relationship.
- The abuser has problems with drug or alcohol use or assaults the intimate partner while intoxicated or high.

One researcher has noted that the pattern of risk factors is not the same across offenders and makes a connection between a male abuser's childhood experiences and his behavior:

> "[S]ome offenders are violent only at home while others attack non-family members. The particular childhood experiences seem to be related to differing patterns of abuse and personality. In one pattern, severe physical abuse in childhood is associated with anti-social personality, a 'criminal lifestyle', a lack of remorse, violence inside and outside the home, substance abuse, and severe violence against a partner. In a second pattern, severe loss or emotional rejection in childhood is associated with borderline personality traits, fear of abandonment, jealousy, severe

> psychological abuse of one's partner, depression, and suicidality. This may be the type of offender who is most likely to stalk and kill his partner after separation, sometimes killing himself as well. In a third pattern, childhood trauma is not evident and violence is restricted to the home. The men appear to be over-controlled . . . and perfectionistic with themselves and others. They are the least likely to be severely violent and have less rigid sex role attitudes than the other types. Typology research has helped to identify the men most likely to be severely violent during and after the relationship. In addition, there are a growing number of assessment tools for uncovering indicators of lethality. The most widely used is the Danger Assessment Instrument, but others are being developed and validated, such as the Spousal Assault Risk Assessment (SARA) instrument." Saunders, *Domestic Violence Perpetrators: Recent Research Findings and Their Implications for Child Welfare*, 3 Mich Child Welfare Law J 3, 4 (Fall, 1999).

Some studies (especially those involving women in shelters or women who sought help after severe abuse)* indicate that domestic violence tends to escalate in frequency and seriousness over time, particularly where there is no effective intervention from the justice system or other social institutions. The existence of this dynamic makes it important to treat domestic violence incidents as a serious threat to the victim from their earliest manifestations — many domestic violence homicides might be prevented with early intervention against abusive behavior.

*_Id._, p 3, 5.

For many women, intimate partner violence begins during pregnancy. Pregnancy as an independent risk factor for lethal violence is under investigation. One study has reported that between 1993 and 1998, homicide was the leading cause of death among pregnant or recently-pregnant women in Maryland. In contrast, homicide was the fifth leading cause of death among non-pregnant women during the same time period. The study did not, however, report the percentage of pregnancy-associated homicides committed by intimate partners. See Frye, *Examining Homicide's Contribution to Pregnancy-Associated Deaths*, and Horon and Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality — Maryland, 1993-1998*, in 285 J of the American Medical Ass'n 1510, 1455 (March 21, 2001).

1.5 Abusive Tactics

An abuser's primary motivation is to maintain control over an intimate partner. Abusers are master manipulators who employ physical assault in conjunction with other tactics to achieve their objective. Abusers' tactics have been compared to the brainwashing tactics used against prisoners of war, which include isolation, threats, occasional indulgences, demonstrations of power, degradation, and enforcement of trivial demands. Abusers may employ similar patterns of physical, sexual, financial, and emotional coercion to control their intimate partners.* These tactics prevent abused persons from leaving a relationship. In addition to physical assaults or threats, abusers' control tactics may include:

*Walker, *The Battered Woman Syndrome*, p 27–28 (Springer, 1984); Graham & Rawlings, *Bonding with Abusive Dating Partners: Dynamics of Stockholm Syndrome,* in *Dating Violence: Young Women in Danger*, p 121–122 (Levy, ed, Seal Press, 1991). A chart illustrating abusive tactics appears in Section 1.8.

- **Emotional abuse**

  Emotional abuse may consist of isolating an intimate partner from family and friends, making degrading remarks, blaming the partner for the abuse, constantly monitoring the partner's activities, stalking, playing "mind games," making and enforcing extensive, egregious rules, and threatening suicide if the partner leaves the relationship.

- **Using children as vehicles for abuse**

  Abusers frequently involve their partners' children in their efforts to assert control. Some abusers kidnap, sexually abuse, or physically harm their partners' children, or threaten to commit one of these acts. Others initiate or threaten to initiate court proceedings to remove the children from their partners' homes or use court-ordered parenting time as an opportunity to harass their partners. Abusers may also force children to act as informers or to deliver threats.

- **Controlling the finances**

  An abuser may maintain control in a relationship by limiting a partner's access to the couple's money. An abuser may also prevent the partner from participating in job training or from getting or keeping a job. This interference with economic independence makes financial abuse a major obstacle to leaving a relationship.

- **Sexual abuse**

  This form of abuse includes rape, forced sexual acts, verbal degradation, forced sexual contact in front of the children, threats to find another partner if sex is refused, and injury to the sexual areas of the body. Sexual abuse may also include the abuser's refusal to take appropriate precautions against unwanted pregnancy or sexually transmitted diseases.

Abusers may extend their controlling tactics to situations within the courtroom. Such tactics may be employed before, during, and after court proceedings to demonstrate control and to manipulate the court's response to the abuser. The following list gives examples of abusive tactics that court personnel may encounter:*

- Physical assaults or threats of violence against the abused person, those providing refuge, and others inside or outside the courtroom.
- Threats of suicide.
- Threats to take the children.
- Harassment intended to coerce the abused person to dismiss proceedings or to recant previous testimony.
- Following an intimate partner in or out of court.
- Sending an intimate partner notes or "looks" during proceedings.
- Bringing family or friends to the courtroom to intimidate the abused person.
- Long speeches about how an intimate partner "made me do it."
- Statements of profound devotion or remorse to the intimate partner and to the court.
- Repeated requests for delays in proceedings.*
- Requests for changes of counsel or failure to follow through with appointments of counsel.
- Intervening in the delivery of information from the court to the abused person so that the abused person will be unaware of when to appear in court.
- Continually testing the limits of parenting time or support arrangements, e.g., arriving late or not appearing at appointed times.
- Requests for mutual orders of protection as a way to continue control over the abused person and to manipulate the court.*
- Threats and/or initiation of custody fights to gain leverage in negotiations over financial issues.
- Assertions that the abusive individual is actually the "victim" in the case.
- Initiating retaliatory litigation against the abused person or others who support the abused person.
- Enlisting the aid of parent rights groups to verbally harass the abused person (and sometimes courts) into compliance with demands.
- Using any evidence of the effects of the abuse as evidence that the abused person in an unfit parent.

*From Tennessee Domestic Abuse Benchbook, p 23–24 (Tenn Task Force Against Domestic Violence, 1996). See also Zorza, *Batterer Manipulation & Retaliation in the Courts,* 3 Domestic Violence Report 67 (June/July, 1998). Threats by an abuser may indicate an actual high risk that the abuser will carry out the threatened behavior.

*See *Ostevoll v Ostevoll,* 2000 U.S. Dist. LEXIS 16178 (SD Ohio, 2000) for an example of this type of conduct.

*Mutual personal protection orders are not permitted under Michigan law. See Section 6.3(A)(2).

The court can take steps to intervene in abusive courtroom tactics, as follows:

- Develop a safe waiting area in the courthouse. MCL 780.757 and 780.817 provide that in criminal proceedings regarding felonies or serious misdemeanors, "[t]he court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings."*
- Call cases involving domestic violence as early as possible on the court calendar.
- Communicate that the court takes evidence of domestic violence seriously.
- Require the abusive party to remain in the courthouse until the abused party has left the building.
- Be alert for multiple court actions or orders concerning the same parties.
- Meet separately with the parties to a relationship where domestic violence is present.

*Serious misdemeanors are defined in MCL 780.811(a). They include stalking, assault and battery, aggravated assault, illegal entry, and discharging a firearm aimed intentionally at a person. Serious misdemeanors also include violations of MCL 750.145d, using the internet or a computer to make a prohibited communication, and violations of MCL 750.233, intentionally aiming a firearm without malice. MCL 780.811(1)(a) (*vii*) and (*viii*).

1.6 Living with Abuse

A. Responses to Abuse

Women who are subject to domestic abuse exhibit no specific "personality profile" that differentiates them from other women. Indeed, research indicates that many commonly-noted responses to domestic abuse are logical under the circumstances. For example, some research shows that abused women leave and return to abusers many times before making a final break with the relationship.* This research notes a progression in some situations:

*See Schechter & Ganley, *Domestic Violence: A National Curriculum for Family Preservation Practitioners,* p 93–94 (Family Violence Prevention Fund, 1995).

- Some women do not leave after a first assault even though they disapprove of the violence. They may see the abuse as an aberration and remain with the abuser to work on the relationship. Alternatively, they may be afraid to leave the relationship for fear the violence will escalate.

- If the violence continues, some women may leave for a few days to gain immediate safety, to think about the relationship, or to get the perpetrator to stop. At this stage, the perpetrator may respond by pursuing the partner, promising to change, apologizing, or trying to reform. Women at this stage may perceive that they have achieved

their goal. They may leave and return several times and try various other strategies (including court intervention) in the hopes of improving the relationship.

- Later, women may leave and return without any hope of change. They may return due to one or more obstacles to leaving permanently, such as lack of housing or job skills. These obstacles are discussed in more detail below.

Researchers noting this progression have observed that the women's behavior at each state is logical, pointing out that ambivalence over leaving an important relationship is normal. Indeed, leaving any important life relationship is a process for most people.

Abused individuals may also display some of the same expected responses to trauma that survivors of other life-threatening situations display.* Responses to trauma may include:

*Saunders, *Domestic Violence Perpetrators: Recent Research Findings & Their Implications for Child Welfare,* 3 Mich Child Welfare Law J 3, 4 (Fall, 1999). Some of the listed responses to trauma appear in *New Service Provider Training Manual & Resource Guide,* p 27 (Mich Coalition Against Domestic & Sexual Violence, 1999).

- Shock.
- Disbelief.
- Fear.
- Withdrawal.
- Confusion.
- Panic or excitement.
- A belief that "everything will be okay."
- Minimization or denial of the traumatic events, or reluctance to discuss what has happened.
- Rationalizing or taking responsibility for what has happened.
- Posttraumatic stress disorder.
- Depression.

B. Coping and Survival Strategies

Persons who are subject to domestic abuse use active strategies for surviving the experience. Strategies for surviving domestic abuse vary, depending upon the abused individual's personal characteristics and the nature of his or her social environment. Some individuals may appear to be no different from those not experiencing violence, having adopted behavior that conceals the abuse they suffer. Others may engage in behavior that appears illogical or erratic to outside observers. Most researchers believe that such behavior is best understood as a logical survival or coping response to the abuse.* Abused

*Walker, *The Battered Woman Syndrome*, p 7–10, 33 (Springer, 1984).

individuals may employ some of the following common survival or coping strategies:

♦ **Minimizing or denying the violence**

Like abusers, some abused persons may minimize or deny the violence in their lives. They may deny or minimize the violence in the abuser's presence or in public settings (such as court proceedings) in order to protect themselves from further retaliatory violence. Abused persons may also minimize their experiences with violence or their emotional responses to it to survive the emotional trauma they suffer.*

*Douglas, *The Battered Woman Syndrome,* in Domestic Violence on Trial, p 43 (Sonkin, ed, Springer, 1987).

♦ **Taking responsibility for the violence**

Instead of objecting to the violence against them, some abused persons may blame themselves for it. In doing so, these individuals focus on their own perceived failings as a cause of the abuse, rather than on the abuser's choice to use violence. This attitude may arise because the abuser has convinced the abused person to take the blame, or because the abused person has submitted to the abuser's exercise of control in the relationship.* Taking responsibility for the violence may give some victims a sense of control over it. These victims believe that if they change the behavior that seems to be causing the violence, it will stop.

*Rygwelski, *Beyond He Said/She Said*, p 25 (Mich Coalition Against Domestic Violence, 1995).

♦ **Using alcohol or drugs**

Persons subject to abuse may use alcohol or drugs as a means of numbing the effect of the violence; one researcher notes that substance abuse problems are likely to be consequences of abuse rather than precursors.* If the abuser is alcoholic or drug dependent, the intimate partner may be forced to join in the use of these substances to prevent abuse. Some abused persons receive prescription medication from their physicians as a means to cope with the anxiety resulting from the abuse. These medications may impair the ability to judge the dangerousness of an abusive situation or to seek protection.

*Saunders, *supra,* p 3, 5, See also Douglas, *supra*.

♦ **Self defense**

Persons subject to domestic abuse often act to defend themselves or their children. A recent analysis of data on crimes by current or former spouses, boyfriends, or girlfriends published by the Bureau of Justice Statistics reported that 77% of female victims of nonlethal intimate violence actively defended themselves.* Of these, 43% tried to escape from the offender, called the police or other help, or used other non-confrontational means of self-defense. Thirty-four percent confronted the offender by struggling, shouting, chasing or other means without a weapon (30%) or with a weapon (4%).

*Greenfeld, et al, *Violence by Intimates,* p 19 (Bureau of Justice Statistics, 1998). The data in the analysis were collected between 1992–1996.

♦ **Seeking help**

Many people who suffer domestic abuse actively seek help, often without success. Justice system professionals may not recognize the validity of an individual's efforts to obtain help from sources outside the "system";

however, these "informal" sources of assistance may be the first to which an abused individual turns. It is important to note that an individual's help-seeking behavior often depends upon the responses they have received or observed in the past.

♦ Remaining in the relationship

Leaving any important relationship is difficult. Leaving an abuser can have serious physical consequences for the abused person. In response to their partners' efforts to leave, many abusers will escalate the physical violence — often to lethal levels — as they seek to reassert control in the relationship.* When seen in this light, the seemingly illogical decision to stay with an abuser makes sense as a survival tactic.

*Recent separation from the abuser is a lethality factor. See Section 1.4(B).

The threat of death or serious injury upon separation from the abuser is not the only obstacle to leaving a relationship where domestic violence is present. Individuals trapped in such relationships often face other formidable barriers to escape, including:*

*The listed obstacles are taken from Jones, *Why Doesn't She Leave?* 73 Mich Bar J 896 (1994); Ganley, *Domestic Violence: The What, Why & Who, as Relevant to Civil Court Cases,* Appendix C, p 20–25, in Lemon, *Domestic Violence & Children: Resolving Custody & Visitation Disputes* (Family Violence Prevention Fund, 1995).

- Concern for the children's welfare.
- Lack of employment skills, or financial dependence on the abuser.
- Lack of housing upon leaving the relationship.
- Inability to afford legal assistance with divorce, custody, or protection order proceedings.
- Fear of the court system's intervention.
- Fear of losing custody of the children if the violence is reported or revealed in divorce proceedings. Some abusers deliberately give their partners misinformation about their legal rights to prevent them from seeking legal recourse.
- Isolation from the social or family connections that could otherwise provide support after leaving the relationship.
- Acceptance of the blame for the abuse. Some abused individuals attempt to change in the hopes that the abuse will stop.
- Belief in the abuser's expressions of remorse and promises to change.
- Lack of self-confidence caused by believing statements made by the abuser such as, "You are worthless without me," or "Nobody cares about you but me."
- Religious or cultural constraints. If a woman believes that her male partner must be the dominant figure in her household, she may regard his abuse as an acceptable extension of his dominance. Under this family concept, she may believe that her efforts to escape are inappropriate. She may also believe that if she ends the

relationship in order to escape the abuse, she will lose her connection with her religious or cultural community.

Note: Lesbian and gay individuals may stay with abusive intimate partners for the same reasons as heterosexual individuals stay, e.g., financial dependence, fear of retaliation, fear of court intervention, and lack of will to resist the violence. Due to society's reluctance to accept same-sex relationships as legitimate, social isolation may be felt more intensely by many abused gay and lesbian individuals. Gay and lesbian individuals may be reluctant to seek outside intervention in an abusive relationship because they fear discrimination by criminal justice authorities or public exposure as members of the lesbian or gay communities. See Elliott, *Shattering Illusions: Same-Sex Domestic Violence*, p 5-7.

Some researchers working with abused individuals have noted a survival response to abuse known as the "Stockholm Syndrome." This dynamic was first noticed in 1973 after hostages in a bank holdup in Stockholm, Sweden, bonded with the captors who had held them for six days. Based on studies of this group and other hostage groups (including battered women), researchers have suggested that bonding to an abuser or captor may be an instinctive survival function for individuals who:

- Perceive a threat to survival and believe that their captor is willing and able to carry out the threat;
- Perceive a small kindness from the captor within the context of the terrifying experience;
- Are isolated from the perspectives of persons other than their captors; and
- Believe they cannot escape.

The effect of the foregoing conditions on the captive individual has been described as follows:

"As a result of being traumatized, the victim needs nurturance and protection. Being isolated from others, the victim must turn to her abuser for the needed nurturance and protection if she turns to anyone. If the abuser shows the victim some small kindness, this creates hope in the victim, who then denies her rage at the terror-creating side of the abuser — because this rage would be experienced as overwhelming — and bonds to the positive side of the abuser. With the hope that the abuser will let her live, the victim works to keep the abuser happy, becoming hypersensitive to his moods and needs. To determine what will keep the abuser happy, the victim tries to think and feel as the abuser thinks and feels. The victim therefore (unconsciously) takes on the world view of the abuser. Because so much is at stake, namely her

survival, the victim is hypervigilant to the abuser's needs, feelings and perspectives. Her own needs (other than survival), feelings and perspectives must take second place to the abuser's. Also, the victim's needs, feelings and perspectives can only get in the way of the victim doing what she must do to survive: they are, after all, feelings of terror. Therefore, the victim denies her own needs, feelings and perspectives." Graham and Rawlings, *Bonding with Abusive Dating Partners: Dynamics of Stockholm Syndrome,* in *Dating Violence: Young Women in Danger*, p 121–122 (Levy, ed, Seal Press, 1991).

C. Survival and the Court System

Efforts to survive or cope with domestic violence may appear in many forms in court proceedings. An abused individual may:

- Publicly agree with the abuser's denial or minimization of a violent incident.
- Avow love for the abuser.
- Make statements supporting the abuser.
- Flee the jurisdiction, along with the children.
- Abandon proceedings.
- Agree to unfair property settlements or support provisions.
- Agree to what outsiders see as unsafe provisions for child custody or parenting time.

Although the foregoing actions may seem illogical to observers outside of a relationship, they make sense if they are regarded as survival tactics and normal human responses to trauma.* Persons subject to domestic violence know their abusers better than anyone else, and they choose active strategies to minimize injury based on past success. Although the strategies above may not be to the long-term advantage of an abused person, many such individuals are so involved in a day-to-day struggle to preserve their own lives and the lives of their children that they cannot focus on the long-range effects of the violence, or on the task of forging a new life apart from the abuser. Accordingly, they are likely to view a court proceeding only in terms of its immediate effect upon their safety. The following discussion explores some of the specific concerns that affect domestic violence victims during court proceedings.

*Ganley, *supra,* p 23; Rygwelski, *supra*, p 26.

1. Coercion

Abused individuals may be unable to protect their interests in court proceedings due to a legitimate fear of death or injury at the hands of an abuser.* Abusers frequently coerce their intimate partners to remain silent

*See Section 1.4(B) for a list of lethality factors.

about the violence, either by injuring them so that they cannot speak, or by threatening them with death or injury. Coercive threats may also extend to others who associate with an abused person. The following factors may indicate coercion:

- The abused person appears in court with the abuser to request that court proceedings be terminated.
- One attorney appears in court to act on behalf of both the abuser and the abuser's intimate partner.
- The abuser has a history of past violence.

If any of these factors is present (or any other suspicious circumstance), the Advisory Committee for this chapter of the benchbook recommends that the court obtain more information about the parties' situation before taking action. See Section 10.3 of this benchbook for a discussion of strategies for identifying cases in which violence or coercion is present.

2. Uncertainty About the Court's Intervention

An abused person's past experience with the court system may contribute to the perception that the court will neither stop the violence nor offer adequate protection from injury. The following factors can erode the confidence of persons who are subject to abuse:

- Procedural delays. For a case illustrating how delays can put an abused individual at risk of harm and discourage participation in court proceedings, see *People v Adams*, 233 Mich App 652 (1999). In this case, the defendant was charged with assault with intent to murder his former girlfriend. The complainant appeared to testify at a preliminary examination that was adjourned and rescheduled. After the adjournment, the mother of defendant's new girlfriend shot at the complainant. After this incident, the complainant reluctantly testified at the rescheduled preliminary examination. However, on the morning of defendant's trial, she was upset and nervous about testifying against defendant. She abruptly left the courthouse without warning or notice before proceedings began, making her unavailable to testify. The trial court refused to admit the complainant's preliminary examination testimony into evidence at trial.* Finding this decision erroneous, the Court of Appeals made the following comment:

  > "Although neither this Court nor the trial court has a statement or affidavit from the complainant explaining why she left the courthouse, her absence coupled with the type of crimes with which defendant was charged and her statements during the preliminary examination regarding the threats to her by others connected to defendant paint a fairly vivid picture. They do not, as the trial court surmised, equally support the conclusion that she wanted

*The evidentiary issues in *People v Adams* are discussed at Section 5.2(A).

> to 'drop the charges.' We are cognizant that all too often, the victims of domestic assault and abuse are fearful and reluctant to assist in the prosecution of their assailants, often as a result of a defendant's or his family's intimidation tactics or out of fear of future reprisals. These fears are too often justified. We cannot simply conclude that the complainant's last-minute decision to silently leave the courthouse was motivated by her belief that defendant would not be prosecuted without her testimony or that by leaving she would not face his wrath in the future. To the contrary, our experience in these matters makes us more likely to believe that her departure was motivated by self-preservation rather than a change of heart." 233 Mich App at 658.

- Complex court proceedings.
- Discourteous court employees.
- Misinformation about the court system given by the abuser, uninformed service providers, or others.
- Vague, easily manipulated court orders that provide opportunities for further abuse.
- Court employees' disbelief that abuse is occurring.
- Court orders that require the abused person to cooperate with the abuser or to have regular personal contact with the abuser.
- Court orders that reward abusive tactics (e.g., awarding custody of children to an abusive parent because the abused parent cannot stop the abuse, rather than requiring the abusive parent to stop the abuse as a prerequisite to gaining access to children).
- Conflicting orders in criminal, personal protection, and civil court proceedings.
- Recurrence of violence despite the issuance of court orders restraining the abuser.
- Failure of law enforcement officers to arrest abusers who violate court restraining orders.
- Failure of prosecutors to prosecute domestic violence offenses.
- Failure of courts to impose appropriate sanctions for domestic violence offenses.
- Court orders that punish protective actions taken by the abused person, characterizing these actions as antagonistic or "unfriendly" to the abusive party.

A court can address the fears of abused persons in a number of ways:

- To the extent possible, maintain the confidentiality of information in court documents that would identify the abused person's whereabouts if that person is in hiding from the abuser and there is a reasonable apprehension of acts or threats of physical violence or intimidation by the abuser.
- Provide for expedited proceedings in cases involving domestic violence.
- Provide domestic violence training for court personnel.
- Provide clear information about court proceedings to unrepresented parties.
- Craft specific, readily-enforceable orders tailored to address the abused person's safety concerns.
- Craft consistent orders in criminal, domestic relations, and personal protection proceedings.
- Craft orders that hold the abuser accountable for the abuse.
- Work with other units of the court system and with social service agencies to develop a clear, coordinated policy for situations involving domestic violence.

3. Effects of a Criminal Conviction on the Family

An abused individual's interactions with the criminal justice system may be influenced by a fear of the social stigma or economic hardship that can result from a criminal conviction of the abuser. An incarcerated abuser will not be able to provide financial support for the family and may experience difficulty in finding employment after the prison sentence has been completed. Furthermore, certain types of criminal convictions mandate a family's eviction from a federally-subsidized residence and may keep low-income people from being approved for assisted housing in the future. See, e.g., 24 CFR 882.413 and 982.553, which permit a Public Housing Authority to deny assistance to an applicant or terminate assistance to a participant family if any member of the family commits any "[v]iolent criminal activity." "Violent criminal activity" can encompass acts constituting domestic violence; it is defined as "any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force against the person or property of another." 24 CFR 5.100. A more complete discussion of this question appears at Doig & Simons, *Civil Consequences of Criminal Convictions for Low-Income Defendants,* 24 Criminal Defense Newsletter 1 (State Appellate Defender Office, December 2000).

D. Prosecutorial Discretion and the Absent Witness

The prosecutor has exclusive authority to decide whether to go forward with the prosecution of a crime in the absence of the complaining witness. *People v Williams*, 244 Mich App 249, 252-253 (2001). In this case, the defendant was charged with assault with intent to do great bodily harm less than murder and third-offense habitual offender. The complainant was his girlfriend, who testified at his preliminary examination that she was severely beaten and sustained a broken nose, a broken jaw, and fractures of numerous other facial bones at his hands. She also testified at a pretrial evidentiary hearing, describing two prior incidents when the defendant had beaten her. During that testimony, she stated repeatedly that she did not want the defendant prosecuted for the instant assault. She was subpoenaed to appear at trial but failed to do so. The prosecutor requested a continuance or permission to use her former testimony at trial. The trial court denied both requests, concluding:

> "This is not really what I would consider a public crime. This is a private crime . . . . But I think that [the complainant] also has some rights too. This man has rights. [The complainant] has rights. If [the complainant] wants to commit suicide and not prosecute this fellow, then that's her right, too, and I'm going to dismiss this case." 244 Mich App at 251, n 1.

The prosecutor appealed and the Court of Appeals reversed, finding that the trial court had usurped the prosecutor's exclusive authority to decide whom to prosecute:

> "The trial court relied on the notion that because the victim and defendant were involved in a personal relationship, this assault amounted to a private, rather than a public, crime. The trial court further opined that it was the victim's right to have the charges dismissed because she had evidenced a desire not to proceed. This is a notion that has pervaded those criminal cases that are commonly known as domestic assaults, but is a rationale that is unsupported by the law.
>
> "Our Legislature enacted the Michigan Penal Code to . . . define crimes and prescribe the penalties for crimes. [Citations omitted.] In other words, as a matter of public policy, the code defines what acts are offenses against the state. The authority to prosecute for violation of those offenses is vested solely and exclusively with the prosecuting attorney. Const 1963, art 7, §4; MCL 49.153. A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. [Citations omitted.] The prosecution is not for the benefit of the injured party, but for the public good. Crimes not only injure the victim, but society in general, and the conviction of a crime results not only in a sentence enumerating the punishment

in quantitative amounts, but also carries with it society's formal moral condemnation." 244 Mich App at 252-253.

In so holding, the Court of Appeals acknowledged that crime victims have statutory and constitutional rights under Const 1963, art 1, §24 and MCL 780.751 et seq. However, these rights do not encompass the authority to "determine whether [the Penal Code] has been violated or whether the prosecution of a crime should go forward or be dismissed." 244 Mich App at 254.

1.7 Domestic Abuse and Children

*Rennison & Welchans, *Intimate Partner Violence,* p 6 (Bureau of Justice Statistics, May, 2000).

The National Crime Victimization Survey reports that between 1993 and 1998, children under age 12 lived in 43% of the households where domestic violence occurred.* This section explores how children are exposed to adult domestic abuse and how it affects them.

A. How Children Are Exposed to Adult Violence

Children are exposed to adult domestic violence in various ways:

- They witness it.
- They are used by the abuser to maintain control in the adult relationship.
- They suffer physical consequences that accompany the adult violence.

1. Witnessing the Violence

*Hart, *Children of Domestic Violence: Risks & Remedies,* Child Protective Services Quarterly (Pittsburgh Bar Ass'n, Winter, 1992); Walker, *The Battered Woman Syndrome*, p 59 (Springer, 1984).

Although parents often minimize or deny the presence of children during violent incidents, studies show that up to 90% of children are aware of domestic violence when it occurs in their households. Children perceive the adult violence in their homes in a variety of ways. They may be eyewitnesses to all or part of a violent incident, or they may catch a fleeting glance of it. They may hear the sounds of abuse — the screaming or crying, the breaking glass, the impact of the blows. Children can also see a parent's tears, along with the blood, bruises, torn clothing, splintered furniture, and broken glass that evidence abuse after an incident has occurred. Finally, children notice the tension between the adults — they may see their mother jump when her abuser's car pulls in the driveway or when the abuser enters the room.*

2. Using Children to Maintain Control in the Adult Relationship

A common tactic of domestic abusers is to use the children in the household to control their intimate partners.* Domestic abusers are likely to:

*Ganley, *Domestic Violence: The What, Why & Who, as Relevant to Civil Court Cases,* Appendix C, p 27, in Lemon, *Domestic Violence & Children: Resolving Custody & Visitation Disputes* (Fam Violence Prevention Fund, 1995).

- Interrogate the children about the abused parent's activities.
- Force the abused individual to always be in the company of a child.
- Take the child away after a violent episode to prevent the abused individual from fleeing.
- Threaten violence against the child, or against a pet or object that is important to the child.
- Encourage the child to participate in the physical or emotional abuse of the abused individual.
- Isolate the child along with the abused individual.
- Manipulate the children through gifts or promises of activities.
- Coerce the abused individual to remain in the relationship for the sake of the children.

Because domestic violence may escalate when the abused individual attempts to leave the relationship, it should not be assumed that separation from the abuser will be sufficient by itself to protect the children from the violence.* The following abusive tactics may be employed after a separation:

*See Section 1.4(B) on separation violence.

- Engaging in lengthy battles over custody or parenting time.
- Detaining or concealing children.
- Abducting the children, or holding them hostage.
- Using parenting time to interrogate the children about the abused parent or to blame the abused parent for the separation.
- Using parenting time to abuse the children.
- Demanding unlimited access to the children.
- Making abusive contacts with the abused parent's home or workplace under the pretext of arranging for access to children.

3. Physical Consequences of Violence for Children

Children living in homes where domestic violence occurs are at increased risk for suffering bodily injury. Such injury may be unintentional, occurring during the adult violence. Some children are harmed when they intervene to defend or protect a parent. Assaults on parents who are holding young children in their arms often result in injury to the children as well as the

*Ganley, *supra*, p 26.

parents. Children can also be struck by furniture or other objects thrown by adults during an assault.*

*Rennison & Welchans, *supra*, p 8; Richie, *The Impact of Domestic Violence on the Children of Battered Women,* Children's Aid Soc Nwsltr, p 3 (Spring, 1992).

Adult domestic violence can have other devastating physical consequences for children beyond bodily injury. Domestic violence can deprive children of housing, schooling, or medical care. As noted in Section 1.6(C)(3), a criminal conviction arising from domestic violence can lead to a family's eviction from federally-subsidized housing. Moreover, flight from domestic violence often leads to homelessness among children and their abused parent and is a primary reason why adolescents run away from home.* Because abusers sometimes find partners who are in hiding by obtaining addresses from children's school or health care records, some abused individuals are reluctant to enroll their children in school or to seek medical care for them out of fear that the abuser will discover their whereabouts.

*See Zorza, *Batterer Manipulation & Retaliation in the Courts,* 3 Domestic Violence Report 68, 75 (June/July, 1998); Saunders, *Domestic Violence Perpetrators: Recent Research Findings & Their Implications for Child Welfare,* 3 Mich Child Welfare Law J 3 (Fall, 1999).

Children in homes where domestic violence occurs can also face dislocation at the hands of the court or child protection system, which may remove them from an abused parent's care — or terminate parental rights — due to a "failure to protect" them. Some domestic violence experts assert that the removal of children from the home on this basis is often founded on faulty assumptions,* namely:

- The abused parent is principally responsible for the safety of the children. This assumption reinforces abusive behavior by placing the blame for it on the abused individual, thus allowing the abuser to escape responsibility for the negative consequences of the violence.
- The abused parent has the power and resources to protect the children. This assumption overlooks abusers' control of the choice to behave violently toward their intimate partners and their deliberate use of physical and psychological tactics to incapacitate their intimate partners.
- The abused parent has not tried to protect the children. An abused person's efforts to protect children may have been ineffective (or perceived as ineffective) because they were met by a less-than-helpful criminal justice or social systems response or did not involve a systems response.
- An allegation of failure to protect may induce an abused individual to leave the abuser. This assumption does not account for the fact that the abused individual and the children may be at increased risk after separating from the abuser. (On separation as a lethality factor, see Section 1.4(B).)

Domestic violence experts suggest that a more effective way to protect children from adult violence is to protect the abused parent by intervening in the abuser's exercise of power and control and insisting that the abuser take responsibility for the violence. Balanced against this consideration, however,

is the reality that some battered parents are so trapped in their circumstances that they cannot adequately care for their children. To address these dual concerns, Michigan's Children's Protective Services has promulgated a policy and best practices guideline that states:

> "Prior to substantiating neglect against a non-offending caretaker of domestic violence, based on failure to protect a child, the worker must assess whether the child was harmed or was/is at imminent risk. If the child was not harmed and/or is not at imminent risk, a substantiation of neglect based on failure to protect will not be made against the non-offending caretaker." Cited in Cain and Hagen, *Protecting Children and Their Mothers*, 3 Mich Child Welfare Law J 12 (Fall, 1999).

Under Michigan's Children's Protective Services policy and best practices guidelines, domestic violence in and of itself does not constitute child maltreatment:

> "A complaint in which the only allegation is domestic violence is not a sufficient basis for accepting the complaint for investigation. A complaint which alleges domestic violence must include information indicating that the domestic violence is causing harm or threatened harm to the child in order for the complaint to meet statutory parameters for CPS involvement . . . . In situations where a child is a witness to domestic violence and there are resulting observable behavioral changes in the child, an investigation should be conducted." Cited in Cain and Hagen, *supra*, p 14.

The Child Protection Law defines child neglect to include "[p]lacing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk." MCL 722.622(j)(*ii)*.* For cases discussing the question whether domestic violence subjects a child to physical or mental harm, see *In re Miller*, 182 Mich App 70, 80 (1990) ("Evidence of violence between parents in front of the children is certainly relevant to showing . . . that the home is an unfit place for children by reason of criminality or depravity"), and *In re Sours Minors*, 459 Mich 624, 634–636 (1999) (trial court was not justified in terminating the mother's parental rights because her child was injured in an altercation between the parents, where the mother had separated from the father and there was not sufficient evidence that the mother's new partner was abusive).

*See *Child Protecitve Proceedings Benchbook — Third Edition* (MJI, 2006-April 2009), Section 2.1(B).

On the connections between domestic violence and child abuse, some researchers have noted that men who batter are at a "fairly high risk to physically abuse their children," while battered women are "much less likely than their partners to abuse their children (50% versus 25% in one national study) and their anger toward the children decreases when they are out of a violent relationship." Saunders, *supra*, p 5. See also Cain and Hagen, *supra*,

p 11, noting studies showing that 40% to 60% of homes with wife abuse also have child abuse present in the home, and that 30% to 59% of mothers of abused children are battered women. For a case involving spousal abuse in which the court considered the accompanying risk of child abuse in reaching a determination regarding access to children, see *Walsh v Walsh*, 221 F3d 204, 220 (CA 1, 2000). This case is discussed in detail in Section 13.18(C).

B. Effects of Adult Violence on Children

*Jackson, *Intervention with Children Who Have Witnessed Abuse,* p 4–5 (House of Ruth, Baltimore, MD, 1996); Ganley, *supra,* p 28–29.

Whether they witness the abuse or are abused themselves, children suffer from involvement with adult domestic violence. In addition to causing physical injury, domestic violence can have a profound impact on children's core beliefs about themselves, those in authority, and those with whom they have intimate relationships. The trauma and anxiety it produces can impede children's development by preventing them from forming healthy emotional attachments with others and derailing their efforts to learn basic social skills. This devastating emotional, cognitive, and behavioral damage can be manifested even after a child reaches adulthood. The following discussion explores some specifics of these effects.*

♦ Emotional Effects

*See Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse,* 39 Social Work 51, 52–53 (1994), and Crites & Coker, *What Therapists See That Judges May Miss,* Judges' Journal, 9, 11–12 (Spring, 1988).

Domestic violence terrorizes children. Once a violent incident has occurred, children may experience pervasive anxiety that another attack is imminent. They may feel rage at both the abuser and the abused parent, or confusion, guilt, shame, and helplessness. If the family is separated as a result of the abuse, children often experience grief and depression.*

♦ Cognitive Effects

Domestic violence teaches children that violence is effective behavior. Children in homes with a heterosexual male abuser may learn that men are aggressive and domineering, while women are powerless and deserving of abuse. They may learn that they and their mothers are worthless and that adults cannot be trusted. Children exposed to domestic violence may learn to equate caring with abuse. They frequently believe that they are to blame for the abuse, particularly if some of the parental conflict involves child care issues. This belief is reinforced when the abuser tells the children that the abused parent deserves the abuse or that it is occurring for the family's own good. If children are threatened or punished when they disclose the violence in their homes, they may learn to be deceptive and indirect in their communication with others.

♦ Behavioral Effects

Domestic violence can cause developmental delays in children. Children in households where violence occurs may experience delayed development of speech, motor, and cognitive skills. Anxiety over their family situation may interfere with their ability to function in school or cause learning disabilities. Conversely, domestic violence may cause a child to "over-achieve." Children in homes where domestic violence is present may also develop complaints such as insomnia, diarrhea,

bedwetting, or frequent illnesses. Some children experience eating or sleeping disorders, withdrawal, over-compliance, clinginess, aggression, destructive rages, detachment, regressive behavior, a fantasy family life, or thoughts of suicide.

A few children turn to violent behavior themselves as a result of observing adult domestic violence. An Oregon study reported that 68% of the delinquent youth in treatment programs had witnessed their mother's abuse and/or had been abused themselves. These youth had committed such crimes as arson, assault, rape, and murder. Ninety percent of the youth within the group were abusing alcohol and 89% were abusing drugs. A 1985 Massachusetts study found that children who witnessed the abuse of their maternal caretaker were:*

*Studies cited in Edwards, *Reducing Family Violence: The Role of the Family Violence Council,* 43 Juvenile & Family Court J 1 (1992), and Jackson, *supra*, p 5.

– Twenty-four times more likely to commit sexual assault crimes.

– Fifty percent more likely to use drugs and/or alcohol.

– Seventy-four percent more likely to commit crimes against another person.

– Six times more likely to commit suicide.

♦ Effects on Adult Behavior

Children carry the effects of domestic violence into their adult lives. The failure to acquire academic or interpersonal skills in childhood may adversely impact an adult's abilities to maintain a job or an intimate relationship. Moreover, male children who have witnessed domestic violence in their homes are at increased risk for perpetuating abuse in the families they form as adults. In one study, men who had witnessed domestic violence were three times more likely to hit their wives than those who had not.*

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**The Effects of Women Abuse on Children,* p 11–12 (2d ed, Nat'l Center on Women & Family Law, 1994).

1.8 Chart — The Power and Control Wheel

The Domestic Abuse Intervention Project of Duluth, Minnesota, has devised the following Power and Control Wheel chart, which illustrates the dynamics of domestic violence as a wheel with spokes symbolizing the control tactics exerted in various aspects of the relationship.

DOMESTIC ABUSE INTERVENTION PROJECT
202 East Superior Street
Duluth, Minnesota 55802
218-722-2781

Chapter 2: Community Domestic Violence Resources

2

2.1 Statewide Agencies That Address Domestic Violence from the Perspective of Abused Individuals

There is broad consensus that the most effective response to domestic violence is a ***coordinated community response***, in which the court's efforts are part of a continuum of services offered by the justice system and social services communities. Courts can best function as part of a coordinated community response when they are aware of the variety of specialized services provided by domestic violence agencies. This section contains information about such agencies at the statewide level.

Note: The services described here and throughout this chapter are primarily focused on domestic violence occurring in heterosexual relationships with male abusers. The discussion has been framed in this way because of the disproportionate number of cases in the criminal justice system involving heterosexual relationships in which the male is the abuser.* Moreover, few studies exist about violence in same-sex relationships. However, domestic violence perpetrators can be men or women involved in heterosexual or same-sex intimate relationships. Information about services for individuals in same-sex relationships or in heterosexual relationships with female abusers can be obtained from the Michigan Coalition Against Domestic and Sexual Violence (described below), or from a local domestic violence service agency (described in Section 2.2).

*The Nat'l Crime Victimization Survey estimates that in 1998, women were victims of intimate partner violence at a rate about five times that of men. Rennison & Welchans, *Intimate Partner Violence,* p 2 (Bureau of Justice Statistics Special Report, May, 2000).

The Michigan Domestic Violence Prevention and Treatment Board, the Michigan Coalition Against Domestic and Sexual Violence, and the Michigan Resource Center on Domestic and Sexual Violence are organizations operating at the statewide level to address the prevention and treatment of domestic violence from the perspective of abused individuals. Although these agencies do not provide direct assistance to persons subject to domestic abuse, they can provide local referrals, information about domestic violence, training resources, and technical assistance to courts.

A. Michigan Domestic Violence Prevention and Treatment Board

The Michigan Domestic Violence Prevention and Treatment Board ("MDVPTB") was created as a department within the Department of Social Services (now the Family Independence Agency) in 1978. Some of its duties include:*

*A complete list of the MDVTPB's powers and duties appears at MCL 400.1504.

- Coordinating and monitoring programs and services for the prevention and treatment of domestic violence.
- Developing standards for the implementation and administration of services and procedures to prevent domestic violence and to assist its victims.
- Coordinating statewide efforts to educate justice system and other professionals about domestic violence.
- Studying and recommending changes in civil and criminal procedures that will enable victims of domestic violence to receive equitable and fair treatment under the law.
- Advising the Legislature and Governor on the nature, magnitude, and priorities of the problem of domestic violence and the needs of its victims and recommending changes in state programs, statutes,

policies, budgets, and standards that will reduce the problem and improve the condition of victims.

The MDVTPB's philosophy (as adopted by the Board in March 1992) is as follows:

> "Domestic violence is rooted in an antiquated sexist social structure that produces profound inequities in the distribution of power and resources; in the roles and relationships between men, women, and children in families; and has devastating effects on victims, their children, and the entire society. It is criminal conduct that cannot be tolerated. A comprehensive community response to domestic violence through education, advocacy, and appropriate intervention is necessary to bring about change and end the violence. Battering stops only when assailants are held accountable for their abuse.
>
> "The MDVPTB shall promote the empowerment of survivors and seek social change to redress the existing power imbalance within violent relationships. To make informed decisions for themselves and their children, survivors need access to safety, and information about domestic violence, available options and community resources. The MDVPTB is committed to treating survivors with dignity and respect, and to providing them the support and advocacy necessary to realize their right to self-determination."

This "empowerment" philosophy of the MDVTPB starts from the proposition that persons subject to domestic violence actively seek to live violence-free lives, and in doing so are most in need of help and support from their communities. Indeed, the characterization of these persons as "survivors" in the advocacy community is intended to reflect a sense of empowerment; the term "survivor" affirms that a person has made successful efforts to survive domestic violence. Some domestic violence advocates may thus avoid the term "victim," which is regarded as a passive term that does not account for the abused person's ability to get on with life after experiencing domestic violence.

In carrying out the duties listed above, the MDVTPB administers funds to local and statewide agencies. It also provides technical assistance to local entities, particularly with regard to educational efforts. The MDVTPB sponsors frequent domestic violence training events for service providers, police, prosecutors, judicial branch employees, and other professionals who are involved in providing service for individuals experiencing domestic violence. MDVTPB staff also speak at training events sponsored by the professional organizations for these service providers (such as the Michigan Judicial Institute, the Michigan Commission on Law Enforcement Standards, and the Michigan Coalition Against Domestic and Sexual Violence).

The MDVTPB is located at 235 S. Grand Avenue, Suite 506, P.O. Box 30037 Lansing, Michigan 48909, telephone 517–373–8144. Its website address is www.michigan.gov/fia/0,1607,7-124-5460_7261-15002--,00.html(last visited February 9, 2004).

> **Note:** MCL 400.1501(d) defines "domestic violence" for purposes of the MDVTPB's activities. A complete citation appears at Section 1.2.

B. The Michigan Coalition Against Domestic and Sexual Violence

The Michigan Coalition Against Domestic and Sexual Violence ("MCADSV") was incorporated as a private non-profit corporation in 1978. It is dedicated to the empowerment of all the state's survivors of domestic and sexual violence.

*See Section 2.2(B) for a detailed discussion of the services provided by local domestic violence agencies.

The mission of MCADSV is to develop and promote efforts aimed at the elimination of all domestic and sexual violence in Michigan. MCADSV is a statewide membership organization whose members represent a network of 70 domestic violence and sexual assault programs and over 200 allied organizations and individuals. The member agencies of MCADSV provide comprehensive emergency and support services to victims of domestic and sexual violence.*

MCADSV promotes public awareness and provides leadership, advocacy, training, and technical assistance on issues regarding domestic violence and sexual assault. The organization participates in collaborative efforts to promote social change with local, state, and national organizations. It also provides a forum for the exchange and development of skills and information regarding the community's response to domestic and sexual violence.

MCADSV researches, compiles, and disseminates current statistics and produces a number of publications addressing the technical assistance needs of its members. MCADSV's priority is to support domestic and sexual violence prevention and intervention work in communities throughout the state of Michigan.

The goals of MCADSV are aimed at ensuring the delivery of quality services to victims of sexual assault and domestic violence. The organization accomplishes its goals by:

- Providing technical assistance and comprehensive issue-based training services to its members.
- Advocating for changes in public policy on behalf of domestic violence and sexual assault survivors.

- Promoting public awareness and acting as a clearinghouse of information on the most current issues relating to domestic violence and sexual assault.

Recent educational efforts by the MCADSV include:

- Technical Assistance Bulletins made available through newsletters, publications, member alerts, and the MCADSV web site (www.mcadsv.org — last visited February 9, 2004).
- Education for new service providers in the field of domestic and sexual violence.
- Education for executive directors of service agencies.
- Technical assistance workshops and teleconferences on a variety of emerging issues in the field of domestic and sexual violence.

The MCADSV also lends its expertise to numerous statewide public policy initiatives. In recent years, these initiatives have included:

- The Curriculum Advisory Committee and the Model Policy Advisory Committee of the Michigan Law Enforcement Officers Training Council (now the Michigan Commission on Law Enforcement Standards).
- The Governor's Task Force on Batterer Intervention Services.
- The Domestic Violence Laws Implementation Task Force and Subcommittees.
- The Michigan Department of Community Health Violence Against Women Advisory Committee.
- The Michigan Department of Community Health Sexual Assault Surveillance System Advisory Committee.

The MDADSV promotes public awareness about domestic and sexual violence through projects and special events. Its public awareness products include:

- Newsletters (*The Coalition Connection*, a biannual *Review*, and a biannual *Public Policy Update*).
- Posters and brochures.
- *Handbook for Survivors of Sexual Assault*.
- Brochure for teachers and school counselors on domestic and dating violence.
- *Victim Assistance Card for Survivors of Sexual Assault*.

- *Handbook for Survivors of Professional Sexual Exploitation.*
- Annual public awareness campaign for Domestic Violence Awareness Month in October.
- Annual public awareness campaign for Sexual Assault Awareness Month in April.

The Michigan Coalition Against Domestic and Sexual Violence is located at 3893 Okemos Rd., Suite B2, Okemos, Michigan 48864, telephone 517–347–7000. Its web site address is www.mcadsv.org (last visited February 9, 2004).

C. Michigan Resource Center on Domestic and Sexual Violence

The Michigan Resource Center on Domestic and Sexual Violence is a collaboration of the Michigan Domestic Violence Prevention and Treatment Board and the Michigan Coalition Against Domestic and Sexual Violence. The MDVPTB is the primary funder and owner of the collection, which is housed at the MCADSV. Additional funding is provided by the U.S. Department of Health and Human Services and other supporters of the MCADSV. The collection is comprised of over 4,000 books and manuals and 400 videos on domestic and sexual violence. The collection and research services are available for all of Michigan's citizens to utilize at no charge. Besides distributing materials, the Resource Center is engaged in the following activities:

- Development and distribution of *Fact Sheets* and *Statistics* on violence against women.
- Research and technical assistance to Resource Center patrons.
- Mobile lending library at statewide conferences.
- Distribution of a quarterly newsletter (*The Source*).
- Development and distribution of Technical Assistance Packets on a variety of issues related to violence against women.

The Michigan Resource Center on Domestic and Sexual Violence is located at 3893 Okemos Rd., Suite B2, Okemos, Michigan 48864, telephone 517–347–7000. The website is www.mcadsv.org/mrcdsv/index.html (last visited February 9, 2004).

2.2 Local Agencies That Address Domestic Violence from the Perspective of Abused Individuals

A. Community Coordinating Councils

Domestic violence is a problem of such complexity that no single social institution acting alone can adequately address the needs of those it affects. Domestic violence typically calls for action by multiple community agencies concerned with such issues as criminal activity, child welfare, health care, and housing. A community's response may thus be most effective if each of its responding agencies works in concert with the others.* To foster a community-wide system of prevention and intervention that meets the needs of those affected by domestic violence, many communities have formed domestic violence coordinating councils (also called a "coordinated community response").

*See Saunders, *Domestic Violence Perpetrators: Recent Research Findings & Their Implications for Child Welfare,* 3 Mich Child Welfare Law J 3, 8 (Fall, 1999).

The membership, structure, and mission of a coordinating council will be unique to its particular location. A coordinating council may simply be an informal network of professionals who meet periodically to discuss issues of common concern. In some communities, the coordinating council has developed into a formal organization with a full- or part-time staff that meets on a regular basis. The agencies represented on community coordinating councils may include courts, prosecutor's offices, law enforcement agencies, local domestic violence service agencies, child protective services, health care agencies, clergy, schools, and others that respond to families where violence is present. The typical activities of a coordinating council include:

- Identifying and coordinating the roles and services of local agencies that provide services to persons experiencing domestic violence.
- Monitoring, evaluating, and promoting the quality and effectiveness of services and protections in the community.

Court cooperation with a local coordinating council can familiarize the court with local domestic violence resources and specialists and give it the opportunity to have a voice in local policies regarding domestic violence. Participating court personnel can also provide accurate information to other agencies about court policies and procedures that can be passed on by these agencies to persons involved in relationships where domestic violence is present.*

*See Section 2.6 for discussion of ethical concerns that arise with judicial participation in a coordinated community response organization.

Local domestic violence service agencies can be contacted for more information about cooperation with a community's coordinated response to domestic violence. A list of local service agencies appears in Appendix A. The Michigan Domestic Violence Resource Directory, which provides a listing of local agencies, is available online at www.michigan.gov/emi/1,1303,7-102-112_219_240-2884--CI,00.html (last visited February 9, 2004).

B. Domestic Violence Service Agencies

Michigan domestic violence service agencies provide abused individuals with help and support in getting free from violence. They typically base their approach on a philosophy of self-help and empowerment, providing information and assistance, but encouraging battered women to make their own decisions and to create their own support systems to help them to continue living violence-free. This "empowerment philosophy" posits that healing occurs when a battered woman realizes that she is not alone and that she is not to blame for the violence perpetrated against her. It further assumes that healing can happen when a battered woman reaches out and provides support to other women. Empowerment philosophy intends to counteract the helplessness and immobility that often accompanies a life crisis and to put responsibility for ongoing change into the hands of the battered woman.* By encouraging a woman to look inward and assess her own needs and the resources she possesses to fulfill them, faith in herself and her abilities can be restored. This approach is thought to be particularly helpful for the battered woman, who throughout her relationship has repeatedly had her power undercut and seized by the batterer.

*Rygwelski, *Beyond He said/She said,* p 71–72 (Mich Coalition Against Domestic Violence, 1995).

Domestic violence service agencies provide shelter, as well as many other forms of assistance to individuals experiencing domestic violence. Domestic violence agencies receiving funds from the Michigan Domestic Violence Prevention and Treatment Board must provide services for non-residents as well as for residents of shelters. See MCL 400.1507 for a list of services provided by shelters that may receive funds from the MDVPTB. The types of services provided are not uniform statewide; however, the following services are common:

- **Twenty-four-hour emergency shelter**

  Emergency shelter typically includes food, clothing, and other personal necessities for a limited period of time (for example, 30 days). Although shelters are generally not licensed to provide child care, most admit children with their parents. Since abusers often direct violent behavior towards pets, a few shelters have developed programs to assist residents with caring for their animals.

- **Twenty-four-hour telephone crisis lines**

  This service is provided to both shelter residents and non-resident populations.

- **Individual and group counseling**

  This service is provided for both shelter residents and non-resident populations. Group counseling is particularly desirable because it helps to overcome the sense of isolation that many abused individuals experience.*

*Isolation of the victim is one common tactic used by abusers. See Section 1.5.

- **Transportation assistance**

This service is typically provided for residents in shelter; it may also be provided for non-residents as resources allow.

- **Safety planning**

  This service is generally provided for both shelter residents and non-resident populations.

- **Advocacy with social service agencies**

  This service is generally provided for both shelter residents and non-residents. Depending upon the agency's staffing, it may include help with filling out forms, applying for government assistance, or obtaining legal services.

- **Child services**

  Although they are not generally licensed to provide child care, domestic violence service agencies may provide services (such as counseling or activities) to the children of shelter residents or non-resident clients. One Michigan shelter (HAVEN in Pontiac) administers supervised parenting time programs.

- **Assistance finding permanent housing**

  This service is typically provided for residents in shelter, and for non-residents as needed.

- **Assistance finding medical or other health care**

  This service is typically provided for all clients. Some shelter programs have access to medical care on-site. In some shelters, residents have access to substance abuse programs such as Alcoholics Anonymous or Alanon.

- **Information and education about domestic violence**

  This service is provided to both residents and non-residents of shelter, as well as to community members generally.

- **Other educational services**

  An individual's period of receiving services can be an opportunity to gain basic life skills in household management, managing finances, parenting, nutrition, and child health care. Residents may also learn about their legal rights or about available social or mental health services.

- **Assistance with court proceedings**

  MCL 600.2950c authorizes the Family Division of the Circuit Court to provide a domestic violence victim advocate to assist victims of domestic violence in obtaining a personal protection order. The court may use the services of a public or private agency or organization that has a record of service to domestic violence victims.* Under this statute, advocates may

*See Section 7.2(B) for more information.

provide such services as: assisting the victim with serving, modifying, or rescinding a PPO; providing an interpreter for a case involving domestic violence, including a request for a PPO; informing the victim of the availability of shelter, safety plans, counseling, other social services, or generic written material about Michigan law. The statute further provides that domestic violence victim advocates are prohibited from representing or advocating for domestic violence victims in court.

In addition to providing the foregoing services to persons subject to domestic abuse, domestic violence service agencies can be a valuable resource to courts. Cooperative arrangements with service agencies can assist a court's information-gathering processes and provide a court with a valuable referral resource.* Obtaining information from a domestic violence expert early in a case assists the court in promoting safety and provides an adequate factual basis for the court's decision-making. Furthermore, service agency employees who are familiar with court policies and procedures can often help their clients to better understand court proceedings and to access pro bono legal services if these are needed. Many domestic violence service agencies make educational programs or speakers available to community organizations such as schools, professional organizations, or charitable groups. This type of service is useful to courts making efforts to educate their staff about the nature and dynamics of domestic violence.

*See *Friend of the Court Domestic Violence Resource Book—Revised Edition,* (MJI, 2008), Section 2.12(A).

A list of local domestic violence service agencies appears in Appendix A.

2.3 Batterer Intervention Services

It is not clear what contributes to the cessation of abuse. Some studies show that some men stop their violence, especially those who were never severely violent. In a criminal context, arrest and prosecution are seen to have a deterrent effect. There are also a variety of interventions, known as "batterer intervention services," that can serve as referral resources in both civil and criminal contexts.*

Although they vary in approach, batterer intervention services are generally designed to hold domestic violence perpetrators accountable for their actions and to provide them with an opportunity to change their behavior. In criminal misdemeanor cases, courts may order domestic violence defendants to participate in a batterer intervention service program as a condition of probation. In civil domestic relations proceedings, it may also be useful to refer an abusive party to a batterer intervention service provider; some judges will require an abusive party to participate in a batterer intervention program as a condition of exercising parental rights to a child.

*Saunders, *Domestic Violence Perpetrators: Recent Research Findings & Their Implications for Child Welfare,* 3 Mich Child Welfare Law J 3, 5–6 (Fall, 1999). This article discusses findings that different types of offenders seem to respond better to different types of treatment.

Courts will not find conclusive research to guide them in making referrals to batterer intervention service programs.* However, there is widespread agreement about two basic requirements for such programs:

Id., p 7.

- Most professionals who work with batterers agree that **abusers must be held accountable** for their behavior. Researchers and other professionals generally agree that domestic violence perpetrators are not suffering from a psychological or biological illness that prevents them from changing their behavior, except in rare cases involving psychosis or other mental illness. In most cases, researchers believe that domestic violence is a learned pattern of behavior, chosen by the abuser for the purpose of controlling an intimate partner.* Since abusers choose to engage in abusive behavior, they can also choose to change. Based on these assumptions, many researchers assert that batterer intervention services should motivate abusers to change by holding them accountable for their behavior.

*For more discussion of the causes of abuse, see Section 1.3.

- In addition to accountability, **safety** is a primary concern in providing batterer intervention services to abusers. The danger abusers pose to their intimate partners and others requires batterer intervention service providers to carefully consider the effects of their services on safety.

In making use of batterer intervention service programs, courts should be aware of the potential for both positive and negative outcomes. Although a batterer intervention program provides the opportunity for change, it may also give the court and the abused individual a false sense of security. Courts and abused individuals should be aware that batterer intervention services cannot guarantee that participants will change their behavior. Indeed, some research questions the efficacy of batterer intervention programs in stopping abuse.* Accordingly, both the court and the abused individual must be careful to do an ongoing assessment of an abuser's potential for lethality, as noted in Section 1.4(B).

*See *Health Watch,* 6 Domestic Violence Report 37 (Feb/March 2001).

To assist courts in identifying batterer intervention services that respond to the need for safety and accountability, many states and several Michigan localities have promulgated "batterer intervention standards." These standards articulate minimum guidelines for the operation of batterer intervention services as they work to provide abusers with an opportunity to change their criminal behavior.

In July 1997, Governor John Engler established a Task Force on Batterer Intervention Standards for the State of Michigan to develop statewide standards for programs providing services to court-ordered perpetrators of domestic violence and to make recommendations for improving the courts' response to the crime of domestic assault. In June 1998, this Task Force released its recommendations for batterer intervention standards. The Task Force recommendations were endorsed by Governor Engler in January 1999, and by the 2001 Governor's Domestic Violence Homicide Prevention Task Force. See *Report and Recommendations,* Domestic Violence Homicide Prevention Task Force, p 12, 18 (April, 2001).* On January 11, 1999, the

*The full text of the Batterer Intervention Standards appears in Appendix C.

State Court Administrator issued Administrative Policy Memorandum 1999–01, which encouraged Michigan courts to follow the guidelines set out in the state standards when ordering convicted criminal defendants to participate in batterer intervention as a condition of probation. Although the statewide Batterer Intervention Standards were drafted for use in a criminal sentencing context, they can also be a useful tool in civil domestic relations actions. The Standards' recommendations on intervention modalities for domestic violence can assist the court in its evaluation of batter intervention programs for referrals in domestic relations cases.

*In some areas, batterer intervention is included among the services provided by the domestic violence agency.

Information about local batterer intervention programs can often be obtained from the local domestic violence service agency.* On a statewide level, the Batterer Intervention Service Coalition of Michigan ("BISCMI") is an organization whose membership includes people and agencies working in batterer intervention services, battered women's services organizations, and coordinated community response efforts. The organization provides a working forum for interaction and information sharing among agencies and individuals concerned with the provision of batterer intervention services in Michigan.

The BISCMI goals include educating the community about the realities of domestic violence and developing, implementing, and monitoring standards that seek accountability in batterer intervention service delivery and community coordination. The Batterer Intervention Services Coalition may be contacted as follows: C/O Total Health Education, 2627 N. East Street, Lansing, Michigan 48906. Its website address is: www.biscmi.org (last visited February 9, 2004).

2.4 Characteristics of Safe, Effective Batterer Intervention Services Under the Statewide Standards

Michigan's statewide Batterer Intervention Standards ("Statewide Standards") address program curriculum and format, contra-indicated interventions, participant rights, communications with courts and victims, and staff qualifications. These recommendations are all intended to apply to men who batter women. See Statewide Standards, §4.2. The Standards document explains that its applicability to male batterers reflects "the predominant pattern of domestic violence. Most men are not batterers, but most batterers are men. Female battering towards males occurs, as does battering in lesbian and gay relationships, but until more is known about appropriate intervention in such relationships, these standards will apply to a [batterer intervention service] for men who batter."

A. Program Curriculum and Format

Michigan's statewide Batterer Intervention Standards recommend initial intake screening for all persons seeking services. Recommended intake procedures include lethality evaluation (which should be ongoing throughout the program)* and information gathering. Potential participants should be questioned regarding personal and family history, medical history, violence history, criminal history, drug and alcohol use, and mental health. See, e.g., Statewide Standards, §§5.1, 5.2.

*On lethality factors, see Section 1.4(B) and Appendix C to the Statewide Standards.

> **Note:** Although the Statewide Standards recommend screening and referral for alcohol/drug, medical, or mental health problems, most batterer intervention service providers do not directly address these problems. These problems are separate from the issue of violence and should thus be separately addressed; a batterer intervention service may refer persons who need assistance in these areas to other appropriate sources. In any event, treatment programs for drug/alcohol, medical, or mental health problems should not be substituted for batterer intervention services because such programs are not designed to address domestic violence. These ancillary issues in a batterer's life should be addressed concurrently with or prior to the violence. Statewide Standards, §5.1. For discussion of the relationship between alcohol or drug use and domestic violence, see Section 1.3(B). See Section 1.3(C) for discussion of illness-based violence.

The Michigan Batterer Intervention Standards contain the following curriculum objectives:*

*Statewide Standards, §7.1.

- Identification and confrontation of abusing and controlling behaviors.
- Identification and discussion of the effects of abuse on victims and on children who witness the abuse.
- Promotion of accountability and responsibility. This objective includes identification and confrontation of excuses for abuse.
- Identification of cultural and social issues that contribute to the choice to use abusive behavior. These issues must not be allowed to excuse or justify abuse.
- Identification and practice of non-threatening and non-abusive forms of behavior.

The Standards recommend that these objectives be conveyed in a group setting. Domestic violence researchers report that group intervention is preferred to individual sessions because it provides an environment where batterers can see their own behaviors in others, hold each other accountable, and learn from those who have been working on making personal changes. The maximum recommended group size in the Statewide Standards is no

more than 15. Statewide Standards, §7.2b. The Statewide Standards recommend that group members be of the same gender. Statewide Standards, §7.2d.

*Recommended lengths for program duration are exclusive of intake sessions.

Because domestic violence is potentially lethal and tends to increase in frequency and severity over time, interventions of 52 weekly sessions or more are recommended as optimal in the Statewide Standards, with 26 sessions being the acceptable minimum. Group sessions should meet at least once a week and last from 90 minutes to two hours. Statewide Standards, §8.8.*

B. Contra-Indicated Interventions

The Statewide Standards do not specify a particular method or technique to be used by intervention services: "Programs may use diverse intervention methods and techniques to accomplish the primary goal of ending batterers' use of violence and abuse." Statewide Standards, §7.1. Nonetheless, the Standards contain recommendations regarding contra-indicated methods for intervention. These methods include some mental health approaches that may be helpful in other contexts but are regarded as counterproductive or dangerous for use as primary interventions with batterers.

The Statewide Standards contain the following general description of inappropriate interventions for batterers:

> "Procedures or techniques are inappropriate if: 1) they endanger the safety of victim(s) by disclosing confidential information or bringing victim(s) into contact with the batterer; 2) they reinforce the batterer's denial of responsibility for his abusive behavior; 3) they blame the victim for the batterer's abusive behavior; or 4) they otherwise support the batterer's entitlement to abuse or control the victim." Statewide Standards, §7.3.

With respect to specific types of approaches, the Standards characterize couples and family counseling as inappropriate primary interventions for batterers. Because these approaches require joint participation by the abuser and victim, they may put the victim in further danger or communicate to the abuser that the victim shares some of the responsibility for the violence. Section 7.3b of the Statewide Standards explains as follows:

> "Couple counseling and/or family therapy are inappropriate as primary intervention for batterers. These approaches may endanger the victim by placing her in the position of self-disclosing information that the batterer may subsequently use against her, and by giving the batterer an opportunity to have contact with her and other family members. Such approaches avoid fixing sole responsibility on the batterer and may implicitly blame the victim for the abuse, even when statements to the contrary are made by counselors. Family or couple counseling

*See also Section 10.6 for a discussion of mediation in domestic relations cases

> may reinforce power differences between family members and can leave victims at a disadvantage."

In addition to the foregoing practical concerns, joint counseling is problematic as a matter of court policy where domestic abuse rises to a criminal level. In most criminal cases involving stranger violence, it would be unthinkable to require the perpetrator and victim to attend joint counseling to resolve their differences. With limited exceptions, Michigan's penal statutes hold convicted offenders solely responsible for their crimes without regard to their relationships with their victims. Accordingly, courts should never order joint counseling where the abuse involves criminal conduct; such orders diminish the seriousness of the criminal behavior, sending the message that the victim shares responsibility for the violence.

> **Note:** Local batterer intervention standards that preceded the adoption of the Statewide Standards acknowledged that the parties to some relationships may benefit from couples or family counseling if the abused individual freely chooses to participate and certain criteria are met. These criteria include: the abuser has completed a batterer intervention service program and demonstrated accountability; the abused individual's choice to participate is made from a perception that participation is safe; and the therapist and the abused individual clearly understand that the therapy is not intended to stop the violence.* The Advisory Committee for this benchbook notes that under these standards a court is not the appropriate agency for deciding whether a couple should participate in couples or family counseling where domestic violence is present — this decision must be made by the parties to the relationship. Indeed, the requirement that the victim freely choose to participate in couples or family counseling makes court-ordered participation in it inappropriate in cases involving domestic violence.

*Ann Arbor Domestic Violence Coordinating Board, *Batterer Intervention Services Standards* (July, 1997); BISC Region 3, *Batterer Intervention Services Standards* (1997).

Under the Statewide Standards, alternative dispute resolution methods are also contra-indicated in cases involving domestic abuse:*

> "Criminal acts are not a subject for negotiation or settlement between the victim and perpetrator because the victim does not have any responsibility for changing the perpetrator's criminal behavior. Accordingly, batterers should not be referred to alternative dispute resolution services in lieu of batterer intervention. Such services typically include mediation, community dispute resolution, and arbitration. Besides being inappropriate to address criminal behavior, these services — which require equal bargaining power between the parties — cannot operate fairly in situations involving domestic violence. Batterers exercise control in violent relationships, and alternative dispute resolution services afford them further opportunity to wield this dangerous control over the victim." Statewide Standards, §7.3c.

*See Statewide Standards, §7.3d. For discussion of factors that may accompany domestic violence without causing it, see Section 1.3(B).

Michigan's Statewide Batterer Intervention Standards further caution against approaches that tend to identify the batterer's pathology or external circumstances as the primary cause of battering. These approaches are disfavored because they may reinforce the batterer's denial of responsibility for violence if used inappropriately.* Such approaches include:

- Psychoanalytic therapy that focuses on the perpetrator's past experiences as a primary cause of battering.
- Approaches that deal with battering as primarily a problem of stress management.
- Approaches that deal with battering as primarily a problem of poor communications skills.
- Anger management groups that focus on anger as the primary cause of battering.
- Approaches that substitute addiction counseling for batterer intervention.
- Techniques that identify poor impulse control as a primary cause of violence.

Although these methods are characterized as inappropriate for use as primary interventions against domestic violence, the Statewide Standards acknowledge that they may be helpful to some participants when integrated into a broader program that is based on batterer accountability. Statewide Standards, §7.3d.

> **Note:** If a batterer is drug or alcohol dependent, separate substance abuse treatment is needed prior to, or in conjunction with, batterer intervention. Substance abuse counseling should not, however, be used as a substitute for batterer counseling, for it will not address the issues of violence or control that are present in a relationship where domestic violence is present. Statewide Standards, §5.1. See also Section 1.3(B).

Other approaches are identified as inappropriate because they contribute to the batterer's denial of responsibility by implicitly or explicitly ascribing some of the responsibility for the violence to the victim. Included in this category of programs are addiction counseling models that identify the violence as an addiction and the victim as an enabler or co-dependent. Other inappropriate approaches identify the victim's psychopathology as provoking battering. Statewide Standards, §7.3d.

Finally, programs that themselves use abusive or violent techniques are contra-indicated in the Statewide Standards because they reinforce the very behaviors that batterer intervention services are designed to stop. Such programs are described as follows:

"Approaches which identify men as heads of households, with the power to chastise and discipline victims, may promote continued abuse, even if the program specifically discourages physical abuse. Programs which promote physical or cathartic expression of anger may contribute to the belief that physical expression of anger is necessary and encouraged. Programs which use abusive or hostile confrontation techniques may reinforce belief in entitlement to the use of abusive control in other interpersonal relationships." Statewide Standards, §7.3d.

C. Participant Rights

Michigan's statewide Batterer Intervention Standards make recommendations regarding participant rights. Batterer intervention services must provide participants with written policies or contracts regarding such issues as confidentiality, fees, attendance, and discharge criteria. See Statewide Standards, §8.0. Recommended policies on these issues are as follows:

♦ Fees

To reinforce accountability, Michigan's Batterer Intervention Standards state that participants in batterer intervention services are expected to make some payment for the program. The Standards further recommend that service providers establish clearly defined payment policies, including provisions for indigent participants based on the ability to pay. See Statewide Standards, §8.7.

♦ Confidentiality

The Michigan Batterer Intervention Standards provide for protection of confidential communications by program participants. There are specified limitations on confidentiality for safety reasons, however. Under the Statewide Standards, program participants must authorize release of information to the victim and the referring court and/or probation department. See Statewide Standards, §8.3. Further limitations on confidentiality are recommended by the Statewide Standards, as follows: 1) a batterer intervention service must comply with all legally mandated reporting requirements regarding suspected child abuse and neglect; 2) a batterer intervention service must comply with all legally mandated reporting requirements regarding the duty to warn third parties of threats of physical violence;* and 3) a batterer intervention service must report to probation, the court, and/or Children's Protective Services any criminal behavior or violation of court order relating to domestic violence that is relayed by the batterer during the course of service. Statewide Standards, §§6.1, 6.2, 8.2, 8.13.

*See MCL 722.623–722.624 (duty to report child abuse and neglect) and MCL 330.1946 (duty to warn third parties).

♦ Discharge Criteria

Michigan's Batterer Intervention Standards contain a recommendation that batterer intervention service providers establish written policies for

discharge from their programs. These policies should cover discharge upon completion of the program ("contractual discharge"), as well as discharge for failure to meet basic program requirements ("administrative discharge").

Criteria for contractual discharge upon completion of a program under the Michigan Standards include: consistent attendance; cooperation with group rules; no reported incidents of physical violence or other abusive behavior; batterer's acknowledgment of responsibility for the choice to use violence; compliance with court orders; compliance with participation requirements of the program; payment of required fees; and compliance with other services received, e.g., drug/alcohol treatment. See Statewide Standards §7.4. Upon contractual discharge, the Michigan Standards further recommend that batterer intervention service providers notify the referral source and/or the victim that completion of the program is no guarantee that the participant will cease his abusive behavior. See Statewide Standards, §7.4.

In developing criteria for administrative discharge upon failure to meet program requirements, the Michigan Standards recommend that batterer intervention service providers consider the following factors: continued domestic violence; failure to make appropriate use of the program; failure to comply with program rules or policies; failure to pay fees; violations of a court order; and criminal behavior. See Statewide Standards, §§7.5, 8.13.

D. Communicating with the Court

The Michigan Batterer Intervention Standards recommend that service providers make progress reports to the referring court about participants in their programs. The Statewide Standards recommend that each batterer intervention service provider develop an agreement with its referring courts regarding reporting procedures. Statewide Standards, §8.14. To facilitate communication with the referring court regarding a participant's progress, it is critical that a batterer intervention service provider obtain the participant's consent to release information to the court and/or probation department. See Statewide Standards, §8.3.

E. Communicating with the Victim

To promote safety for victims and others who may be threatened by an individual's abusive behavior, Michigan's Batterer Intervention Standards contain the following recommendations about communications with victims:

- A batterer intervention service provider must have a policy and procedure for informing victims about its program. The information provided must caution the victim that an individual's participation in the program will not guarantee safety or a change in the individual's behavior. Additionally, victims should be given referrals to appropriate victim service providers. Statewide Standards, §8.5.

- Victims always have the right to refuse contact with the batterer intervention service provider. Statewide Standards, §8.5.

- If the victim gives the batterer intervention service provider information about a re-offense, the victim's permission should be obtained before reporting the offense to probation. Statewide Standards, §8.14.

- A batterer intervention service provider should keep records of communications with victims in a separate file from communications with batterers. Statewide Standards, §8.12. This precautionary measure prevents batterers from gaining access to information that might endanger their victims.

2.5 Cross-Cultural Communication

Michigan is home to a diverse population. Its educational, economic, and recreational opportunities continue to attract people of many racial, national, and ethnic backgrounds. This section offers suggestions for effective cross-cultural communication. A partial list of culturally specific referral resources for survivors of domestic violence and sexual assault appears in Appendix B.

> **Note:** The following text on cross-cultural communication is adapted from a document prepared by the Los Angeles County Commission on Human Relations (January, 2001).

As used in this section, "culture" means group customs, beliefs, social patterns, and characteristics. Nationalities and ethnicities have culture, as do businesses, occupations, generations, genders, and groups of people who have some common distinguishing characteristics or experiences. "Culture" is not always apparent from a person's appearance. For example, immigrants and third-generation U.S. citizens, city and small-town dwellers, deaf and hearing persons may all be indistinguishable on sight.

In national and ethnic groups, the components of "culture" include language, non-verbal communication, views on hierarchies (e.g., responsibilities, duties, and privileges of family or group members), interpersonal relationships, time, privacy, touching, and speech patterns. Groups other than nationalities and ethnicities may also have distinctive verbal and nonverbal perceptions and expression, shared values, standards, beliefs, and understandings; for example, language and values usually differ depending on age or occupation.

The following tips are based on observations of successful cross-cultural communicators. None of the behaviors that follow requires a particular personality or talent; the only underlying assumption is that both parties speak the same language.

Things to Do All of the Time

- Remember that diversity has many levels and complexities, including cultures and overlapping cultures. For example, there is great cultural diversity among Spanish-speaking populations in Europe, the Caribbean, Central America, North America, and South America, despite the fact that they share Spanish as a native language.
- Respect people as individuals without making assumptions and expect others to be thoughtful, intelligent people of goodwill, deserving of respect. Don't make judgments based on accent, wordiness or quietness, posture, mannerisms, grammar, or dress; rather, assume that there are good reasons why people do things the way they do.
- Work to become conscious of your own biases.
- Be willing to admit what you don't know.
- Listen actively and carefully. Careful listening usually means undivided attention. Avoid such things as looking at your watch, looking around to see who else has arrived at the meeting, and avoidable interruptions. Listen not only for factual information, but also for glimpses of the other person's sensibilities and reality. Closely watch reactions. Notice what the other person asks about. It usually indicates not only interest in the subject, but that the subject is not too personal or sensitive to discuss openly. Stop talking the instant it looks as if the other person has something to say.
- Accept responsibility for any misunderstanding that may occur, rather than expecting the other person to bridge cultural differences. This is easy to do by saying something like: "I'm sorry that I didn't make it clear."
- Notice and remember what people call themselves, e.g., African-American or Black, Hispanic or Chicano, Iranian or Persian, Korean or Asian, and use those terms.
- Remember that you are an insider to your culture and an outsider to other cultures. Be careful not to impose. Showing off your knowledge of someone else's culture, for example, might be considered intrusive.
- Look for aspects of the other culture that are admirable. When you identify such a characteristic, you may want to somehow indicate your appreciation of it.

Things to Do Much of the Time

- Expect to enjoy meeting people with experiences different from yours. This tip is in the "much of the time" section and not in the "all of the time" section because, although getting to know other cultures is

stimulating and gratifying, it can take energy. There are times when each of us seeks out familiar things and people.

- Be a bit on the formal side at first in language and in behavior. After you get acquainted, you might choose to be more casual. Even then remember to use what have been called the "magic words." "Please," "thank you," and "excuse me" are universally appreciated. Use formal terms of address unless and until the other person indicates a preference for the informal.

- Be careful about how literally you take things and how literally your statements might be taken. "Let's have lunch soon" or "Make yourself at home" are two examples of easily misunderstood courtesy phrases.

- Expect silence as a part of conversation. Silence can mean that the person you're talking to is not interested, or defers to you on the subject, or thinks that the subject is his or her business. Or silence means that she or he is thinking over what you said before answering.

- If it appears to be appreciated, act as a cultural guide/coach. Explain what the local custom/practice is, e.g., "Some people dress up for the holiday luncheon, but most wear ordinary work clothes."

- Look for guides/coaches to other cultures, someone who can help you put things in perspective.

Things to Do Some of the Time

- Ask questions. Most people appreciate the interest in their culture. Each person can speak for his experience and some will speak in broader terms. Be careful about asking "why," however. It frequently has a judgmental tone to it, implying that the thing you ask about is not acceptable.

- When you are asked questions, take care that your answers aren't too short. Make your answers smoother and gentler than a plain "yes" or "no," or other short answers. Most cultures are less matter-of-fact than that.

- Watch cultural groups interacting among themselves; learn what their norms are. Do they urge their views on one another? Do they flatter one another? Do they defer to one another? Do they maintain eye contact? How do they behave toward elders? Children? Women?

- Open a subject for discussion without putting the other person on the spot. Try thinking aloud about your own experience and your culture. Thinking aloud is one way of interpreting your culture without talking down or assuming that the other person is ignorant. It also makes it safe for him and her to ask questions because you have been the first to reveal yourself.

Things Successful Communicators Never Do

- Never make assumptions based on a person's appearance, name or group.
- Never expect people of a population group to all think alike or act alike.
- Never show amusement or shock at something that is strange to you.
- Never imply that the established way of doing something is the only way or the best way.

2.6 Ethical Concerns with Judicial Participation in a Coordinated Community Response

*See Saunders, *Domestic Violence Perpetrators: Recent Research Findings & Their Implications for Child Welfare,* 3 Mich Child Welfare Law J 3, 8 (Fall, 1999).

Domestic violence is a phenomenon of such complexity that no single community institution acting in isolation can provide an adequate response. For example, a court cannot address criminal domestic assault unless the police have first arrested the alleged offender and the prosecutor has filed criminal charges. Issuance of a personal protection order will not adequately protect a domestic violence victim unless violations of the order are swiftly and strictly enforced. A court's efforts to protect victims and hold abusers accountable will thus be most effective if they are coordinated with the actions of other community service providers. Accordingly, many commentators suggest that local courts participate in community organizations that strive to achieve a coordinated response to domestic violence.*

Judicial participation in a coordinated community response to domestic violence gives rise to certain ethical concerns, which are explored in this section. This section also discusses cases in which criminal defendants have asserted that a judge should be disqualified from hearing cases due to bias or prejudice arising from participation in extrajudicial activities concerned with domestic violence.

A. Coordinated Response and the Code of Judicial Conduct

Under the Michigan Code of Judicial Conduct, a judge may participate in the activities of a community coordinating council against domestic violence as long as: 1) the judge's participation does not cast doubt on his or her ability to perform the function of the office in a manner consistent with the law; and 2) the council's activities are concerned with the improvement of the law, the legal system, or the administration of justice. See Canons 2(E), 4, 5(B), and 5(G). Canon 4 provides as follows:

> "As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice,

including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

"A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities:

> "A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
>
> "B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.
>
> "C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not individually solicit funds. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice."

See also Canon 5(G), which states in pertinent part:

"A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. . . ."

Canon 5(B) provides:

"Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization, subject to the following limitations:

> "(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.
>
> "(2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization."

In a relevant context, the State Bar of Michigan Standing Committee on Professional and Judicial Ethics applied the principles of Canon 5(B) in JI-66 (March 23, 1993). This informal opinion was issued in response to a judge's inquiry whether a judge and a judicial law clerk could serve on the board of a civic organization providing counseling and shelter for victims of rape, child abuse, and other circumstances causing a need for such support. The organization's staff members frequently accompanied victims to the court when criminal charges were heard to provide the victims with emotional support. When subpoenaed by counsel, staff members testified in particular cases regarding the appearance, attitude, and other condition of the victim when the victim arrived at the shelter or during treatment at the shelter. Criminal defendants could also be sentenced to assailant counseling with the organization. Other than testifying when called, however, the organization was not directly involved in court proceedings or litigation.

The Standing Committee concluded that the judge's impartiality was not per se placed at risk when the judge presided over a matter in which a member of the organization was a witness. However, the Committee noted that the judge's affiliation with the organization and the court's referrals to the organization "may give the appearance that the judge is predisposed to a particular viewpoint regarding allegations of abuse." Therefore, the Committee opined that "whenever a staff member of the organization is called to testify, the judge should disclose the judge's membership on the board of the organization and recuse unless the parties ask the judge to proceed. If the affiliation results in frequent disqualification, the judge should resign from the organization."

The Committee further concluded that the judicial law clerk was not a judicial officer whose conduct was regulated by the Michigan Code of Judicial Conduct. Although Canon 3(B)(2) requires judges to direct staff and court officials to "observe high standards fidelity, diligence and courtesy" to persons with whom they deal in their official capacity, judges are not required to regulate employees' activities outside the scope of the employees' official duties for the court. The Committee noted, however, that clerks who are licensed attorneys are subject to the Michigan Rules of Professional Conduct,

and pointed out that MRPC 8.4(e) prohibits a lawyer from knowingly assisting a judge or judicial officer in conduct that violates the Michigan Code of Judicial Conduct or other law.

In another relevant context, the Judicial Tenure Commission upheld judicial participation in community efforts to improve the administration of justice. In Advisory Opinion 68 (June 12, 1986), the Judicial Tenure Commission found that a judge may serve on a task force established to implement the Crime Victims' Rights Act and may "express to the public the general desirability for victims' assistance programs."

For further relevant discussion, see:

- Informal Opinion JI-67 (March 30, 1993) (A judge may sit as a member of an independent law revision commission providing information and assistance to the Legislature).
- Informal Opinion JI-65 (February 25, 1993) (A judge may not serve on a legislative affairs and political action committee to support pro-business interests).
- Informal Opinion JI-68 (April 26, 1993) (A judge may participate in health education and social awareness activities such as AIDS prevention and encourage others to support the same cause, but should not wear on the judicial robe symbols indicating the judge's support or opposition to a particular political, social, or charitable/civic cause).
- Informal Opinion JI-84 (March 7, 1994) (A judge who attends a program or seminar at which the faculty argues issues that are nearly identical to those in a case pending before the judge is not required to advise the parties and their counsel in the pending case that the judge attended the seminar).
- JTC/AO 96 (December 10, 1987) (A judge may not serve on a municipal downtown development authority concerned with matters other than the improvement of the law, legal system, or administration of justice).
- JTC/AO 90 (July 31, 1987) (A judge may serve as a consultant on "court delay reduction" to the Adjudication Technical Assistance Project carried on by the Bureau of Justice Assistance of the U.S. Department of Justice).

*Some of these examples are also discussed in Hornsby, *Ethical Considerations for Family Court Judges,* 4 Synergy 2 (Summer, 1999).

Other jurisdictions that have addressed the ethical questions arising from judicial participation in a coordinated community response organization have come to various conclusions depending upon the activities of the organization and the judge's role in it. The following examples illustrate.*

The Indiana Supreme Court found that a judge's participation in a county coalition against domestic violence did not create an inference of bias or prejudice in *Allen v State,* 737 NE 2d 741 (Ind, 2000). In that case, a defendant convicted of crimes against his estranged wife moved for a change of judge, asserting that the participation of the judge and the judge's wife in the coalition's activities caused a reasonable basis to doubt the judge's impartiality. The judge's wife was president of the coalition, and the judge appeared and spoke at a radio phonathon designed to publicize the organization and to solicit donations for a shelter. Citing the equivalent of Canon 4 of the Michigan Code of Judicial Conduct, the Indiana Supreme Court found no basis to support a rational inference of bias or prejudice on the part of the judge:

> "While not strictly a bar association or judicial conference, an organization serving victims of domestic violence is not unlike various organizations dedicated to the improvement of the law. Indiana judges routinely appear and often speak at functions of organizations seeking, for example, to advance juvenile justice, to improve criminal rehabilitation, to prevent crime, and to encourage mediation and other alternative dispute resolution methods. This participation does not raise a rational inference of bias or prejudice if such judges preside over juvenile cases, criminal sentencing proceedings, probation revocation hearings, or jury trials. So it is with this judge's appearance and participation with an organization seeking to assist the victims of domestic violence."

In Florida, the Judicial Ethics Advisory Committee opined that a judge may speak to and submit proposed legislation to members of the Legislature in an effort to improve the law. In this case, a judge assigned to the court's domestic violence division desired to submit proposed legislation and/or discuss proposed statutory amendments that would increase the maximum periods of incarceration and probation for guilty defendants in domestic violence cases. Citing the equivalent of Canon 4(A) of the Michigan Code of Judicial Conduct, the Committee concluded:

> "[P]ursuant to . . . the Code of Judicial Conduct, a judge may communicate with members of the legislature on matters concerning the law, the legal system and the administration of justice. This would include speaking to members of the legislature and submitting proposed legislation concerning changes to improve the law, the legal system, and the administration of justice. However the judge must be mindful that he or she may do [sic] only so long as the judge's activities do not (1) cast

> reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." Judicial Ethics Advisory Committee Opinion 98-13 (July 7, 1998).

In a separate opinion, the Florida Judicial Ethics Advisory Committee found no prohibition against an administrative judge in a county domestic violence department serving on a domestic violence task force, as long as the activities of the task force were law-related and gender-neutral. The Committee noted:

> "Although there is no blanket prohibition on a judge serving on a Domestic Violence Task Force, in light of the caveat . . . that a judge must regularly re-examine the propriety of continued membership in an organization, six members of the Committee believe that the reputation and activism of the leadership or make-up of an organization concerning racial, ethnic and gender issues and the resulting perceived impression of the agenda of the organization within a community are valid and proper factors for a judge to consider in evaluating membership. The current assignment of a judge and the frequency of the appearance of the organization or its membership in court are also factors which must be considered on a case by case basis." Judicial Ethics Advisory Committee Opinion 95-14 (April 26, 1995).

In Arizona, the Supreme Court Judicial Ethics Advisory Committee found that a judge could not be a member, even on a limited basis, of a county domestic violence commission because the commission was not solely concerned with the improvement of the law, the legal system, or the administration of justice. The commission was a governmental body involved in several areas of public policy outside the legal system; its activities included matters relating to domestic violence and education, child care, and law enforcement as well as issues directly concerning the judiciary. The director of the commission had asked the judge-member to sign a letter purporting to commit the court and the judge "to achieve an environment of zero tolerance reference intimate partner violence." Moreover, various documents related to the commission revealed that:

> "the commission's agenda includes attempts to influence law enforcement, prosecutors and the judiciary in their handling of domestic violence cases. Also apparent is the pro-victim mind set which the commission was created to propound . . . . The commission appears to be too agenda-driven and advocacy-oriented for suitable involvement of the judiciary."

The Ethics Advisory Committee also noted that if assigned to a particular committee, the judge would be expected to engage in fund-raising on behalf of the commission.

Citing Arizona's equivalent of Canon 5(G) of the Michigan Code of Judicial Conduct, the Ethics Advisory Committee concluded that "[p]articipation in an advocacy group for domestic violence victims casts doubt on the capacity for unbiased decision making." While membership on the commission was impermissible, however, the Committee observed that "nothing in the Code of Judicial Conduct prohibits a judge from providing information about the judicial system to [the commission] or from speaking on subjects relating to the improvement of justice in a forum that the commission might provide." Supreme Court Judicial Ethics Advisory Committee Opinion 97-6 (May 28, 1997).

B. Disqualification for Personal Bias or Prejudice

In jurisdictions outside Michigan, criminal defendants have challenged judges' qualifications to preside over cases involving domestic violence based on judicial participation in coordinated community response organizations. These challenges are based on statutory or other authorities regarding judicial bias or prejudice.

In Michigan, MCR 2.003(B) states the following grounds on which a judge may be disqualified from hearing a case:

> "(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
>
> > "(1) The judge is personally biased or prejudiced for or against a party or attorney.
> >
> > "(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
> >
> > "(3) The judge has been consulted or employed as an attorney in the matter in controversy.
> >
> > "(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
> >
> > "(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

> "(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> > "(a) is a party to the proceeding, or an officer, director or trustee of a party;
> >
> > "(b) is acting as a lawyer in the proceeding;
> >
> > "(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
> >
> > "(d) is to the judge's knowledge likely to be a material witness in the proceeding.
>
> "A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge."

In *Cain v Dep't of Corrections*, 451 Mich 470, 495 (1996), the Michigan Supreme Court stated that MCR 2.003(B)(1) "requires a showing of *actual* bias." [Emphasis in original.] A party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. 451 Mich at 497. "Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section." *Id.* at 495. The Court further stated:

> "Coupled with the requirement of actual bias, subsection (B)(1) also requires that the judge be 'personally' biased or prejudiced in order to warrant disqualification pursuant to this section . . . . Simply stated, a showing of 'personal' bias must usually be met before disqualification is proper. This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." 451 Mich at 495-496.

While a favorable or unfavorable predisposition that springs from facts or events occurring in a proceeding may deserve to be characterized as "bias" or "prejudice," this will not constitute a basis for disqualification unless it displays a "deep-seated favoritism or antagonism that would make fair judgment impossible." 451 Mich at 496, citing *Liteky v United States*, 510 US 540, 555 (1994).

Judicial disqualification may also be required to satisfy a constitutional due process requirement that the decision-maker be unbiased and impartial. The Supreme Court in *Cain* noted that where the requirements of MCR 2.003(B)(1) have not been met, or where the court rule is otherwise

inapplicable, a party may pursue disqualification based on due process principles. The Court cited *Crampton v Dep't of State*, 395 Mich 347 (1975) as the leading case on this issue, noting that it requires disqualification for bias or prejudice only in the "most extreme cases." 451 Mich at 498. The *Crampton* standard is as follows:

> "The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' Among the situations identified by the Court as presenting that risk are where the judge or decisionmaker (1) has a pecuniary interest in the outcome; (2) 'has been the target of personal abuse or criticism from the party before him'; (3) is 'enmeshed in [other] matters involving petitioner . . . '; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." 395 Mich 351 [citations omitted].

In *Wayne County Prosecutor v Doerfler*, 14 Mich App 428, 438-442 (1968), the Michigan Court of Appeals considered whether a trial judge's membership in and appearances on behalf of a Catholic organization that worked to prevent distribution of obscene literature to children was grounds to disqualify him from presiding over a civil action to enjoin the distribution of allegedly obscene publications. Finding that a motion to disqualify the judge was properly denied, the Court of Appeals, reasoned as follows:

> "A judge is not expected to bring with him to the bench a blank mind and personality . . . . To require a blank mind is unreasonable, but to demand an impartial and clear appraisal of each new case is not. A judge may well be subconsciously prejudiced in one way towards the evidence or the parties in a case before him. It is his duty not to permit these prejudices to override his responsibilities in providing a fair forum for the determination of controversy . . . . An appellate court must demand actual proof of claimed prejudice when reviewing the non-judicial activities of a judge, and when none is forthcoming that court must find no violation of due process has occurred . . . . The activities of the trial judge [in this case] have been reviewed by this Court and we believe them to be no more than general public statements made with the intent of educating the community as to the existence and spread of obscene literature among young people." 14 Mich App at 440-441.

The following cases from other jurisdictions have addressed defense motions for recusal of a trial judge on the basis of the judge's participation in coordinated community response organizations.

- *Yates v State*, 704 So 2d 1159 (Fla App, 1998), vacated on other grounds 755 So 2d 202 (2000):

A defendant charged with domestic violence appealed from his conviction, asserting that the trial judge should have disqualified herself because she had established and chaired a task force on domestic violence. Before the events leading to the charges against the defendant, the judge had participated in a dedication ceremony at which the victim in the case presented a wreath. However, there were no allegations that the judge knew the victim at the time of the dedication or recognized her from the ceremony during the course of the case. The district court of appeal affirmed defendant's conviction in a per curiam opinion; in a separate concurring opinion one judge on the panel commented as follows:

> "[T]he judge has no affirmative duty to automatically step down from a case because of membership on a task force unless the agenda of the task force is inconsistent with the judge's duty to judge impartially . . . . Mere membership in the task force should not justify a belief that the judge cannot be fair unless there is a showing that the agenda of the task force advocates stiffer penalties for domestic abusers. The fact that a judge opposes domestic violence is no more relevant at sentencing than the fact that a judge opposes robbery or drug abuse; nor does it distinguish a particular judge from any other member of the bench . . . . If it could have been shown that the task force does advocate stiffer penalties for domestic abusers or that the judge has indicated, through words or practice, a tendency to more severely punish domestic abusers, then [defendant] would have had a basis for a reasonable fear that the judge would not be even-handed in the application of her discretion."

The concurrence further cited *State v Knowlton*, 123 Idaho 916 (1993), in which the Idaho Supreme Court found that a judge's service on a task force for children at risk would not prevent the judge from presiding over a probation revocation hearing involving child abuse. The *Knowlton* court held:

> "A judge does not have an affirmative duty to withdraw from cases which merely tangentially relate to the judge's participation in an organization or committee. To hold otherwise would deprive the citizens of this state of the knowledge and experience which a judge brings to groups designed to improve the legal system."

♦ *Allen v State*, 737 NE 2d 741 (Ind, 2000):

A defendant convicted of crimes against his estranged wife moved for a change of judge, asserting that the participation of the judge and the judge's wife in a county coalition against domestic violence caused a reasonable basis to doubt the judge's impartiality. The judge's wife was president of the coalition, and the judge appeared and spoke at a radio phonathon designed to publicize the organization and to solicit donations

for a shelter. The Indiana Supreme Court held that the participation of the judge and his wife in the coalition did not require disqualification under a rule requiring a showing that "historical facts" support a "rational inference of bias or prejudice."

- *State v Haskins,* 573 NW 2d 39 (Ia App, 1997):

  A defendant convicted of the attempted murder of his wife appealed, asserting that his motion for recusal of the trial judge should have been granted. The judge sat on a committee that targeted the prevention of domestic abuse and promoted the better handling of domestic abuse cases within the court system. The governing statute provided for disqualification in cases where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," and required a party to show actual prejudice to sustain a motion for recusal. The appellate court affirmed the conviction, holding that there was no abuse of discretion in overruling defendant's motion for recusal. The court found that the judge's activities "were not in the nature of victim advocacy, but were geared toward case management issues. Her work, along with others, on a domestic abuse coalition looks not to a particular case but to improve the general framework of the system."

- *Robinson v United States,* 769 A2d 747 (DC App, 2001)

  A defendant convicted of assault asserted on appeal that he was denied due process of law by virtue of the fact that his case was tried in a special unit of the Superior Court established to hear domestic violence cases exclusively. The defendant argued that the unit was structured so that the same judge presiding over a criminal prosecution for an intrafamily offense without a jury may also preside over other civil intrafamily matters involving the same parties and be privy to evidence in those matters that would be inadmissible in the criminal trial. The appellate court found no due process violation because the defendant did not claim that the judge in his case had received or considered any specific inadmissible evidence from any source. In so holding, the court cited a general principle that a trial judge's mere familiarity with a party and his or her legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias.

  For a Michigan case decided using similar principles, see *People v Coones,* 216 Mich App 721 (1996), holding that the same judge may preside over civil restraining order and criminal stalking proceedings. This case is discussed at Section 3.11(C).

Chapter 3: Common "Domestic Violence Crimes"

3

3.1 Chapter Overview

As discussed in Section 1.5, domestic abusers employ a wide variety of tactics to maintain control over their victims. Accordingly, criminal behavior in situations involving domestic violence may take many forms, so that any crime can be a "domestic violence crime" if perpetrated as a means of controlling an intimate partner. "Domestic violence crimes" may be directed against the person, property, animals, family members, or associates of the abuser's intimate partner. In *People v Wilson*, ___ Mich App ___ (2005), the Court of Appeals addressed the issue of what constitutes a "domestic violence case." The Court stated:

> "Domestic violence includes any of the assaults. Indeed, even murder may be characterized as domestic violence. Domestic violence is not a specific crime, but a description of circumstances surrounding a violent crime in which the perpetrator and victim have a pre-existing relationship that may be categorized as a 'domestic' relationship."

The only specific "domestic violence crimes" that this chapter will address in detail are domestic assault, parental kidnapping, stalking, and witness tampering. In Section 3.14, however, the reader will find a list of other Michigan criminal offenses that are likely to arise from domestic abuse. Because there are so many offenses on this list, a detailed discussion of each one is beyond the scope of this benchbook.

> **Note:** In the Violence Against Women Act, the U.S. Congress created three federal domestic violence crimes that are beyond the scope of this benchbook. These offenses are found at: 18 USC 2261 (traveling in interstate or foreign commerce or entering or leaving Indian country with the intent to kill, injure, harass, or intimidate a spouse or intimate partner and thereby committing a crime of violence); 18 USC 2261A (traveling in interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, or entering or leaving Indian country with the intent to kill, injure, or harass another person and thereby placing that person in reasonable fear of death or serious bodily injury to him/herself or to a member of his/her immediate family); and, 18 USC 2262 (traveling in interstate or foreign commerce or entering or leaving Indian country to violate a protection order).

3.2 Domestic Assault

A. Elements of Offense; Penalties for First-Time Offenders

In general, MCL 750.81(1) punishes assault or assault and battery as a misdemeanor offense subject to imprisonment for not more than 93 days and/or a maximum $500.00 fine. In subsections (2) to (4), however, the statute contains special penalty provisions for situations where the victim has one of the following relationships with the assailant:

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81(6).
- The victim is a resident or former resident of the same household as the assailant.

For a jury instruction on domestic assault, see CJI2d 17.2a.

First-time offenders who have one of the foregoing domestic relationships with the victim are subject to misdemeanor sanctions of not more than 93 days imprisonment and/or a maximum $500.00 fine. MCL 750.81(2). First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 3.6(A).

The Michigan Court of Appeals has addressed who may be included as a resident within the same household under the domestic assault statute. In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition in probate court charging a 16-year-old girl with battering her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts' decision, holding that:

> "When a statute is clear and unambiguous, judicial interpretation is precluded . . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute . . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim's relationship with the offender." 226 Mich App at 87-88.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaultive behavior between college roommates who were not romantically involved. 226 Mich App at 88, n 4.

> **Note:** The dissenting judge on the *Lovell* panel would have required residence in the household plus a romantic involvement as a prerequisite to coverage under MCL 750.81(2).

MCL 750.81 does not apply to an individual using "necessary reasonable physical force" as authorized in MCL 380.1312 to maintain order in a school setting. MCL 750.81(5).

B. Enhanced Penalties for Repeat Offenders

*There is no statutory requirement that the victim involved in the prior conviction be the same person as the victim of the current offense.

The penalties for domestic assault as defined in MCL 750.81(2) are enhanced for individuals who violate that statute after a previous conviction of certain other assaultive offenses. If the prior conviction involved a crime listed in MCL 750.81(3)-(4), and that prior crime was committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, or a resident or former resident of the assailant's household,* the penalties for the current offense will be enhanced as follows:

- Offenders with a single prior conviction "may be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.81(3).
- Offenders with 2 or more prior convictions are "guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both." MCL 750.81(4).

The prior offenses that result in enhanced penalties under MCL 750.81(3)-(4) are:

- A violation of MCL 750.81 (assault);
- A violation of MCL 750.81a (assault and infliction of serious injury);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);

- A violation of a local ordinance substantially corresponding to MCL 750.81;* or,

- A violation of a law of another state or a local ordinance of another state that substantially corresponds to any of the above statutes.

*For discussion of special problems arising from ordinance violations, see Section 3.6(C).

C. Procedures for Seeking an Enhanced Sentence

If the prosecutor seeks an enhanced sentence for domestic assault under MCL 750.81(3)-(4) or MCL 750.81a(3)*, the procedural requirements of MCL 750.81b apply:

*MCL 750.81a(3) is domestic assault and infliction of serious injury. See Section 3.3 for a discussion of MCL 750.81a(3).

> "(a) The charging document or amended charging document shall include a notice provision that states that the prosecuting attorney intends to seek an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL 750.81a(3)] and lists the prior conviction or convictions that will be relied upon for that purpose. The notice shall be separate and distinct from the language charging the current offense, and shall not be read or otherwise disclosed to the jury if the case proceeds to trial before a jury.
>
> "(b) The defendant's prior conviction or convictions shall be established at sentencing. The existence of a prior conviction and the factual circumstances establishing the required relationship between the defendant and the victim of the prior assault or assault and battery may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> > "(*i*) A copy of a judgment of conviction.
> >
> > "(*ii*) A transcript of a prior trial, plea-taking, or sentencing proceeding.
> >
> > "(*iii*) Information contained in a presentence report.
> >
> > "(*iv*) A statement by the defendant.
>
> "(c) The defendant or his or her attorney shall be given an opportunity to deny, explain, or refute any evidence or information relating to the defendant's prior conviction or convictions before the sentence is imposed, and shall be permitted to present evidence relevant for that purpose unless the court determines and states upon the record that the challenged evidence or information will not be considered as a basis for imposing an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL 750.81a(3)].
>
> "(d) A prior conviction may be considered as a basis for imposing an enhanced sentence under [MCL 750.81(3) or (4)] or [MCL

750.81a(3)] if the court finds the existence of both of the following by a preponderance of the evidence:

> "(*i*) The prior conviction.
>
> "(*ii*) 1 or more of the required relationships between the defendant and the victim of the prior assault or assault and battery."

D. Domestic Assault as a Lesser Included Offense

Two types of lesser-included offenses exist: (1) necessarily included offenses; and (2) cognate (or allied) lesser offenses. A necessarily included offense is one in which all the elements of the offense are contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser. *People v Bearss*, 463 Mich 623, 627 (2001). See also *People v Veling*, 443 Mich 23, 36 (1993) (the evidence at trial will always support the lesser offense if it supported the greater). A cognate or allied lesser offense is one that "share[s] some common elements, and [is] of the same class or category as the greater offense, but ha[s] some additional elements not found in the greater offense." *People v Perry*, 460 Mich 55, 61 (1999), quoting *People v Hendricks*, 446 Mich 435, 443 (1994).

> **Note**: For a comprehensive discussion of lesser-included offenses, see *Hendricks*, *supra* at 441-451 and *People v Bailey*, 451 Mich 657, 667-676 (1996).

The following offenses, often associated with domestic violence, are divided into degrees:

- Child abuse, see Section 3.14(A)(2);
- Homicide, see Section 3.14(A)(4);
- Criminal sexual conduct, see Section 3.14(A)(7); and
- Home invasion, see Section 3.14(B)(3).

MCL 768.32(1), a statute governing lesser-included offenses, must be applied to all offenses that are expressly divided into degrees and to offenses in which different grades or offenses or degrees of enormity are recognized. *People v Cornell*, 466 Mich 335, 353-354 (2002), citing *Hanna v People*, 19 Mich 316 (1869).

MCL 768.32(1) provides:

> "Except as provided in subsection (2),* upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."

*MCL 768.32(2) covers lesser-included offenses for specified controlled substance offenses.

In reference to MCL 768.32(1) and its application to lesser-included offenses, the Supreme Court in *Cornell, supra*, made a number of determinations. First, it explained that the word "inferior" in MCL 768.32(1) means that the statute only authorizes lesser offenses that either are necessarily included in the greater offense or that are attempts to commit the greater offense. *Cornell, supra* at 354, 354 n 7. Second, the Supreme Court held that, based on its interpretation of the statute, MCL 768.32(1) "does not permit cognate lesser offenses." *Cornell, supra* at 354. On this last point, see also *People v Pasha*, 466 Mich 378, 384 n 9 (2002) ("Following our decision in *Cornell*, the trier of fact may no longer convict a defendant of a cognate lesser offense."). Third, the Supreme Court held that instructions for necessarily included lesser offenses under MCL 768.32(1) are not limited to felonies and may include misdemeanors. *Cornell, supra* at 358-359. In so holding, the Supreme Court expressly overruled the following cases that permitted cognate lesser offenses and that "blatantly disregarded" MCL 768.32(1): *People v Jones*, 395 Mich 379 (1975); *People v Chamblis*, 395 Mich 408 (1975); *People v Stephens*, 416 Mich 252 (1982); and *People v Jenkins*, 395 Mich 440 (1975). *Cornell, supra* at 357-358.

The Supreme Court in *Cornell* established the following rule for determining whether an instruction for a necessarily included lesser offense is proper:

> "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell, supra* at 357.

See also *People v Silver*, 466 Mich 386, 392-393 (2002) (breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion and, as applied to facts of case, was appropriate since the distinguishing element was factually disputed and substantial evidence supported the lesser included offense).

In *People v Corbiere*, 220 Mich App 260 (1996), the Michigan Court of Appeals held that domestic assault is not a necessarily included lesser offense of third degree criminal sexual conduct. However, the court in *Corbiere* applied the five-step test that was articulated in *People v Stephens*, 416 Mich 252, 261-265 (1982), which was expressly overruled by *Cornell, supra* at 367.

3.3 Domestic Assault and Infliction of Serious Injury

MCL 750.81a(1) punishes "a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder." The Criminal Jury Instructions define a "serious or aggravated injury" as "a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4).

In subsections (2) and (3), this statute contains special penalty provisions for aggravated assaults where the victim has one of four types of relationships with the assailant:

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81a(4).
- The victim is a resident or former resident of the same household as the assailant. See Section 3.2(A) for discussion of who is included as a resident of the same household.

If the victim has one of these four types of domestic relationship with the assailant, the following penalties apply:

- A first-time offender is subject to misdemeanor sanctions of imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.81a(2). First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 3.6(A).
- An assailant with one or more previous convictions of certain other assaultive offenses is guilty of a felony punishable by imprisonment for not more than two years and/or a fine of not more than $2,500.00. MCL 750.81a(3). To be subject to enhanced penalties, the prior conviction must have involved a crime listed in MCL 750.81a(3) and have been committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, or a resident or former resident of the assailant's household. There is no statutory requirement that the victim involved in a prior conviction be the same person as the victim of the current offense.

The prior offenses that result in enhanced penalties under MCL 750.81a(3) are:

- A violation of MCL 750.81a (domestic assault and infliction of serious injury);
- A violation of MCL 750.81 (domestic assault, assault and battery);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);
- A violation of a local ordinance substantially corresponding to MCL 750.81a;* or,
- A violation of a law or local ordinance or another state substantially corresponding to one of the above enumerated crimes.

*For discussion of special problems arising from ordinance violations, see Section 3.6(C).

If the prosecutor seeks an enhanced sentence for domestic assault and infliction of serious injury under MCL 750.81a(3), the procedural requirements of MCL 750.81b apply. These requirements are set forth in full at Section 3.2(C).

3.4 Warrantless Arrest in Domestic Assault Cases

MCL 764.15a authorizes the warrantless arrest of an individual for violating MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, if the arresting officer has reasonable cause to believe (or receives positive information that another peace officer has reasonable cause to believe) both of the following:

- The violation occurred or is occurring; and,
- The individual arrested has had a child in common with the victim, has or has had a dating relationship with the victim, resides or has resided in the same household as the victim, or is a spouse or former spouse of the victim.

In *Klein v Long*, 275 F3d 544 (CA 6, 2001), the United States Court of Appeals for the Sixth Circuit provided guidance on determining probable cause in domestic violence cases. In *Klein*, David Klein had an argument with his wife. After the argument, Mr. Klein pushed one of his children back down into a chair and instructed the child to stay there. Mrs. Klein went into the kitchen to call the police. Mr. Klein followed her into the kitchen and grabbed the phone from Mrs. Klein. In the process of grabbing the phone, Mrs. Klein

was cut. Mrs. Klein then left the house and called 911 from a cell phone. When she spoke to the dispatcher, she indicated that Mr. Klein had been "grabbing and pushing" her and the children. When the police arrived, they found Mrs. Klein in front of the house. She was visibly upset, and her finger was bleeding. After questioning Mrs. Klein and the children, the officers placed Mr. Klein under arrest. Mr. Klein was held for 24 hours and released without being charged. Mr. Klein filed suit against the officers claiming that they violated his constitutional rights. The officers moved for summary judgment claiming that they had probable cause to arrest the defendant therefore did not violate his constitutional rights. The trial court denied the motion for summary judgment, and the officers filed an interlocutory appeal. The Court of Appeals reversed, concluding that the officers had probable cause to arrest the defendant. The Court provided the following guidance in determining probable cause:

> "The physical evidence of battery in the bleeding finger, combined with Mrs. Klein's description to the officers of Mr. Klein's grabbing and pushing and her immediate fear of Mr. Klein, constitutes a sufficient factual basis for the finding of probable cause.
>
> . . .
>
> "Thus, to have probable cause to arrest, a police officer must take into account all the evidence -- both inculpatory and exculpatory --that he has at the time of the arrest. Where the police have sufficient inculpatory evidence to give rise to a determination of probable cause and they do not know of any exculpatory evidence, we have held that 'the failure to make a further investigation does not negate probable cause.' *Coogan v. City of Wixom*, 820 F.2d 170, 173 (6th Cir. 1987) (internal quotation omitted); see also *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988)." *Klein, supra* at 552.

Warrantless arrest authority under MCL 764.15a extends regardless of whether the violation was committed in the presence of the arresting officer. The Michigan Attorney General has concluded that reasonable cause to arrest may exist even in the absence of physical evidence of domestic abuse.* See OAG, 1994, No 6822 (November 23, 1994), which states as follows:

> "It is my opinion . . . that, under MCL 764.15a; MSA 28.874(1), a peace officer, in a domestic relations matter, may make a warrantless arrest for a misdemeanor of assault or assault and battery committed outside of the officer's presence, in the absence of physical evidence of domestic abuse, when there is other corroborating evidence sufficient to constitute probable cause to believe that the person to be arrested committed the offense."

*The U.S. Attorney General has also concluded that this warrantless arrest statute is constitutional. See OAG, 1985-1986, No 6296, p 79 (May 21, 1985).

MCL 764.9c(3)(a) prohibits the issuance of an appearance ticket to persons arrested without a warrant for violating MCL 750.81, MCL 750.81a, or any

local ordinance substantially corresponding to MCL 750.81, if the victim of the assault is the offender's spouse, former spouse, an individual who has or has had a dating relationship with the offender, an individual who has had a child in common with the offender, or an individual residing or having resided in the same household as the offender.

Note: For warrantless arrest provisions applicable in other situations that may involve domestic violence, see:

- MCL 764.15(1)(d) (peace officer has "reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it.")
- MCL 764.15(1)(g) (violation of a condition of probation or parole).
- MCL 764.15b (violation of a personal protection order). This statute is discussed in Section 8.5.
- MCL 764.15e (violation of a pretrial release condition issued in a criminal proceeding for protection of a named person). This statute is discussed in Section 4.10.

3.5 Parental Kidnapping

This section addresses parental kidnapping in its criminal context. For discussion of civil remedies for violation of custody orders issued in domestic relations proceedings, and steps courts can take to discourage parental kidnapping, see Sections 12.9 and 12.10.

A. Elements of Parental Kidnapping; Penalties

Under Michigan law, parental kidnapping is a felony. MCL 750.350a(1) defines this offense as follows:

> "An adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights pursuant to a lawful court order at the time of the taking or retention, or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention."

The elements of parental kidnapping are as follows:*

*See also CJI2d 19.6.

- ♦ The defendant must be an adoptive or natural parent of the child; and

- The defendant must have:
  - taken the child from a person having the lawful charge of the child at the time of the taking; or
  - retained the child for more than 24 hours beyond the time when the defendant should have returned the child to the person having the lawful charge of the child; and
- The defendant must have had the intent to detain or conceal the child from:
  - the person having lawful charge of the child at the time;
  - the parent or legal guardian who had custody or parenting time rights at the time; or
  - the person who had adopted the child.

A person convicted under the parental kidnapping statute is subject to imprisonment for not more than one year and one day and/or a maximum fine of $2,000.00. MCL 750.350a(2). Additionally, the court may order the offender to make restitution for any financial expense incurred as a result of attempting to locate and have the child returned. Restitution may be made to the child's other parent, legal guardian, adoptive parent, or to any other person with lawful charge of the child. MCL 750.350a(3). Offenders with no prior kidnapping convictions may be eligible for deferred proceedings under MCL 750.350a(4), discussed at Section 3.6(B).

It is possible to violate this statute in the absence of a court order. In *People v Reynolds*, 171 Mich App 349 (1988), the defendant took a child from a grandparent who was baby-sitting. Because the child was born out-of-wedlock, there was no custody or parenting time order governing the rights of the parents. Nonetheless, the Court of Appeals held that the defendant was criminally liable for taking the child from the grandparent, who had lawful charge of him as a baby-sitter at the time of the taking. 171 Mich App at 352-353.

It is also possible for a parent to be convicted under the statute without receiving formal notice of the court's order giving custody to the other parent. In *People v McBride*, 204 Mich App 678 (1994), the defendant was separated from his wife in September, 1991. On September 25, 1991, the circuit court entered an ex parte order granting his wife sole custody of their children. On October 17, 1991, the defendant absconded with the children to California. Although his wife had told him about the custody order prior to October 17, it was not served on him until after that date. The Court of Appeals held that the failure of service did not prevent the district court from binding the defendant over for trial on criminal charges under the parental kidnapping statute. The panel noted that the statute contains no requirement that a parent be formally served with a custody order before he or she can be charged with parental kidnapping. It requires only that the parent from whom the child is

taken have custody or parenting time rights pursuant to a lawful court order at the time of the taking or retention. 204 Mich App at 682.

The parental kidnapping statute applies to parents who retain a child in another jurisdiction after taking the child from Michigan. In *People v Harvey*, 174 Mich App 58 (1989), the defendant abducted a child from Michigan five years before the 1983 enactment of the parental kidnapping statute and detained her in Colorado until 1986. The Court of Appeals held that the defendant had violated MCL 750.350a and was subject to the jurisdiction of the Michigan courts. The panel stated: "Acts done outside a state which are intended to produce, and in fact do produce, detrimental effects within the state may properly be subject to the criminal jurisdiction of the courts of that state. The detrimental effects of defendant's intentional *retention* of the girl [after 1983] in violation of the Michigan court's custody order occurred here, in Michigan, since it was the authority of a Michigan court that was thwarted and it was the custodial right of a Michigan resident that was infringed upon." 174 Mich App at 61 [emphasis added.]

B. Defenses to Parental Kidnapping

MCL 750.350a(5) provides an affirmative defense to parents who prove that they acted to protect the child "from an immediate and actual threat of physical or mental harm, abuse, or neglect."* This defense applies on its face only to actions taken to prevent harm to the *child*. The statute does not mention situations in which the defendant *parent* is threatened with harm, abuse, or neglect. As of the publication date of this benchbook, no Michigan appellate court has addressed the operation of this defense to parental kidnapping in a case involving a parent's flight from adult abuse. However, it is interesting to note a provision in the Child Custody Act, MCL 722.27a(6)(h), stating that a parent's temporary residence with a child in a domestic violence shelter does not amount to evidence of the parent's intent to conceal the child from the other parent for purposes of determining the frequency, duration, and type of parenting time.

*For a jury instruction on this defense, see CJI2d 19.7. A discussion of the harmful effects of adult domestic violence on children appears at Section 1.7(B).

In addition to the statutory affirmative defense, the common law defense of duress may apply in parental kidnapping cases. To establish duress, a defendant must show: 1) threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; 2) the conduct actually caused such fear in the defendant's mind; 3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act; and 4) the defendant committed the act to avoid the threatened harm. *People v Luther*, 394 Mich 619, 623 (1975). The defendant has the burden of providing some evidence from which the jury can conclude that the defendant acted under duress. If the defendant meets this burden of production, then the prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If a defendant denies that he or she has committed a crime, that defendant is not entitled to a jury instruction on duress. *People v McKinney*, 258 Mich App 157, 164 (2003) (defendant sought to prove that she lived with defendant out of fear but denied committing major controlled

substance offenses). For a jury instruction and commentary on duress, see CJI2d 7.6.

> **Note:** For specific circumstances supporting a defense of duress, see MCL 768.21b(4), which lists six conditions for a jury to consider in deciding whether a defendant acted under duress in escaping from prison. These conditions are illuminating because they are similar to conditions that are present in many relationships involving domestic violence: 1) whether the defendant was faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future; 2) whether there was insufficient time for a complaint to the authorities; 3) whether there was a history of complaints by the defendant which failed to provide relief; 4) whether there was insufficient time or opportunity to resort to the courts; 5) whether force or violence was not used towards innocent persons in the escape; and 6) whether the defendant immediately reported to the proper authorities upon reaching a position of safety from the immediate threat.

3.6 Deferred Sentencing for Domestic Assault and Parental Kidnapping

The Michigan Legislature has enacted deferred sentencing provisions for offenders charged with the following crimes:

- Domestic assault and battery or aggravated domestic assault. MCL 769.4a.
- Parental kidnapping. MCL 750.350a(4).
- Use or possession of a controlled substance. MCL 333.7411.

Additionally, deferred proceedings are available for most criminal defendants age 17 or older and under 21, under the Holmes Youthful Trainee Act, MCL 762.11, et seq. (Life-offense felonies, major controlled substance offenses, and traffic offenses are excepted from the Act.).

This section will provide more detailed information about the deferral statutes governing domestic assault and parental kidnapping. Deferred proceedings under the Controlled Substances Act and the Holmes Youthful Trainee Act are beyond the scope of this benchbook.

A. Deferred Proceedings Under the Domestic Assault Statutes

An offender who is found guilty of, or pleads guilty to, a violation of MCL 750.81, or MCL 750.81a,* may be eligible for deferred proceedings under MCL 769.4a. In order for the offender to be eligible, one of the following must apply:

*See Sections 3.2-3.3 on these domestic assault crimes.

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 769.4a(1).
- The victim is a resident or former resident of the same household as the assailant. See Section 3.2(A) for discussion of who is included as a resident of the same household.

MCL 769.4a allows the court to place the defendant on probation after a finding of guilt, without entering judgment. If the defendant subsequently violates a condition of probation, the court may enter an adjudication of guilt and impose sentence — in certain cases the court is required to do so. If the defendant fulfills the conditions of probation, the court must discharge him or her and dismiss the proceedings without an adjudication of guilt. This discharge and dismissal does not operate as a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. An individual may be discharged and dismissed only one time under the deferral statute. The Department of State Police is charged with keeping nonpublic records of proceedings under the statute to ensure that repeat offenders do not benefit from multiple deferrals.

Deferred proceedings under MCL 769.4a are authorized *only* if the following criteria are met:

- The defendant has no previous conviction for an assaultive crime. "Assaultive crime" means one or more of the following: (*i*) that term as defined in MCL 770.9a; (*ii*) a violation of MCL 750.81 to 750.90g; or (*iii*) a violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state substantially corresponding to a violation described in subparagraph (*i*) or (*ii*). MCL 769.4a(7)(a).
- The defendant consents to deferred proceedings.

- The prosecuting attorney, in consultation with the victim, consents to deferred proceedings.

Before ordering deferred proceedings in cases meeting the above criteria, the court must contact the Department of State Police to determine whether the defendant has previously been convicted of an assaultive crime or has previously availed himself or herself of proceedings under the deferral statute. If State Police records indicate that a defendant was previously arrested for an assaultive crime, but that there was no disposition, the court must contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of the arrest.

Orders of probation under MCL 769.4a(3) may include any condition of probation under MCL 771.3, including, but not limited to, requiring the defendant to participate in a "mandatory counseling program," and to pay the costs of this program.* The order of probation under MCL 769.4a(3) may also require the defendant to participate in a drug treatment court.

*See Sections 2.3 and 2.4 for more information on batterer intervention services.

In addition, the court may order the defendant to be imprisoned for not more than 12 months at the time or for consecutive or nonconsecutive intervals within the period of probation. The period of imprisonment must not exceed the maximum term of imprisonment authorized for the offense if the maximum term is less than 12 months. The court may permit day parole as authorized under MCL 801.251 to 801.258 or permit a work or school release from jail.* MCL 769.4a(3).

*Effective January 10, 2007. 2006 PA 663.

Upon a violation of a term or condition of probation, the court has discretion to enter an adjudication of guilt and impose sentence. MCL 769.4a(2). However, MCL 769.4a(4) *requires* the court to enter an adjudication of guilt and proceed to sentencing if any of the following three circumstances exist:

- The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.
- The accused violates an order of the court that he or she have no contact with a named individual.
- The accused commits an assaultive crime during the period of probation. An "assaultive crime" means a violation of one or more of the following:
  - Assault under MCL 750.81.
  - Assault and infliction of serious injury under MCL 750.81a.
  - Threats or assault against an FIA employee under MCL 750.81c.
  - Assault, battering, resisting, obstructing, or opposing a person performing his or her duty under MCL 750.81d.
  - Felonious assault under MCL 750.82.

- Assault with intent to commit murder under MCL 750.83.
- Assault with intent to do great bodily harm less than murder under MCL 750.84.
- Assault with intent to maim under MCL 750.86.
- Assault with intent to commit a felony under MCL 750.87.
- Unarmed assault with intent to rob and steal under MCL 750.88.
- Armed assault with intent to rob and steal under MCL 750.89.
- Sexual intercourse under pretext of medical treatment under MCL 750.90.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual under MCL 750.90a.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in a miscarriage or stillbirth under MCL 750.90b(a).
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in great bodily harm to the embryo or fetus under MCL 750.90b(b).
- Gross negligence against a pregnant individual under MCL 750.90c.
- Operating a vehicle while impaired or while under the influence of intoxicating liquors resulting in an accident with a pregnant individual under MCL 750.90d.
- Conduct as proximate cause of accident involving pregnant individual under MCL 750.90e.
- Infant Protection Act under MCL 750.90g.
- Attempt to murder under MCL 750.91.
- Explosives; common carriers for passengers; transportation under MCL 750.200.
- Manufacture, delivery, possession, transport, placement, use, or release of biological, chemical, or radioactive device or substance under MCL 750.200i.
- Manufacture, delivery, possession, transport, placement, use, or release of chemical irritant, chemical irritant device, smoke device, or an imitation device or substance under MCL 750.200j.

- Acts causing false belief of exposure under MCL 750.200*l*.
- Explosives exploded by concussion or friction under MCL 750.201.
- Marking of explosives intended for shipment under MCL 750.202.
- Sending explosives with intent to kill or injure persons or damage property under MCL 750.204.
- Representing or presenting a device as an explosive, incendiary device, or bomb under MCL 750.204a.
- Placing explosive substances with the intent to destroy and cause injury to any person under MCL 750.207.
- Placing an offensive or injurious substance with intent to injure, coerce, or interfere with a person or property under MCL 750.209.
- Possession of explosive substance or device in a public place under MCL 750.209a.
- Possession of a substance that when combined will become explosive or combustible with the intent to use unlawfully under MCL 750.210.
- Possession, sale, purchase, or transport of valerium under MCL 750.210a.
- Possession of a device designed to explode upon impact, upon application of heat or a highly incendiary device with intent to use unlawfully under MCL 750.211a.
- Manufacture or sale any high explosive which is not marked under MCL 750.212.
- First-degree murder under MCL 750.316.
- Second-degree murder under MCL 750.317.
- Manslaughter under MCL 750.321.
- Kidnapping under MCL 750.349.
- A prisoner taking another as a hostage under MCL 750.349a.
- Kidnapping a child under 14 under MCL 750.350.
- Mayhem under MCL 750.397.
- First-degree criminal sexual conduct under MCL 750.520b.
- Second-degree criminal sexual conduct under MCL 750.520c.
- Third-degree criminal sexual conduct under MCL 750.520d.

- Fourth-degree criminal sexual conduct under MCL 750.520e.
- Assault with intent to commit criminal sexual conduct under MCL 750.520g.
- Armed robbery; aggravated assault under MCL 750.529.
- Carjacking under MCL 750.529a.
- Unarmed robbery under MCL 750.530.
- Terrorism under MCL 750.543f.
- Hindering the prosecution of terrorism under MCL 750.543h.
- Providing material support for terrorist acts or soliciting material support for terrorism under MCL 750.543k.
- Making a terrorist threat or false report of terrorism under MCL 750.543m.
- Unlawful use of the internet, telecommunications, or electronic device to disrupt the functions of the public safety, educational, commercial, or governmental operations under MCL 750.543p.
- Obtaining or possessing certain information about a vulnerable target under MCL 750.543r.
- A violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state that substantially corresponds to a violation listed above. MCL 769.4a(7)(a)(*iii*).

Note: Domestic violence may occur as an abusive pattern that tends to escalate over time. MCL 769.4a is intended to intervene in abusive behavior during its early stages by offering the offender an incentive to seek assistance in changing his or her behavior before it escalates to a more dangerous level. For this reason, the statute's provisions for deferred sentencing are inappropriate for multiple offenders, or for offenders who are at risk for committing serious violent acts. See Section 1.4(B) for a discussion of lethality factors.

B. Deferred Sentencing in Parental Kidnapping Cases

Under MCL 750.350a(4), the court may defer imposition of sentence if a person found guilty of violating the parental kidnapping* statute meets both of the following criteria:

*The elements of parental kidnapping are discussed at Section 3.5(A).

- The defendant must not have been previously convicted of violating the parental kidnapping statute, the general kidnapping statute (MCL

750.349), or the statute governing kidnapping of children under 14 (MCL 750.350).

- The defendant must not have been previously convicted of violating any statute of the United States or any state related to kidnapping.

*Effective January 1, 2005. 2004 PA 223.

If there are no prior disqualifying convictions and the defendant consents, the court may place the defendant on probation "with lawful terms and conditions" without entering a judgment of guilt. The "terms and conditions" of the probation order may include participation in a drug treatment court. MCL 750.350a(4).* If the defendant violates a condition of probation, the court has discretion to enter a judgment of guilt and proceed to sentencing. If the defendant fulfills the terms and conditions of probation, however, the court must dismiss the proceedings without an adjudication of guilt. The defendant's discharge and dismissal under this provision do not operate as a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions.

To prevent repeat offenders from being sentenced under the deferred proceedings option, MCL 750.350a(4) requires the Department of State Police to keep a nonpublic record of arrests and discharges and dismissals under the parental kidnapping statute. When requested, the Department must furnish this record to a court or police agency to show whether a defendant in a criminal action has already been subject to deferred proceedings. It is thus important for courts to communicate with the State Police about parental kidnapping proceedings to prevent repeat offenders from improperly receiving deferrals.

C. Deferred Sentencing and Local Ordinances

*See Section 1.4(B) on lethality factors.

Domestic violence crimes are different from most other types of crime because these offenses often occur as part of an abusive pattern that may tend to escalate over time. Moreover, the perpetrator of a domestic violence crime usually has ready access to the victim due to the parties' living situation or arrangements for access to children. These characteristics place victims of domestic violence crimes at great risk of injury from re-offense. To adequately protect domestic violence crime victims in setting bond conditions and imposing (or deferring) sentence, it is important for the court to have information about the past behavior of the accused that will enable it to make a safety assessment.*

*See Sections 3.2(B)-3.3 on sentence enhancement for domestic assault. Bond conditions are discussed in Chapter 4.

State Police records are a critical source of information about the past criminal behavior of an individual. The appropriate use of deferred sentencing options in domestic assault and parental kidnapping cases is dependent upon the court's communication with the State Police regarding prior offenses. Police records are also needed for purposes of setting bond conditions under MCR 6.106 and imposing enhanced sentences for repeat domestic assault offenders under MCL 750.81(3)-(4) and MCL 750.81a(3).*

Prior convictions for local ordinance violations may not appear in State Police records if they do not carry the 93-day penalty that triggers the fingerprinting requirements of MCL 28.243. Under this provision, local law enforcement authorities *must* take fingerprints and send them to the State Police after the arrest or conviction of a person charged with a felony or a misdemeanor for which the maximum penalty exceeds 92 days imprisonment or a fine of $1,000.00, or both. MCL 28.243(1)-(2). Local law enforcement authorities must also take fingerprints and forward them to the State Police if a person is arrested for a violation of a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible term of imprisonment is 93 days. Local authorities *may* take fingerprints for other misdemeanor offenses and may send them to the State Police. MCL 28.243(5). Thus, State Police records will be incomplete to the extent that local authorities exercise their discretion to fingerprint and report persons convicted of ordinance violations carrying a maximum 92-day jail term. In some jurisdictions, these gaps in the State Police records have permitted persons with previous convictions of domestic assault ordinance violations to avoid enhanced penalties or to improperly receive a deferred sentence under MCL 769.4a upon their first conviction under state law.

To improve the tracking of misdemeanor ordinance violations, the Michigan Legislature has amended the statutes governing townships, cities, villages, and other municipalities, authorizing these entities to adopt ordinances with 93-day terms of imprisonment in cases where the ordinance would substantially correspond to a state statute that also imposes a maximum 93-day term of imprisonment. See, e.g., MCL 41.183(5). The 93-day penalties under these ordinances will trigger fingerprinting requirements under MCL 28.243(2), facilitating the compilation of a criminal history in the event that a misdemeanant later commits another offense.

3.7 Stalking Generally — Behavior Patterns and Legal Relief

Stalking — the willful, repeated harassment of another person — does not necessarily involve parties who are in a domestic relationship. A stalker can be any person whose behavior harasses another person; the media frequently report incidents in which the stalker is a stranger to or co-worker of the victim. Nonetheless, this chapter includes a discussion of stalking because domestic abusers often stalk their victims. Stalking behavior in a domestic relationship may arise from the abuser's obsessive jealousy or possessiveness of the victim. A jealous, possessive abuser may constantly monitor the victim's activities during the relationship. When the victim leaves or attempts to leave the relationship, the abuser may refuse to accept the end of the relationship and continue or escalate surveillance of the victim.* The abuser may subject the victim to ongoing harassment and pressure tactics, including multiple phone calls, homicide or suicide threats, uninvited visits at home or work, and manipulation of children.

*Adams, *Identifying the Assaultive Husband in Court: You Be the Judge,* Boston Bar Journal 23, 24 (July/August, 1989).

*See Section 1.4(B) for discussion of factors indicating potential lethality.

Abusers who stalk may be prepared to kill the victim rather than relinquish control over the victim's life. Thus, stalking behavior is a significant indicator of an abuser's potential lethality, particularly if it escalates in severity or increases in frequency when the victim attempts to leave the relationship or seeks court intervention to end the abuse. Prompt action to protect the victim is necessary when abusive behavior exhibits the foregoing (or any other) signs of potential lethality.*

*1992 PA 260, 261, 262.

Until January 1, 1993, civil injunctive relief or tort damages were the only remedies the courts could offer to stalking victims who could not show that the harassment had risen to the level of criminal assault against the victim or the victim's property. These civil remedies did not provide effective, accessible relief because they were not readily issued by the courts or enforced by police. To better protect victims, the Michigan Legislature enacted four anti-stalking statutes during its 1992 session.* Effective January 1, 1993, these statutes provided both criminal and civil remedies against stalking.

*Anti-stalking orders under this statute became one of two types of "personal protection order" created in 1994. See Section 6.2.

Two of the statutes enacted in 1992 contain criminal penalties for stalking. As enacted, MCL 750.411h imposed misdemeanor sanctions for less serious stalking behavior, while MCL 750.411i governed felony aggravated stalking. In addition to the criminal stalking statutes, the Legislature created two new civil remedies for stalking victims during its 1992 session. Effective January 1, 1993, a stalking victim could: 1) obtain an injunctive order restraining stalking (now known as a "personal protection order"), pursuant to MCL 600.2950a,* or, 2) file a civil action for damages against a stalker, pursuant to MCL 600.2954. 1992 PA 262.

The discussion that follows in Sections 3.8 - 3.12 and 3.14(A) will address all of the stalking statutes enacted in 1992, except for MCL 600.2950a, which is discussed in Section 6.4.

3.8 Misdemeanor Stalking

A. Elements of the Offense

*This statute contains felony penalties if the victim is less than 18 years of age at any time during the offense, and the offender is five or more years older than the victim. See Section 3.8(C).

"Stalking" is a criminal misdemeanor under MCL 750.411h.* In subsection (1)(d), the statute defines stalking as follows:

- "[A] willful course of conduct involving repeated or continuing harassment of another individual";
- "[T]hat would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and
- "[T]hat actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The following definitions further explain this offense:

- A "course of conduct" involves "a series of 2 or more separate, noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). See also *Poboursky v Gee*, 249 Mich App 44, 47-48 (2002).

- "Harassment" means conduct directed toward a victim that includes, but is not limited to, "repeated or continuing unconsented contact that would cause a reasonable individual 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." MCL 750.411h(1)(c).

- "Emotional distress" means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).

- Under MCL 750.411h(1)(e), "unconsented contact" means "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Unconsented contact includes, but is not limited to:

  – Following or appearing within the victim's sight.

  – Approaching or confronting the victim in a public place or on private property.

  – Appearing at the victim's workplace or residence.

  – Entering onto or remaining on property owned, leased, or occupied by the victim.

  – Contacting the victim by phone, mail, or electronic communications.

  – Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

  Note: A stalker's contacts with the victim may be both consented and unconsented. For example, a victim may consent to telephone calls from a former spouse to arrange for parenting time without consenting to the former spouse's appearance at his or her workplace. In these cases, the court might distinguish consented from unconsented contact and inquire whether the unconsented contact meets the requirements of the stalking statute.

In a criminal prosecution for stalking, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL

750.411h(4). For a discussion of the constitutionality of this provision, see Section 3.12(C).

The crime of stalking does not require the victim and the perpetrator to have a prior domestic relationship. Nonetheless, the prosecution may choose to charge a defendant with stalking in domestic situations where:

*See Section 3.1 for a definition of a "domestic violence crime."

- The elements for other domestic violence crimes cannot be proved;* or,
- The separate acts constituting the stalking behavior are less serious when considered as individual criminal acts than they are when considered cumulatively.

For a jury instruction on the elements of stalking, see Section 3.11(A).

B. Legitimate Purpose Defense to Stalking

MCL 750.411h(1)(c) creates defenses to stalking for "**constitutionally protected activity**" or "**conduct that serves a legitimate purpose**." A similar defense exists under the aggravated stalking statute, MCL 750.411i(1)(d). Constitutionally protected activities are discussed in Section 3.12(B).

The Court of Appeals addressed the legitimate purpose defense in *People v Coones*, 216 Mich App 721, 725-726 (1996). The Court found that the defendant was not entitled to a jury instruction on the "legitimate purpose" defense under the aggravated stalking statute, despite his assertions that contact with his estranged wife was made for the purpose of preserving their marriage. Defendant forcibly entered his wife's residence after she had obtained a restraining order against him, in violation of the order. Given this illegitimate conduct on defendant's part, his "ends justifies the means" argument did not require the trial court to instruct the jury on "legitimate purpose" under the statute.

In *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005), the Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq.* MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity,

> movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

C. Penalties for Misdemeanor Stalking

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, misdemeanor stalking is punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.411h(2)(a). The court may place the offender on probation for a term of not more than five years. MCL 750.411h(3) and MCL 771.2a(1). If the court orders probation, it may impose any lawful condition of probation, and in addition, may order the offender to:

- Refrain from stalking any individual during the term of probation;
- Refrain from having any contact with the victim of the offense; or,
- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.* MCL 750.411h(3).

*See Section 4.14(C) on batterer intervention services as a condition of probation.

MCL 750.411h(2)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, stalking

is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both.

*For juvenile offenders, see MCL 780.794.

Victims of misdemeanor stalking are entitled to restitution from the defendant under MCL 780.826.*

The foregoing penalties for stalking may be imposed in addition to any penalties that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct. MCL 750.411h(5). Regarding double jeopardy concerns with this provision, see Section 3.12(A).

3.9 Felony Aggravated Stalking

The following discussion sets forth the elements of and the penalties for felony aggravated stalking. For a discussion of the "legitimate purpose" defense to a stalking prosecution, see Section 3.8(B). "Constitutionally protected activities" are addressed in Section 3.12(B).

A. Elements of Aggravated Stalking

*See Section 3.8(A) on this definition.

The aggravated stalking statute, MCL 750.411i(1), contains the same definition of "stalking" as found in the misdemeanor stalking statute, MCL 750.411h(1).* However, an offender's behavior becomes felony aggravated stalking if it also involves any of the following circumstances set forth in MCL 750.411i(2):

- At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. "Actual notice" is not defined in MCL 750.411i. In *People v Threatt*, 254 Mich App 504, 506-507 (2002), the Michigan Court of Appeals held that actual notice does not mean service. Knowledge of the restraining order constitutes actual notice. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court. For a stalking case holding that violation of an Illinois protective order in Iowa could lawfully serve as the basis for elevation of the charges under Iowa's stalking statutes, see *State v Bellows*, 596 NW2d 509 (Ia, 1999).

- At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.

- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. A "credible threat" is a threat to kill or to inflict physical injury on another person, made so that it causes

the person hearing the threat to reasonably fear for his/her own safety, or for the safety of another. MCL 750.411i(1)(b).

- The offender has been previously convicted of violating either of the criminal stalking statutes.

In a criminal prosecution for aggravated stalking, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411i(5). For a discussion of the constitutionality of this provision, see Section 3.12(C).

For a jury instruction on the elements of aggravated stalking, see Section 3.11(A).

B. Penalties for Aggravated Stalking

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, aggravated stalking is punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both. MCL 750.411i(3)(a). Under MCL 750.411i(4),* the court may place an offender on probation for any term of years, but not less than five years. If it orders probation, the court may impose any lawful condition and may additionally order the offender to:

*MCL 771.2a(2) makes similar provision.

- Refrain from stalking any individual during the term of probation;
- Refrain from any contact with the victim of the offense; and
- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.*

*See Section 4.14(C) on batterer intervention services as a condition of probation.

MCL 750.411i(3)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years or a fine of not more than $15,000.00, or both.

If a prisoner convicted of aggravated stalking under MCL 750.411i is paroled and the victim has registered to receive notification about that prisoner, the prisoner's parole order must require that the prisoner's location be monitored by a global positioning monitoring system during the entire parole period. MCL 791.236(18).*

*See *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapter 7, for more information on victim notification.

Note: If at the time the prisoner was paroled no victim of that crime had registered to receive notification, but a victim registers to receive notification after the prisoner's parole, the parole order

must *immediately* be modified to include the requirement that the prisoner's location be monitored by a global positioning system. MCL 791.236(18).

*For juvenile offenders, see MCL 780.794.

Victims of aggravated stalking are entitled to restitution from the defendant under MCL 780.766.* For a discussion of procedural issues regarding restitution, see *People v White*, 212 Mich App 298, 316 (1995) (where the stalking victim's statement that her financial losses "equaled hundreds or thousands of dollars" was unsubstantiated by other evidence, remand to the trial court for an evidentiary hearing was necessary).

The foregoing penalties for stalking may be imposed in addition to any penalties that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct. MCL 750.411i(6). Regarding double jeopardy concerns with this provision, see Section 3.12(A).

3.10 Unlawful Posting of a Message Using an Electronic Medium of Communication

Effective April 1, 2001, the Michigan Legislature has specifically addressed stalking behavior in which the offender posts a message using an electronic medium of communication. MCL 750.411s(1) sets forth the basic offense as follows:

> "(1) A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:
>
> > "(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.
> >
> > "(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.
> >
> > "(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
> >
> > "(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

Violation of the foregoing provision is a felony punishable by imprisonment for not more than two years or a fine of not more than $5,000.00, or both. MCL 750.411s(2)(a).

Like the general stalking statutes, this statute provides increased penalties when there are aggravating circumstances. If any of the following circumstances apply, the offender is subject to imprisonment for not more than five years or a fine of not more than $10,000.00, or both, under MCL 750.411s(2)(b):

> "(*i*) Posting the message is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.
>
> "(*ii*) Posting the message is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.
>
> "(*iii*) Posting the message results in a credible threat being communicated to the victim, a member of the victim's family, or another individual living in the same household as the victim.
>
> "(*iv*) The person has been previously convicted of violating this section or [MCL 750.145d (use of computer technology to commit specified crimes against minor victims), MCL 750.411h or 750.411i (stalking and aggravated stalking), or MCL 752.796 (use of computer technology to commit a crime)] or a substantially similar law of another state, a political subdivision of another state, or of the United States.
>
> "(*v*) The victim is less than 18 years of age when the violation is committed and the person committing the violation is 5 or more years older than the victim."

The court may order a person convicted under either MCL 750.411s(2)(a) or (b) to reimburse the state or a local unit of government for expenses incurred in relation to the violation, in the same manner as provided in MCL 769.1f (governing expenses for emergency response to and prosecution of specified offenses). MCL 750.411s(4).

A person charged under this statute may also be charged with, convicted of, or punished for "any other violation of law committed by that person while violating or attempting to violate this section." MCL 750.411s(5).

This offense does not apply to:

- "[A]n internet or computer network service provider who in good faith, and without knowledge of the specific nature of the message

posted, provides the medium for disseminating information or communication between persons." MCL 750.411s(3).

- "[C]onstitutionally protected speech or activity." MCL 750.411s(6).*

*See Section 3.12(B) for more information about this issue.

MCL 750.411s(7) contains the following jurisdictional requirements:

> "A person may be prosecuted in this state for violating or attempting to violate this section only if 1 of the following applies:
>
> > "(a) The person posts the message while in this state.
> >
> > "(b) Conduct arising from posting the message occurs in this state.
> >
> > "(c) The victim is present in this state at the time the offense or any element of the offense occurs.
> >
> > "(d) The person posting the message knows that the victim resides in this state."

MCL 750.411s(8) contains the following definitions:

> "(a) 'Computer' means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.
>
> "(b) 'Computer network' means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.
>
> "(c) 'Computer program' means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.
>
> "(d) 'Computer system' means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.
>
> "(e) 'Credible threat' means a threat to kill another individual or a threat to inflict physical injury upon another individual that is

made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.

"(f) 'Device' includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

"(g) 'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

"(h) 'Internet' means that term as defined in . . . the communications act of 1934 . . . 47 U.S.C. 230.

"(i) 'Post a message' means transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim.

"(j) 'Unconsented contact' means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following:

> "(*i*) Following or appearing within sight of the victim.
>
> "(*ii*) Approaching or confronting the victim in a public place or on private property.
>
> "(*iii*) Appearing at the victim's workplace or residence.
>
> "(*iv*) Entering onto or remaining on property owned, leased, or occupied by the victim.
>
> "(*v*) Contacting the victim by telephone.
>
> "(*vi*) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network.
>
> "(*vii*) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim.

> "(k) 'Victim' means the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family."

It is also unlawful to use the internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit stalking under MCL 750.411h or aggravated stalking under MCL 750.411i. MCL 750.145d(1)(b).

3.11 Procedural Issues in Criminal Stalking Cases

This section sets forth the criminal jury instruction on stalking or aggravated stalking. It also summarizes Court of Appeals cases that have considered the evidence required to bind a defendant over for trial on aggravated stalking charges and the propriety of the same judge presiding over civil and criminal proceedings arising from stalking behavior.

A. Jury Instruction on Stalking

*For discussion of the elements of stalking or aggravated stalking, see Sections 3.8(A) and 3.9(A).

CJI2d 17.25 contains a jury instruction on stalking and aggravated stalking, which is quoted below. The comments inserted within the quoted instruction reflect changes to the instruction suggested by members of the Advisory Committee for this chapter of the benchbook. These changes are suggested in order to make the instruction more consistent with the stalking statutes.*

> "(1) [The defendant is charged with/You may consider the lesser offense of] stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> "(2) First, that the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact with [*name complainant*]."
>
> > **Comment:** To be more consistent with the statutes, the instruction might insert the words "*evidencing a continuity of purpose*" after the complainant's name. MCL 750.411h(1)(a), MCL 750.411i(1)(a). Moreover, the instruction might add the statutory definition of "unconsented contact" at this point. MCL 750.411h(1)(e) and MCL 750.411i(1)(f).
>
> "(3) Second, that the contact would cause a reasonable individual to suffer emotional distress.
>
> "(4) Third, that the contact caused [*name complainant*] to suffer emotional distress."

Comment: The instruction might add the statutory definition of "emotional distress" at this point. MCL 750.411h(1)(b) and MCL 750.411i(1)(c).

"(5) Fourth, that the contact would cause a reasonable individual to feel [terrorized/ frightened/ intimidated/ threatened/ harassed/ molested].

"(6) Fifth, that the contact caused [*name complainant*] to feel [terrorized/ frightened/ intimidated/ threatened/ harassed/ molested].

"[*For aggravated stalking, add the following:*]

"(7) Sixth, the stalking

"[was committed in violation of a court order]

"[included the defendant making one or more credible threats against the complainant, a member of (his/her) family, or someone living in (his/her) household]

"[was a second or subsequent stalking offense]."

Comment: If the evidence warrants it, the instruction should state that stalking does not include conduct that serves a legitimate purpose. See Section 3.8(B).

B. Sufficiency of Evidence

People v Kieronski, 214 Mich App 222 (1995) addressed the sufficiency of evidence required to bind a defendant over for trial on charges of aggravated stalking. Here, the prosecutor appealed from a decision of the Recorder's Court to quash an information against defendant alleging aggravated stalking. The Court of Appeals vacated the Recorder's Court order and reinstated the charge, finding that the evidence presented at the preliminary examination was sufficient to bind the defendant over for trial. The sole witness at the preliminary examination was defendant's ex-wife, who had obtained an ex parte order from the Wayne Circuit Court providing that defendant was to have no contact with her.* After the order was issued and defendant had actual notice of it, the witness testified that defendant had threatened her on three occasions — twice in person as she conducted business with the court and once when he telephoned her at her parents' house, saying, "I'll get you."

*The Court of Appeals' opinion does not specify the type of injunctive order at issue in this case.

C. Disqualification of Judge

*See Section 2.6(B) for more discussion of MCR 2.003(B).

In *People v Coones,* 216 Mich App 721, 726-727 (1996), the Court of Appeals held that the same judge who issued a temporary restraining order in defendant's divorce case and found defendant guilty of contempt for violating it could also preside over the defendant's criminal trial for aggravated stalking. Under MCR 2.003(B), a judge should be disqualified if he or she cannot impartially hear a case because of personal bias for or against a party or attorney.* The party seeking disqualification must show "actual prejudice" under this rule, except in cases where the judge might have prejudged the case because of prior participation as accuser, investigator, fact finder, or initial decision-maker. Here, disqualification was not required because the defendant failed to show actual prejudice on the part of the trial judge. Moreover, the trial judge's participation in the show cause hearing on the temporary restraining order did not require disqualification. The temporary restraining order was issued in defendant's divorce case and the trial judge did not participate as the fact finder or decision-maker in pretrial proceedings in the criminal stalking case.

3.12 Constitutional Questions Under the Criminal Stalking Statutes

This section summarizes cases upholding Michigan's criminal stalking statutes over constitutional challenges on double jeopardy, overbreadth, and due process grounds.

A. Double Jeopardy

*For more discussion of double jeopardy issues, see Section 8.12.

The Fifth Amendment to the U.S. Constitution and Article 1, §15 of the Michigan Constitution prohibit putting a criminal defendant twice in jeopardy for the same offense. This guarantee against double jeopardy affords separate protections against: 1) successive prosecutions for the same offense; and 2) protection against multiple punishments for the same offense. *People v Sturgis*, 427 Mich 392, 398-399 (1986).* In the following stalking cases, the Court of Appeals addressed double jeopardy objections based on alleged violations of both of these interests.

1. Successive Prosecution

In *People v White*, 212 Mich App 298 (1995), the defendant continuously stalked his victim from September 1992, through August 1993, making threats to kill the victim and her children. The stalking continued even after defendant was served with a temporary restraining order forbidding him from assaulting, beating, molesting, or wounding the victim. As a result, two separate complaints were issued against defendant. One complaint charged him with felony aggravated stalking. A second misdemeanor complaint charged defendant with violating a municipal ordinance identical to MCL

750.411h. Defendant pled guilty to both charges, but objected to the felony prosecution on double jeopardy grounds. The Court of Appeals found defendant's objection meritless. Citing *People v White*, 390 Mich 245, 254, 258-259 (1973), the Court noted that all charges arising against a defendant out of a single criminal act, occurrence, episode, or transaction must be joined at one trial. In this case, however, the charges against defendant did not arise out of a single transaction, but from distinct occurrences on distinct dates. The felony complaint stated that in June 1993, defendant repeatedly harassed the victim in violation of a restraining order, and made a credible threat to kill her or inflict physical injury upon her. The misdemeanor complaint alleged that in July 1993, defendant stalked, pursued, or terrorized the victim by calling her place of employment, threatening to kill her and her family members. The Court of Appeals held that these were two separate episodes of stalking, rejecting defendant's assertion that stalking is a continuous act for which he could receive only one punishment. 212 Mich App at 305-308.

> **Note:** *People v White*, 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*, 469 Mich at 578. See Section 8.12(C) for further discussion.

2. Multiple Punishments

The Court of Appeals in *People v Coones*, 216 Mich App 721, 727-728 (1996) held that separate convictions of aggravated stalking and criminal contempt for violation of a temporary restraining order are not multiple punishments in violation of double jeopardy, even though they are based upon the same conduct. The guarantee against double jeopardy does not prevent the Legislature from imposing separate penalties for what would otherwise be a single offense. The determinative inquiry is thus whether the Legislature *intended* to impose cumulative punishment for similar crimes. *People v Robideau*, 419 Mich 458, 485 (1984). With regard to aggravated stalking, the Legislature has clearly expressed its intent to impose multiple punishments for aggravated stalking and criminal contempt. MCL 750.411i(6) states:

> "A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct."

> **Note:** An identical double jeopardy provision exists in the misdemeanor stalking statute, MCL 750.411h(5).

B. Vagueness and Overbreadth

*For further commentary on these issues, see Kowalski, *The Michigan Stalking Law: Is It Constitutional?* 73 Mich Bar J 926 (1994).

An effective stalking law must be general enough to encompass the wide variety of behaviors that can constitute stalking, without being so broad as to run afoul of the Constitution. In *People v White*, 212 Mich App 298 (1995), the Michigan Court of Appeals upheld the Michigan stalking statutes over objections based on vagueness and overbreadth.* The Court of Appeals' reasoning in this case was later examined in the context of a federal habeas corpus proceeding and found to be a reasonable application of federal law.

After his victim ended her dating relationship with him, the defendant in *People v White, supra,* made hundreds of telephone calls to her home and workplace, threatening to kill her and her family members. After his arrest, defendant pled guilty to misdemeanor stalking in violation of a township ordinance substantially similar to the state misdemeanor statute, to attempted aggravated stalking under the state statute, and to habitual offender-third. On appeal from his conviction, defendant asserted that the stalking statutes were unconstitutionally vague, and that they abridged his First Amendment right to free speech by permitting the complainant to determine subjectively which telephone calls were acceptable and which were criminal.

The Court of Appeals in *White* rejected defendant's challenge to the statutes. The Court stated that a statute may be challenged for vagueness if it: 1) is overbroad, impinging on First Amendment rights; 2) does not provide fair notice of the conduct proscribed; or 3) confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. 212 Mich App at 309. Applying these standards, the Court held that the Michigan criminal stalking statutes were not unconstitutionally vague. The Court reasoned that the stalking statutes are not overbroad and do not impinge on the defendant's constitutional right to free speech. The statutes specifically exclude constitutionally protected speech, addressing instead a willful pattern of unconsented conduct — including conduct combined with speech — that would cause distress to a reasonable person. Defendant's repeated verbal threats to kill the victim and members of her family were neither protected speech, nor conduct serving a "legitimate purpose" of reconciliation. 212 Mich App at 310-311.

Moreover, the Court of Appeals found that the stalking laws provide fair notice of the proscribed conduct. The U.S. Supreme Court has stated that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson,* 461 US 352, 357 (1983). Here, a person of reasonable intelligence would not need to guess at the meaning of the stalking statutes. The definitions of crucial words and phrases in the statutes are clear and understandable to a reasonable person reading the statute. Also, the meaning of the words used in the statutes can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the

words themselves, because they possess a common and generally accepted meaning. 212 Mich App at 312.

Finally, the Court of Appeals determined that the trial court's discretion to decide whether the complainant receives a series of contacts in a positive or a negative fashion does not render the statutes vague. The Court of Appeals held that vagueness can only be established if the wording of the statute itself is vague. 212 Mich App at 313.

> **Note:** See also *People v Ballantyne*, 212 Mich App 628 (1995), in which the Court of Appeals rejected a similar overbreadth challenge to the aggravated stalking statute for the reasons stated in *People v White, supra*.

The U.S. Court of Appeals for the Sixth Circuit revisited the issues decided in *People v White, supra*, in *Staley v Jones,* 239 F3d 769 (CA 6, 2001). The defendant in the *Staley* case filed a petition for a writ of habeas corpus under 28 USC 2254 in the U.S. District Court for the Western District of Michigan, after the Michigan Supreme Court denied leave to appeal from his conviction of aggravated stalking under MCL 750.411i.* Although it found that the conduct giving rise to the defendant's conviction clearly fell within the scope of conduct that could constitutionally be penalized under the stalking statute, the federal district court nonetheless granted the petition, opining that the statute was overbroad and vague on its face. The district court reasoned that the state court in *White, supra,* had so limited the statutory exclusions for "constitutionally protected activities" and "conduct that serves a legitimate purpose" that the statute could be unconstitutionally applied to protected First Amendment conduct. In support of its decision, the district court cited the following language from *White*:

*28 USC 2254(a) authorizes a federal court to grant a writ of habeas corpus to state prisoners if they are held "in custody in violation of the Constitution or laws or treaties of the United States."

> "Both §411h(1)(c) and §411i(1)(d) state that '[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' *and such protected activity or conduct has been defined as labor picketing or other organized protests*." 212 Mich App at 310 [citation omitted; emphasis added].

From the foregoing language, the district court concluded that the Court of Appeals in *White* intended to limit the statutory exclusions to the two instances mentioned, namely, to labor picketing and other organized protests. Based on this conclusion, the district court found the stalking statute at odds with the First Amendment, because it could criminalize protected speech by such individuals as persistent news reporters or salespersons who cause emotional distress. *Staley v Jones*, 108 F Supp 2d 777, 784-788 (WD Mich, 2000). The district court further stated that if it had not found the statute inconsistent with First Amendment protections, it would have found it unconstitutionally vague because it provides no guidance as to what constitutes a "legitimate purpose." *Id*. at 786 n 4.

The U.S. Court of Appeals for the Sixth Circuit reversed the district court's grant of the habeas corpus petition, finding, among other things, that the district court had misinterpreted the controlling state precedent set forth in *White.* The appellate panel found that the *White* court's reference to labor picketing and other organized protests was meant to be illustrative of protected activities; the panel found "no indication" that the *White* court meant this reference to constitute an exhaustive list. 239 F3d at 783. This misreading of *White* "improperly colored" the district court's analysis of the overbreadth issue. *Id.*

*28 USC 2254(d)(1) requires the federal court in a habeas corpus proceeding to determine whether the state court's decision is contrary to, or an unreasonable application of, federal law.

The Sixth Circuit further rejected defendant's assertions that the Michigan Court of Appeals had unreasonably applied federal law in upholding the aggravated stalking statute over his constitutional challenges to them.* With respect to the defendant's challenge on overbreadth grounds, the Sixth Circuit panel held that the *White* court's application of federal law as set forth in *Broadrick v Oklahoma,* 413 US 601 (1973) was a reasonable application of federal law:

> "In short, even if the state court of appeals wrongly assessed the First Amendment implications in relation to the statute's legitimate reach (and we do not think it did), it cannot be said that the *White* court's application of *Broadrick* was unreasonable. As the Michigan Court of Appeals recognized, the thrust of this statute is proscribing unprotected conduct. Furthermore, any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute . . . . Simply stated, it was not unreasonable for the state court to reject Staley's overbreadth challenge." 239 F3d at 787.

With respect to the defendant's assertions that the statute was vague, the Sixth Circuit panel stated:

> "The state court's conclusion that the Michigan stalking law gives fair notice of what conduct is proscribed is not directly contrary to [U.S.] Supreme Court precedent or an unreasonable application of it . . . . The exclusion for 'conduct that serves a legitimate purpose' is . . . not defined. But this does not transform an otherwise unambiguous statute into a vague one. As the *White* court noted, a person of reasonable intelligence would know whether his conduct was violating the statute." 239 F3d at 791.

The Sixth Circuit's opinion in the *Staley* case also discusses at length the circumstances under which a facial challenge to a statute may be made by someone to whom the statute may constitutionally be applied, a question that is beyond the scope of this discussion.

C. Statutory Presumptions

MCL 750.411i(5) and MCL 750.411h(4) provide that:

> "[E]vidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

In *People v Ballantyne*, 212 Mich App 628, 629 (1995), the Court of Appeals held that the foregoing provisions do not unconstitutionally shift the burden of proof of an element of the offense to the defendant. Adopting the reasoning of *People v White*, 212 Mich App 298, 313-315 (1995), the Court of Appeals upheld MCL 750.411i(5) and MCL 750.411h(4) over objections that these provisions unconstitutionally shift the burden of proof of an element of the offense to the defendant. The Constitution requires that there be some rational connection between the fact proved and the ultimate fact presumed; the presumption of one fact from evidence of another does not constitute a denial of due process of law or of the equal protection of the law. Given the nature of the required conduct necessary to prove stalking, the presumption regarding the victim's state of mind is not so unreasonable as to be purely arbitrary. Moreover, assurance that the prosecutor continues to bear the burden of proof as to each element of stalking is found in MRE 302(b). This rule provides that whenever the existence of a presumed fact against the defendant is submitted to the jury, the court shall instruct the jury that it may, but need not, infer the existence of the presumed fact from the basic fact, and that the prosecution still bears the burden of proof beyond a reasonable doubt as to the elements of the offense.

3.13 Witness Tampering

Abusers may use a variety of methods to avoid conviction, including tampering with witnesses. Attempts to influence a victim-witness may include the following:

- giving or promising the victim something of value in exchange for not testifying or changing testimony,
- threatening or intimidating a victim through threats of physical harm,
- interfering with a victim's ability to testify, and
- retaliating against a victim for testifying.

The following discussion sets forth the types of witness tampering and the penalties for each offense.

A. Types of Witness Tampering

Effective March 28, 2001, the Michigan Legislature has specifically addressed witness tampering and intimidation, by enacting MCL 750.122. The witness tampering statute prohibits tampering through bribery, threats, intimidation, interference, or retaliation.

1. Bribery

MCL 750.122 sets forth the basic offense as follows:

> "(1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> > "(a) To discourage any individual from attending a present or future official proceeding* as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
> >
> > "(b) To influence any individual's testimony at a present or future official proceeding.
> >
> > "(c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> "(2) Subsection (1) does not apply to the reimbursement or payment of reasonable costs for any witness to provide a statement to testify truthfully or provide truthful information in an official proceeding as provided for under . . . MCL 213.66, or . . . MCL 600.2164, or court rule."*

*See Section 3.13(B), below, for the definition of "official proceeding."

*MCL 213.66 provides for witness fees in condemnation proceedings, and MCL 600.2164 regulates the payment of expert witness fees.

It is an affirmative defense to a bribery charge brought pursuant to MCL 750.122(1), that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully. The defendant has the burden of proof to prove the affirmative defense by a preponderance of the evidence. MCL 750.122(4).

MCL 750.122(1) does not apply to the following:

- The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.
- The lawful conduct or communications of a person as permitted by statute or other lawful privilege. MCL 750.122(5).

2. Threats or Intimidation

MCL 750.122(3) prohibits a person from doing any of the following by threat or intimidation:

> "(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> "(b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> "(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."

It is an affirmative defense to a charge brought pursuant to MCL 750.122(3) that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully. The defendant has the burden of proof to prove the affirmative defense by a preponderance of the evidence. MCL 750.122(4).

MCL 750.122(3) does not apply to the following:

- The lawful conduct of an attorney in the performance of his or her duties, such as advising a client.
- The lawful conduct or communications of a person as permitted by statute or other lawful privilege. MCL 750.122(5).

3. Interference

MCL 750.122(6) states as follows:

> "(6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding."

For an illustrative case on witness interference, see *People v Greene*, 255 Mich App 426 (2003). In this case, the defendant was originally charged with manslaughter for the willful killing of an unborn quick child after he allegedly physically assaulted his pregnant girlfriend. At the arraignment, the court ordered the defendant not to have any contact with the victim. At the preliminary examination, the victim testified that she was reluctant to testify against the defendant because she still loved him. She also admitted that she spoke with the defendant after the arraignment but prior to the preliminary examination. The prosecutor then filed a new criminal information charging the defendant with witness interference. At the continuation of the

preliminary examination, the parties stipulated that the previous testimony of the victim would be applied to the new charge. The court also received in evidence a taped conversation between the defendant, an acquaintance of his, and the victim. During the conversation, the defendant told the victim not to come to court, even though she was subpoenaed, and suggested a place to hide out for the day. The victim testified that she was not intimidated by the defendant, she did not think he was going to harm her, and she was not afraid to come to court. The district court bound the defendant over for trial. The defendant filed a motion to quash the information arguing that the evidence at the preliminary examination, if true, did not demonstrate that he violated MCL 750.122(6). The circuit court granted the defendant's motion to quash, finding that the magistrate could not have found probable cause to believe that the defendant's contact with the victim violated the narrowly drawn provisions of the witness tampering statute. The prosecutor appealed. The Court of Appeals articulated the elements of "interference" under MCL 750.122(6) as follows:

> "[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6." *Green, supra* at 442-443.

The Court of Appeals concluded:

> "We do not hold that a request, alone, not to attend a hearing or a stated desire that a witness not attend a hearing would be unlawful under MCL 750.122(6). Neither act would necessarily affect a witness's *ability* to attend a hearing. . . . Rather, in sum, the evidence presented at the preliminary examination would allow a reasonable person to infer that [defendant] knew [the victim] would be attending the preliminary examination to provide testimony against him; . . . [Defendant] then willfully attempted to interfere with [the victim's] intention to attend that hearing by telling her explicitly not to attend, playing to her feelings for him, and assuring her that the consequences would be minor or nonexistent; and this interference attempted to affect her ability to attend the hearing by impairing her ability to choose to do the right thing, which was to obey the subpoena." *Greene, supra* at 447.

4. Retaliation

After a victim of domestic violence testifies against her abuser, she may be faced with retaliation from the abuser. The abuser's conduct may violate MCL 750.122(8), which provides:

> "A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following:
>
> > "(a) Commit or attempt to commit a crime against any person.
> >
> > "(b) Threaten to kill or injure any person or threaten to cause property damage."

B. Definitions Under the Witness Tampering Statute

The witness tampering statute defines an "official proceeding" as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a). The witness tampering statute applies "regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding." MCL 750.122(9).

MCL 750.122(12)(b) provides that to "threaten or intimidate" does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the otherwise lawful filing of any civil action or police report the purpose of which is not to harass the other person. MCL 750.122(12).

"Retaliate" means to do any of the following:

> "(a) Commit or attempt to commit a crime against any person.
>
> "(b) Threaten to kill or injure any person or threaten to cause property damage." MCL 750.122(8).

C. Penalties for Witness Tampering

A person who is convicted of retaliation is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.

A person who violates MCL 750.122 is guilty of a felony punishable by imprisonment for not more than four years and/or a fine of not more than $5,000.00, except in the following circumstances:

- If the violation is committed in a criminal case involving an offense for which the maximum term of imprisonment is more than 10 years, or an offense punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.
- If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both. MCL 750.122(7).

A person charged under this witness tampering statute may also be charged with, convicted of, or punished for "any other violation of law arising out of the same transaction as the violation of this section." MCL 750.122(10).

"The court may order a term of imprisonment imposed for violating [MCL 750.122] to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of [MCL 750.122]." MCL 750.122(11).

3.14 Other Crimes Commonly Associated with Domestic Violence

As noted in Section 1.5, domestic violence involves a pattern of potentially criminal behavior that can include emotional, financial, physical, and sexual abuse. Such abuse can lead to a variety of criminal charges in addition to assault and battery; indeed, any crime can be characterized as a "domestic violence crime" if it is perpetrated with the intent to control an intimate partner. Although a complete discussion of all possible potential "domestic violence crimes" is beyond the scope of this benchbook, a list of offenses commonly associated with domestic violence is provided here for the reader's convenience.

A. Offenses Against Persons

A domestic violence perpetrator may commit a variety of crimes directed at the person of an intimate partner. In addition, some abusers seek to assert control over their intimate partners through criminal acts directed against the partner's family members, friends, or associates.

1. Assaults

In addition to the domestic assault offenses described in the foregoing sections of this chapter, the Michigan Penal Code penalizes the following types of assaults:

- Felonious assault. MCL 750.82. See CJI2d 17.9.
- Assault with intent to commit murder. MCL 750.83. See CJI2d 17.3 and 17.4.
- Assault with intent to do great bodily harm less than murder. MCL 750.84. See CJI2d 17.7.
- Assault with intent to maim. MCL 750.86. On the elements of this offense, see *People v Ward*, 211 Mich App 489 (1995).
- Assault with intent to commit a felony. MCL 750.87. See CJI2d 17.5.
- Conduct against a pregnant woman that causes death, miscarriage, stillbirth, or physical injury to the embryo or fetus. MCL 750.90a-750.90f. These statutes apply to intentional conduct, gross negligence, drunk driving, and careless or reckless operation of motor vehicles.

For a case involving assault with intent to commit murder, see *People v Hoffman*, 225 Mich App 103, 111 (1997). Here, the defendant sought reversal of his conviction for this offense based on the assertion that there was insufficient evidence. The Court of Appeals disagreed. The elements of this crime are: 1) assault; 2) with actual intent to kill; 3) which, if successful, would make the killing murder. The intent to kill may be proven by inference from any facts in evidence. Here, these elements were established where the defendant knocked his girlfriend down and repeatedly beat the back of her head against a paved sidewalk. He also threw her against the wall of his house, pulled her inside by her hair, punched her in the eye, and hit her on the head and shoulder with a baseball bat. He allowed his dog to repeatedly bite her legs while she was incapacitated.

2. Child Abuse

As noted in Section 1.7(A)(2), some abusers seek to control their intimate partners by perpetrating or threatening violence against their partners' children. The following Michigan Penal Code provisions impose criminal penalties for such behavior:

- First-, second-, third-, or fourth-degree child abuse. MCL 750.136b. This statute prohibits behavior that causes a child any physical harm or serious mental harm.* See CJI2d 17.18 through 17.24, and *People v Daoust*, 228 Mich App 1, 14-15 (1998).

*There is an affirmative defense to prosecution under this statute. MCL 750.136b(10). 2008 PA 577, effective April 1, 2009.

- Contribution to the neglect or delinquency of a minor. MCL 750.145 imposes misdemeanor penalties on persons who "by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, as defined in [MCL 712A.2], whether or not such child shall in fact be adjudicated a ward of the probate court."

3. Extortion, Obstruction of Justice

Abusers frequently obtain their partners' silence by threatening them with physical harm if they testify about the abuse in court or report it to the police. In addition to the witness tampering statute discussed in Section 3.13, such conduct is subject to criminal penalties under the following statutes:

- Extortion. MCL 750.213. See CJI2d 21.1-21.6.

- Obstruction of justice. MCL 750.122 and MCL 750.483a.

The above-cited statutes governing obstruction of justice took effect March 28, 2001.* Prior to that date, obstruction of justice was a common law offense governed by MCL 750.505. On the common law elements of this offense, see *People v Towar*, 215 Mich App 318, 320-321 (1996).

*See 2000 PA 451, 452.

For an illustrative case on extortion, see *People v Pena*, 224 Mich App 650 (1997), modified on other grounds 457 Mich 885 (1998). In this case, the defendant assaulted the victim, who reported the assault to the police. The defendant subsequently assaulted the victim a second time, threatening to kill her if she made further reports to the police. A jury convicted the defendant of extortion and obstruction of justice under the above-referenced statutes. On appeal, the Court of Appeals rejected the defendant's argument that the extortion statute did not contemplate the behavior giving rise to the defendant's conviction. The Court stated:

> "When a defendant is charged with extortion arising out of a compelled action or omission, a conviction may be secured upon the presentation of proof of the existence of a threat of immediate, continuing, or future harm . . . . [W]e conclude that the demand by defendant that the victim not talk to the police was an offense contemplated by the extortion statute because the act demanded was of such consequence or seriousness that the statute should apply." 224 Mich App at 656-657.

The Court of Appeals also rejected the defendant's assertion that her convictions of both extortion and obstruction of justice arising from the same

incident were in violation of the guarantees against double jeopardy. 224 Mich App at 658.

4. Homicide

Domestic violence can have fatal consequences, either for the victim, or, if the victim is pregnant, for her unborn child. The following statutes govern homicide:

- First-degree murder. MCL 750.316. See CJI2d 16.1, 16.6. On home invasion as an underlying felony to support a conviction for first-degree felony murder, see *People v Warren*, 228 Mich App 336, 345-354 (1998), rev'd in part on other grounds 426 Mich 415 (2000) and *People v McCrady*, 244 Mich App 27 (2000).
- Second-degree murder. MCL 750.317. See CJI2d 16.5, 16.6.
- Manslaughter. MCL 750.321. See CJI2d 16.8, 16.10.
- Wilful killing of an unborn quick child by any injury to its mother that would be murder if it resulted in the death of the mother. MCL 750.322. See *Larkin v Wayne County Prosecutor*, 389 Mich 533, 539 (1973).
- Attempt to murder. MCL 750.91.

5. Injuries or Death Involving Firearms or Dangerous Weapons

The presence of firearms or other weapons can increase the potential for lethality in a situation involving domestic violence.* The following criminal offenses can arise from conduct involving firearms or dangerous weapons:

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence.

- Death resulting from a firearm pointed intentionally, but without malice. MCL 750.329. See CJI2d 16.11.
- Intentionally aiming a firearm without malice. MCL 750.233. See CJI2d 11.23.
- Intentionally discharging a firearm aimed at another without malice and without causing injury. MCL 750.234. See CJI2d 11.24.
- Intentionally discharging firearm at dwelling or occupied structure. MCL 750.234b. See CJI2d 11.26a and CJI2d 11.26b.
- Intentionally discharging a firearm from a motor vehicle so as to endanger the safety of another. MCL 750.234a. See CJI2d 11.37.
- Intentional discharge of a firearm at a dwelling or occupied structure. MCL 750.234b. See CJI2d 11.37.
- Knowingly brandishing a firearm in public. MCL 750.234e.

- Reckless, wanton use or negligent discharge of firearm. MCL 752.863a. See CJI2d 11.26.
- Careless, reckless, or negligent use of firearms. MCL 752.861. See CJI2d 11.20.
- Injuring another by discharging a firearm aimed intentionally, without malice. MCL 750.235. See CJI2d 11.25.
- Carrying a firearm or dangerous weapon with unlawful intent. MCL 750.226. See CJI2d 11.17.
- Possession of a firearm at the time of commission or attempted commission of a felony. MCL 750.227b. See CJI2d 11.34.
- Possession or use of firearm by person under the influence of liquor or a controlled substance. MCL 750.237.

In addition to the foregoing offenses, criminal charges can arise from violation of certain firearms restrictions that arise under federal and Michigan law after a person has been:

- Indicted on felony or misdemeanor charges;
- Convicted of a felony or a misdemeanor crime; or
- Made subject to a personal protection order or a conditional pretrial release order in a criminal proceeding.

The firearms disabilities that result from these court proceedings are discussed in Chapter 9.

6. Kidnapping

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence. See Section 1.7(A)(2) regarding the use of children as a means of controlling the victim.

Abusers may kidnap their partners or others (e.g., children) as a means of asserting control in the relationship. Abusers who kidnap or take hostages are at increased risk for committing acts of lethal violence.*

Parental kidnapping under MCL 750.350a is the subject of Section 3.5. Other criminal statutes governing kidnapping are as follows:

- Kidnapping. MCL 750.349. See CJI2d 19.1-19.2, 19.4. On the elements of this offense and on forms of conduct that can constitute kidnapping, see *People v Jaffray*, 445 Mich 287, 297-300 (1994), *People v Hoffman*, 225 Mich App 103 (1997), and *People v Warren*, 462 Mich 415 (2000).

  Note: The applicability and content of the Criminal Jury Instructions and case law cited above may be affected by 2006 PA 159, which amended MCL 750.349, effective August 24, 2006.

- Maliciously, forcibly, or fraudulently leading, taking, carrying away, decoying, or enticing away any child under age 14 with the intent to detain or conceal the child from his or her parent or other person having lawful charge of the child. Adoptive or natural parents of a child may not be charged with this crime. MCL 750.350. On the elements of this offense, see *People v Kuchar*, 225 Mich App 74 (1997).

7. Criminal Sexual Conduct

Criminal sexual offenses may be committed in the context of a consensual intimate relationship. Sexual abuse is one common control tactic employed by domestic violence perpetrators and Michigan law specifically provides that an individual may be convicted of criminal sexual conduct even though the victim is the individual's spouse. MCL 750.520*l*. See also CJI2d 20.30. When assessing the danger presented by a situation involving allegations of domestic violence, it is important to recognize that an individual who is assaultive to an intimate partner during sex is at increased risk for committing lethal acts of violence.*

*On abusive tactics, see Section 1.5. See Section 1.4(B) for a list of lethality factors.

Because of its complexity, a discussion of the substantive law on criminal sexual conduct is beyond the scope of this benchbook.* For a detailed discussion of criminal sexual conduct, see *Sexual Assault Benchbook* (MJI, 2002-April 2009).

*But see Section 5.11 for a discussion of Michigan's rape shield provisions.

The following Penal Code provisions set forth the elements of criminal sexual offenses:

- First-degree criminal sexual conduct. MCL 750.520b. See CJI2d 20.1.
- Second-degree criminal sexual conduct. MCL 750.520c. See CJI2d 20.2.
- Third-degree criminal sexual conduct. MCL 750.520d. See CJI2d 20.12.
- Fourth-degree criminal sexual conduct. MCL 750.520e. See CJI2d 20.13.
- Assault with intent to commit criminal sexual conduct. MCL 750.520g. See CJI2d 20.17 and 20.18.

A conviction of certain criminal sexual conduct offenses may preclude the person convicted from obtaining custody or parenting time rights to a child. See Sections 12.3 and 12.8(A).

8. Mayhem

MCL 750.397 makes it a felony offense to commit the following acts with malicious intent to maim or disfigure: cut out or maim the tongue; put out or destroy an eye; cut or tear off an ear; cut or slit or mutilate the nose or lip; or cut off or disable a limb, organ or member, of any other person.

9. Stalking

Stalking and aggravated stalking are governed by MCL 750.411h and MCL 750.411i respectively. Electronic stalking is prohibited by MCL 750.411s. These offenses are discussed in Sections 3.7 - 3.12.

10. Malicious Use of Mail or Telecommunications Services

Malicious use of the mail or a telecommunications service may fall within the purview of the criminal stalking statutes discussed in Sections 3.7 - 3.12. Where the facts do not amount to stalking, however, the following statutes may apply:

- MCL 750.540 makes it a two-year felony to willfully and maliciously cut, break, disconnect, interrupt, tap, or make any unauthorized connection with any electronic medium of communication, to willfully and maliciously read or copy any message from any electronic medium of communication accessed without authorization, to willfully and maliciously make unauthorized use of any electronic medium of communication, or to willfully and maliciously prevent, obstruct, or delay by any means the delivery of any authorized communication by or through any electronic medium of communication. Violation of the statute is a four-year felony "[i]f the incident to be reported results in injury to or the death of any person...."

- MCL 750.540e makes it a misdemeanor punishable by six months in jail and/or a $1,000.00 fine to use "any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quite of another person." See *People v Taravella*, 133 Mich App 515 (1984) on the intent that must be established to support a conviction under this statute.

- MCL 750.390 makes it a misdemeanor to "knowingly send or deliver . . . any letter, postal card or writing containing any obscene language with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or other designation, with the intent thereby to cause annoyance to any person, or with a view or intent to extort or gain any money or property of any description belonging to another."

- MCL 750.539a-750.539d impose criminal penalties for unlawful eavesdropping and surveillance. See *People v Stone*, 463 Mich 558 (2001), in which the defendant was charged with eavesdropping on his former wife's private telephone conversations under MCL 750.539c. Because the conversations took place on a cordless telephone, the trial court quashed the information, holding that the conversations were not "private" for purposes of the statute. The Court of Appeals reversed the trial court's decision and the Supreme Court affirmed, holding that

as a matter of law, it was reasonable for defendant's former wife to expect that her cordless telephone conversations were private.

11. Torture

MCL 750.85 makes it a felony punishable by imprisonment for life or any term of years for a person to inflict great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control, with the intent to cause cruel or extreme physical or mental pain and suffering.

12. Unlawful Imprisonment

A person who knowingly restrains another person under any of the following circumstances has committed the crime of unlawful imprisonment:

- use of a weapon or dangerous instrument to restrain the person.
- the person restrained was secretly confined.
- the person was restrained in order to facilitate the commission of another felony or to facilitate flight after another felony was committed. MCL 750.349b(1)(a)–(c).

The crime of unlawful imprisonment is a felony punishable by not more than 15 years of imprisonment or a fine of not more than $20,000.00, or both. MCL 750.349b(2). In addition, a defendant may be charged with, convicted of, or sentenced for any other violation of law occurring during the defendant's commission of the unlawful imprisonment violation. MCL 750.349b(4).

13. Human Trafficking

MCL 750.462b makes it a felony to knowingly subject or attempt to subject another person to forced labor or services by causing or threatening to cause physical harm to another person.

MCL 750.462c makes it a felony to knowingly subject or attempt to subject another person to forced labor or services by physically restraining or threatening to physically restrain another person.

MCL 750.462d makes it a felony to knowingly subject or attempt to subject another person to forced labor or services by abusing or threatening to abuse the law or legal process.

MCL 750.462e makes it a felony to knowingly subject or attempt to subject another person to forced labor or services by knowingly destroying, concealing, removing, confiscating, or possessing an actual or purported passport or other immigration document, or any other actual or purported government identification document of another person.

MCL 750.462f makes it a felony to knowingly subject or attempt to subject another person to forced labor or services by using blackmail, using or threatening to cause financial harm to, or exerting or threatening to exert financial control over another person.

MCL 750.462g makes it a felony to knowingly recruit, entice, harbor, transport, provide, or obtain by any means, or attempt to recruit, entice, harbor, provide, or obtain by any means, a minor knowing that the minor will be used for child sexually abusive activity.

MCL 750.462h makes it a felony to recruit, entice, harbor, transport, provide, or obtain by any means, or attempt to recruit, entice, harbor, transport, provide, or obtain by any means another person, intending or knowing that the person will be subjected to forced labor, and to benefit financially or receive anything of value from participation in a venture that has engaged in one of these acts.

Violations of MCL 750.462b–750.462f and MCL 750.462h all are subject to the same punishment scheme:

- Simple violation of any of these statutes is punishable by imprisonment for not more than ten years.
- Violation of any of these statutes resulting in injury to another person is punishable by imprisonment for not more than 15 years.
- Violation of any of these statutes resulting in the death of another person is punishable by imprisonment for life or any term of years.

Violation of MCL 750.462g is punishable by imprisonment for not more than 20 years.

MCL 750.462i provides that if a violation of MCL 750.462b–750.462h involves kidnapping or an attempt to kidnap, criminal sexual conduct or an attempt to commit criminal sexual conduct, or an attempt to kill, that violation is punishable by imprisonment for life or any term of years.

The following definitions apply to the statutes discussed above:

- **"Child sexually abusive activity"** means "a child engaging in a listed sexual act." MCL 750.462a(a), MCL 750.145c.
- **"Commercial sexual activity"** means "[a]n act of sexual penetration or sexual contact as those terms are defined in [MCL 750.]520a for which anything of value is given or received by any person" or any conduct prohibited under MCL 750.145c(2) or (3) (creation, production, distribution, promotion, etc. of child sexually abusive material). MCL 750.462a(b).

- **"Extortion"** means conduct prohibited under MCL 750.213, "including, but not limited to, a threat to expose any secret tending to subject a person to hatred, contempt, or ridicule." MCL 750.462a(c).

- **"Financial harm"** means criminal usury as prohibited by MCL 438.41, extortion, employment contracts in violation of the wage and benefit provisions in MCL 408.471 to 408.490, or any other adverse financial consequence. MCL 750.462a(d).

- **"Forced labor or services"** means labor or services obtained or maintained by conduct described in at least one of the following provisions:

  – causing/threatening to cause serious physical harm to another person.

  – physically restraining/threatening to physically restrain another person.

  – abusing/threatening to abuse the law or legal process.

  – knowingly destroying, concealing, removing, confiscating, or possessing another person's actual or purported passport or other immigration document, or any other government identification document.

  – blackmail.

  – causing/threatening to cause financial harm to any person. MCL 750.462a(e).

- **"Labor"** means work having economic or financial value. MCL 750.462a(f).

- **"Maintain,"** as it relates to labor or services, means "to secure continued performance of labor or services, regardless of any initial agreement on the part of the victim to perform the labor or services." MCL 750.462a(g).

- **"Minor"** means a person under the age of 18. MCL 750.462a(h).

- **"Obtain"** means securing the performance of labor or services. MCL 750.462a(i).

- **"Services"** means "an ongoing relationship between a person and another person in which the other person performs activities under the supervision of or for the benefit of the person, including, but not limited to, commercial sexual activity and sexually explicit performances." MCL 750.462a(j).

B. Property Offenses

Some abusers seek to exercise control over their intimate partners through criminal behavior directed at their partners' animals or property. Such behavior might result in charges under the following statutes.

1. Cruelty to Animals

*See Section 1.4(B) for a list of lethality factors in situations involving domestic violence.

Abuse of pets is a common control tactic of domestic violence perpetrators. Abusers who kill or mutilate their partners' pets are at increased risk to commit lethal acts of violence.* The following statutes penalize animal abuse:

- Crimes against animals. MCL 750.50.
- Willfully, maliciously, and without just cause or excuse killing, torturing, mutilating, maiming, disfiguring, or poisoning an animal. MCL 750.50b.

2. Arson

Arson is governed by the following criminal statutes:

- Willfully or maliciously burning an occupied or unoccupied dwelling, or its contents, or any building within its curtilage, regardless of whether the defendant owns the dwelling. MCL 750.72. See CJI2d 31.1 and 31.2.
- Willfully and maliciously burning any personal property owned by oneself or another. MCL 750.74. See CJI2d 31.4.

The foregoing offenses apply to a married person, although the property burnt may belong partly or wholly to his or her spouse and be occupied by the couple as a residence. MCL 750.76.

It is also a criminal offense to use any inflammable material or device in or near a building or property with the intent to willfully and maliciously set it on fire, or to persuade or procure another to do the same. MCL 750.77.

3. Breaking and Entering, Home Invasion

The following Michigan statutes govern breaking and entering and home invasion:

- Breaking and entering into a building with intent to commit a felony or a larceny. MCL 750.110. See CJI2d 25.1 and 25.2.
- Entering a dwelling or other building without breaking with intent to commit a felony or a larceny. MCL 750.111. See CJI2d 25.3.

- Breaking and entering, or entering without breaking, a dwelling or other structure without obtaining permission to enter. MCL 750.115. See CJI2d 25.4.

- Home invasion. MCL 750.110a. See CJI2d 25.2a - 25.2f and *People v Warren*, 228 Mich App 336, 345-354 (1998), rev'd in part on other grounds 426 Mich 415 (2000) regarding the elements of this offense.

The home invasion statutes can often come into play in cases of domestic violence. In 1999, the home invasion statute was amended by adding provisions for circumstances where an assault occurs in conjunction with a breaking and entering or a breaking and entering occurs for the purpose of assaulting another person. MCL 750.110a(2) provides that a person who does any of the following:

- breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling,

- enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or

- breaks and enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault,

while either armed with a dangerous weapon or while another person is lawfully present in the dwelling, is guilty of first-degree home invasion.

First-degree home invasion is a felony punishable by imprisonment for not more than 20 years or a fine of not more than $5,000.00, or both. MCL 750.110a(5). The court may order a term of imprisonment imposed for first-degree home invasion to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. MCL 750.110a(8).

The elements for a second-degree home invasion are provided in MCL 750.110a(3), which states:

> "A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree."

Second-degree home invasion is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $3,000.00, or both. MCL 750.110a(6).

A person is guilty of third-degree home invasion if the person does either of the following:

- Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

- Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons:

  - A probation term or condition.
  - A parole term or condition.
  - A personal protection order term or condition.
  - A bond or bail condition or any condition of pretrial release.

Third-degree home invasion is a felony punishable by imprisonment for not more than five years or a fine of not more than $2,000.00, or both. MCL 750.110a(7).

Imposition of a penalty under the home invasion statute does not bar imposition of a penalty under any other applicable law. MCL 750.110a(9).

*The statutory provisions took effect Oct. 1, 1999.

See *People v Szpara*, 196 Mich App 270, 272-274 (1992), a case pre-dating the statutory home invasion provisions just described.* In this case, the Court of Appeals upheld the defendant's conviction for breaking and entering into his home where the acts constituting this offense also violated a civil injunction that prohibited him from entering his home. The civil injunction was issued under MCL 552.14, which at that time authorized the trial court in a divorce proceeding to enter a preliminary injunction restraining a party from entering onto certain premises. In upholding the defendant's criminal conviction, the panel reasoned that: 1) the contempt provision of MCL 552.14 was not the exclusive remedy for defendant's actions because this remedy serves a different purpose from the penalties under the breaking and entering statute; and 2) defendant could be charged with breaking and entering into his own home where the divorce court's injunction had removed his right to enter it.

Both misdemeanor and felony assaults may be charged as the underlying offense for first-degree home invasion. *People v Sands*, ___ Mich App ___, ___ (2004). In *People v Musser*, 259 Mich App 215 (2003), the defendant entered the victim's house and sexually assaulted her. The defendant was convicted of first-degree home invasion and fourth-degree criminal sexual conduct. On appeal, the defendant argued that pursuant to MCL 750.110a(2),

a home invasion offense must be based upon the intent to commit, or the actual commission of, a "felony, larceny, or assault." The defendant claimed that he did not commit a "felony, larceny, or assault" because criminal sexual conduct in the fourth degree is a misdemeanor and is not a larceny or an assault. *Id.* The Court of Appeals rejected this argument and held:

> "Although the term 'assault' is not defined within the statute, our Supreme Court has previously defined this term. In *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998), the Supreme Court explained that while the penalty and constituent elements of aggravated assaults are codified, 'the *definition* of assault is left to the common law.' (Emphasis added.) As further stated by the *Reeves* Court, Michigan has defined the term 'assault' as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.' *Id*. at 240 (citation omitted).
>
> * * *
>
> "[T]his Court has recognized that [criminal sexual conduct] crimes are actually a specialized or aggravated form of assault. In *People v Corbiere*, 220 Mich App 260, 264; 559 NW2d 666 (1996), recognizing that criminal sexual conduct and assault statutes were enacted to protect distinct legislative interests, this Court indicated that '[t]he Legislature has gone to great lengths to carve out sexual *assaults* from other types of assaults.'(Citation omitted; emphasis changed) . . .
>
> "Thus, the fact that the penalty and constituent elements of [criminal sexual conduct] crimes are codified in a different section than the 'general assault' crimes does not mean that [criminal sexual conduct] crimes do not constitute a specific type of assault. Accordingly, we hold that fourth-degree [criminal sexual conduct] constitutes an assault for the purposes of the home invasion statute, and therefore defendant's conviction for home invasion must be affirmed." *Id.*

4. Desertion and Non-support

One common abusive tactic involves the exercise of economic control over an intimate partner. Abusers who fail to provide necessary shelter, food, care, or clothing for their spouses and children are subject to criminal sanctions under the following provisions:

*There is an affirmative defense to prosecution under this statute. MCL 750.136b(10). 2008 PA 577, effective April 1, 2009.

- MCL 750.136b(3)(a) and (6) impose criminal sanctions for "omissions" that cause a child physical harm or serious mental harm. "Omissions" are defined as a "willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child." MCL 750.136b(1)(c). This statute applies to a child's parent or guardian, or to any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person. MCL 750.136b(1)(d).* See CJI2d 17.19 and 17.22.

- MCL 750.167, and MCL 750.168 provide that "[a] person of sufficient ability who refuses or neglects to support his or her family" is a "disorderly person" subject to misdemeanor sanctions.

- MCL 750.165(1) states: "If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both." A person may not be liable under this statute unless he or she "appeared in, or received notice by personal service of, the action in which the support order was issued." MCL 750.165(2).

- MCL 750.161(1) provides that "a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony." For discussion of the elements of this crime, see *People v Coleman*, 325 Mich 618 (1949), and *People v Haralson*, 26 Mich App 353 (1970). See also *People v Law*, 459 Mich 419 (1999) (trial court may award interest on unpaid support under the Crime Victim's Rights Act, MCL 780.751 et seq).

- The Child Support Recovery Act, 18 USC 228(a)(1), makes it a federal offense for a person to willfully fail to "pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000." This statute also makes it unlawful to travel in interstate or foreign commerce with the intent of evading a support obligation that has remained unpaid for longer than one year or that exceeds $5000.00. Penalties for violating the statute include imprisonment and restitution. 18 USC 228 (c)-(d), 3663A. For a case upholding the Act's validity under the Commerce Clause and discussing the proper method of collecting the child support award at issue, see *United States v Bongiorno*, 106 F3d 1027 (CA 1, 1997). For a case concluding that the Act is an appropriate exercise of Congress's power under the Commerce Clause, see *United States v Faasse*, 265 F3d 475 (2000).

Civil remedies for non-support are discussed at Section 7.4(B)(5) and in Chapter 11.

5. Malicious Destruction of Property

Domestic abuse may involve destruction of an intimate partner's personal property. The following criminal statutes apply to this behavior:

- Malicious destruction of personal property of another. MCL 750.377a. See CJI2d 32.2.
- Malicious destruction of or injury to a house or other building of another, or to the appurtenances thereof. MCL 750.380. See CJI2d 32.3.
- Maliciously breaking down, injuring, marring, or defacing any fence belonging to or enclosing another's land. MCL 750.381.
- Malicious destruction of trees, shrubs, plants, or soil. MCL 750.382.

6. Trespassing

Trespassing upon property may amount to criminal stalking, which is discussed above at Sections 3.7 - 3.12. Where stalking is not at issue, however, the following statutes may apply:

- Willfully entering onto another's improved land without permission and with intent to injure the plants growing there. MCL 750.547.
- Willfully entering another's premises after being forbidden to do so. MCL 750.552.
- Trespassing for purposes of eavesdropping or surveillance. MCL 750.539b.

3.15 A Note on Tort Remedies

This section provides information about tort remedies for damages incurred as a result of criminal conduct in cases involving stalking or domestic assault.* For discussion of the interplay between divorce and tort actions based on domestic violence, see Section 11.7.

*General discussion of civil actions filed by crime victims appears in *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapter 12.

A. Civil Suit for Damages Resulting from Stalking

*Victims of stalking can also petition the circuit court for a personal protection order. This remedy is discussed in Chapters 6-8.

MCL 600.2954 provides a civil remedy for damages resulting from stalking, as follows:*

> "(1) A victim may maintain a civil action against an individual who engages in conduct that is prohibited under section 411h or 411i of the Michigan penal code . . . for damages incurred by the victim as a result of that conduct. A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section.
>
> "(2) A civil action may be maintained under subsection (1) whether or not the individual who is alleged to have engaged in conduct prohibited under section 411h or 411i . . . has been charged or convicted under section 411h or 411i . . . for the alleged violation.
>
> "(3) As used in this section, 'victim' means that term as defined in section 411h."

MCL 750.411i(1)(g) and MCL 750.411h(1)(f) define "victim" as "an individual who is the target of a willful course of conduct involving repeated or continuing harassment."

No appellate cases have been decided under MCL 600.2954 as of the publication date of this benchbook.

B. Intentional Infliction of Emotional Distress

Prior to the effective date of MCL 600.2954, victims of stalking behavior availed themselves of such common law tort remedies as intentional infliction of emotional distress. *Haverbush v Powelson*, 217 Mich App 228 (1996) illustrates the elements of this cause of action and the remedies available. In *Haverbush*, plaintiff, an orthopedic surgeon, was harassed over a two-year period by a registered nurse at the same hospital where he worked. When the nurse's behavior escalated to the point where the surgeon feared for his life and the safety of his patients, he obtained a temporary restraining order against the nurse and sued her for intentional infliction of emotional distress. After trial, the court found Powelson liable and awarded the surgeon $11,615.00 in damages. The court also issued an injunction, which, among other things, required the nurse to apply for a transfer at the hospital so as to avoid contact with the surgeon and his patients. On appeal from the trial court's judgment, the nurse argued that: (1) her conduct was not extreme and outrageous; (2) Haverbush failed to prove severe emotional distress; and (3) the court erred in granting an injunction.

Affirming the trial court's decision, the Court of Appeals acknowledged that liability for intentional infliction of emotional distress may be found only

where the defendant's conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." 217 Mich App at 234. However, after reviewing the record, the Court concluded that a rational trier of fact could find that Powelson's conduct was sufficiently extreme and outrageous under this standard. *Id.*

Although the Court agreed that the plaintiff must prove severe emotional distress, it emphasized that the extreme and outrageous character of a defendant's conduct may, in itself, establish that element of the cause of action. *Dickerson v Nichols*, 161 Mich App 103, 107-108 (1987). Although the surgeon presented no evidence that he sought medical treatment for emotional distress, the Court nevertheless concluded:

> "On the facts of this case, severe emotional distress was established by Haverbush's testimony (1) that Powelson's letter accused him of harassment, (2) that he was especially fearful after Powelson left the ax and the hatchet on his vehicles, (3) that Powelson's letters caused him great concern that she was going to interfere with his wedding, (4) that he was worried about his reputation because of what Powelson said about him to others, (5) that he was concerned with his patients' safety, and (6) that Powelson's actions affected the way he did his work." 217 Mich App at 235-236.

With respect to the injunction, Powelson argued that it should not have been granted because there existed an adequate remedy at law (i.e., the stalking law and the peace bond statute). The Court disagreed. Citing *Peninsula Sanitation v Manistique*, 208 Mich App 34, 43 (1994), the Court stated that the existence of criminal or economic penalties is not an adequate remedy at law if it requires a party to return repeatedly to court. The Court stated:

> "In light of the overwhelming evidence of Powelson's actions over nearly three years to harass and inflict distress and fear in Haverbush, the trial court did not err in concluding that Haverbush had no adequate remedy because the remedies proposed by Powelson here would require him to return to the police or the courts repeatedly." 217 Mich App at 237-238.

The Court then addressed the trial court's order that required Powelson to apply for a transfer within the hospital. Powelson argued that the order was ineffectual and difficult to enforce, and that it impaired her occupation and livelihood. The Court disagreed. It noted that 90 percent of Haverbush's patients were on Powelson's floor, and that given Powelson's "bizarre behavior," the order was justified. The Court emphasized that the order would effectively minimize contact between Powelson and Haverbush and Haverbush's patients, and that it merely required Powelson to apply for a lateral transfer to another floor. 217 Mich App at 239.

Note: For cases discussing intentional infliction of emotional distress in domestic contexts other than stalking, see *Bhama v Bhama*, 169 Mich App 73 (1988) (alleged destruction of plaintiff's relationship with her children), and *McCoy v Cooke*, 165 Mich App 662 (1988) (alleged physical and mental abuse of plaintiff). These cases are discussed in Section 11.7(A).

C. Statute of Limitations

MCL 600.5805 sets forth a five-year period of limitations for the following civil actions brought by a plaintiff who has been assaulted or battered by a domestic partner:

- Actions charging assault or battery, MCL 600.5805(3) and MCL 600.5805(4); or
- Actions to recover damages for injury to a person or property, MCL 600.5805(11) and MCL 600.5805(12).

The five-year period of limitations applies in cases where the defendant is:

- The plaintiff's spouse or former spouse;
- A person with whom the plaintiff has had a child in common;
- A person with whom the plaintiff has or has had a dating relationship; or
- A person with whom the plaintiff resides or has formerly resided.

Prior to the enactment of the foregoing provisions, the actions they describe were subject to a two-year period of limitations for an action charging assault, battery, or false imprisonment, and a three-year period of limitations for a general action to recover damages for the death of a person, or for injury to a person or property not otherwise covered by the statute.*

*See subsections (2) and (9) for these provisions. The statute also provides specific limitations periods for other actions, including malicious prosecution, libel, slander, and misconduct or neglect by a constable, sheriff or sheriff's deputy.

The amended limitations periods apply to:

- Causes of action arising on or after February 17, 2000 under MCL 600.5805(3) and MCL 600.5805(11) that involve a spouse or former spouse, an individual with whom the plaintiff has had a child in common, or a person with whom the plaintiff resides or formerly resided.
- Causes of action under MCL 600.5805(3) and MCL 600.5805(11) that involve a spouse or former spouse, an individual with whom the plaintiff has had a child in common, or a person with whom the plaintiff resides or formerly resided in which the period of limitations described in MCL 600.5805(2) has not expired by February 17, 2000.

- Causes of action arising on or after January 1, 2003 under MCL 600.5805(4) and MCL 600.5805(12) that involve a dating partner.
- Causes of action under MCL 600.5805(4) and MCL 600.5805(12) that involve a dating partner in which the period of limitation described in MCL 600.5805(2) has not expired as of January 1, 2003.

The period of limitation described in MCL 600.5805(2) is two years for an action charging assault, battery, or false imprisonment.

Chapter 4: Promoting Safety in Criminal Proceedings

4

4.1 Chapter Overview

Criminal cases involving allegations of domestic violence differ from other criminal cases due to the increased risk for re-offense or obstruction of justice during periods when the defendant is not held in custody.* Two reasons for this increased risk are:

*See *Attorney General's Task Force on Family Violence*, p 42-43 (Final Report, 1984); Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 32 (1990).

- The perpetrator of a domestic violence crime has greater access to the victim than does the perpetrator of stranger violence. Domestic violence perpetrators are likely to live with their victims, or to have regular contact with them for purposes such as child visitation.
- Domestic violence is motivated by the abuser's desire to control the victim. Accordingly, abusers may resort to violence to regain the control that is lost when their behavior leads to criminal charges.

This chapter presents information on statutory provisions and case management practices that address the foregoing risks, with a primary focus on orders for pretrial release and probation. Police reporting requirements and crime victim confidentiality concerns are also discussed. For additional discussion of how abuse might affect an individual's interactions with the court system and attendant safety and policy concerns, see Section 1.6(B) and (C).

> **Note:** The discussion in this chapter assumes that the defendant is an adult. For a discussion of pretrial release and probation of juvenile offenders, see *Juvenile Justice Benchbook: Delinquency and Criminal Proceedings—Revised Edition* (MJI, 2003-April 2009). A discussion of crime victim safety generally appears in *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009).

4.2 Police Reports in Cases Involving Domestic Violence

Police who investigate or intervene in "domestic violence incidents" are required by statute to prepare a standard domestic violence incident report form describing the incident. The law enforcement agency must keep a copy for its file and file a copy with the prosecuting attorney within 48 hours after an incident is reported. MCL 764.15c(2)-(3). Pursuant to MCL 764.15c(5)(b), a "domestic violence incident" involves allegations of one or both of the following:

*See Section 6.3 on domestic relationship PPOs. See Section 8.13 on foreign protection orders.

- A violation of a domestic relationship PPO issued under MCL 600.2950 or a valid foreign protection order. "Foreign protection order" means an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to

another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. MCL 764.15c(5)(c) and MCL 600.2950h(a). In order to be a "valid foreign protection order" the order must meet the requirements of MCL 600.2950i.*

- A crime committed by an individual against his or her spouse or former spouse, a person with whom the individual has a child in common, a person with whom the individual has or has had a dating relationship, or a person who resides or has resided in the same household with the individual. "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 764.15c(5)(a) and MCL 600.2950(30)(a).

Pursuant to MCL 764.15c(2), the police domestic violence incident report must contain at least all of the following information:

- The address, date, and time of the incident investigated.
- The victim's name, address, home and work telephone numbers, race, sex, and date of birth.
- The suspect's name, address, home and work telephone numbers, race, sex, date of birth, and descriptive information.
- The existence of an injunction or restraining order against the suspect.
- The name, address, home and work telephone numbers, race, sex, and date of birth of any witness, and the relationship of the witness to the suspect or victim. The witness may be a child of the victim or suspect.
- The name of the person who called the law enforcement agency.
- The relationship of the victim and suspect.
- Whether alcohol or controlled substance use was involved in the incident and by whom it was used.
- A brief narrative describing the incident and the circumstances leading to it.
- Whether and how many times the suspect physically assaulted the victim and a description of any weapon or object used.

- A description of all injuries sustained by the victim and an explanation of how the injuries were sustained.
- If the victim sought medical attention, information about where and how the victim was transported, whether the victim was admitted to a hospital or clinic for treatment, and the name and telephone number of the attending physician.
- A description of any property damage reported by the victim or evident at the scene.
- A description of any previous domestic violence incidents between the victim and suspect.
- The date and time of the report and the name, badge number, and signature of the reporting officer.

The Michigan State Police have developed a standardized form. MCL 764.15c(4). That form is available online at www.michigan.gov/documents/DV-001_42334_7.pdf. (Last visited March 2, 2004.)

After investigating or intervening in a domestic violence incident, a peace officer must also provide the victim with a written notice. MCL 764.15c(1). The notice must contain the following information:

- Name and telephone number of the responding police agency;
- Name and badge number of the responding peace officer;
- The following statement:

  "You may obtain a copy of the police incident report for your case by contacting this law enforcement agency at the telephone number provided.

  "The domestic violence shelter program and other resources in your area are (include local information).

  "Information about emergency shelter, counseling services, and the legal rights of domestic violence victims is available from these resources.

  "Your legal rights include the right to go to court and file a petition requesting a personal protection order to protect you or other members of your household from domestic abuse which could include restraining or enjoining the abuser from doing the following:

  (a) Entering onto premises.

  (b) Assaulting, attacking, beating, molesting, or wounding you.

(c) Threatening to kill or physically injure you or another person.

(d) Removing minor children from you, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

(e) Engaging in stalking behavior.

(f) Purchasing or possessing a firearm.

(g) Interfering with your efforts to remove your children or personal property from premises that are solely owned or leased by the abuser.

(h) Interfering with you at your place of employment or education or engaging in conduct that impairs your employment relationship or your employment or educational environment.

(i) Engaging in any other specific act or conduct that imposes upon or interferes with your personal liberty or that causes a reasonable apprehension of violence.

(j) Having access to information in records concerning any minor child you have with the abuser that would inform the abuser about your address or telephone number, the child's address or telephone number, or your employment address.

"Your legal rights also include the right to go to court and file a motion for an order to show cause and a hearing if the abuser is violating or has violated a personal protection order and has not been arrested."

4.3 Denial of Interim Bond for Misdemeanor Domestic Assault Defendants

As noted in Section 4.1, domestic violence perpetrators are more likely to coerce or re-assault their victims than are perpetrators of stranger violence. Accordingly, it is important to assess the potential for further violence before the pretrial release of a defendant charged with a domestic violence crime.* To give courts an opportunity to make the necessary safety evaluation, the Legislature has limited the applicability of the interim bond statutes in cases where the defendant has been arrested for misdemeanor domestic assault.

*See Section 4.5 for a discussion of factors indicating a high risk for lethal violence.

The interim bond statutes are found at MCL 780.581 to MCL 780.588. They apply generally to defendants arrested with or without a warrant for misdemeanor or ordinance violations punishable by imprisonment for not

more than one year and/or a fine. If a magistrate is not available or immediate trial cannot be had, these defendants may be released upon payment of an interim bond to the arresting officer or to the deputy in charge of the county jail. The amount of the bond shall neither exceed the maximum possible fine nor be less than 20% of the minimum possible fine for the offense for which the defendant was arrested. MCL 780.581(1)-(2) and MCL 750.582.

*Interim bond is also restricted for persons arrested without a warrant for alleged violation of a PPO. See Section 8.6(C).

The foregoing general provisions for interim bond **do not apply** to defendants arrested **without a warrant** pursuant to MCL 764.15a, or a city, village, or township ordinance that substantially corresponds to it. MCL 780.582a(1)(a).*

Under MCL 780.582a(1)(b), interim bond is likewise **unavailable** to a defendant arrested **with a warrant** for violation of MCL 750.81 (assault and battery), MCL 750.81a (assault and infliction of serious injury), or a substantially corresponding city, village, or township ordinance, if the defendant:

- ♦ is a spouse or former spouse of the alleged victim;
- ♦ has or has had a dating relationship with the alleged victim;
- ♦ has had a child in common with the alleged victim; or,
- ♦ resides or has resided in the same household with the alleged victim.

The foregoing defendants who are ineligible for interim bond under MCL 780.582a are also ineligible for release on their own recognizance under MCL 750.583a. MCL 780.582a(1).

Domestic assault defendants who are ineligible for interim bond or release on their own recognizance under MCL 780.582a - 780.583a must be held until they can be arraigned or have interim bond set by a judge or district court magistrate. MCL 780.582a(1).

As of the publication date of this benchbook, Michigan's appellate courts have not yet addressed the question whether MCL 780.582a and MCL 780.581(3) authorize police to detain arrestees without regard to whether a magistrate is available for immediate arraignment. However, in civil suits against police agencies and municipalities based on 42 USC 1983, federal courts have described the circumstances in which detention under these Michigan statutes will violate an arrestee's Fourth Amendment rights. In *Brennan v Northville Twp,* 78 F3d 1152 (CA 6, 1996), and *Williams v Van Buren Twp,* 925 F Supp 1231 (ED Mich, 1996), the federal courts noted that the Fourth Amendment requires a prompt determination of probable cause to arrest whenever a suspect is arrested without a warrant. While a judicial probable cause determination within 48 hours of arrest will generally comply with the promptness requirement, a detention for less than 48 hours may still run afoul of the Fourth Amendment if the arrested individual can show that

the probable cause determination was delayed unreasonably. The *Brennan* and *Williams* courts deemed the following reasons for delay unreasonable:

- Desire to gather additional evidence to justify the arrest;
- Ill will against the person arrested;
- Delays for delay's sake; and
- Allowing a domestic situation to "cool down."

Although the foregoing reasons do not justify delays in the probable cause determination, the *Brennan* and *Williams* courts held that delays caused by the unavailability of a magistrate would be reasonable. In *Brennan*, the U.S. Court of Appeals for the Sixth Circuit stated that "there ordinarily should not be a finding of unconstitutionality when a defendant is detained for the legitimate purpose of obtaining an arraignment, if a magistrate is not immediately available." 78 F3d at 1156. The *Williams* court went a step further, stating that "any delay beyond that reasonably necessary to arrange a probable cause determination is unconstitutional." 925 F Supp at 1236. See also *Riverside Co v McLaughlin*, 500 US 44, 56-57 (1991) (any delay longer than 48 hours is presumed unreasonable, and the burden falls on the government to demonstrate that extraordinary circumstances necessitated it; shorter delays may also be unreasonable if unnecessary).

Note: The *Brennan* and *Williams* cases both arose from situations in which the arrest for domestic assault occurred after the court's regular business hours. After-hours arrests are common in domestic violence cases. One study of 435 battered women reported that Saturdays and Sundays were the days of the week on which battering incidents (particularly serious ones) were most likely to occur. The study further reported that the most likely time of day for abusive incidents to occur was from 6 p.m. to 12 midnight.* To promote safety and avoid the difficulties that surfaced in *Brennan* and *Williams*, a court might arrange to have a judicial officer on call to conduct arraignments after court business hours. See MCR 6.104(G), which requires courts with trial jurisdiction over felony cases to adopt plans for judicial availability.

*Walker, The Battered Woman Syndrome, p 25 (Springer, 1984). See also Greenfeld, et al, *Violence by Intimates*, p 11 (Bureau of Justice Statistics, 1998).

Interim Bond Determination by a Judge or District Court Magistrate. Domestic assault defendants who are ineligible for interim bond or release on their own recognizance under MCL 780.582a - 780.583a must be held until they can be arraigned or have interim bond set by a judge or district court magistrate. MCL 780.582a(1).

*See Section 4.5 for a discussion of factors to consider in determining bond conditions.

If the judge or the district court magistrate sets interim bond pursuant to MCL 780.582a, the judge or magistrate "shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582a(2).*

If the court releases a defendant subject to protective conditions, the court must inform the defendant on the record either orally or in a writing that is personally delivered of the following:

> "the specific conditions imposed and that if the [defendant] violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bond forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if he or she is found in contempt of court." MCL 780.582a(3).

MCL 780.582a(4) requires that an order or amended order for interim bond issued pursuant to MCL 780.582a(3) contain all of the following:

> "(a) A statement of the person's full name.
>
> "(b) A statement of the person's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate.
>
> "(c) A statement of the date the conditions become effective.
>
> "(d) A statement of the date on which the order will expire.
>
> "(e) A statement of the conditions imposed, including, but not limited to, the condition prescribed in [MCL 780.582a(3)]."

Upon issuing an interim bond order the court must immediately direct, in writing, a law enforcement agency within the court's jurisdiction to enter the order or amended order into LEIN. MCL 780.582a(5). The law enforcement agency within the jurisdiction of the court must immediately enter the order into LEIN. MCL 780.582a(6). If the court rescinds an order, then the court must immediately notify the law enforcement agency to remove the order from LEIN. MCL 780.582a(5). The law enforcement agency must also remove the order from LEIN when directed to do so by the court or when the order expires. MCL 780.582a(6).

MCL 780.582a(7) states:

> "This section does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules."

4.4 Procedures for Issuing Conditional Release Orders

To enhance safety in a case with allegations of domestic violence, the court can issue its order for conditional pretrial release under **MCL 765.6b**, using **SCAO Form MC 240**, which is based on that statute. The SCAO form can be found online at www.courts.michigan.gov/scao/courtforms. (Last visited March 2, 2004.) MCL 765.6b permits the court to impose such conditions as are "reasonably necessary for the protection of 1 or more named persons." Release orders issued under this statute can be expeditiously enforced. They are entered into the LEIN system and law enforcement officers have statutory authority to make a warrantless arrest upon reasonable cause to believe that a violation has occurred.* The following discussion outlines the issuance procedures set forth in the statute and in MCR 6.106(D), which operates in conjunction with the statute pursuant to MCL 765.6b(6).

*Warrantless arrest authority is based on MCL 764.15e, discussed at Section 4.10.

> **Note:** Pretrial release conditions under MCL 765.6b can be considered whenever there are allegations of a crime committed against an intimate partner. "Domestic violence crimes" are not limited to domestic assault and stalking offenses. Domestic abuse takes many forms, so that any crime can be a "domestic violence crime" if perpetrated within a pattern of controlling behavior directed against an intimate partner. Moreover, "domestic violence crimes" are not limited to crimes directed against the person of the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. For a discussion of the nature of domestic abuse and its various forms, see Sections 1.2 and 1.5. For a list of crimes that can be associated with domestic violence, see Section 3.14.

A. Time to Impose Conditions

Bond conditions may be imposed at the time of the defendant's first appearance in court or at any time during the pendency of the criminal case. See MCR 6.106(A), (H)(2). The court may apply conditions to all types of bonds, including cash bonds and personal recognizance bonds. MCR 6.106(C)-(E).

Domestic violence is a pattern of behavior perpetrated with the intent to control an intimate partner. An abuser's loss of control may cause an escalation of violence against the victim. Moreover, abusive control tactics may extend to situations within the courtroom. At the defendant's first appearance in court, the judge or magistrate has the opportunity to discourage abusive behavior by letting the defendant and anyone else involved with the case know that coercion and abuse will not influence the outcome of the case.* The court can also remind the defendant that:

*See Section 1.5 and Craft & Findlater, *The Dynamics of Domestic Violence,* 4 Colleague 1, 3 (MJI, Dec, 1991).

- Domestic violence is a serious criminal offense.

- The charges are brought by the People, not by the complaining witness.
- Pretrial release conditions do not include the freedom to harm or intimidate witnesses or others who are directly or indirectly involved with the case.
- Use of coercion or violence to affect witnesses' participation in the case will violate the release conditions and may violate the witness tampering statute.*
- Violation of bond conditions will result in warrantless arrest, revocation or forfeiture of bond, and possible further prosecution for obstruction of justice or criminal contempt.*

*See Section 3.13 on the witness tampering statute.

*See Sections 4.10-4.12 on enforcing bond conditions.

B. Appointing Counsel for Defendant

Because long pretrial delays leave witnesses and others involved with the case vulnerable to coercion and re-victimization, expedited docketing and case processing promote safety in domestic violence cases.* Some courts expedite proceedings by appointing counsel at the first appearance of all defendants charged with domestic violence crimes, regardless of whether they have stated the intent to retain an attorney. This practice may prevent delays caused by a defendant's failure to make timely efforts to retain counsel, and safeguards the defendant's right to counsel. Defendants who so desire can later substitute counsel retained at their own expense in the court's discretion.

*For an illustrative case, see *People v Adams*, 233 Mich App 652 (1999), discussed in Section 1.6(C)(2).

The Michigan Court Rules provide for the court to advise defendants of the right to counsel and for the appointment of counsel for indigent defendants. MCR 6.005 governs appointment of counsel in felony cases; MCR 6.610(D)(2) applies to misdemeanor cases.

A defendant's right to proceed in propria persona is discussed in *People v Adkins (After Remand)*, 452 Mich 702, 720-727 (1996). *People v Mack,* 190 Mich App 7, 14 (1991) addresses the court's discretion to order substitution of counsel.

Regarding the defendant's payment of attorney fees for appointed counsel, see: MCR 6.005(C) (court may require partially indigent defendant to contribute to attorney fees); *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970) (trial judge has discretion to apply known assets of an alleged indigent defendant toward defraying "in some part" the cost of appointed counsel); *People v Nowicki*, 213 Mich App 383, 388 (1995), (court had authority to order reimbursement for the cost of appointed counsel where the order was not part of the sentence, counsel was appointed irrespective of the defendant's ability to reimburse, and there was no claim that the defendant was not able financially to make the reimbursement); *People v Washburn*, 66 Mich App 622, 624 (1976) (order for repayment of the cost of appointed counsel should not be made prior to conviction). A detailed discussion of the

rules governing appointed counsel for indigent defendants is found in *Criminal Procedure Monograph 3: Misdemeanor Arraignments and Pleas—Third Edition*, Section 3.18 (MJI, 2006-April 2009). For discussion of a defendant's obligation to pay the costs of court-appointed counsel after acquittal, see Newman, Schulte, and McCann, *Reimbursement or Contribution: An Indigent's Assumption of Counsel Costs*, 24 Criminal Defense Newsletter 1 (State Appellate Defender Office, March/April 2001).

C. Required Findings by Judge or District Court Magistrate

MCL 765.6b(1) requires the judge or district court magistrate to make a finding of the need for protective conditions. This provision further states that the court must inform the defendant of the following *on the record*, either orally, or by a writing personally delivered to the defendant:

- The specific conditions imposed; and
- The consequences of violating a condition of release. The defendant must be informed *on the record* that upon violation of a release condition, he or she "will be subject to arrest without a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if the defendant is found in contempt of court."*

*On warrantless arrest, see MCL 764.15e, discussed at Section 4.10.

If the court orders the defendant released on conditions that include money bail, the court must state the reasons for its decision on the record. The court need not make a finding on each of the factors enumerated in the court rule. MCR 6.106(F)(2).* However, the court must make findings on the record in accordance with MCL 765.6(1), which states:

*The court rule factors are discussed at Section 4.5.

> "(1) Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> > "(a) The seriousness of the offense charged.
> >
> > "(b) The protection of the public.
> >
> > "(c) The previous criminal record and the dangerousness of the person accused.
> >
> > "(d) The probability or improbability of the person accused appearing at the trial of the cause.
>
> "(2) If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full

bail amount fixed under subsection (1) and executed by a surety approved by the court."

Use of standard bond forms is encouraged to provide defendant with written notice of any conditions. SCAO Form MC 240 is designed for orders issued under MCL 765.6b. **In cases involving allegations of domestic violence, it is safest to issue pretrial release orders under MCL 765.6b.** This statute expedites enforcement of release orders by authorizing their entry into the LEIN system and giving law enforcement officers the authority to make a warrantless arrest upon reasonable cause to believe that a release order has been violated. See MCL 764.15e, discussed at Section 4.10.

4.5 Factors to Consider in Determining Bond Conditions

MCL 765.6b does not specify factors for the court to consider in determining what conditions are "reasonably necessary" to protect a person from further assault by the defendant. However, MCR 6.106(D) states that the court may impose conditions on pretrial release to "ensure the appearance of the defendant," or to "reasonably ensure the safety of the public." MCR 6.106(F)(1) provides that the court should consider "relevant information" in making its release decision. Under MCR 6.106(F)(1), "relevant information" includes:

"(a) defendant's prior criminal record, including juvenile offenses;*

"(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

"(c) defendant's history of substance abuse or addiction;

"(d) defendant's mental condition, including character and reputation for dangerousness;

"(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

"(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

"(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

"(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

*Walker, et al, *Domestic Violence and the Courtroom . . . Understanding the Problem, Knowing the Victim*, p 4 (American Judges Foundation, 1995); Walker, The Battered Woman Syndrome, p 38-44 (Springer, 1984); Rygwelski, *Beyond He Said/ She Said,* p 49-52 (Mich Coalition Against Domestic Violence, 1995). See also Section 1.4(B).

*See Section 3.6(C) for special concerns regarding reporting of prior local ordinance violations.

> "(i) *any other facts bearing on the risk of nonappearance or danger to the public*." [Emphasis added.]

In a case with allegations of domestic violence, "any other facts bearing on . . . danger to the public" may include circumstances indicating that the defendant is likely to kill or seriously injure an intimate partner or other person. Assessing the lethality of a situation is difficult, because domestic abuse can be unpredictable. Lethal violence may occur unexpectedly, without any advance warning, or it may be preceded by one or more circumstances that serve as danger signals. In the latter case, researchers have found that certain factors can often reveal a potential for serious violence. These "lethality factors" are noted in the following list. While it is impossible to predict with certainty what a given individual will do, the presence of the following factors can signal the need for extra safety precautions — the more of these factors that are present in a situation, the greater its danger.*

- The victim has left the abuser, or the abuser has discovered that the victim is planning to leave.
- The victim (who is familiar with the abuser's patterns of behavior) believes the abuser's threats may be lethal.
- The abuser threatens to kill the victim or other persons.
- The abuser threatens or attempts suicide.
- The abuser fantasizes about homicide or suicide.
- Weapons are present, and/or the abuser has a history of using weapons.
- The abuse involves strangling or biting the victim.
- The abuser has easy access to the victim or the victim's family.
- The couple has a history of prior calls to the police for help.
- The abuser exhibits stalking behavior.
- The abuser is jealous and possessive, or imagines the victim is having affairs with others.
- The abuser is preoccupied or obsessed with the victim.
- The abuser is isolated from others, and the victim is central to the abuser's life.
- The abuser is assaultive during sex.
- The abuser makes threats to the victim's children.
- The abuser threatens to take the victim hostage, or has a history of hostage-taking.

- The severity or frequency of violence has escalated.
- The abuser is depressed or paranoid.
- The abuser or victim has a psychiatric impairment.
- The abuser has experienced recent deaths or losses.
- The abuser was beaten as a child or witnessed domestic violence as a child.
- The abuser has killed or mutilated a pet or threatened to do so.
- The abuser has started taking more risks, or is "breaking the rules" for using violence in the relationship (e.g., after years of abuse committed only in the privacy of the home, the abuser suddenly begins to behave abusively in public settings).
- The abuser has a history of assaultive behavior against others.
- The abuser has a history of defying court orders and the judicial system.
- The victim has begun a new relationship.
- The abuser has problems with drug or alcohol use or assaults the victim while intoxicated or high.

"[A]ny other facts bearing on . . . danger to the public" may also include the wishes of the defendant's intimate partner. It is not uncommon for the partner of a defendant charged with domestic violence to appear in court at the time of setting bond to request that the charges be dropped or that the court refrain from issuing a "no contact" order or an order excluding the defendant from premises. Some courts consider such requests in setting conditions of release. Other courts elect not to hear these requests, preferring that they be directed to the prosecutor. The Advisory Committee for this chapter of the benchbook recommends the latter approach. The defendant's intimate partner is not a party to the criminal proceedings against the defendant and the court can promote the partner's safety by emphasizing this fact to the defendant. A defendant who realizes that his or her partner cannot control court proceedings may be discouraged from making efforts to manipulate the partner's participation in the case. For more discussion of this subject, see Section 4.9(C).

*See Section 4.6(A) for a detailed discussion of GPS monitoring.

Global positioning system (GPS) monitoring.* If a defendant is charged with a crime involving domestic violence, as that term is defined in MCL 400.1501, the court may also require as a condition of release that the defendant carry or wear a global positioning system device. MCL 765.6b(6). Before ordering a defendant to wear or carry a GPS device, "the court shall consider the likelihood that the defendant's participation in global positioning system monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id.*

4.6 Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under MCL 765.6b and MCR 6.106. The following discussion summarizes the statutory and court rule provisions governing the contents of conditional release orders, and addresses practical concerns with such orders in cases involving allegations of domestic violence.

A. Statutory and Court Rule Requirements

Under MCL 765.6b(2), the court's order (or amended order) for conditional release must contain:

- Defendant's full name;
- Defendant's height, weight, race, sex, birth date, hair color, eye color, and any other appropriate identifying information;
- A statement of the effective date of the conditions;
- A statement of the order's expiration date; and
- A statement of the conditions imposed.

The court may also impose a prohibition on the defendant's purchase or possession of a firearm under MCL 765.6b(3).* If the court imposes such a restriction, and the defendant is known to possess firearms, the court can promote safe enforcement of its order by giving specific instructions for their removal. Such instructions might provide for the police to remove weapons from the defendant's home prior to release, or specify a time and place for the defendant to turn them in.

*See Sections 9.7-9.8 for more discussion of firearms disabilities in domestic violence cases.

In conjunction with MCL 765.6b, MCR 6.106(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably ensure the appearance of the defendant as required, or . . . the safety of the public." Under MCR 6.106(D)(1), conditional release orders must provide that "the defendant will appear as required, will not leave the state without permission of the court,* and will not commit any crime while released." Additionally, the court rule contains a lengthy, nonexclusive list of other specific conditions that the court may impose. Under MCR 6.106(D)(2), the court may require the defendant to:

*Conditional release orders issued under MCL 765.6b are entitled to full faith and credit in other U.S. jurisdictions. 18 USC 2265-2266. See Section 8.13 for more information.

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> "(b) not use alcohol or illicitly use any controlled substance;
>
> "(c) participate in a substance abuse testing or monitoring program;

"(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

"(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

"(f) surrender driver's license or passport;

"(g) comply with a specified curfew;

"(h) continue to seek employment;

"(i) continue or begin an educational program;

"(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

"(k) not possess a firearm or other dangerous weapon;

"(*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

"(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved.

"(n) satisfy any injunctive order made a condition of release; or

"(o) comply with any other condition, including the requirement of money bail . . . reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

*See MCL 765.6b(6)(b) for a definition of "global positioning monitoring system."

Global positioning system (GPS) monitoring.* If a defendant is charged with a crime involving domestic violence, as that term is defined in MCL 400.1501, the court may also require as a condition of release that the defendant carry or wear a global positioning system device. MCL 765.6b(6). Before ordering a defendant to wear or carry a GPS device, "the court shall consider the likelihood that the defendant's participation in global positioning system monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id.* A defendant must agree to pay the cost of the device and monitoring, or perform community service in lieu of payment, in order to be released under the provisions of MCL 765.6b(6). If a defendant is ordered to carry or wear a GPS device as a condition of release, the court must order as an additional condition of release that the defendant not purchase or possess a firearm. MCL 765.6b(3).

With the victim's informed consent, as defined in MCL 765.6b(6)(c)(*i*)-(*viii*), the court may also require the defendant to provide the victim with an electronic receptor device that would notify the victim if the defendant comes within a certain proximity of the victim, as determined by the judge or district court magistrate in consultation with the victim. MCL 765.6b(6). In determining proximity, the court must consider the areas from which the victim would like the defendant excluded. *Id.* The victim shall be given a telephone number by which to request immediate assistance from local law enforcement if the defendant comes within the predetermined proximity of the victim. *Id.* The victim may ask the court to discontinue the victim's participation in GPS monitoring at any time, and the court may not sanction the victim for refusing to participate in GPS monitoring. *Id.*

MCL 765.6b(6)(c) defines a victim's informed consent:

> "'Informed consent' means that the victim was given information concerning all of the following before consenting to participate in global positioning system monitoring:
>
> > "(*i*) The victim's right to refuse to participate in global positioning system monitoring and the process for requesting the court to terminate the victim's participation after it has been ordered.
> >
> > "(*ii*) The manner in which the global positioning system monitoring 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.
> >
> > "(*iii*) The boundaries imposed on the defendant during the global positioning system monitoring.
> >
> > "(*iv*) Sanctions that the court may impose on the defendant for violating an order issued under this subsection.
> >
> > "(*v*) The procedure that the victim is to follow if the defendant violates an order issued under this subsection or if global positioning system equipment fails.
> >
> > "(*vi*) Identification of support services available to assist the victim to develop a safety plan to use if the court's order issued under this subsection is violated or if global positioning system equipment fails.
> >
> > "(*vii*) Identification of community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other help

in addressing the consequences and effects of domestic violence.

"(*viii*) The nonconfidential nature of the victim's communications with the court concerning global positioning system monitoring and the restrictions to be imposed upon the defendant's movements."

B. Promoting Pretrial Safety in Cases Involving Allegations of Domestic Violence

The Advisory Committee for this chapter of the benchbook offers the following suggestions for promoting pretrial safety in cases involving allegations of domestic violence.

- **Emphasize that the criminal proceeding is between the defendant and the state, not the defendant and his or her intimate partner.**

  A court can promote the safety of witnesses in criminal cases by emphasizing to the defendant that the state has control over the prosecution of the case. A defendant who realizes that witnesses cannot control court proceedings may be discouraged from making efforts to obstruct justice in the case. Accordingly, the Advisory Committee discourages the practice of asking a complaining witness to approve of or agree to release conditions in cases involving allegations of domestic violence, particularly if this is done in the presence of the defendant. Doing this may endanger the witness, as it sends the message to the defendant that the witness is responsible for the conditions of release rather than the court.

  Because witnesses are not parties to a criminal case, MCR 6.106(D) does not authorize the court to impose conditions on them. Accordingly, the court lacks authority to issue mutual "no contact" orders. Moreover, the court lacks authority to order that witnesses participate in counseling sessions, either alone or jointly with the defendant. The court may appropriately provide a witness with information about community service providers, however, as long as it is clear that the use of such services is strictly voluntary.*

*Joint counseling may endanger the victim in a violent relationship. See Section 1.3(B). On other legal and practical difficulties with mutual orders, see Sections 7.4(E) and 8.13(B)(2).

- **Consider issuing a "no contact" order that clearly prohibits *all* contact with persons who may be in danger of re-victimization.**

  Domestic violence crimes are potentially more dangerous than crimes involving strangers due to the defendant's easy access to and influence over persons who may serve as witnesses at trial. By limiting the defendant's access to these persons, "no contact" orders decrease the risk of coercion or re-assault. If the defendant and a complaining witness live together, a "no contact" order that excludes the defendant from the shared premises can also expedite case processing by encouraging resolution of the case and discouraging efforts to delay the proceedings. If the defendant and a complaining witness have children in common, the court

can promote safe enforcement of its order by taking existing court orders regarding custody and parenting time into consideration. For more information on such orders, see Chapters 12 - 13.

Some courts consider the wishes of the complaining witness as a relevant factor in determining whether to issue a "no contact" order.* Other courts elect not to hear from complaining witnesses in setting bond conditions, and refer witness concerns to the prosecutor. The Advisory Committee for this chapter of the benchbook recommends the latter approach. The complaining witness is not a party to the criminal proceedings against the defendant, and the court can promote safety by emphasizing this fact to the defendant. A defendant who realizes that witnesses cannot control court proceedings may be discouraged from making efforts to obstruct justice in the case.

*See Section 4.9(C) for more discussion of witness concerns with pretrial release orders.

Effective "no contact" orders prohibit the defendant from making any contact with witnesses in person, by mail, by phone, or through a third party. It may be helpful to remind the defendant and the complaining witness that *any* contact between them is a violation of a "no contact" order, even if the complaining witness consents; the release conditions are strictly a matter between the defendant and the court.

♦ **If a "no contact" order is issued, it is preferable to remove the defendant from premises shared with a complaining witness.**

If the defendant's residence with a complaining witness to the alleged crime poses a safety threat, it is preferable to remove the defendant from the shared premises and allow the witness and any children to remain. This practice clearly communicates the state's intent to protect victims of domestic violence. Moreover, requiring a complaining witness to vacate the shared premises may reward the defendant for a crime and discourage others from turning to the court for protection.* If the court excludes a defendant from premises shared with a witness, it can forestall some enforcement problems by including a provision in its order that specifies a date and time for removal of the defendant's property. The court might also provide for property removal under police supervision.

*_Attorney General's Task Force on Family Violence_, p 43 (Final Report, 1984).

♦ **Inquire into the safety of children in the home.**

The National Crime Victimization Survey reports that between 1993 and 1998, children under age 12 lived in 43% of households where domestic violence occurred. A majority of these children are aware of the violence around them.* Children are often exploited by abusers as a tactic for maintaining control in the adult relationship; moreover, they are at risk of physical injury from domestic violence. Accordingly, conditional release orders in cases involving domestic violence will not effectively promote safety unless the court considers the needs of the defendant's or witnesses' children.

*Rennison & Welchans, _Intimate Partner Violence,_ p 6 (Bureau of Justice Statistics, May, 2000); Hart, _Children of Domestic Violence,_ Child Prot Svcs Q (Pittsburgh Bar Ass'n, Winter, 1992).

♦ **Inquire whether the defendant is subject to a personal protection order or a prior domestic relations order.**

Conflicting court orders cause confusion for the parties subject to them and for police officers who may be called upon for enforcement. This confusion offers domestic violence perpetrators the opportunity to abuse without being held accountable. It may also prevent police from adequately assessing the danger that is present at the scene of a domestic violence call. A court issuing a conditional release order can prevent confusion by inquiring whether another court has previously issued a personal protection order restraining the defendant's contacts with a witness in the criminal case. If the defendant is subject to a PPO, the criminal court can craft its release order to contain consistent provisions. If the criminal court deems it necessary to impose release conditions that are inconsistent with the PPO provisions, it can prevent confusion by communicating with the court that issued the PPO.

Similar concerns arise in cases where a defendant's interactions with a witness in a criminal case are subject to conditions imposed in a prior domestic relations order. As is the case with PPOs, a criminal court issuing a conditional release order can prevent confusion by inquiring into the existence of a prior domestic relations order, and, if possible, crafting a release order with consistent provisions. If this cannot be safely done, however, the Advisory Committee for this chapter of the benchbook recommends that the criminal court issue whatever conditions it deems necessary to promote safety in the case and inform the domestic relations court that it has done so. MCR 3.205 contains notice requirements that may apply in cases where a conditional release order affects a defendant's access to minor children who are subject to a prior domestic relations order. Although no Michigan statute or court rule addresses the precedence of court orders issued in concurrent criminal and domestic relations proceedings, the Advisory Committee for this chapter of the benchbook suggests that orders issued in criminal cases should be followed by courts in domestic relations cases, because criminal orders address serious public safety concerns that are not at issue in domestic relations cases.

MCR 6.106(D)(2)(m) provides that if a pretrial release order limiting or prohibiting contact with any other named person conflicts with another court order, "the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved."

♦ **Remember that failure to support one's family members is a criminal offense.**

*See Section 1.5 for a discussion of abusive tactics.

Domestic abusers often exert control over their intimate partners by manipulating the couple's finances.* For example, an abuser may maintain a partner's dependence by limiting the partner's access to money. It is thus not uncommon that an abuser who has been excluded from premises will assert control by refusing to make mortgage, utility, or other payments necessary to support a partner and children who remain on the premises.

Although questions of family support are typically addressed in domestic relations proceedings in family court, financial abuse is a criminal offense that can be as harmful as physical assault. See Section 3.14(B)(4) for a list

of crimes involving desertion and non-support. The Advisory Committee for this chapter of the benchbook notes that MCR 6.106(D)(1) authorizes the court to order that the defendant "will not commit any crime while released." If the court feels that family support may be problematic with a particular defendant, it can discourage financial abuse by informing him or her that it will regard failure to provide family support as a criminal action in violation of the release conditions.

- **To protect the defendant's right against self-incrimination, do not order *pretrial* participation in a batterer intervention service.**

  Under MCR 6.106(D)(2)(d), the court may require the defendant to "participate in a specified treatment program for any physical or mental condition, including substance abuse." Although batterer intervention services might be characterized as "treatment programs" for a "mental condition," they are inappropriate pretrial treatment options insofar as they require participants to admit responsibility for their violent acts. Prior to conviction, court-ordered participation in such a program would arguably violate a criminal defendant's constitutionally guaranteed right against self-incrimination.

  Batterer intervention programs should be distinguished from other types of "treatment programs" that promote safety without requiring participants to make incriminating admissions. A mental health assessment may be a necessary precaution in cases where the defendant is potentially suicidal or homicidal. The court may also order treatment for drug or alcohol use, which tends to increase the severity of domestic violence. A release condition that addresses a mental illness (such as psychosis) is likewise justifiable on safety grounds, for such illnesses impede the ability to control violent behavior.*

  *See Section 1.3(B)-(C) for a discussion of how drug or alcohol use and mental illness interrelate with domestic abuse.

  Batterer intervention services should also be distinguished from the pretrial informational programs that some courts have instituted for defendants in cases where domestic violence is alleged.* These programs explain court proceedings and provide general information about domestic violence without requiring participants to accept responsibility for specific behavior.

  *See Sections 2.3-2.4 on batterer intervention services.

- **Require the defendant to post a cash bond.**

  A defendant released on personal recognizance will have little incentive to refrain from abusive behavior. Requiring the defendant to post a cash bond pursuant to MCR 6.106(E) will more likely ensure the defendant's appearance and the safety of witnesses. This requirement will also convey the message that the court regards the charged offense as a serious matter.

  MCL 765.6a provides that before granting an application for bail, "a court shall require a cash bond or a surety other than the applicant if the applicant (1) Is charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him; or (2) Has been twice convicted of a felony within the preceding 5 years."

- **Use pretrial services to monitor bond conditions.**

In some courts, the office of pretrial services monitors defendants' compliance with bond conditions. Pretrial supervision may consist of drug and alcohol testing or "tether" programs. Some offices of pretrial services also assist the court by assessing the defendant's lethality or providing pretrial domestic violence education programs for defendants.

♦ **Consider the need to preserve the confidentiality of witnesses' identifying information.**

In cases where a witness is in hiding from the defendant, the court can promote safety by restricting the defendant's access to information that would identify the witness's whereabouts. In felony cases, the Crime Victim's Rights Act provides as follows:

> "(1) Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera." MCL 780.758(1).

Provisions substantially similar to MCL 780.758(1) apply in cases involving serious misdemeanors* and offenses by juveniles. See MCL 780.818 (serious misdemeanors) and MCL 780.788 (juvenile offenders).

*Serious misdemeanors include stalking, assault and battery, aggravated assault, and illegal entry. MCL 780.811(a).

"Other personal identification" that may place a victim in danger includes:

– A child's residence address.

– A victim's job training address.

– A victim's occupation.

– Facts about a victim's receipt of public assistance.

– A child's day-care or school address.

– Addresses for a child's health care providers.

– Telephone numbers for the above entities.

– Name change information. See Section 4.16(D).

For more about criminal court records, see Section 4.16. See Sections 10.4-10.5 and 11.4 on confidentiality of records in domestic relations actions, and Section 7.4(C) on confidentiality in PPO actions. On victim privacy concerns in criminal cases generally, see *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapter 5.

In addition to the advisory committee's recommendations discussed above, it is also important to remember that witness tampering is a criminal offense. Abusers may use a variety of methods to avoid conviction, including tampering with witnesses.* Attempts to influence a victim or witness may include:

*See Section 3.13.

- giving or promising the victim or witness something of value in exchange for not testifying or changing testimony;
- threatening or intimidating a victim or witness;
- interfering with a victim's or witness' ability to testify; and
- retaliating against a victim for testifying.

MCR 6.106(D)(1) authorizes the court to order that the defendant "will not commit any crime while released." If the court feels that a defendant may commit any of the acts listed above, it can discourage the defendant by informing him or her that it will regard such acts as a violation of the release conditions.

4.7 LEIN Entry of Conditional Release Orders

Upon issuance of a release order (or a modified release order*) under MCL 765.6b, the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4). SCAO Form MC 240 can be used for this purpose.

*See Section 4.9 on modifying conditional release orders.

> **Note:** Although MCL 765.6b does not require it, some courts give a certified copy of pretrial release orders to the individuals for whom protective conditions have been issued. This practice does not fulfill the court's statutory responsibility to have release orders with protective conditions entered into LEIN, but it can inform protected individuals of the release conditions and allow them to show the order to police officers in the event of a violation. While it may promote safety, this practice carries a potential risk for confusion if the order is later amended or rescinded.

4.8 Duration of Conditional Release Orders

Under MCL 765.6b(2), the court's conditional release order (or amended order) must contain a statement of the order's expiration date. The duration of the release order is within the court's discretion and court practices differ in this regard. For example, some courts issue orders of six months' duration in misdemeanor cases and one year's duration in felony cases. Other courts specify a one-year duration for release orders in all cases. The order should at least be of sufficient duration to cover the time needed to complete

*SCAO Form MC 240a can be used to extend the expiration date of a bond.

proceedings in the issuing court. In felony cases, six months is usually sufficient time to complete preliminary examination and bind-over proceedings in district court. In specifying an expiration date, it is important to note that release conditions expire at 12:01 a.m. on the date specified in the order.*

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms. (Last visited March 2, 2004.)

Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court. See MCL 780.66(3). To expedite enforcement, however, the Advisory Committee for this chapter of the benchbook suggests that circuit courts take steps to update the information in the LEIN system after bind-over, so that law enforcement agencies will have no questions about the status of the case in the event that the defendant violates a release condition. The circuit court can continue or modify the district court's release order at arraignment, making it an order of the circuit court. If the only amendment the circuit court wishes to make is to extend the bond's expiration date, the court can complete SCAO Form MC 240a.* If the conditions of bond release are to be amended in addition to, or instead of, the expiration date, the court should use SCAO Form MC 240. In any event, the court should contact the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered into LEIN, SCAO Form MC 239 can be used to remove the district court's order from the system.

If an order issued under MCL 765.6b ceases to be in effect due to rescission or closure of the case, the judge or district court magistrate shall immediately order the law enforcement agency to remove the ineffective order from the LEIN system. MCL 765.6b(4). SCAO Form MC 239 is appropriate to use where the case is closed. By checking box number 5, SCAO Form MC 240 can be used when the order is revoked.

After a defendant's conviction, the court may incorporate the pretrial release conditions into orders of probation. MCL 771.3(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system. MCL 771.3(5). Violation of a probation order subjects the offender to warrantless arrest under MCL 764.15(1)(g). Some courts give a copy of the probation order to the protected individual to show to police officers in the event of a violation. See Sections 4.14 - 4.15 for more on probation.

4.9 Modification of Conditional Release Orders

Because of the complexity and potential danger in criminal cases involving allegations of domestic violence, modification of conditional release orders should only be granted on the basis of objectively valid reasons. This section addresses requests for modification of release orders containing conditions for the protection of a named individual brought by the prosecutor, the defendant,

and the protected individual. The discussion distinguishes statutory and court rule procedures in felony and misdemeanor cases.

A. Modification of Release Orders in Felony Cases

In felony cases, a party seeking modification of a release order should generally proceed under MCR 6.106(H)(2).* Modification of release decisions under this court rule may be initiated by the prosecutor or defendant, or by the court on its own motion. The party seeking modification has the burden of going forward. MCR 6.106(H)(2)(c). In modifying a release decision, the court should apply one of the following standards, depending on when the modification is requested:

*This court rule does not specify that it applies only to felonies. However, this may be inferred from the rule's reference to the "arraignment on the information," which would not occur in misdemeanor cases.

- **Prior to arraignment on the information in circuit court**, any court before which proceedings against the defendant are pending (i.e., the district court) may modify a prior release decision, based on a finding that there is "a substantial reason for doing so." MCR 6.106(H)(2)(a).

- **At and after the defendant's arraignment on the information in circuit court**, the court with jurisdiction over the defendant (i.e., the circuit court) may make a de novo determination and modify a prior release decision. MCR 6.106(H)(2)(b).

Other provisions governing modification of release orders in felony cases are as follows:

- The court must of necessity initiate modification of a bond where release is required under MCR 6.004(C). This rule requires pretrial release on personal recognizance in felony cases where the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or for a crime based on the same conduct or arising from the same criminal episode, "unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

- Under the Crime Victims' Rights Act, the prosecuting attorney may move that the bond of a felony defendant be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family . . . ." MCL 780.755(2). A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2).

B. Modification of Release Orders in Misdemeanor Cases

In misdemeanor cases, either the prosecutor or defendant may seek modification of a release order in the court before which the proceeding is pending. MCL 780.65(1). Unlike MCR 6.106(H)(2) governing felonies, this

statute gives the court no authority to initiate modification on its own motion. The defendant shall give the state reasonable notice of his or her request to modify the release conditions. MCL 780.65(2). If the state seeks modification, it shall give the defendant reasonable notice, except in cases where there has been a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4).*

*For release orders issued under MCL 765.6b, the defendant is subject to warrantless arrest upon probable cause to believe that he or she has violated the order. See Section 4.10.

Other provisions governing modification of release orders in misdemeanor cases are as follows:

- The court must of necessity initiate modification of a bond where release is required under MCR 6.004(C). This rule requires pretrial release on personal recognizance in misdemeanor cases where the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, "unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

- In cases involving serious misdemeanors under the Crime Victims' Rights Act, the prosecuting attorney may move that a defendant's bond be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family." MCL 780.813a.* Serious misdemeanors are defined in MCL 780.811(a) to include stalking, assault and battery (including domestic assault), aggravated assault (including aggravated domestic assault), illegal entry, and discharging a firearm aimed intentionally at a person. See MCL 780.811(a) for the complete listing of "serious misdemeanors." Serious misdemeanors also include violations of MCL 750.145d, using the internet or a computer to make a prohibited communica-tion, and violations of MCL 750.233, intentionally aiming a firearm without malice. MCL 780.811(1)(a) (*vii*) and (*viii*).

*A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2).

C. Requests for Modification by the Protected Individual

Sometimes the individual protected by a conditional release order appears in court to request modification of the order. Common requests are that the court lift its "no contact" order or allow the defendant to return to premises shared with the protected individual. The protected individual may also request that charges be dropped. These requests may be motivated by various factors not known to the court, such as:*

*See Section 1.6(B)-(C) on abused individuals' survival strategies and participation in court proceedings.

- Coercion by the defendant.
- A cyclical pattern of abuse and reconciliation in the relationship — the protected individual may seek modification during a period of reconciliation.
- Emotional attachment to the defendant.
- Belief that the abuse will stop.
- Ambivalence about jailing or otherwise removing the defendant from the home where the defendant is the sole source of support for the family.
- Shame about the criminal proceedings or fear of public exposure.
- Fear of the practical consequences of a criminal conviction (e.g., loss of federally-subsidized housing).
- Distrust of the legal process due to lack of information or prior bad experiences.

If a defendant is ordered to carry or wear a GPS device as a condition of release and the victim has been provided with an electronic receptor device that would notify the victim if the defendant comes within a certain proximity, the victim may ask the court to discontinue the victim's participation in GPS monitoring at any time. MCL 765.6b(6). The court may not sanction the victim for refusing to participate. *Id.*

Some courts consider the wishes of the protected individual in deciding whether to modify conditions of release. Other courts elect not to hear from this person, referring any concerns with bond conditions to the prosecutor. The Advisory Committee for this chapter of the benchbook discourages ex parte responses to any requests for modification and recommends the latter approach. The protected individual is not a party to the criminal proceedings against the defendant, and the court can promote safety by emphasizing this fact to the defendant. A defendant who realizes that the protected individual cannot control court proceedings may be discouraged from re-offending or making efforts to obstruct justice in the case.

The Advisory Committee makes the following further observations about common scenarios that arise incident to requests for modification:

- The protected individual's appearance in court with the defendant after issuance of a "no contact" order is itself a violation of that order, for which the defendant is subject to sanction. Such appearances may indicate that the defendant has used coercion to manipulate the protected individual's participation in the case.

- Appearances by one attorney who purports to act on behalf of both the defendant and the protected individual may indicate coercion by the defendant, and are likely to involve a conflict of interest on the part of the attorney. See MRPC 1.7.

- If it modifies its release order, the court can promote safety by advising the defendant and the protected individual that any deleted conditions can be reinstated if the court deems it necessary. If the court decides to drop a "no contact" provision, it might consider retaining a prohibition on assaultive behavior.

D. LEIN Entry of Modified Release Order; Notice to Surety

If a release order issued under MCL 765.6b is modified, the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the modified order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4). SCAO Form MC 240 can be used to notify the law enforcement agency. If a release order is modified using Form MC 240, it should be clearly marked as "modified" or "amended" to avoid confusion with the original order. The superseded order can be removed from the LEIN system using SCAO Form MC 239.*

*If the only amendment the court wishes to make is to extend the bond's expiration date, Form MC 240a may be used. SCAO forms are available online at www.courts.michigan.gov/scao/courtforms. (Last visited March 2, 2004.)

Whenever the court modifies its order to impose an additional release condition after the surety has signed the bond, the surety's consent to that condition must be obtained before forfeiture based on its violation is permitted. See *Kondzer v Wayne County Sheriff*, 219 Mich App 632 (1996), discussed at Section 4.12.

4.10 Enforcement Proceedings After Warrantless Arrest for an Alleged Violation of a Release Condition

A release order with conditions for the protection of a named person will only be effective if the defendant knows that violation of the order will result in sanctions. Lax enforcement of such orders may actually increase danger by providing the protected person with a false sense of security. Accordingly, strict, swift enforcement procedures are important tools to promote safety.

If the court has imposed release conditions for the protection of a named person under MCL 765.6b(1), a peace officer may arrest the defendant without a warrant upon reasonable cause to believe that the defendant is violating or has violated a release condition. MCL 764.15e. The warrantless

arrest authority conferred in these statutes offers swift, significant protection to the person protected by the release order; MCR 6.106 contains no similar provision for warrantless arrest. **Therefore**, **in cases involving allegations of domestic violence, it is safer to issue pretrial release orders under MCL 765.6b using SCAO Form MC 240.** The following discussion outlines the bond revocation proceedings that follow a warrantless arrest for the alleged violation of a release condition pursuant to MCL 764.15e.

> **Note:** MCL 764.9c(3)(c) prohibits the issuance of an appearance ticket for a misdemeanor or ordinance violation to a person who is subject to a condition of bond or other condition of release, until the person meets the requirements of bond or other conditions of release.

A. Preparation of Complaint

After warrantless arrest for violation of a release condition pursuant to MCL 764.15e, bond revocation proceedings are initiated by a complaint. The arresting officer must prepare the complaint in a format that substantially corresponds to the format contained at MCL 764.15e(2)(a). Proceedings after preparation of the complaint depend on whether or not the defendant was arrested within the judicial district of the court that issued the order for conditional release.

- If the arrest occurred **within the judicial district** of the court that issued the order for conditional release, the defendant must appear before the issuing court within one business day after the arrest to answer the charge of violating the release conditions. MCL 764.15e(2)(b)(*ii*). Under MCL 764.15e(2)(b)(*i*), the arresting officer must immediately provide copies of the complaint as follows:
  - One copy to the defendant;
  - The original and one copy to the issuing court;
  - One copy to the prosecuting attorney for the case; and
  - One copy for the arresting agency.
- If the arrest occurred **outside the judicial district** of the court that issued the order for conditional release, the defendant shall be brought before the district or municipal court in the judicial district in which the violation occurred within one business day following the arrest. That court shall determine conditions of release and promptly transfer the case to the court that issued the conditional release order. The court to which the case is transferred shall notify the prosecuting attorney in writing of the alleged violation. MCL 764.15e(2)(c)(*ii*). Under MCL 764.15e(2)(c)(*i*), the arresting officer must immediately provide copies of the complaint as follows:

- One copy to the defendant;
- The original and one copy to the district court in the judicial district in which the violation occurred; and,
- One copy for the arresting agency.

B. Availability of Interim Bond

If the arresting agency or officer in charge of the jail determines that it is safe to release the defendant before he or she is brought before the court, the defendant may be released on interim bond of not more than $500.00 requiring that the defendant appear at the opening of court the next business day. If the defendant is held for more than 24 hours without being brought before the court, the officer in charge of the jail must note in the jail records the reason it was not safe to release the defendant on interim bond. MCL 764.15e(3).

> **Note:** The interim bond statutes (MCL 780.581 - MCL 780.588) do not apply to certain domestic violence offenses. If the conditional release violation also constitutes one of these offenses, the defendant should not be released on interim bond. See Section 4.3 for discussion of restrictions on interim bond.

C. Hearing Procedures

If a defendant has been arrested without a warrant for alleged violation of release conditions imposed under MCL 765.6b(1), the warrantless arrest statute requires the court to give priority to cases in which the defendant is in custody or the defendant's release would present an unusual risk to the safety of any person. MCL 764.15e(4). The warrantless arrest statute further provides that "[t]he hearing and revocation procedures for cases brought under this section shall be governed by supreme court rules." MCL 764.15e(5).

MCR 6.106 does not give clear guidance on hearing procedures after a warrantless arrest for alleged violation of a pretrial release condition. This court rule states that the court may issue a warrant for the defendant's arrest if he or she has violated a release condition,* and contains no requirement for a hearing whatsoever. MCR 6.106(I)(2) provides:

*MCR 6.106 was adopted prior to the 1993 passage of the warrantless arrest provisions in MCL 764.15e.

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> > "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known

> address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond."

Although MCR 6.106(I)(2) is silent on the issue of a revocation hearing, the statutes governing bail for traffic or misdemeanor offenses require the court to hold a hearing in cases where the defendant has been arrested on a warrant issued after a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court *for a hearing* on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4). [Emphasis added.]

The federal due process requirements for revoking bond were addressed in *Atkins v People*, 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981), a habeas corpus proceeding arising from the petitioner's prosecution for murder in Detroit Recorder's Court. The petitioner in *Atkins* asserted that the Michigan Court of Appeals violated his due process rights when it summarily cancelled his bond set by the Recorder's Court without reviewing the transcript of proceedings in the Recorder's Court or providing any reasons for its action. The federal courts agreed, holding that the defendant's liberty interest pending trial on criminal charges was "sufficiently urgent that as a matter of due process [bail] cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial." 644 F2d at 549. The Sixth Circuit Court of Appeals further noted that the Michigan Court of Appeals' action rendered meaningful review impossible and violated "basic norms of judicial decisionmaking." It held that "if [defendant's] liberty is to be denied, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment." 644 F2d at 550. For a similar holding in a case involving the cancellation of bond for a post-conviction detainee pending appeal of the conviction, see *Puertas v Department of Corrections,* 88 F Supp 2d 775 (ED Mich, 2000).

In light of the protected liberty interests articulated in *Atkins*, and the hearing requirement set forth in MCL 780.65(4), the Advisory Committee for this chapter of the benchbook suggests that basic due process requires the court to give defendants an opportunity for a hearing after warrantless arrest for alleged violation of a release condition imposed under MCL 765.6b. The Committee further suggests hearing procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request, as follows:

> "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> "(b) The rules of evidence, except those pertaining to privilege, are not applicable. . . . A verbatim record of the hearing must be made."

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

In addition to revocation procedures under the court rule, MCL 765.6b(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants on the record of the following sanctions at the time the court issues a conditional release order:

*For a discussion of contempt proceedings generally, see Sections 8.3-8.4.

> "[I]f the defendant violates a condition of release, he or she . . . may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

The U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. In *United States v Dixon*, 509 US 688 (1993), a defendant accused of second degree murder was granted pretrial release on the condition that he not commit any criminal offense. After his release, the defendant was arrested and indicted for possession of narcotics. Based on the alleged narcotics offense, the court in the murder proceeding found the defendant guilty of criminal contempt for the violation of his release conditions. The defendant then moved to have the narcotics indictment dismissed on double jeopardy grounds. A majority of the U.S. Supreme Court agreed that double jeopardy barred the defendant's prosecution for possession of narcotics. For more discussion of both the *Dixon* case and Michigan law on double jeopardy, see Section 8.12.

4.11 Enforcement Proceedings Where the Defendant Has Not Been Arrested for the Alleged Violation

If the defendant violates a release condition imposed under MCL 765.6b and is not arrested under the warrantless arrest statute,* MCR 6.106(I)(2) provides as follows:

*The warrantless arrest statute is MCL 764.15e.

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> > "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond."

Practice under the court rule varies as to whether the bond revocation proceedings are initiated on motion of the prosecutor, or on the court's own motion. In misdemeanor cases, MCL 780.65(4) provides:

> "*Upon verified application by the state or local unit of government* stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." [Emphasis added.]

This statute makes no provision for court-initiated revocation proceedings in misdemeanor cases. In felony cases, however, MCR 6.106(H)(2) authorizes modification of prior release decisions on the motion of a party to the proceedings, or on the court's own initiative.* In any event, if the court initiates revocation proceedings on its own motion, the Advisory Committee for this chapter of the benchbook suggests that it notify all interested parties, and set the matter for hearing if it is contested.

*See also Section 4.9(A).

MCR 6.106(I)(2) is silent as to the hearing requirements after a defendant's arrest pursuant to a warrant for an alleged violation of a release condition. A hearing is required in misdemeanor cases under MCL 780.65(4); however, this statute does not set forth specific hearing procedures. In light of the liberty interests at stake, the Advisory Committee suggests that courts follow procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request. Such hearings must follow the following procedures:

> > "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.

> "(b) The rules of evidence, except those pertaining to privilege, are not applicable . . . . A verbatim record of the hearing must be made."

See *Atkins v People*, 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981), for a discussion of the federal due process requirements for revoking bond. This case is discussed in Section 4.10(C).

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "(1)A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

In addition to revocation procedures under the court rule, MCL 765.6b(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants of the following sanctions at the time the court issues a conditional release order:

*For a discussion of contempt proceedings generally, see Sections 8.3-8.4.

> "[I]f the defendant violates a condition of release, he or she . . . may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

The U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. See *United States v Dixon*, 509 US 688 (1993), discussed at Sections 4.10(C) and 8.12.

4.12 Forfeiture of Bond Where Defendant Violates a Release Condition

MCR 6.106(I)(2) contains the procedural requirements for bond forfeiture:

- If the court revokes its release order and declares the surety bond or bail forfeited, it must mail notice of the revocation order immediately to the defendant at his or her last known address and to anyone who posted bail or bond. MCR 6.106(I)(2)(a).
- "If the defendant does not appear and surrender to the court within 28 days after the revocation date or does not within the period satisfy the court that there was compliance with the conditions of release or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone

> who posted bail or bond for an amount not to exceed the full amount of the bail, or if a surety bond was posted an amount not to exceed the full amount of the surety bond, and costs of the court proceedings. If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court." MCR 6.106(I)(2)(b).

Forfeiture of a bond in the event the defendant violates a condition of release imposed under MCL 765.6b(1) is permitted only if the surety has notice of the condition and given consent to it. In *Kondzer v Wayne County Sheriff*, 219 Mich App 632 (1996), the surety obtained a $50,000.00 bail bond for the pretrial release of a criminal defendant, who was charged with criminal sexual conduct. When the district court bound the defendant over to circuit court for trial, it added a condition to release that defendant have no contact with the complaining witness. The surety was not present when the court added the additional condition, and did not consent to it. Thereafter, the defendant raped the complaining witness, in violation of the protective condition. The Court of Appeals held that forfeiture of the bond was improper in this case, because the surety did not consent to the additional protective condition on defendant's release. A surety bond is a contract governed by the common law rule that the parties' liabilities under a contract are strictly limited by its terms, which cannot be changed without the parties' consent. This common law rule was not changed by MCL 765.6b(1).

4.13 Denying Bond

The court may only deny bond to defendants charged with certain serious crimes, "when the proof is evident or the presumption great." Const 1963, art 1, §15. Since some domestic violence crimes may involve the type of serious conduct for which bail may be denied, this section discusses the circumstances under which a court may deny bond.

A court may deny pretrial release to a defendant charged with murder if it finds that proof of guilt is evident or the presumption great. MCR 6.106(B)(1)(a)(i) (which incorporates the constitutional bail provisions).

A court may also deny pretrial release to a defendant charged with a violent felony* if it finds that proof of guilt is evident or the presumption great and:

> "[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> "[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of

*A violent felony contains an element involving a violent act or threat of a violent act against any other person. MCR 6.106(B)(2).

the United States or another state arising out of separate incidents." MCR 6.106(B)(1)(a)(*ii*).

If a court finds that proof of guilt is evident or the presumption great, it may deny pretrial release under MCR 6.106(B)(1)(b) to a defendant charged with the following listed offenses, unless it finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person:

- First-degree criminal sexual conduct;
- Armed robbery; or,
- Kidnapping with the intent to extort money or other valuable thing thereby.

No hearing is required to deny bond under MCR 6.106(B) unless the defendant is held in custody and a custody hearing is requested by either the defendant or the prosecutor. If a hearing is held, MCR 6.106(G)(2) requires the following procedural safeguards:

- The defendant is entitled to be present and to be represented by a lawyer;
- The defendant and prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses;
- The rules of evidence are not applicable, except those pertaining to privilege; and
- A verbatim record of the hearing must be made.

If a court denies pretrial release, it must state its reasons on the record, using SCAO Form MC 240.* The completed form must be placed in the court file. MCR 6.106(B)(4).

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms. (Last visited March 2, 2004.)

Upon denial of pretrial release, defendant may be held in custody for a maximum of 90 days after the date of the court's order, excluding delays attributable to the defense. If trial does not begin within the 90-day period, the court must immediately schedule a hearing and set the amount of bail. MCR 6.106(B)(3).

4.14 Sentencing Domestic Violence Offenders

A. Identifying and Assessing Domestic Violence Offenses

When sentencing an individual convicted of a crime against an intimate partner, it is important to remember that "domestic violence" is more than assault and battery. Domestic violence involves a variety of tactics, so that any

crime can be a "domestic violence crime" if it occurs within a pattern of behavior designed to exert power and control over an intimate partner. Moreover, "domestic violence crimes" are not limited to crimes directed against the person of the offender's intimate partner. Abusers may attempt to exercise control by using behavior directed against their partners' property, animals, family members, or associates. For a discussion of the nature of domestic abuse and its various forms, see Sections 1.2 and 1.5. For a discussion of crimes that can be associated with domestic violence, see Chapter 3.

Once a court has identified a crime as a "domestic violence crime," it is critical to assess the lethality of the situation. A list of lethality factors appears at Section 1.4(B). The National Council of Juvenile and Family Court Judges recommends that courts have information about the following subjects at the time of sentencing for a domestic violence crime:*

*Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 15-16 (1990).

- The facts of the case.
- The offender's criminal history.
- The offender's prior abusive behavior.
- The offender's drug or alcohol use.
- The offender's mental health.
- Prior and pending court contacts with the offender and his or her family, particularly domestic relations and personal protection actions.
- Children living in the home of the victim or offender.
- The impact of the violence on the victim and the victim's desires as to the disposition. On a victim's right to make an impact statement at sentencing, see the Crime Victims' Rights Act, MCL 780.764-780.765 (felony cases), MCL 780.824-780.825 (misdemeanor cases), and MCL 780.792-780.793 (juvenile offenses).*

*Detailed discussion of these provisions appears in *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapter 9.

To reduce the risk of repeat offenses against the victim, sentence should be imposed as soon as possible after conviction of a domestic violence crime. The most effective sentences motivate change by holding the offender accountable and conveying the message that the community will not tolerate domestic abuse.

B. Choosing a Sentencing Option — Conditions of Probation

*See Section 1.7 on the effects of domestic violence on children. For recommendations on sentencing, see Herrell & Hofford, *supra*, at 16, 32.

The existence of an intimate relationship between the victim of a crime and its perpetrator does not diminish the seriousness of the crime. On the contrary, the close relationship between the victim and perpetrator of a domestic violence crime may enhance the perpetrator's access to the victim and the potential for re-victimization. Moreover, when the devastating effects on children are considered, domestic violence crimes pose a far greater potential for harm to society in the long term. Accordingly, it is important for purposes of sentencing that domestic violence crimes be treated no less seriously than similar crimes involving strangers. Furthermore, it is critical that the court impose sentence with the victim's safety in mind.*

Incarceration, fines, restitution, and probationary sentences are all tools for courts to use in holding domestic violence perpetrators accountable for their behavior. Incarceration and fines for specific domestic violence crimes are discussed in other sections of this benchbook, as follows:

- Section 3.2 — Penalties for domestic assault under MCL 750.81.
- Section 3.3 — Penalties for domestic assault and infliction of serious injury under MCL 750.81a.
- Section 3.6(A) — Deferral of proceedings for first-time offenders under the domestic assault statutes.
- Section 3.8(C) — Penalties for misdemeanor stalking under MCL 750.411h.
- Section 3.9(B) — Penalties for felony aggravated stalking under MCL 750.411i.
- Section 3.10 — Penalties for stalking by way of an electronic medium of communication under MCL 750.411s.
- Section 3.5(A) — Penalties for parental kidnapping under MCL 750.350a.
- Section 3.6(B) — Deferral of proceedings for first-time offenders in parental kidnapping cases.
- Section 3.13(C) — Penalties for witness tampering under MCL 750.122.
- Section 8.9 — Contempt sanctions for violation of a personal protection order.

In ordering restitution, courts are to compensate crime victims or their estates for harm suffered as a result of the defendant's conduct. Additionally, courts are to order restitution to any persons or entities that have compensated the

victim or provided the victim with services such as shelter, food, clothing, and transportation. See MCL 769.1a and the Crime Victim's Rights Act, MCL 780.766 (felony cases), MCL 780.794 (juvenile offenses), and MCL 780.826 (misdemeanor cases). For a general discussion of restitution, see *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapter 10.

In imposing probationary sentences, courts have great discretion as to the conditions of probation. Probation orders must prohibit the probationer from violating any criminal law of any U.S. jurisdiction and from leaving Michigan without court consent. MCL 771.3(1). Additionally, MCL 771.3(2) lists specific requirements that a court may impose upon a probationer, including: imprisonment in the county jail; payment of costs, fines, or restitution; community service; and participation in "mental health treatment" or "mental health or substance abuse counseling."* (See MCL 771.3(2) for additional requirements that the court may impose.) MCL 771.3(4) provides generally that the court may impose "other lawful conditions of probation as the circumstances of the case require or warrant, or as in its judgment are proper." For a case stating that a court may impose payment of child support as a probation condition, see *People v Robin Ford*, 95 Mich App 608, 612 (1980), overruled on other grounds 410 Mich 902 (probation shall not be revoked for failure to pay child support or court costs absent appropriate findings on defendant's claim of indigency).

*See also MCL 750.411h(3) and MCL 750.411i(4), which permit the court to order psychiatric, psychological, or social counseling as a condition of probation for stalking offenders.

Effective January 1, 2005, the court may also require a probationer to participate in a drug treatment court. MCL 771.3(2)(g).*

*2004 PA 219.

In crafting probation orders for cases involving domestic violence, a court can promote safety by considering the same factors and incorporating many of the same types of provisions that are relevant for pretrial release conditions. See Sections 4.5 and 4.6 in this regard. In particular, "no-contact" provisions may be necessary to promote the safety of a domestic violence victim; MCL 771.3(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system to facilitate warrantless arrest in case of a violation. MCL 771.3(5) (on LEIN entry), MCL 764.15(1)(g) (on warrantless arrest).

> **Note:** Probation orders with conditions for protection of a named individual are entitled to full faith and credit in other U.S. jurisdictions under the federal Violence Against Women Act. 18 USC 2265 - 2266. See Section 8.13 for further discussion. See also MCL 791.236(16), providing for parole orders with conditions to protect a named individual. These are entered into the Corrections Management Information System, which is accessible by the LEIN system. *Id.*

C. Batterer Intervention Services as a Condition of Probation

In misdemeanor cases involving domestic violence, many courts order defendants to complete programs offered by "batterer intervention services" as a condition of probation. To promote victim safety and offender accountability in such cases, the State Court Administrative Office has encouraged Michigan courts to follow guidelines on batterer intervention standards that were promulgated by a statewide task force and endorsed by Governor John Engler in 1999, and by the 2001 Governor's Domestic Violence Homicide Prevention Task Force. See SCAO Administrative Policy Memorandum 1999-01 and *Report and Recommendations,* Domestic Violence Homicide Prevention Task Force, p 12, 18 (April 2001). For a detailed discussion of the Michigan Batterer Intervention Standards, see Sections 2.3-2.4.

In making use of batterer intervention service programs, courts should be aware of the potential for both positive and negative outcomes. Although a batterer intervention program provides the opportunity for change, it may also give the court and the abused individual a false sense of security. Courts and abused individuals should be aware that batterer intervention services cannot guarantee that participants will change their behavior. Indeed, some research questions the efficacy of batterer intervention programs in stopping abuse.* Accordingly, both the court and the abused individual must be careful to do an ongoing assessment of an abuser's potential for lethality, as noted in Section 1.4(B). Especially in cases with a high risk for lethal violence, batterer intervention services alone will not be sufficient to protect victims. Batterer intervention services should never be substituted for other conditions of probation imposed to protect the victim, such as jail sentences, "no-contact" orders, tethers, or frequent reports to a probation officer.

*See *Health Watch,* 6 Domestic Violence Report 37 (Feb/March 2001).

Batterer intervention services are also limited as a sentencing option in that they have no punitive function. Although they stress abuser accountability, the purpose of a batterer intervention service is to provide an opportunity for behavioral and attitudinal change, not to punish. To convey the message that domestic violence crimes are just as serious as other types of crimes, it may be necessary for the court to order punitive sanctions (such as jail time or fines) in addition to participation in batterer intervention services. Where a court orders batterer intervention as a condition of probation without accompanying punitive sanctions, it runs the risk of communicating to the offender that domestic abuse is not truly "criminal."

A further limitation on batterer intervention is that is serves no restorative purpose. Participation in a batterer intervention service should not be substituted for restitution to the victim or the community in the form of compensatory payments or community service.

Despite the foregoing limitations, some judges have found that batterer intervention services can teach some individuals non-abusive ways of relating to their partners. Other judges are skeptical of the efficacy of batterer intervention (or of their responsibility to 'cure' the offender), but nonetheless believe that it can serve a useful purpose by reinforcing the court sanctions.*

*Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement,* p 44 (Nat'l Inst of Justice, 1990).

Note: If the court orders participation in a batterer intervention service as a condition of probation, the Advisory Committee for this chapter of the benchbook suggests that the probation period be for two years, with the possibility of early discharge if the offender satisfactorily completes the batterer intervention service or other conditions of probation. If the sentence requires *satisfactory* completion of the batterer intervention service (rather than mere attendance), probation can be revoked for reasons other than non-attendance. Satisfactory completion would require such things as attendance, payment of fees, participation in group discussions, and compliance with rules. Probationary sentences of less than a year's duration do not create an opportunity to adequately hold abusers accountable, particularly when they do not require the offender to report regularly to a probation officer.

4.15 Monitoring Compliance with Conditions of Probation

To hold a domestic violence offender accountable and to promote victim safety, the offender must be adequately monitored. This section contains suggestions for obtaining information about compliance with the conditions of probation and for effective enforcement of orders for probation.

A. Obtaining Information

The court can promote safety in cases involving domestic violence if its probationary sentences require that the offender report frequently and in person to his or her probation officer.* Frequent, in-person reporting can also promote accountability and provide incentive for change by regularly reminding the offender that his or her behavior is not acceptable. Some Michigan counties have instituted intensive supervision programs for domestic violence offenders. These offenders are assigned to a single probation officer. They are required to report to the probation officer at least once a week, and to submit to drug and/or alcohol testing and unscheduled home visits.

*MCL 771.3(1)(c) requires that probationers report to probation officers "either in person or in writing, monthly or as often as the probation officer requires."

If the court orders an offender to participate in a batterer intervention service program, it is important that the service provider make regular (e.g., monthly) reports to the court or probation officer about the offender's compliance with this condition of probation. The Michigan Batterer Intervention Standards contain provisions for service providers to make progress reports to the referring court about program participants. See Section 2.4(C)-(D) for

guidelines under the Statewide Standards on participant confidentiality and communicating with the referring court.

Information about an offender's compliance with conditions of probation can also be obtained from the victim of the crime. The National Council of Juvenile and Family Court Judges recommends that probation officers maintain periodic, private contact with the victim for this purpose. In doing so, however, the officer should remember that monitoring compliance is the state's responsibility and be careful not to place the victim in the potentially dangerous position of monitoring and reporting on the offender.* Officers should also be mindful of the confidential relationship that exists between a probation officer and a probationer or defendant under investigation. See MCL 791.229, providing that "[a]ll records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection." Discussion of the scope of this privilege appears at *Howe v Detroit Free Pres*s, 440 Mich 203 (2002).

*Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court Journal 33-34 (1990). See also Section 2.4(E) for guidance under the Michigan Batterer Intervention Standards.

Finally, it is essential in monitoring compliance with conditions of probation to remember that concurrent personal protection or domestic relations actions involving probationers and their intimate partner may be pending in other courts. Probation officers can promote victim safety and abuser accountability by making regular inquiry into the existence and status of these other proceedings.

B. Enforcing Probation Violations

The police have warrantless arrest authority to enforce violations of probation orders. MCL 764.15(1)(g). Probation orders with conditions for the protection of a named individual under MCL 771.3(2)(o) are entered into the LEIN system. MCL 771.3(5). To further promote safety, some courts give the victim a copy of the probation order to show to police officers in the event of a violation.*

*The victim may also get a PPO. See Chapters 6 - 8 on PPOs.

To reduce the risk of further crimes against the victim, a domestic violence offender should face clear, certain, consistent, quick consequences for any violation of conditions of probation. Jail time is only one of many consequences the court can impose. In some cases, it may be appropriate and effective to impose alternative sanctions such as more stringent supervision conditions, community service, tethers, or work crew service. The imposition of incremental sanctions for noncompliance may be appropriate for directing offenders away from ingrained, learned patterns of behavior. Herrell & Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 34 (1990).

The mechanics of probation revocation proceedings are beyond the scope of this benchbook. For more information, see *Criminal Procedure Monograph 7: Probation Revocation—Third Edition* (MJI, 2006-April 2009).

4.16 Victim Confidentiality Concerns and Court Records

Court records and confidential files are not subject to requests under Michigan's Freedom of Information Act ("FOIA"), as the judicial branch of government is specifically exempted from that act. MCL 15.232(d)(v). However, court records are public unless specifically restricted by law or court order. MCR 8.119(E)(1). This section examines specific restrictions on access to criminal court records that will help to preserve the confidentiality of crime victims' identities.

> **Note:** See Sections 10.4-10.5 and 11.4 on confidentiality of records in domestic relations actions, and Section 7.4(C) on confidentiality issues in personal protection actions. On safety and privacy for crime victims generally, see *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Chapters 4-5.

A. Felony Cases

The Crime Victim's Rights Act, MCL 780.758(2), limits access to the victim's address and phone number in felony cases:

> "The work address and address of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim shall not be in the court file or ordinary court documents except as contained in a transcript of the trial."*

*The misdemeanor and juvenile articles of the Crime Victim's Rights Act do not contain this provision.

On motion by the prosecutor, victim identifying information may also be protected from disclosure during testimony at trial or pretrial proceedings, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation. See MCL 780.758(1), governing felony proceedings. Similar protections are available in misdemeanor and delinquency cases under MCL 780.818(1) (misdemeanor cases) and MCL 780.788(1) (delinquency cases).

When the court is considering a motion to seal court records in a criminal matter and the motion involves an allegation of domestic violence, the court must consider the safety of any alleged victim or potential victim of the domestic violence. MCL 600.2972(1). "'Domestic violence' means the occurrence of any of the following acts by a person that is not an act of self-defense:

> "(*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> "(*ii*) Placing a family or household member in fear of physical or mental harm.

> "(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> "(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 400.1501(d)(*i*)–(*iv*).

MCR 8.119(F) governs the procedure for sealing court records. MCR 8.119(F)(1) provides:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts records, in whole or in part, in any action or proceeding, unless
>
> > "(a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > "(b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > "(c) there is no less restrictive means to adequately and effectively protect the specific interest asserted."

MCR 8.119(F)(2)(a)-(b) provides that in order to determine whether "good cause" exists, the court must consider:

> "(a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> "(b) the interest of the public."

B. Juvenile Delinquency Cases

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* of the "juvenile court" are open to the general public, while *confidential files* are not open to the public. MCR 3.903(A)(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3) defines "confidential files" as follows:

> "(a) that part of a file made confidential by statute or court rule, including, but not limited to,

(*i*) the diversion record of a minor pursuant to the Juvenile Diversion Act, MCL 722.821 et seq.;

(*ii*) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act, MCL 780.751 et seq.;

(*iii*) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);

(*iv*) the dispositional reports pursuant to MCR 3.943(C)(3) and 3.973(E)(4);

(*v*) fingerprinting material required to be maintained pursuant to MCL 28.243;

(*vi*) reports of sexually motivated crimes, MCL 28.247;

(*vii*) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;

"(b) the of a social file maintained by the court, including materials such as

(*i*) youth and family record fact sheet;

(*ii*) social study;

(*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);

(*iv*) Family Independence Agency records;

(*v*) correspondence;

(*vi*) victim statements;

(*vii*) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver."

MCR 3.925(D)(2) states that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

- The nature of the proceedings;
- The welfare and safety of the public;

- The interests of the juvenile; and
- Any restriction imposed by state or federal law.

The Crime Victim's Rights Act, MCL 780.788(1), provides that on a motion by the prosecutor or victim, victim identifying information may be protected from disclosure during testimony at any court hearing in delinquency cases, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation.

C. Misdemeanor Cases

The Crime Victim's Rights Act, MCL 780.816(1), provides that the post-arraignment notice from the court to the prosecuting attorney containing the victim's name, address, and telephone number is not a public record.

At MCL 780.830, the Crime Victim's Rights Act further provides that a victim's address and telephone number maintained by a court or a sheriff for any purpose under Article 3 (the misdemeanor article) of the Act are exempt from disclosure under Michigan's Freedom of Information Act.

On motion by the prosecutor, victim identifying information may be protected from disclosure during testimony at trial or pretrial proceedings, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation. MCL 780.818(1).

D. Name Changes

MCL 711.3(1) provides that in a name change proceeding under MCL 711.1, the court may order for "good cause" that no publication of the proceeding take place and that the record of the proceeding be confidential. "Good cause" includes (without limitation) evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger, such as evidence that the petitioner or another individual has been the victim of stalking or an assaultive crime.

Evidence of the possibility of physical danger must include the petitioner's or endangered person's sworn statement of the reason for the fear of physical danger if the record is published or otherwise available. If evidence is offered of stalking or and assaultive crime, the court shall not require proof of arrest or prosecution for that crime to reach a finding of "good cause." MCL 711.3(2).

The statute imposes misdemeanor penalties on court officers, employees, or agents who divulge, use, or publish, beyond the scope of their duties with the court, information from records made confidential under the foregoing provisions. However, no sanctions apply to disclosures made under a court order. MCL 711.3(3).

MCR 3.613(E) states:

> "Confidential Records. In cases where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file. Except as otherwise ordered by the court, only the original petitioner may gain access to confidential files, and no information relating to a confidential record, including whether the record exists, shall be accessible to the general public."

Confidential records created under this statute are exempt from disclosure under the Freedom of Information Act. MCL 711.3(4).

Chapter 5: Evidence in Criminal Domestic Violence Cases

5

5.1 Chapter Overview

*Although the focus of this chapter is on criminal proceedings, many of the evidentiary questions discussed here are also relevant to civil proceedings.

This chapter addresses evidentiary problems that are likely to arise in criminal cases involving allegations of domestic violence.* These problems stem from three circumstances that are commonly present in crimes between intimates:

1) From an evidentiary point of view, some criminal trials on charges involving allegations of domestic violence may be similar to murder trials in that the victim will not appear as a witness. As noted in Section 1.6(C), some domestic violence victims may be unwilling or unable to participate in court proceedings as a result of injury, coercion, ambivalence about the outcome of court proceedings, or lack of confidence in the justice system. Other victims may be ineffective witnesses due to the traumatic effects of the abuse. In such cases, courts may be requested to rule upon the admissibility of the following forms of evidence:

   - Former testimony of an unavailable witness.
   - Audiotaped evidence.
   - Photographic evidence.
   - Business records of medical or police personnel.
   - Statements made for purposes of medical treatment or diagnosis.
   - Statements offered under the "catch-all" hearsay exception.
   - Expert testimony about domestic abuse and its effects.

   The admissibility of such evidence is addressed in Sections 5.2 - 5.8 of this chapter. For discussion of prosecutorial discretion and the absent witness, see Section 1.6(D).

2) Michigan law protects privacy rights by giving the parties to certain relationships the privilege to protect communications made

during the relationship. In cases involving allegations of domestic violence, the privileges most often at issue are those protecting marriage and relationships with medical or mental health care providers. These privileges are the subject of Sections 5.9 - 5.10 of this chapter.

3) As noted in Section 1.2, domestic violence involves ongoing abusive behavior perpetrated in order to control an intimate partner. Accordingly, evidence of the parties' past interactions may become relevant in criminal cases involving allegations of domestic violence. Such evidence may concern:

   - The complainant's past sexual relationship with the defendant.
   - The defendant's other wrongful acts against the complainant.
   - The defendant's threats against the complainant or other witnesses.

   These subjects are discussed in Sections 5.11 - 5.13 of this chapter.

5.2 Former Testimony or Statements of Unavailable Witness

In cases involving allegations of domestic violence, the complaining witness is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness's earlier testimony or other statement as substantive evidence at trial under exceptions to the hearsay rule contained in MRE 804(b)(1) and (6), which are the subject of this section.*

*See Section 1.6(C) on reasons why a witness in a domestic violence case may be unavailable. For a general discussion of the hearsay rule, see Section 5.7.

A. Admissibility of Former Testimony Under MRE 804(b)(1)

MRE 804(b)(1) provides:

> "(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > "(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

See also MCL 768.26, which states:

> "Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of

> the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

MRE 804(a) defines "unavailability" as follows:

> "(a) *Definition of unavailability*. 'Unavailability as a witness' includes situations in which the declarant—
>
> > "(1) is exempted by ruling of the court on the ground of privilege* from testifying concerning the subject matter of the declarant's statement; or
> >
> > "(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> >
> > "(3) has a lack of memory of the subject matter of the declarant's statement; or
> >
> > "(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> >
> > "(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.*****
>
> "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

*See Sections 5.9-5.10 for information on privileges.

*On the effort to procure the declarant's attendance required under MRE 804(a)(5), see *People v Bean*, 457 Mich 677, 684 (1998).

In *People v Adams*, 233 Mich App 652 (1999), the Court of Appeals considered the issue of "unavailability" when a complaining witness did not appear to testify at trial against her former boyfriend, who was charged with assault with intent to commit murder and other offenses.* The complainant had previously appeared to testify at a preliminary examination that was adjourned and rescheduled. After the adjournment, the mother of defendant's new girlfriend shot at the complainant. After this incident, the complainant reluctantly testified at the rescheduled preliminary examination, but on the morning of defendant's trial, she was upset and nervous about testifying against defendant. She abruptly left the courthouse without warning before the trial began. After an unsuccessful two-hour search for her, the prosecutor asked the court to either adjourn the trial or declare her unavailable and admit into evidence her preliminary examination testimony under MRE 804(b)(1). The trial court dismissed the charges, opining that the complainant may have

*This case is also discussed in Section 1.6(C)(2).

simply changed her mind about pursuing the charges. On appeal, the Court of Appeals held that the trial court abused its discretion by excluding the complainant's preliminary examination testimony from evidence at trial. 233 Mich App at 656. The Court of Appeals found that the complainant's abrupt departure and evasion from detection made her "unavailable" under the "ordinary meaning of the word" and for purposes of MRE 804(a)(2). In light of her unavailability, the trial court should have admitted her former testimony into evidence under MRE 804(b)(1). The Court of Appeals further noted that use of the preliminary examination testimony would not violate defendant's constitutional right to confront witnesses. 233 Mich App at 658-659.

In *People v Garland*, 286 Mich App 1, 7 (2009), the trial court did not clearly err when it found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, [] lived in Virginia, and [] was unable to fly or travel to Michigan to testify[.]"

In *People v Williams*, 244 Mich App 249 (2001),* the defendant was charged with assault with intent to do great bodily harm (and third-offense habitual offender) against his girlfriend. The complainant testified at the preliminary examination about the assault and at an evidentiary hearing about two prior incidents where defendant had beaten her, one of which was ruled admissible at trial. On the day of trial, the victim failed to appear. The prosecutor requested that the trial court either grant a continuance and issue a bench warrant or proceed to trial and use the complainant's former testimony from the preliminary examination and evidentiary hearing. The trial court dismissed the charges, concluding that the victim did not want to prosecute. The Court of Appeals reversed and remanded, holding that the trial court usurped the prosecutor's exclusive authority to decide whom to prosecute. Regarding the complainant's former testimony, the Court of Appeals held:

*This case is also discussed in Section 1.6(D).

> "Here, despite the victim's failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed by showing that the victim was an unavailable witness. MRE 804(a)(5); MCL 768.26; MSA 28.1049. Rather than dismiss the charges, the trial court should have proceeded to make a determination whether the prosecution had shown due diligence in attempting to procure the victim's attendance at trial. MRE 804(a)(5); *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If due diligence were shown, the victim's testimony from the preliminary examination or the evidentiary hearing could have been utilized at trial if defendant 'had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.' MRE 804(b)(1)." 244 Mich App at 254-255.

The content of a 911 call is not testimonial evidence and its admission at trial does not violate a defendant's Sixth Amendment right to confrontation. *Davis v Washington*, 547 US 813, 827 (2006).

In *Davis, supra,* the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during an assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. *Id*. at 828. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at 828 (emphasis in original).

In a companion case, *Hammon v Indiana,* the *Davis* Court ruled that a victim's sworn statement regarding an assault was testimonial evidence and was not admissible at trial unless the victim's unavailability resulted from the defendant's wrongful conduct. *Davis* (*Hammon*), *supra* at 834.

In *Hammon, supra,* the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. *Id*. at 832. In this case, the Court concluded that the circumstances under which Amy was interrogated closely resembled the circumstances in *Crawford v Washington,* 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. *Davis* (*Hammon*), *supra* at 820, 830. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Hammon's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis* (*Hammon*), *supra* at 830 (emphasis in original).

A victim's statements made for the primary purpose of identifying, locating, and apprehending a perpetrator after the crime has already occurred constitute testimonial evidence. *People v Bryant*, 483 Mich 132, 143 (2009). In *Bryant*, the victim was allegedly shot at the defendant's house and drove to a gas station where he was questioned by the police and identified the shooter as the defendant shortly before the victim died from the gunshot wound. *Bryant, supra* at 135-136. The Court concluded that the police questioned the victim

about past events when they questioned him about a crime that had been committed 30 minutes prior to questioning and six blocks away from where it allegedly took place. *Id.* at 143. In addition, the police officers' actions did not indicate that they "considered the circumstances at the gas station to constitute an 'ongoing emergency,'" as defined by the United States Supreme Court. *Id.* at 144. For these reasons, the Michigan Supreme Court concluded that the victim's statements were testimonial in nature and should not have been admitted against the defendant at trial. *Id.* at 151.

In general, statements made by a victim of sexual abuse to a Sexual Assault Nurse Examiner (SANE) or other examiner may be testimonial or nontestimonial. *People v Spangler*, 285 Mich App 136, 154 (2009). To make that determination, "the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the [examiner]'s questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *Spangler*, *supra* at 154. See *Spangler*, *supra* at 155-156, for a nonexhaustive list of factual indicia helpful to making an admissibility determination under the Confrontation Clause.

See *People v Garland*, 286 Mich App 1, 9-10 (2009), where the Court found that statements made by a victim of sexual abuse to a nurse were nontestimonial and their admission did not violate the defendant's right of confrontation when the statements were reasonably necessary for the victim's treatment and diagnosis. Specifically, the Court indicated:

> "The victim's statements to the nurse were reasonably necessary for her treament and diagnosis. The victim went to the hospital for medical care the morning of the assault. She was directed to LACASA, a nonprofit organization in Livingston County that provides free and confidential comprehensive services for sexual assault survivors, for such medical care. The nurse was the first person to take a history from the victim and examine the victim, which she did at 6:00 p.m. on the day of the assault. The police investigation occurred after, and separate from, the nurse's taking of the history and examination. The nurse testified that the patient's history is very important because it tells her how to treat the patient and how to proceed with the examination. Then, considering the victim's history, the nurse provides medical treatment to the victim.
>
> * * *
>
> "Here, unlike in [*People v*] *Spangler*, [285 Mich App 136 (2009),] where the factual record was not developed enough to determine whether the victim's statements were testimonial, we have a factual record that sufficiently indicates that under the totality of

> the circumstances of the [victim's] statements, an objective witness would reasonably believe that the statements made to the nurse objectively indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency.
>
> "For the same reasons that the victim's statements to the nurse were reasonably necessary for her treatment and diagnosis, we conclude that the victim's statements were nontestimonial. Although the nurse does collect evidence during the course of the examination after taking a patient's history and the nurse is required to report the assault and turn over the evidence to law enforcement officials, the nurse is not involved in the police officer's interview of the victim after the examination and is not personally involved in the officer's investigation of the crime. The victim in this case did not have any outwardly visible signs of physical trauma; therefore, the nurse could not have treated her with antibiotics and emergency birth control unless she knew her history. Thus, we hold that, on these facts, the circumstances did not reasonably indicate to the victim that her statements to the nurse would later be used in a prosecutorial manner against defendant." *Garland*, 286 Mich App at 9, 11 (internal citations omitted).

*The victim died before trial.

See also *People v Jordan*, 275 Mich App 659, 664 (2007), quoting *Davis v Washington*, 547 US 813, 822 (2006), where the Court confirmed the nontestimonial character of statements made by a rape victim* "under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." In accordance with *Davis*, the *Jordan* Court determined that the following sequence of events following the rape and robbery of the 73-year-old victim qualified as an ongoing emergency under *Crawford v Washington*, 541 US 36 (2004). Immediately after the early morning assault, the victim ran out of her house in her nightgown yelling for help. The owner/operator (Ferris) of a nearby service station responded to the victim's screams and called 911. The police arrived 45 minutes later and although the victim told Ferris she had been raped, she failed to tell the police detective about the rape when first questioned. Avery, the victim's landlord and friend, arrived at the scene after the police left but the victim did not mention the rape. After learning of the rape by talking with Ferris, Avery took the victim to the police station where she told the police about the rape.

B. Statements by Witnesses Made Unavailable by an Opponent

MRE 804(b)(6) states:

> "(b) *Hearsay exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

> "(6) *Statement by declarant made unavailable by opponent.* A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

On the definition of "unavailability," see MRE 804(a), which is discussed in Section 5.2(A).

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza,* ___ F3d ___, ___ (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:

> "[T]he Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability. *See Crawford*, 541 U.S. 36, 124 S. Ct. at 1370 ('[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds'); *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879) ('The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.')."

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture only applies when a criminal defendant kills or otherwise prevents a witness from testifying with a specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

See also *People v Bauder*, ___ Mich App ___, ___ (2005), affirming that the use of a murder victim's non-testimonial statements did not violate defendant's Confrontation Clause rights. Concurring with *United States v Garcia-Meza,* 403 F3d 364 (CA 6, 2005), the *Bauder* Court determined that defendant's admission that he killed the victim resulted in the forfeiture of his constitutional right to confront the victim.

A decedent's statements identifying his assailant to the police during the hectic minutes shortly after the fatal shooting took place were admissible as nontestimonial statements under *Crawford v Washington*, 541 US 36, 68 (2004). In the alternative, the decedent's statements were also admissible as dying declarations under the historical hearsay exception to the Confrontation Clause. *People v Taylor*, ___ Mich App ___ (2007).

In *People v Jones*, ___ Mich App ___, ___ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at ___. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

The admission of an unavailable witness' former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, ___ Mich App ___ (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial the co-defendant died. His statement was admitted at trial. In applying the U.S. Supreme Court's holding in *Crawford v Washington*, ___ U.S. ___ (2004),* the Court of Appeals found the co-defendant's statement to police was "testimonial." However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court concluded that admission of the statement for impeachment purposes did not violate either *Crawford v Washington, supra*, or the Confrontation Clause.

*For more information on *Crawford v Washington*, see the June 2004 update to Section 5.7.

5.3 Audiotaped Evidence

This section addresses the admissibility of 911 tapes and other types of audiotapes. The discussion concerns three issues that commonly arise when such evidence is introduced at trial:

- Authentication of audiotaped evidence (MRE 901).
- Hearsay objections to audiotaped evidence (MRE 803, 804).
- Weighing the probative value of audiotaped evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

A. Authentication of Audiotaped Evidence

Authentication of all types of evidence is governed by MRE 901(a), which generally provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b) then provides a non-exhaustive list of authentication techniques that meet the requirements of MRE 901(a). Two of these examples apply directly to audiotaped evidence. They are:

> "(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> "(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone."

In *People v Berkey*, 437 Mich 40 (1991), the Michigan Supreme Court considered the admissibility of audiotapes recorded by a murder victim several months before her death. The tapes contained recordings of conversations between the victim and her husband, who was convicted of her murder. The tapes were played for the jury at trial, after authentication by the victim's neighbor, who identified the voices on the tapes as those of the victim, the defendant, and their children. At a previous hearing on admissibility of the tapes held outside the presence of the jury, the neighbor testified that she was not present when the tapes were made, and did not know: 1) what tape recorder was used; 2) who made the tapes; 3) whether the tapes contained entire conversations or only portions of conversations; 4) whether the tapes had been changed in any way; or 5) whether the statements on the tapes were made voluntarily.

Applying MRE 901(a), the Supreme Court in *Berkey* held that the audiotapes had been sufficiently authenticated: "[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901

requires no more." 437 Mich at 50. In so holding, the Supreme Court noted that prior to the 1978 adoption of MRE 901, questions of authentication had been governed by *People v Taylo*r, 18 Mich App 381 (1969). The Court of Appeals in *Taylor* adopted a seven-part test to determine the admissibility of sound recordings. This test requires:

> "(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement." 18 Mich App at 383-384.

Although the *Taylor* test has been superseded by MRE 901, the Supreme Court in *Berkey* acknowledged that the seven *Taylor* elements are still important considerations for the finder of fact in weighing the evidence. Moreover, the Supreme Court left open the possibility that judicial consideration of the seven *Taylor* elements might in other cases lead to the exclusion of audiotaped evidence:

> "[W]e do not exclude the possibility that, on other facts or upon a different record, elements of the seven-part test (or other relevant considerations) might lead to the exclusion of recorded conversations, notwithstanding testimony that identifies the voices on the tape. Depending on the circumstances, such an exclusion could be premised on a determination that the recording lacks authenticity, or that it lacks probative value, or that it is subject to exclusion notwithstanding its probative value." 437 Mich at 53.

B. Hearsay Objections to Audiotaped Evidence

Not all information on a 911 tape will fall within the definition of hearsay. MRE 801(c) defines hearsay 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." In *City of Westland v Okopski*, 208 Mich App 66, 77 (1994), admission of the tape recording of a 911 call was not prohibited by the hearsay rule because it was offered to show why the police responded rather than to prove the truth of the matter asserted.

In addition, for purposes of the hearsay rule, a "statement" is defined in MRE 801(a) as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." In *People v Slaton*, 135 Mich App 328, 335 (1984), the Court of Appeals found that background noises in a 911 tape were not hearsay because they were not statements.*

*For general discussion of the nature of hearsay, see Section 5.7.

In cases where audiotaped evidence does fall within the definition of "hearsay," Michigan appellate courts have upheld trial court decisions

admitting 911 tapes as evidence under the present sense impression, excited utterance, and dying declaration exceptions to the rule against hearsay.

1. Present Sense Impression Exception Under MRE 803(1)

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A present sense impression is admissible even though the declarant is available as a witness. MRE 803(1).

In *People v Hendrickson*, 459 Mich 229 (1998), the Michigan Supreme Court reviewed the trial court's decision to admit a 911 audiotape recording into evidence at defendant's trial on charges of domestic assault. According to the evidence, the complainant telephoned 911 at 12:43 a.m. and stated, "I want someone to pick up" the defendant. In response to the dispatcher's request for further explanation, the complainant stated, "I have just had the living s- beat out of me," that the defendant was "leaving the house now," and that she herself was leaving to seek medical treatment. At 7:00 a.m., a police officer interviewed the complainant, who described being grabbed around the neck, thrown to the floor, and pummeled by the defendant. The officer photographed the complainant's injuries; these photographs were also admitted into evidence at trial. In holding that the trial court properly admitted the audiotape recording under MRE 803(1), the Supreme Court set forth the following three conditions for admission of evidence under the present sense exception to the hearsay rule, 459 Mich at 236:

- The statement must provide an explanation or description of the perceived event.
- The declarant must personally perceive the event.
- The explanation or description must be substantially contemporaneous with the perceived event.

Additionally, four Justices held that evidence is admissible under MRE 803(1) only if there is corroborating evidence that the perceived event occurred. 459 Mich at 237-238 (lead opinion of Justice Kelly), and 251, n 1 (concurring and dissenting opinion of Justice Brickley). Three of these Justices found that the photographic evidence of the victim's injuries satisfied this requirement in this case. 459 Mich at 239-240 (lead opinion of Justice Kelly). Justice Brickley dissented because he would require corroborating evidence of substantial contemporaneity and he found no such evidence in this case. 459 Mich at 251-252. The other three Justices concurred in the holding that the trial court properly admitted the audiotape recording under MRE 803(1), but disagreed that the present sense impression exception requires corroborative evidence of the underlying event as a prerequisite to admissibility. 459 Mich at 240-241 (concurring opinion of Justice Boyle).

See also *People v Slaton*, 135 Mich App 328, 334 (1984), in which the Court of Appeals found no error in admission of a tape of the murder victim's 911

call, ruling in part that, "[The victim's] statements to [the 911 operator] informing her that some person or persons had broken into his basement as he spoke described an event as he was perceiving that event and were therefore admissible as present sense impressions under MRE 803(1)." *People v Slaton* is further discussed in Sections 5.3(B)(2) and 5.3(C).

2. Excited Utterance Exception Under MRE 803(2)

An excited utterance is defined as "[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." An excited utterance is admissible even though the declarant is available as a witness. MRE 803(2).

In *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996), the Court of Appeals described the three prerequisites to admission of evidence under the excited utterance exception to the hearsay rule:*

**People v Kowalak* is discussed in more detail in Section 5.13.

- The statement must arise out of a startling event.
- The statement must relate to the circumstances of the startling event.
- The statement must be made before there has been time for contrivance or misrepresentation by the declarant.

Additionally, the Michigan Supreme Court has held that in order to admit evidence of an excited utterance, some independent proof — direct or circumstantial — must be offered that the startling event took place. The proffered excited utterance by itself is not sufficient to establish that the startling event took place. *People v Burton,* 433 Mich 268, 294-295 (1989). See also *People v Layher*, 238 Mich App 573, 583 (1999), lv granted on other grounds 463 Mich 906 (2000) (strong circumstantial evidence was sufficient to establish independent proof that a sexual assault occurred).

In *People v Walker (Walker I),* 265 Mich App 530, 532 (2005), the defendant beat his live-in girlfriend with a stick and threatened to "blow her back out" with a handgun. Two hours after the beatings had stopped, the victim jumped from a second-story balcony, ran to a neighbor's house, and asked the neighbor to call the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim also made a written statement to the police. *People v Walker (Walker II),* ___ Mich App ___, ___ (2006). The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant argued that the statements should not have been admitted because of the two-hour delay between the assault and the victim's escape, during which time the victim fell asleep and had time to "compose herself enough to jump from a second story window." *Walker I, supra* at 533. The defendant also argued that this delay provided the victim with time to fabricate the assault. The Court of Appeals rejected the defendant's argument and upheld the admission of the statements as "excited utterances." *Id*. at 534–535. The Court of Appeals reiterated the Michigan Supreme Court's holding

in *People v Smith*, 456 Mich 543, 551 (1998), that there is no express time limit for excited utterances: the focus is on whether the declarant was still under the stress of the event at the time the statement was made. The Court found that the facts of this case, including the testimony of the neighbor and police officer that the victim was upset, crying, shaking, and hysterical, supported the trial court's determination that the statements were properly admitted. *Walker I*, *supra* at 534–535.

The Court of Appeals also found that the crime victim's statements made to the neighbor and police officer did not constitute "testimonial statements" for the purposes of the Confrontation Clause. *Walker I*, *supra* at 535. Subsequently, however, the Michigan Supreme Court vacated the Court of Appeal's holding in *Walker I* as to the Confrontation Clause issue, and remanded the case to the Court of Appeals for reconsideration in light of the newly decided case of *Davis v Washington*, 547 US ___, ___ (2006). *People v Walker*, 477 Mich 856, 856 (2006). On remand, the Court of Appeals found that the statements made during the 911 call were not testimonial in nature because they were made for the purpose of resolving an existing emergency. However, the Court found that the neighbor's written statement to the police and the victim's own statement to the police both did constitute "testimonial statements" for purposes of the Confrontation Clause. On this basis the Court of Appeals reversed its prior holding in *Walker I*, and remanded the case to the trial court for further proceedings as appropriate.

The hearsay exception in MRE 803(2) assumes that a person who has been excited by a startling event will not have the reflective capacity to fabricate, so that his or her statement will be spontaneous and trustworthy. The dispositive question is not strictly one of time, but of the capacity for conscious reflection that would give rise to possible fabrication. Accordingly, there is no fixed time limit that applies in determining whether a declaration comes within the excited utterance exception. The Michigan Supreme Court has found that an excited state may last for many hours after the occurrence of a startling incident. In *People v Smith*, 456 Mich 543 (1998), the defendant appealed from his conviction of first-degree criminal sexual conduct, asserting that the trial court should not have applied the excited utterance exception to admit a hearsay statement made ten hours after the alleged criminal incident occurred. A majority of the Supreme Court affirmed the conviction, holding that the statement was admissible as an excited utterance. The Court found that the statement was reliable and admissible because the declarant made it while still under the overwhelming influence of the assault. 456 Mich at 551-553.

Similarly, in *People v Layher*, *supra*, 238 Mich App at 583-584, the Court of Appeals applied MRE 803(2) to uphold the trial court's decision to admit into evidence statements made by a five-year-old victim of sexual assault. The Court found that the victim was in a continuing state of emotional shock precipitated by the assault when she made the statements during therapy one week after the alleged assault and with the aid of anatomical dolls. See also *People v Kowalak*, *supra*, 215 Mich App at 559-560 (excited utterance

**People v Slaton* is also discussed in Sections 5.3(B)(1) and 5.3(C).

exception applicable notwithstanding delay of 30 to 45 minutes between death threat and statement) and *People v Slaton*, 135 Mich App 328, 334-335, (1984) (tape recording of the statements of both a caller and a 911 operator were admissible because they related to a startling event and were made under the stress of that event.)*

3. Dying Declarations Exception Under MRE 804(b)(2)

A dying declaration is defined as "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." A dying declaration is admissible only when the declarant is not available to appear as a witness in either a criminal prosecution for homicide or in a civil action. MRE 804(b)(2).

The Court of Appeals held that a 911 tape was admissible under the dying declaration exception in *People v Siler*, 171 Mich App 246 (1988). Here, the defendant appealed from a conviction of second-degree murder, challenging the district court's decision to bind him over for trial based on an audiotape made when the victim called 911 for an ambulance. The district court admitted the tape over defendant's hearsay objection as a dying declaration under MRE 804(b)(2). On the tape, the victim told the dispatcher that he had been stabbed in the heart, that he needed immediate assistance, and that the defendant had committed the stabbing. The defendant asserted on appeal that the statement was not a dying declaration because the victim was not conscious of his impending death. The Court of Appeals upheld the district court's decision to admit the 911 tape. The Court noted that this case involved the first of four prerequisites to admission of a hearsay statement as a dying declaration in a criminal action:

- the declarant must have been conscious of impending death;
- death must have ensued;
- the proponent of the statement seeks its admission in a criminal prosecution against the person charged with killing the decedent; and
- the statement must relate to the circumstances of the killing. 171 Mich App at 251.

With respect to the "consciousness of death" requirement, the Court stated:

> "'Consciousness of death' requires, first, that it be established that the declarant was in fact *in extremis* at the time the statement was made and, secondly, that the decedent believed his death was impending. But, it is not necessary for the declarant to have actually stated that he knew he was dying in order for the statement to be admissible as a dying declaration." *Id.*

The Court of Appeals found that the record established the decedent's consciousness of impending death. The decedent told the dispatcher that he needed immediate help, repeating this request three times. A forensic pathologist testified that the decedent remained conscious for four to five minutes after the wound was inflicted, and was pronounced dead about an hour and a half later, not having regained consciousness. 171 Mich App at 251-252.*

**People v Siler* is also discussed in Section 5.3(C).

C. Exclusion of Audiotaped Evidence Under MRE 403

MRE 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the following cases, the Court of Appeals reviewed trial court decisions to admit 911 tapes into evidence over defense objections based on MRE 403.

♦ *People v Slaton*, 135 Mich App 328 (1984):

At the defendant's trial for felony murder, a 911 operator testified regarding a call from the victim. During the call, the victim reported that a person had broken into his home. The operator spoke to the victim for approximately five minutes before she heard the phone drop. The operator then heard banging noises, the victim yelling, and two voices demanding money. The prosecutor also introduced portions of a tape of the 911 call into evidence under the excited utterance and present sense impression exceptions to the hearsay rule.* On appeal from his conviction, the defendant challenged the admission of the 911 tape, asserting that it was not relevant to his identification as one of the perpetrators of the crime. He alternatively argued that the tape's probative value was reduced by the availability of the operator's in-court testimony, and that the prejudicial effect of the tape outweighed its probative value. The Court of Appeals held that the 911 tape was relevant because it was highly probative of at least two issues: 1) whether the victim's injuries were inflicted by the perpetrators of the breaking and entering; and 2) whether the defendant's alibi testimony was credible. 135 Mich App at 332-334. The Court further found that the probative value of the tape was not outweighed by its potentially prejudicial nature:

*Present sense impressions and excited utterances are discussed in Sections 5.3(B)(1)-(2).

> "Included in the edited portions of the 911 tape heard by the jury were [the victim's] calls for help and pleas not to be hurt, followed by his muffled moans. We agree with defendant that these sounds were likely to elicit an emotional response from the jury. We do not, however, agree that the effect of these sounds upon the jury was so prejudicial to the issue of defendant's guilt or innocence as to require exclusion of this otherwise highly probative evidence. Defendant's voice was not identified as one of the voices on the tape, leaving the question of defendant's involvement in the crime to be decided in light of other evidence. We cannot say that the trial court abused its discretion in its balancing of the probative

value and prejudicial effect of the 911 tape as evidence." 135 Mich App at 334.

- *People v Siler*, 171 Mich App 246 (1988):

*Dying declarations are discussed in Section 5.3(B)(3).

The defendant was convicted of second-degree murder, after the district court bound him over for trial based on an audiotape made when the victim called 911 for an ambulance. On the tape, the victim told the dispatcher that he had been stabbed in the heart, and that the defendant had committed the stabbing. The district court admitted the tape as a dying declaration under MRE 804(b)(2).* In addition to objecting to introduction of the tape on hearsay grounds, the defendant asserted on appeal that it should have been excluded under MRE 403 because it was more prejudicial than probative. The Court of Appeals disagreed:

> "[The victim's] statement that defendant had stabbed him was relevant because it was proof of the crime of murder with which defendant was charged. The tape was extremely probative because no one saw defendant stab [the victim]. Evidence of guilt is always prejudicial. Only if it would unfairly prejudice defendant should probative evidence be excluded. We hold that defendant was not unfairly prejudiced by the admission of this evidence and that the trial court did not abuse its discretion in admitting the 911 tape." 171 Mich App at 252-253. [Citation omitted.]

- *People v Schmitz*, 231 Mich App 521, 534-535 (1998):

The defendant was convicted of second-degree murder and felony firearm. Although it reversed and remanded for a new trial on other grounds, the Court of Appeals found no error in the trial court's decision to admit into evidence a tape recording of an eyewitness's 911 telephone call. The Court noted that the evidence, although generally cumulative to the eyewitness's trial testimony, was not unduly emotional. The Court found no abuse of discretion in the trial court's balancing of the probative value of the recording and its prejudicial effect or cumulative nature.

5.4 Photographic Evidence

This section addresses the admissibility of photographic evidence. The discussion concerns two issues that commonly arise when such evidence is introduced at trial:

- Authentication of photographic evidence (MRE 901).
- Weighing the probative value of photographic evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury (MRE 403).

A. Authentication of Photographic Evidence

Authentication of photographic evidence is governed by MRE 901(a). That rule provides generally:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

MRE 901(b)(1)-(10) also provides a non-exclusive list of examples of appropriate means of authentication:

- Testimony of witness with knowledge;
- Nonexpert opinion on handwriting;
- Comparison by trier or expert witness;
- Distinctive characteristics and the like;
- Voice identification;
- Telephone conversations;
- Public records or reports;
- Ancient documents or data compilation;
- Process or system; and
- Methods provided by statute or rule.

Proper authentication of a videotape was found in *People v Hack*, 219 Mich App 299, 308-310 (1996). In that case, the defendant was convicted of child sexually abusive activity based on a videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts. Citing *People v Berkey*, 437 Mich 40, 50 (1991),* the Court of Appeals found that the videotape was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question.

**People v Berkey* is discussed in Section 5.3(A).

For a case addressing a photograph of a sexual assault victim, see *People v Riley*, 67 Mich App 320 (1976), rev'd on other grounds 406 Mich 1016 (1979). In *Riley*, the Court of Appeals upheld the trial court's decision to allow a photograph of the victim's bruised backside into evidence. This photograph was authenticated by the victim's testimony that it accurately reflected the condition of her body at the time the picture was taken. The appeals panel found this testimony sufficient authentication, stating that the photographer's testimony was not required:

> "All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it accurately reflects the scene photographed. . . . We believe that a person is familiar with the appearance of one's own body, and therefore complainant was qualified to identify the picture in question." 67 Mich App at 322-323.

Note: Digital photographs are increasingly being introduced as evidence in domestic violence cases. The procedure and standard for admitting digital photographs should be no different than the procedure and standard for admitting other photographs. See *Almond v State*, 553 SE2d 803, 805 (Ga, 2001), where the Georgia Supreme Court stated: "We are aware of no authority . . . for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera." Although digital photographs may be altered and enhanced, they have no monopoly on such tampering, since regular photographs may also be altered and enhanced. Any such tampering, regardless of the type of photograph, may constitute a criminal offense and subject the offender to criminal penalties. However, perhaps because digital images can be more easily altered and enhanced than other photographs, intentionally or unintentionally, one unit of the Michigan Department of State Police (MSP) has developed Standard Operating Procedures for handling digital images taken at crime scenes or autopsies. Although not adopted for use by all MSP units and posts, these procedures are designed to ensure that the images remain unaltered and to establish the chain of evidence. They require that images taken on a digital system be: (1) downloaded unopened to the hard drive of a computer; and (2) copied unopened from the computer hard drive onto a serial-numbered WORM (write once, read many times) compact disc. (Once an image is copied onto a WORM CD, it cannot be altered.) If requested by a prosecutor or defense attorney, copies of digital images will be made from the compact disc. The disc is to be handled with the same precautions as any other piece of evidence, with the same chain of custody concern.

B. Relevancy Questions Under MRE 401 and 403

Substantive objections to photographic evidence in criminal cases are frequently based on questions of relevancy arising under MRE 401 and 403. MRE 401 defines "relevant evidence" as follows:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In general, "[a]ll relevant evidence is admissible." MRE 402. An exception to this general rule appears in MRE 403, which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In *People v Mills*, 450 Mich 61 (1995), the Michigan Supreme Court applied MRE 401 and 403 to decide whether the trial court should have admitted 17 color slides of a victim's severe burn wounds in the trial of two defendants on charges of assault with intent to commit murder. The Supreme Court held that the trial court had properly admitted this evidence, finding it both relevant under MRE 401 and more probative than unfairly prejudicial under MRE 403.

In determining admissibility under MRE 401, the Supreme Court first considered whether the proffered slides were "material." To be material, a fact need not be an element of a crime, cause of action or defense, but it must be "in issue" in that it is within the range of litigated matters in controversy. 450 Mich at 68. The Court further noted that all elements of a criminal offense are "in issue" when a defendant pleads not guilty, and that evidence is not inadmissible merely because it relates to an undisputed issue. 450 Mich at 69, 71. Second, the Court addressed whether the proffered slides had "probative force," defined as *any* tendency to make a material fact more or less probable than it would be without the evidence. 450 Mich at 68.

Applying the foregoing principles, the Court decided that the slides were relevant evidence as required by MRE 401 because they were probative of facts "of consequence" in the case, namely, the elements of the crime and the credibility of witnesses (450 Mich at 68-74):

- They showed the nature and extent of injuries, which was probative of the defendants' intention to kill.
- They corroborated other evidence of the circumstances of the alleged crime.
- They demonstrated the victim's state of mind, which was relevant during cross-examination regarding inconsistent statements.

Having concluded that the slides were relevant under MRE 401, the Supreme Court in *Mills* considered whether their probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. In making this determination, the Court cited its opinion in *People v Eddington*, 387 Mich 551 (1972). In *Eddington*, the Supreme Court rejected the notion that the prosecution must pursue alternative proofs before resorting to photographic evidence, and adopted the following test for admissibility of photographs:

> "Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, *particularly if they are not substantially necessary or instructive to show material facts or conditions.* If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent calculated to excite passion and prejudice, does not render it inadmissible in evidence.
>
> "When a photograph is offered the tendency of which may be to prejudice the jury, its admissibility lies in the sound discretion of the court. It may be admitted if its value as evidence outweighs its possible prejudicial effect, or may be excluded if its prejudicial effect may well outweigh its probative value." 387 Mich at 562-563, citing 29 Am Jur 2d, Evidence, §787, p 860-861. [Emphasis added.]

Applying this standard, the Supreme Court in *Mills* concluded that the relevancy of the slides was not substantially outweighed by the danger of unfair prejudice. The Court found that the slides were accurate factual representations of the victim's injuries, which did not present enhanced or altered representations. The Court further noted that in deciding to admit 17 slides into evidence, the trial judge had reviewed 30 out of 150 slides, excluding those that appeared to be repetitive, gruesome, or unfairly prejudicial. 450 Mich at 77-80.

In *People v Watson*, 245 Mich App 572 (2001),* the defendant was convicted of sexually assaulting his stepdaughter. On appeal, he challenged the trial court's admission into evidence of a cropped photograph, and an 8" x 10" enlargement of the photograph, showing the victim's naked buttocks. There was evidence that the defendant carried the cropped photograph in his wallet. He argued that the photograph was inadmissible because it was offered only to show that he was a "sexual pervert," which made it more likely that the victim's allegations of sexual abuse were true. The Court of Appeals disagreed, finding that the evidence was admissible under MRE 404(b) to show the defendant's motive to have sexual relations with his stepdaughter. Rejecting the defendant's argument that the evidence was inflammatory, the Court noted that the evidence had strong probative value and that the defendant had not shown that the danger of unfair prejudice substantially outweighed that value. In addition, the Court found that the enlargement was properly admitted to show the entire photograph and that there was no

**People v Watson* is also discussed in Section 5.12(C).

reversible error in the admission of an 8" x 10" print instead of a smaller print. 245 Mich App 416-419.

See also *People v Riley*, 67 Mich App 320, 323 (1976), rev'd on other grounds 406 Mich 1016 (1979) (Photograph of a rape victim's bruised backside held admissible over objection that it was unduly prejudicial, where the defense was the consent of the victim.)

5.5 Business Records of Medical or Police Personnel

Due to their hearsay nature, police and medical records are inadmissible at trial unless subject to an exception under MRE 803.* This section discusses two hearsay exceptions that may apply to these records — the exception for records of a regularly conducted activity under MRE 803(6), and the exception for public records and reports under MRE 803(8). These exceptions apply regardless of the declarant's availability as a witness.

*See Section 5.6 on statements made for purposes of medical treatment or diagnosis.

A. Records of a Regularly Conducted Activity — MRE 803(6)

MRE 803(6) contains a hearsay exception for records of a regularly conducted activity, which are described as follows:

> "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."*

*MCL 600.2146 also addresses business records. To the extent that it is inconsistent with the Rules of Evidence, it is superseded. See MRE 101, and *People v Shipp*, 175 Mich App 332, 336-338 (1989).

Under MRE 803(6), properly authenticated records may be introduced into evidence without requiring the records' custodian to appear and testify. See Staff Comment to September 1, 2001 amendment to MRE 803(6). MRE 902(11) governs authentication of certified records of a regularly conducted activity, as follows:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . .

> "(11) *Certified records of regularly conducted activity*. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that —
>
> > "(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
> >
> > "(B) The record was kept in the course of the regularly conducted business activity; and
> >
> > "(C) It was the regular practice of the business activity to make the record.
>
> "A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

*MRE 803(7) concerns the absence of an entry in a record described in MRE 803(6).

For an example of a case in which police records were admitted into evidence under MRE 803(6), see *People v Jobson*, 205 Mich App 708 (1994), police records were admitted into evidence under MRE 803(6). In that case, a police officer took part in unauthorized police raids at two homes and was convicted of entering a building without the owner's permission. On appeal, the officer challenged the trial court's decision to admit into evidence his activity log, which made no reference to the raids in question. The Court of Appeals noted that police officers are required to record all patrol activity in an activity log, and held that the defendant's log was admissible into evidence under MRE 803(6) and MRE 803(7).* 203 Mich App at 713.

For an example of a case in which a medical record was admitted into evidence under MRE 803(6), see *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998). In that case, the Michigan Supreme Court held that part of the "History and Physical" contained in the plaintiff's hospital record was admissible under MRE 803(6). Evidence established that the "History and Physical" was compiled and kept in the regular course of business by the hospital.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. In the following cases, the appellate courts found that the proffered business records were not trustworthy because they were prepared in anticipation of litigation.

♦ *People v McDaniel*, 469 Mich 409 (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence. On appeal, the defendant argued that the lab report was inadmissible hearsay and could not have been admitted under MRE 803(6). The Michigan Supreme Court indicated that the hearsay exception in MRE 803(6) is based on the inherent trustworthiness of business records, and that that trustworthiness is undermined when records are prepared in anticipation of litigation. The Court concluded that "the police laboratory report is inadmissible hearsay because 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" 469 Mich at 414.

♦ *Solomon v Shuell,* 435 Mich 104 (1990):

The plaintiff filed a wrongful death action against the City of Detroit and Detroit police officers John Shuell, Michael Hall, and Richard Nixon, after Shuell shot and killed the plaintiff's husband. The trial court dismissed Nixon and granted a directed verdict in favor of Hall and the City or Detroit. The jury returned a special verdict finding that Shuell was negligent, and the trial court entered a judgment for the plaintiff in the amount of $20,000.00. On appeal, the plaintiff asserted that the trial court improperly admitted four police reports into evidence. Two of these reports were police department homicide witness statements taken during the investigation of the shooting; these reports contained Shuell's and Nixon's versions of the shooting. The other two reports were preliminary complaint reports. In one of these, Hall described his conversation with Shuell immediately after the shooting. In the other report, Shuell described his actions leading up to the decedent's death. In plurality opinions, all seven Justices found that the business records exception in MRE 803(6) was inapplicable because the proffered reports were not trustworthy. The officers making the records in this case had motivation to misrepresent the facts — their statements were taken during the course of a police homicide investigation that could have resulted in civil liability, a criminal prosecution, or interdepartmental discipline. 435 Mich at 126 (opinion of Justice Archer). This lack of trustworthiness went to the admissibility of the reports, not merely to the weight they should be given by the factfinder. 435 Mich at 128 (opinion of Justice Archer).

♦ *People v Huyser,* 221 Mich App 293 (1997):

The defendant was charged with first-degree criminal sexual conduct involving his former girlfriend's daughter. The prosecution retained Dr. David Hickok as an expert witness. Dr. Hickok examined the victim and prepared a report stating his finding of evidence consistent with vaginal penetration. Dr. Hickok was named on the prosecution's witness list, but died prior to trial. A subsequent examination of the victim by a different physician

revealed no evidence of vaginal penetration. At trial, the defendant and the prosecutor offered conflicting testimony regarding vaginal penetration. Over the defendant's objection, one of Dr. Hickok's employees read portions of his report to the jury. The trial court ruled that the report was admissible under MRE 803(6). The defendant was convicted of second-degree criminal sexual conduct. On appeal from his conviction, the defendant challenged the admission of Dr. Hickok's report into evidence. The Court of Appeals agreed, and reversed the defendant's conviction. It found that because Dr. Hickok had prepared the report in contemplation of the criminal trial, the report lacked the trustworthiness of a record generated exclusively for business purposes. The trustworthiness of the report was also undermined by the results of the subsequent examination.

Once a business record is admitted under MRE 803(6), each entry in the record must be admissible within the language of the rule as an act, transaction, occurrence, event, condition, opinion, or diagnosis recorded in the course of a regularly conducted business activity. If the document contains a hearsay statement, that statement is admissible only if it qualifies under a separate exception to the hearsay rule. MRE 805, *Merrow v Bofferding*, *supra*, 458 Mich at 627, and *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 315-316 (1983).

In *Hewitt v Grand Trunk W R Co*, a wrongful death action was brought by the widow of a man who was struck by a train. The trial court admitted into evidence a police accident report containing eyewitnesses' statements that the decedent jumped into the train. The jury found in favor of the defendant railroad, and the plaintiff appealed, asserting that the accident report was admitted into evidence in violation of the hearsay rule. The Court of Appeals reversed and remanded for a new trial, holding that the eyewitnesses' statements in the police report were not admissible. In response to the defendant's contention that the entire report was admissible as a record of a regularly conducted activity under MRE 803(6), the Court noted that the eyewitnesses' statements did not fall within the regular course of their business, so that the primary foundational requirement for this exception was lacking. 123 Mich App at 325.

B. Public Records and Reports — MRE 803(8)

MRE 803(8) contains a hearsay exception for:

> "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624."*

*MCL 257.624 prohibits the use in a court action of a report required by Chapter VI of the Vehicle Code.

The hearsay exception in MRE 803(8) does not allow the introduction of evaluative or investigative reports. The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554 (1984) (holding inadmissible a National Highway Traffic Safety Administration report regarding alleged malfunctions in automotive transmissions). *People v Shipp*, 175 Mich App 332, 339-340 (1989), further illustrates this distinction. The defendant in *Shipp* was convicted of involuntary manslaughter arising from his wife's death. On appeal, he asserted that the trial court erroneously permitted the prosecution to read an autopsy report into evidence. This report contained recorded observations about the body, as well as the medical examiner's opinion and conclusion that death ensued after attempted strangulation and blunt instrument trauma. The Court of Appeals granted the defendant a new trial, holding that the conclusions and opinions contained in the autopsy report were inadmissible under MRE 803(8)(B). The Court noted, however, that the examiner's recorded observations about the decedent's body were admissible under the rule.

> **Note:** A medical examiner's opinion as to the cause of death may be admissible as a record of a regularly conducted activity under MRE 803(6), which was amended after the decision in *Shipp* to include "conditions, opinions, or diagnoses." The Court of Appeals in *People v Shipp* found the autopsy report inadmissible under the business records exception created by MRE 803(6), which at the time extended only to "acts, transactions, occurrences, or events" recorded in the course of a business. 175 Mich App at 338-339. See Section 5.5(A) for discussion of the current business records exception.

Due to Confrontation Clause concerns, MRE 803(8) precludes the admission of certain police reports in criminal cases. This restriction extends to reports of observations made at crime scenes or while investigating crimes. See *People v Tanner*, 222 Mich App 626, 629-630 (1997) (search warrant affidavit inadmissible). It does not, however, operate to exclude routine, non-adversarial observations incorporated in police records. The following cases illustrate this distinction.

- *Solomon v Shuell*, 435 Mich 104 (1990) (investigative police reports inadmissible):

Plaintiff filed a wrongful death action against the City of Detroit and four Detroit police officers after one of the officers shot and killed the plaintiff's husband. An issue on appeal was admission of four police reports into evidence under MRE 803(8).* Four Supreme Court Justices found the hearsay exception in MRE 803(8) inapplicable because the reports were not routine records made in a non-adversarial setting. Instead, these Justices found that the reports were investigative or evaluative reports of a similar nature to police reports that are excluded in criminal cases:

*The reports are described at Section 5.5(A).

> "A . . . rationale for the exclusion of police reports in criminal matters is that police reports in criminal cases are felt to be unreliable because of the adversarial nature of the confrontation between the police and the citizen in a criminal case. . . . [T]he rulemakers were hesitant to allow the admission of a document which was the product of an adversarial relationship, both because the circumstances of production lessened the likelihood of reliability, and because the admission of such a document would not be fair to a criminal defendant.
>
> . . .
>
> "We . . . hold that the police documents in this case were investigative reports outside the scope of MRE 803(8)(B). Clearly, they were not routine recordings of routine acts, nor were they created in a nonadversarial setting. However, this is not to say that all 'police' reports are generally outside the scope of MRE 803(8)(B). Police documents recording routine matters fall within the scope of the public records hearsay exception." 435 Mich at 143, 145 (opinion of Justice Boyle).

♦ *People v Stacy*, 193 Mich App 19, 32-35 (1992) (police records of routine matters made in non-adversarial settings held admissible):

A jury convicted the defendant of arson of a dwelling. At trial, the prosecution theorized that the defendant set the fire after fighting with James Davis, a person whom the defendant believed to be a resident of the dwelling. In an effort to show that someone other than the defendant may have set the fire, defense counsel elicited testimony from Davis that Davis had been involved in a fight with a man other than defendant, Roderick Rankin. In response, the prosecutor sought to establish that the police officer in charge of the arson investigation had explored this possibility and rejected it. The officer testified that he had interviewed Rankin and verified his alibi by checking a police report made by another officer. The information in the other officer's police report was gathered prior to the ignition of the fire, in a routine response to a call from the mother of a girl who wanted Rankin to leave her home. On appeal, the defendant asserted that the trial court erred in admitting the police report. The defendant based his assertion partly on MRE 803(8)(B), which in criminal cases excludes "matters observed by police officers" from the public records exception to the hearsay rule. The Court of Appeals affirmed the defendant's conviction, holding that the police report was properly admitted under MRE 803(8):

> "The literal terms of MRE 803(8)(B) would appear to exclude, in all criminal cases, reports containing matters observed by police officers. FRE 803(8)(B) has not, however, been so broadly read. . . . In *Solomon v Shuell*, 435 Mich 104 (1990), four justices of our Supreme Court appeared to suggest that the Court might, at some future date, find 'routine police reports made in a non-adversarial setting . . . admissible in criminal cases . . . .' 435 Mich 144-145,

> n 9 (opinion of Justice Boyle; two other justices signed the opinion and Justice Griffin concurred in this part of Justice Boyle's opinion, 435 Mich 153). See also *United States v Hayes*, 861 F2d 1225, 1229 (CA 10, 1988) (citing cases for the proposition that 'the exclusionary provision of [Federal] Rule 803[8][B] was only intended to apply to observations made by law enforcement officials at the scene of a crime or while investigating a crime, and not to reports of routine matters made in non-adversarial settings'). . . . We find this interpretation persuasive and applicable to the Michigan Rules of Evidence." 193 Mich App at 33.

The Court of Appeals further found that "no independent inquiry into reliability is required for confrontation clause purposes when MRE 803(8) is satisfied." 193 Mich App at 34.

♦ *People v McDaniel*, 469 Mich 409 (2003):

The defendant was convicted of selling a packet of heroin to an undercover police officer. A police department chemist analyzed the packet and prepared a report indicating that the packet contained heroin. At trial, the chemist did not testify because he had retired. However, the trial court admitted the lab report into evidence under MRE 803(8). The Court of Appeals upheld the admission and in doing so relied upon *People v Stacy*, 193 Mich App 19 (1992). The Michigan Supreme Court reversed the Court of Appeals and stated:

> "[T]he *Stacy* Court held that the exclusion of hearsay observations by police officers was intended to apply only to observations made at the scene of the crime or while investigating a crime. The import of that holding is that MRE 803(8) allows admission of routine police reports, even though they are hearsay, if those reports are made in a setting that is not adversarial to the defendant. We do not deal with such a situation here. The report at issue, prepared by a police officer, was adversarial. It was destined to establish the identity of the substance–an element of the crime for which defendant was charged . . . . Thus, the Court of Appeals erred in applying *Stacy*. Because the report helped establish an element of the crime by use of hearsay observations made by police officers investigating the crime, the report cannot be admitted under MRE 803(8). Further, the error cannot be harmless because this was the only evidence that established an element of the crime for which defendant was charged." [Internal citations omitted.] 469 Mich at 413.

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805. See *In re Freiburger*, 153 Mich App 251, 259-260 (1986) (third party statements in police reports inadmissible hearsay), and *Hewitt v*

**Hewitt v Grand Trunk W R Co* is discussed in Section 5.5(A).

Grand Trunk W R Co, 123 Mich App 309, 325-327 (1983) (eyewitnesses' statements in police accident report inadmissible hearsay).*

5.6 Statements Made for Purposes of Medical Treatment or Diagnosis

MRE 803(4) provides that, regardless of the declarant's availability as a witness, the rule against hearsay does not apply to statements made for purposes of medical treatment or diagnosis, which are defined as follows:

> "Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

In general, exceptions to the hearsay rule are justified by the belief that certain statements are both necessary and inherently trustworthy. The rationale for the exception in MRE 803(4) is: 1) the self-interested motivation to speak truthfully to treating physicians in order to receive proper medical care; and 2) the reasonable necessity of the statement to the patient's diagnosis and treatment. *Merrow v Bofferding*, 458 Mich 617, 629 (1998) (declarant's statement that his self-inflicted wound occurred after "a fight with his girlfriend" was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment).

A. Medical Relevance: Statements Identifying the Declarant's Assailant

*See also Section 5.10(E) (physician's duty to report injuries inflicted by violence).

Where an injury is caused by a criminal assailant, a victim's statements made to medical personnel are likely to identify the assailant as the "cause or external source."* In such cases, the question arises whether the assailant's identity is "reasonably necessary to . . . diagnosis and treatment." The following cases set forth some general principles for determining whether an assailant's identity is medically relevant, and illustrate how courts have applied these principles.

♦ *People v Meeboer (After Remand)*, 439 Mich 310 (1992):

In these consolidated criminal sexual conduct cases involving children aged seven and under, the Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment, and thus admissible under MRE 803(4). The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases. . . .
>
> "Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> "In addition to the medical aspect . . . the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> "A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> "Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." 439 Mich at 328-330.

- *People v Crump,* 216 Mich App 210 (1996):

The defendant was convicted by a jury of first-degree criminal sexual conduct. On appeal, he asserted that the trial court erroneously admitted evidence of the complainant's statements to medical personnel. The Court of Appeals held that the statements were properly admitted under MRE 803(4). "The victim's statements to the medical personnel merely described the beatings and rape that led to her injuries. . . . Further, the statements were cumulative evidence; the victim testified at trial to essentially the same facts as contained within the medical statements." 216 Mich App at 212.

- *People v Van Tassel (On Remand),* 197 Mich App 653 (1992):

A 13-year-old complainant in a criminal sexual conduct case identified her father as her assailant during a health interview preceding a medical examination ordered by the probate court in a separate abuse/neglect proceeding. The Court of Appeals held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." 197 Mich App at 661.

♦ *People v Creith,* 151 Mich App 217 (1986):

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center, and another nurse from a hospital emergency room. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen. The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose.

♦ *People v Zysk*, 149 Mich App 452 (1986):

The defendant was convicted of first-degree criminal sexual conduct. The victim was his ex-girlfriend, who testified that he sexually assaulted her at knifepoint. At trial, an emergency room nurse who cared for the victim immediately after the assault testified regarding the victim's statement during her hospital examination. On appeal, the defendant argued that the trial court improperly applied MRE 803(4) to admit this testimony as an exception to the hearsay rule, because the testimony was not "reasonably pertinent" to either diagnosis or treatment. The Court of Appeals disagreed, holding that the trial court properly admitted the nurse's testimony under either the excited utterance or medical treatment exception:*

> "[N]othing in the record indicates that [the victim's] statement was made for any purpose other than treatment. Second, the witness testified that getting the victim's account is very important in the treatment of a rape victim. If any error occurred, it was in admitting that part of the statement which identified defendant as the attacker. However, since defendant's identification was not at issue, no prejudice to defendant resulted from the admission." 149 Mich App at 458.

*For a discussion of excited utterances, see Section 5.3(B)(2).

B. Trustworthiness: Child Declarant

For persons over ten years of age, a rebuttable presumption arises that they understand the need to tell medical personnel the truth. *People v Van Tassel (On Remand),* 197 Mich App 653, 662 (1992). See also *People v Crump,* 216

Mich App 210, 212 (1996) (adults are presumed to know the need to tell medical personnel the truth).

In cases involving children ten and younger, the trial court must inquire into the child's understanding of the need to be truthful with medical personnel. *People v Meeboer (After Remand*), 439 Mich 310, 326 (1992). In *Meeboer*, the Supreme Court held that an inquiry into the trustworthiness of a child's statement to a physician must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." 439 Mich at 324. Factors to consider include:

- the age and maturity of the child;
- the manner in which the statements are elicited;
- the manner in which the statements are phrased;
- the use of terminology unexpected of a child of similar age;
- the circumstances surrounding the initiation of the examination;
- the timing of the examination in relation to the assault or trial;
- the type of examination;
- the relation of the declarant to the person identified as the assailant;
- the existence of or lack of motive to fabricate; and
- corroborative evidence relating to the truth of the child's statement. 439 Mich 324-326.

For a hearsay exception for statements about sexual acts made by children under age ten, see MRE 803A. See also *Sexual Assault Benchbook* (MJI, 2002-April 2009), Section 7.5(C).

- *People v McElhaney*, 215 Mich App 269, 279-283 (1996):

On appeal from his three first-degree criminal sexual conduct convictions, defendant argued that the trial court abused its discretion by admitting a physician's assistant's testimony concerning statements made to her by a nine-year-old complainant that described a sexual assault by "a man who had given her a ride." The Court of Appeals, after applying the *Meeboer* factors, found the complainant's statements trustworthy. The Court also found that the reliability of the statements was strengthened by the resulting diagnosis and treatment, which corroborated the complainant's statements. The Court also found that the statements were reasonably necessary to the diagnosis and treatment of complainant because they allowed the physician's assistant to structure the examination and questions to the exact type of trauma experienced, stating: "Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment." *McElhaney, supra,* 215 Mich App at 283.

♦ *People v Hyland*, 212 Mich App 701, 704-707 (1995):

In appealing his first-degree criminal sexual conduct conviction arising from acts committed against his nine-year-old daughter, defendant argued that the trial court erred in admitting the daughter's statement to her medical doctor describing defendant sexually assaulting her. The Court of Appeals, after applying the *Meeboer* factors, concluded that the trial court did not err in finding that the daughter's statement was inherently trustworthy and in admitting it under MRE 803(4). The Court also presumed that the trial court did not apply the "tender years" hearsay exception in MRE 803A because the prosecution gave only one day notice of its intent to use the daughter's allegations of sexual abuse by defendant and that MRE 803A requires more extensive notice.

C. Trustworthiness: Statements to Psychologists

In *People v LaLone*, 432 Mich 103 (1989), a criminal sexual conduct case, the Supreme Court overturned a trial court's decision to admit the testimony of a psychologist who treated the 14-year-old complainant. One reason given for the Supreme Court's decision was the difficulty in determining the trustworthiness of statements to a psychologist. 432 Mich at 109-110 (opinion of Justice Brickley). The Supreme Court revisited this question in *People v Meeboer*, *(After Remand*), 439 Mich 310 (1992), reiterating its belief that statements to psychologists may be less reliable than statements to physicians. 439 Mich at 325, 327. However, the Court in *Meeboer* also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." 439 Mich at 329. Accordingly, the Court stated that its decision in *LaLone* does not preclude statements made during "psychological treatment resulting from a medical diagnosis [of physical child abuse]." 439 Mich at 329.

5.7 "Catch-All" Hearsay Exceptions

*Certain statements are by definition not hearsay; namely, prior statements of witnesses and admissions by party-opponents. MRE 801(d).

MRE 801(c) defines "hearsay" 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." A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a).*

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Detailed specific exceptions to this rule appear in MRE 803 (availability of declarant immaterial to admissibility), MRE 803A (child statement about sexual act), and MRE 804 (declarant must be unavailable as a witness). MRE 803(24) and 804(b)(7) also include general "catch-all" exceptions for out-of-court statements that do not fall within a specified exception to the hearsay rule. MRE 803(24) states the following exception:

> "A statement not specifically covered by [MRE 803(1)-(23)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

MRE 804(b)(7) contains a substantially similar provision.

The Michigan Court of Appeals and the Michigan Supreme Court have considered the "catch-all" hearsay exceptions in the following cases:

♦ *People v Katt*, 248 Mich App 282 (2001); 468 Mich 272 (2003):

Defendant was convicted of three counts of first-degree criminal sexual conduct against a seven-year-old boy and the boy's five-year-old sister. On appeal, he claimed the trial court erred by admitting under MRE 803(24) testimony from a child protective services specialist detailing hearsay statements made by the seven-year-old boy. These statements implicated the defendant in numerous incidents of sexual abuse against both the boy and the boy's sister. Defendant claimed that the hearsay exception in MRE 803(24) was inapplicable because it was intended only to apply to statements "not specifically covered" by other hearsay exceptions. Defendant claimed that, contrary to the rule's intent, the statements were "covered" by the tender years exception in MRE 803A, even though they were inadmissible on the basis that they were not the first corroborative statements made by the boy, as required by that rule. The Court of Appeals rejected defendant's narrow interpretation of MRE 803(24), holding that "where a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24)." 468 Mich at 294. However, the Court also held that, to be admissible, the statements must still possess the requisite "particularized guarantees of trustworthiness" and otherwise meet the requirements of MRE 803(24). In this case, the Court found the boy's statements trustworthy because he voluntarily and spontaneously told the CPS specialist about the sexual abuse, his recitation of facts remained consistent, he had personal knowledge of the sexual abuse, he freely recounted the circumstances without leading questions or coaxing, he was not shown to have a motive to fabricate, and he and his sister testified at trial and were subject to extensive cross-examination. 468 Mich at 298.

The defendant appealed the Court of Appeals holding to the Michigan Supreme Court. In *People v Katt*, 468 Mich 272 (2003), the Michigan Supreme Court rejected the defendant's argument that statements coming close to admission under a specific hearsay exception but that do not quite fit within the exception are not admissible under a residual hearsay exception. The Supreme Court affirmed the defendant's conviction and declined to apply the "near miss" theory. The Court stated:

> "We agree with the majority of the federal courts and conclude that a hearsay statement is 'specifically covered' by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adopt the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24)." 468 Mich at 286.

⌛ *People v Geno,* ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant's girlfriend's two-year-old daughter. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child's pull-up. The interviewer asked the child if she "had an owie," and the child answered, "yes, Dale [defendant] hurts me here" and pointed to her vaginal area. The defendant argued that the child's statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child's statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt,* 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant's right to confrontation was violated by the admission of the victim's statements. The Court of Appeals stated:

> "We recognize that with respect to 'testimonial evidence,' *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness's statement – despite the defendant's inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a 'firmly rooted hearsay exception' or it bears 'particularized guarantees of trustworthiness.' *Roberts, supra* at 66. However, we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .
>
> Therefore, we conclude, at least with respect to nontestimonial evidence such as the child's statement in

> this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim."

♦ *People v Lee*, 243 Mich App 163, 170-181 (2000):

An 80-year-old victim of armed robbery made statements identifying the defendant as his assailant, but died before trial. The Court of Appeals found that testimony about the statements was properly admitted at trial under MRE 803(24). The Court noted that the statements had "a particularized trustworthiness." 243 Mich App at 179. They were consistent, coherent, lucid, voluntary, based on personal knowledge, and not the product of pressure or undue influence. Further, there was no evidence that the victim had a motive to fabricate or any bias against the defendant, or that the victim suffered from memory loss before the attack. The Court found no indication that cross-examination of the victim would have been of any utility, given his unwavering identification of his assailant, the absence of expectation that his testimony was expected to have varied from his prior identification, and the cognitive decline he suffered after being in the hospital for several days after the attack. 243 Mich App at 179-181.

♦ *People v Smith*, 243 Mich App 657, 688-690 (2000):

The trial court concluded that hearsay statements to the police and to the declarant's friend were trustworthy and admissible under the "catch-all" exception in MRE 804(b). The Court of Appeals found the trial court's conclusions erroneous. The Court found that the statements to the police lacked sufficient trustworthiness because at the time she made them, the declarant had been accused of a crime and had good reason to incriminate the defendant to avoid prosecution herself. Addressing the declarant's statement to her friend, the Court found that the prosecution wrongfully sought to establish its trustworthiness "by showing that the statement was proved true at a different time or place." Because there was no showing that the statement was trustworthy based on the circumstances surrounding its making, the Court of Appeals ruled that the trial court erred in finding that the statement was trustworthy.

♦ *People v Welch*, 226 Mich App 461, 464-468 (1997):

A defendant charged with second-degree murder sought to introduce an eyewitness's statement contained in a police report. The eyewitness's statement related the victim's alleged statement that she was going to kill herself, after she was assaulted and before she jumped off a bridge to her death. The Court of Appeals found no abuse of discretion in the trial court's determination that the eyewitness's statement was not sufficiently trustworthy to be admitted under MRE 803(24). The trial court found insufficient

evidence that the eyewitness had actually heard the victim's statement, and the Court of Appeals noted that cross-examination of the eyewitness "would have been of more than marginal utility."

5.8 Expert Testimony on Battering and Its Effects.

This section will briefly outline the criteria for admitting expert testimony on battering and its effects into evidence at trial, and digest illustrative appellate cases.

A. Criteria for Admitting Expert Testimony

Michigan Rules of Evidence 702 to 707 govern the use of expert testimony at trial. MRE 702 provides the threshold standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

MRE 703 governs the bases of opinion testimony:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rules does not restrict the discretion of the court to receive expert testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

MRE 705 governs disclosure of facts or data underlying the opinions:

> "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."
>
> **Note**: See also MRE 706 on court-appointed experts and MRE 707 on the use of treatises for impeachment.

MRE 702 can be broken down into the following requirements:

(1) the evidence will assist the trier of fact to understand the evidence or to determine a fact in issue;

(2) the expert is qualified by knowledge, skill, experience, training, or education;

(3) the testimony is based on sufficient facts or data;

(4) the testimony is the product of reliable principles and methods; and

(5) the expert has applied the principles and methods reliably to the facts of the case.

Note: As discussed below, MRE 702 was amended effective January 1, 2004. Although the cases discussed in the following bullets were decided prior to the amendment to MRE 702, they are still applicable. The amendment to MRE 702 did not change the first or second aforementioned requirements.

- **The evidence must give the trier of fact a better understanding of the evidence or assist in determining a fact in issue.**

  Expert testimony must be helpful and relevant to explain matters not readily comprehensible to an average juror. In *People v Christel*, 449 Mich 578, 591 (1995), the Michigan Supreme Court held that in an appropriate case, an expert may explain the generalities or characteristics of the battered woman syndrome, so long as the testimony is limited to a description of the uniqueness of a specific behavior brought out at trial. Such behavior may include prolonged endurance of abuse, attempts to hide or minimize abuse, delays in reporting abuse, or recanting allegations of abuse.* 449 Mich at 580, 592-593. The expert's testimony must be limited to generalities, however. An expert may not opine that the complainant in a case is a battered woman, that the defendant is a batterer, or that the defendant is guilty of the crime charged. Moreover, an expert may not comment on whether the complainant is being truthful. 449 Mich at 591.

  *See Section 1.6 on victims' coping and survival strategies.

  See also *People v Wilson*, 194 Mich App 599, 605 (1992) (expert testifying about battered spouse syndrome may render an opinion only about the syndrome and its symptoms, not whether an individual suffers from the syndrome or acted pursuant to it). *Wilson* applied the reasoning found in *People v Beckley*, 434 Mich 691, 725-728 (1990), in which the Supreme Court reached a similar conclusion regarding expert testimony about the rape trauma syndrome in a child sexual abuse case.

- **The expert must be qualified.**

*For a jury instruction on the weight that a juror should give to expert testimony, see CJI2d 5.10 and 20.29 (for child sexual abuse cases).

There are two basic types of expert witnesses — those with academic training, and those with practical experience. Witnesses with either background may be qualified to testify if they demonstrate understanding of the particular fact situation. *People v Boyd*, 65 Mich App 11, 14-15 (1975). Whether a witness's expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury. *People v Gambrell*, 429 Mich 401, 408 (1987).* In cases involving sexual abuse of children, expert testimony has been presented by physicians, crisis counselors, social workers, police officers, and psychologists. See *People v Beckley*, *supra*, 434 Mich at 711, and cases cited therein.

♦ **The testimony must be based on sufficient facts or data and be the product of reliable principles and methods, and the expert must have applied the principles and methods reliably to the facts of the case.**

Effective January 1, 2004, amended MRE 702 no longer contains the requirement that expert testimony be based on a "recognized" discipline. However, amended MRE 702 provides that expert testimony is only admissible "if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The staff comment for the amended version of MRE 702 provides the following guidance:

> "The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration."

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and physiologists or psychiatrists). *Daubert, supra* 509 US at 593-94, contains a nonexhaustive list of factors for determining the reliability of expert testimony including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert.*

The Michigan Supreme Court in *Gilbert v DaimlerChrysler Corp*, ___ Mich ___, ___ (2004), reiterated the trial court's gatekeeper responsibility in the admission of expert testimony under amended MRE 702. The Court stated:

> "MRE 702 has [] been amended explicitly to incorporate *Daubert's** standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony–regardless of whether the testimony is based on 'novel'[52] science–is reliable.
>
> ---
>
> [52] See, e.g., *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983). Because the court's gatekeeper role is mandated by MRE 702, rather than *Davis-Frye*, the question whether *Davis-Frye* is applicable to evidence that is not 'novel' has no bearing on whether the court's gatekeeper responsibilities extend to such evidence. These responsibilities are mandated by MRE 702 irrespective of whether proffered evidence is 'novel.' . . ."
>
> ---
>
> *Gilbert, supra* at ___.

**Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579 (1993).

The Court also indicated that the trial court must focus its MRE 702 inquiry on the data underlying the expert opinion and must evaluate the extent to which the expert extrapolates from that data in a manner consistent with *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). *Gilbert, supra* at ___.

If the court determines that the expert testimony meets the foregoing requirements, it must next determine whether the probative value of the expert testimony outweighs the danger of unfair prejudice. MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, on request, the trial judge may deem a limiting instruction an appropriate alternative to excluding the evidence. *People v Christel, supra*, 449 Mich at 587.

> **Note:** In *Christel*, the Supreme Court stated that the danger of unfair prejudice was dispelled by the limitations the Court imposed on the scope of an expert's testimony regarding battered woman syndrome. 449 Mich at 591, n 24.

B. Michigan Cases Addressing Evidence of Battering and Its Effects

*For a 50-state survey of statutory and case law, see Parrish, *Trend Analysis: Expert Testimony on Battering & Its Effects in Criminal Cases,* in Validity & Use of Evidence Concerning Battering & Its Effects in Criminal Trials (Nat'l Inst of Justice, 1996).

Expert testimony on battering and its effects may be used by either the prosecutor or defendant in criminal cases.* The Michigan appellate courts have considered the admissibility of expert testimony on battering and its effects in the following cases.

- *People v Christel*, 449 Mich 578 (1995) (prosecutor seeks to explain the behavior of the complaining witness):

The defendant in *Christel* was convicted of first-degree criminal sexual conduct against his former intimate partner. On appeal, he asserted that the trial court erred in admitting testimony about battered woman syndrome from a clinical psychologist trained in the field of domestic violence. The prosecution offered this testimony at trial to help evaluate the complainant's credibility and to rebut defendant's claims that the complainant was a liar, a self-mutilator, and an embezzler. The psychologist testified that women often remain in an intimate relationship even though abuse is occurring. As the abuse escalates over time, they may deny, repress, or minimize it rather than be outraged. 449 Mich at 584-585. The Supreme Court concluded that the trial court erred in admitting this testimony because the requisite factual underpinnings for its introduction were lacking. The Court found that the complainant had ended her relationship with the defendant one month prior to the assault and did not try to hide or deny the assault. Moreover, she did not delay reporting the crime, but immediately sought medical attention with accompanying discussions with police. The complainant also never recanted her testimony that the assault occurred. Under these circumstances, the expert testimony was not relevant because the complainant's actions were not characteristic of battered woman syndrome. 449 Mich at 597-598.

- *People v Daoust*, 228 Mich App 1 (1998) (prosecutor seeks to explain the behavior of a witness to an alleged crime):

The defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child suffered numerous bruises. During the initial stages of the investigation, the child's mother denied involvement with the defendant, and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him. 228 Mich App at 4-5.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant challenged the trial court's decision to admit expert testimony regarding the battered woman syndrome, asserting

that the testimony was not relevant and helpful to the trier of fact. The testimony, given by the executive director of a domestic violence, sexual assault, and child abuse center, described the dynamics of relationships involving women who live under threat of physical or sexual violence. The witness explained that certain types of control mechanisms apart from physical violence are often present in such relationships, and that a woman could fall into a pattern of abuse without ever being hit. She further stated that it was quite common for a woman in this type of relationship to lie in order to protect her partner. Thus, she opined that a woman in this situation might falsely take the blame for abusing her own child because she may fear that exposing the truth will result in even greater abuse. 228 Mich App at 10-11.

The Court of Appeals upheld the trial court's decision to admit the expert testimony, finding that the circumstances described by the expert corresponded to circumstances described by the child's mother. Although the child's mother testified that defendant never actually hit her, she also stated that the defendant: 1) verbally abused her; 2) threatened to harm her and her child; 3) paid close attention to her whereabouts, discouraging her from seeing her friends; 4) controlled her access to her own money; 5) threatened to beat up the child's baby-sitter for making reports to Protective Services about bruises on the child's body; and 6) forced her to perform oral sex on him against her will. The mother also stated that she was afraid to leave the defendant because of his threats. In light of the mother's testimony, the Court of Appeals found that the expert testimony was "relevant and helpful to explain why [the mother] might have initially sought to deflect the blame for her daughter's injuries away from defendant while knowing he was responsible." 228 Mich App at 11.

- *People v Wilson*, 194 Mich App 599 (1992) (defendant seeks to prove that she committed murder in self defense):

The defendant admitted to shooting her husband while he slept, claiming that she acted in self defense. Prior to her trial on murder charges, defendant moved for admission of expert testimony regarding "battered spouse syndrome" (BSS). She asserted that this testimony was essential to establish that she acted in self defense following 48 hours of abuse and death threats and years of battery. 194 Mich App at 600-601. The people appealed from the trial court's interlocutory order granting defendant's motion. The Court of Appeals held that the proffered testimony was relevant and helpful because it would give the jury a better understanding of whether defendant reasonably believed her life was in danger, and whether she could have left her husband. 194 Mich App at 604. Having so held, however, the Court of Appeals limited the parameters of the testimony. Citing *People v Beckley*, 434 Mich 691,726-727, 729 (1990), the Court of Appeals stated:

> "Because an expert regarding the child sexual abuse accommodation syndrome is an expert with regard to the syndrome and not the victim, it is inappropriate for that expert to render an opinion regarding whether the victim actually suffers

> from the syndrome. However, the Court in *Beckley* held the expert could render an opinion that the victim's behavior is common to the class of child abuse victims as long as the symptoms are already established in evidence. The expert may not introduce new facts about the victim unless those facts are properly admitted under a rule other than MRE 702. . . . We believe the same limitations should apply to experts who testify about the BSS. As with the child abuse syndrome, the BSS expert is an expert with regard to the syndrome and not the particular defendant. Thus, the expert is qualified only to render an opinion regarding the 'syndrome' and the symptoms that manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it." 194 Mich App at 605. [Citation omitted.]

Under the foregoing guidelines, the defendant's expert was not allowed to offer an opinion whether the defendant suffered from BSS, or whether her act was the result of the syndrome. The expert was further restricted from testifying whether the defendant's allegations of battery were truthful, this being an issue of credibility for the jury.

> **Note:** To establish self-defense, a defendant must honestly and reasonably believe either that the use of deadly force is necessary to prevent the imminent death of, or imminent great bodily harm to, himself or herself, or that the use of deadly force is necessary to prevent the imminent sexual assault of himself or herself. MCL 780.972.

The theory of self-defense does not apply to cases involving murder-for-hire. *Varner v Stovall*, ___ F3d ___, ___ (CA 6, 2007); *People v Varner*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 224865). The Sixth Circuit Court of Appeals found no error where "Michigan courts determined that, when an individual hires a contract killer, the evidence does not support a defendant's belief that she was 'in imminent danger or that there is a threat of serious bodily harm.' '[S]elf-defense,' the courts concluded, 'is not available to repel a potential force.'" *Varner*, *supra* at ___, quoting the Michigan Court of Appeals in *People v Varner*, *supra*.

♦ *People v Kurr*, 253 Mich App 317 (2002) (defendant seeks to prove that she committed murder in defense of her unborn children):

The defendant was convicted of voluntary manslaughter for the stabbing death of her boyfriend. The defendant claimed that her boyfriend had punched her twice in the stomach, and that she then warned him not to hit her because she was carrying his babies. When her boyfriend came at her again, she stabbed him in the chest, killing him. At trial, the defendant asserted the "defense of others" defense and requested the jury instruction CJI2d 7.21, which provides in part, "a person has the right to use force or even take a life to defend someone else under certain circumstances." The trial court denied

that request, indicating the testimony showed the fetuses were only at 16 or 17 weeks of gestation and would not be viable. Accordingly, the court found the "defense of others" jury instruction was not appropriate because the fetuses had to be living human beings existing independent of the defendant. 253 Mich App at 320. The Court of Appeals reversed the trial court and provided that the "defense of others" instruction does apply to the defense of a fetus from an assault against the mother, regardless of whether the fetus is viable. 253 Mich App at 323. The Court of Appeals concluded that the Legislature had determined that fetuses and embryos were worthy of protection, as evidenced by the Fetal Protection Act, MCL 750.90a et seq. The Court of Appeals indicated:

> "Because the act reflects a public policy to protect even an embryo from unlawful assaultive or negligent conduct, we conclude that the defense of others concept does extend to the protection of a nonviable fetus from an assault against the mother. We emphasize, however, that the defense is available *solely* in the context of an assault against the mother." 33 Mich App at 323. [Emphasis in original.]

The Court of Appeals remanded the case for a new trial, indicating the failure of the trial court to instruct the jury on the "defense of others" theory deprived the defendant of her due process right to present a defense. 253 Mich App at 327-328.

♦ *People v Moseler*, 202 Mich App 296 (1993) (defendant seeks to prove that the charged crime was committed under duress):

On appeal from her conviction of vehicular manslaughter, the defendant claimed that she had been driving recklessly to escape her boyfriend. On the date of the accident that led to the charges, defendant argued with her boyfriend, and inadvertently backed her car into his car. He became angry and threatened to "kick her ass." She drove away at a high rate of speed, with her boyfriend in pursuit. She ran four red lights and struck another vehicle, killing the driver of this vehicle. Defendant stated that she had been beaten by her boyfriend in the past, and feared that he would carry out his threat to "kick her ass." 202 Mich App 297. She further asserted that she was denied effective assistance of counsel because her attorney did not introduce evidence of the "battered women's syndrome" to show that her actions were the result of duress. The Court of Appeals rejected defendant's argument as follows:

> "[Defendant] was the one who drank six beers before confronting [her boyfriend], she was the one who backed her car into his car, and she was the one who elected to drive in excess of the speed limit and to run red lights rather than adopt any of the other options available to her. On the basis of the existing record, we do not find any error in counsel's trial strategy that prejudiced defendant's case." 202 Mich App at 299.

The Court of Appeals further rejected defendant's argument that the trial court erroneously failed to instruct the jury on duress, stating that duress is not a valid defense to homicide. *Id*.

5.9 Privileges Arising from a Marital Relationship

This section addresses the two privileges that arise from a marital relationship under MCL 600.2162:

♦ **Spousal privilege**

MCL 600.2162(1)-(2) establish spousal privileges that limit the circumstances under which one spouse may "be examined as a witness" for or against the other spouse in civil, administrative, and criminal proceedings. This privilege is only applicable when the witness spouse and the non-witness spouse are married at the time of the examination. *People v Vermeulen,* 432 Mich 32, 35 (1989).

♦ **Confidential communication privilege**

MCL 600.2162(4)-(7) establish confidential communication privileges limiting the circumstances under which an individual may "be examined" in civil, administrative, and criminal proceedings as to communications that occurred between the individual and his or her spouse during their marriage. This privilege applies whether the testimony is sought during or after the marriage, as long as the communication occurred during the marriage. *Vermeulen, supra*.

*See Sections 5.9(A)–(B), below, for discussion of who holds the privileges.

The foregoing statutes were amended by 2000 PA 182, effective October 1, 2000, and 2001 PA 11, effective May 29, 2001. Before 2000 PA 182 took effect on October 1, 2000, the nonwitness spouse held the privileges in all proceedings. Now, the person who holds the statutory privileges depends upon the nature of the proceedings.* This marked a significant change from prior law, where criminal defendants were able to assert the privileges to keep their spouses from testifying. See, e.g., *People v Love*, 425 Mich 691 (1986) (reversible error found in denial of defendant's motion to suppress wife's testimony as to killing of third person).

In cases applying MCL 600.2162, the Michigan Supreme Court has narrowly construed the provisions that establish the privileges, and broadly construed the exceptions to the privileges. *People v Warren*, 462 Mich 415, 427 (2000). Accordingly, the Court has construed the language "be examined" in the statute to connote a narrow testimonial privilege, i.e., a privilege against being questioned as a sworn witness. The introduction of a spouse's statement through other means is thus not precluded. See *People v Fisher*, 442 Mich 560, 575-576 (1993) (confidential communication privilege did not preclude the trial court from considering a wife's statements about her husband to a police officer, which were contained in a presentence report), and *People v*

Williams, 181 Mich App 551, 554 (1989) (spousal privilege inapplicable to a statement by the defendant's husband to a 911 operator, which the prosecutor sought to introduce by way of the operator's testimony at trial). See also *People v Smith*, 243 Mich App 657, 681-690 (2000) (prosecutor conceded that the defendant's wife could not be called to testify due to the marital privileges, but sought to introduce her statements under a hearsay exception; the effect of admitting hearsay testimony on the marital privileges was not decided by the Court of Appeals, however.)

Note: The cases cited above were decided before amendments to MCL 600.2162 took effect on October 1, 2000, and May 29, 2001. However, the amendments did not change the basic nature of the spousal and confidential communication privileges as described above.

A. Spousal Privilege

Pursuant to statutory amendments effective October 1, 2000 and May 29, 2001,* the person who holds the spousal privilege depends on the nature of the proceeding:

*2000 PA 182, and 2001 PA 11. Prior to these enactments, the non-witness spouse held the spousal privilege in all proceedings.

- **Civil actions and administrative proceedings:** The *non-witness* spouse holds the privilege, subject to certain statutory exceptions that will be addressed below. MCL 600.2162(1) states that "a husband shall not be examined as a witness for or against his wife without her consent, or a wife for or against her husband without his consent."

- **Criminal prosecutions:** The *witness* spouse holds the privilege, subject to certain statutory exceptions addressed below. MCL 600.2162(2) provides that "a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent."

The spousal privilege may only be invoked when the witness spouse and the non-witness spouse are legally married at the time of trial. The spousal privilege precludes all testimony, regardless of whether the events at issue occurred before or during the marriage. *People v Warren*, 462 Mich 415, 422 (2000).*

*The 2000-2001 amendments to the statute do not appear to have altered these characteristics.

The spousal privilege does not apply in several situations that may be of particular importance in cases involving allegations of domestic violence:

- Suits for divorce, separate maintenance, or annulment. MCL 600.2162(3)(a).

- Prosecutions for crimes committed against a child of either or both spouses, or crimes committed against individuals younger than age 18. MCL 600.2162(3)(c).

- Actions growing "out of a personal wrong or injury done by one [spouse] to the other. MCL 600.2162(3)(d).
- Actions growing out of the refusal or neglect to furnish the spouse or children with suitable support. MCL 600.2162(3)(d).
- Cases of desertion or abandonment. MCL 600.2162(3)(e).

In addition, the privilege also does not apply in prosecutions for bigamy, and in certain property disputes between the spouses. MCL 600.2162(3)(b),(f).

In the following cases, Michigan appellate courts addressed the scope of the "personal wrong or injury" exception to the spousal privilege. These cases are decided under the statute that preceded the current version of MCL 600.2162(3)(d). However, the "personal wrong or injury" provision in the current version of the statute does not differ significantly from its predecessor.

- *People v Warren*, 462 Mich 415 (2000):

After an argument in the family's apartment, the defendant threatened his wife and began to tie her up. He was interrupted, however, when his sister-in-law arrived. She took defendant's wife and children to her home. Later, defendant's wife and children went with the wife's mother to the mother's home. Defendant also went to his mother-in-law's home, arriving there before the other family members. He broke into the home and hid in the basement. At trial, the defendant testified that he encountered his mother-in-law upon her arrival at her home. A struggle ensued, during which the mother-in-law fell bleeding to the floor. Defendant's wife testified that he beat and sexually assaulted her after the encounter with her mother. He then tied her hands and feet, gagged her mouth, and drove away in her mother's car. Defendant's wife eventually escaped to a neighbor's house. Her mother was found dead in the basement.

Defendant was convicted of first-degree felony murder, two counts of first-degree criminal sexual conduct, assault and battery, kidnapping, and the unlawful driving away of an automobile. On appeal, he asserted the spousal privilege in MCL 600.2162, arguing that the trial court abused its discretion in allowing his wife to testify regarding the charges of murder, home invasion, and UDAA. Defendant argued that these crimes fell outside the scope of the personal wrong exception. The Supreme Court upheld the trial court's decision to allow defendant's wife to testify about all the crimes of which defendant was convicted. First, the Court approved of a "temporal sequence test" articulated in *People v Love*, 425 Mich 691, 709 (1986) (opinion of Chief Justice Williams). Under that test, a criminal action can "grow out of" a personal wrong or injury only if the testifying spouse was wronged prior to that action. 462 Mich at 425. Additionally, the Court expressed the following criteria:

> "[W]e read the exception to allow a victim-spouse to testify about a persecuting [sic] spouse's precedent criminal acts where (1) the

> underlying goal or purpose of the persecuting spouse is to cause the victim-spouse to suffer personal wrong or injury, (2) the earlier criminal acts are committed in furtherance of that goal, and (3) the personal wrong or injury against the spouse is ultimately completed or 'done.'
>
> "Thus, where a persecuting spouse's criminal activities have roots in acts ultimately committed against the victim-spouse, those preparatory crimes constitute 'cause[s] of action that grow[] out of a personal wrong or injury done by one to the other. . . .' MCL 600.2162(1)(d). This is because the underlying intent, the 'seed' from which the other criminal acts grew, was the personal wrong or injury done to the spouse." 462 Mich at 429.

Applying this test to the facts, the Supreme Court found that "[Defendant's] purpose in embarking on his crime spree was to commit a personal wrong against or injury to his wife. He achieved this objective and all the crimes that he perpetrated grew out of it." 462 Mich 431-432. After initially assaulting his wife at their home, the defendant broke into his mother-in-law's home "in order to have access to his wife." 462 Mich at 431. He assaulted, battered, sexually assaulted, and kidnapped his wife there. The crime of felony murder, based on the underlying felony of home invasion, grew out of those personal wrongs to his wife. He then took his mother-in-law's car after binding his wife in order to continue her secret confinement. The UDAA thus grew out of the kidnapping of his wife and came within the personal wrong exception to the spousal privilege. *Id.*

- *People v Vann*, 448 Mich 47 (1995):

Defendant was convicted of assaulting another man with a gun. At trial, his estranged wife testified that she was leaving the victim's house when she heard the defendant call and approach her. She ran back into the victim's house, where she heard a struggle at the door, breaking glass, and gun shots. One bullet struck her on the shoulder, but did not injure her. On appeal, defendant asserted that his wife's testimony violated the spousal privilege because the crimes charged were not committed against his wife. The Supreme Court disagreed, upholding the trial court's decision to allow the wife to testify. The Court stated:

> "[T]he prosecution's evidence indicated that there was an assault on the defendant's wife, and that it occurred contemporaneously with the assault on the third party. . . . [T]he offense committed against the third party . . . did 'grow out of' the personal wrong or injury done by the defendant to his wife." 448 Mich at 52.

- *People v Eberhardt*, 205 Mich App 587 (1994):

Defendant was convicted of larceny from a person and uttering and publishing after stealing his wife's AFDC check from a letter carrier, forging her

signature on it, and cashing it at a supermarket. At trial, defendant's wife identified the endorsement on the check as her name signed by defendant. On appeal, defendant contended that the trial court should have precluded his wife's testimony under the spousal privilege rule. The Court of Appeals upheld the trial court's decision to admit the testimony under the personal wrong or injury exception to the privilege:

> "[T]he grocery store was not the only victim of the crime of uttering and publishing. We believe that the personal wrong or injury exception applies to this case because defendant's action . . . constituted a personal wrong against her by depriving her and her children of a benefit to which they were legally entitled." 205 Mich App at 590.

- *People v Pohl*, 202 Mich App 203, 207-208 (1993), remanded on other grounds 445 Mich 915 (1994):

In this case, the Court of Appeals held that the destruction of personal property can constitute a personal wrong or injury. The Court applied the personal wrong exception to the spousal privilege where the defendant broke into the marital home in violation of a restraining order, damaged property, and removed personal property that had been in the possession of his wife.

B. Confidential Communications Privilege

MCL 600.2162(4)-(7) create a privilege for confidential communications made between spouses during a marriage. The extent of this privilege is determined according to the nature of the proceeding:

Civil actions and administrative proceedings: "[A] married person or a person who has been married previously shall not be examined . . . as to any communication made between that person and his or her spouse or former spouse during the marriage." MCL 600.2162(4). However, a married or previously married person may *with his or her consent* be examined as to communications during the marriage regarding the matters described in MCL 600.2162(3). These matters are the same as the exceptions to the spousal privilege listed in Section 5.9(A). MCL 600.2162(5)-(6).

Criminal prosecutions: "[A] married person or a person who has been married previously shall not be examined . . . as to any communication made between that person and his or her spouse or former spouse during the marriage *without the consent of the person to be examined*." [Emphasis added.] However, this privilege does not apply to the matters described in MCL 600.2162(3). These matters are the same as the exceptions to the spousal privilege listed in Section 5.9(A). MCL 600.2162(7).

The confidential communications privilege may be invoked during the marriage or after it has ended, as long as the communication at issue was made during the marriage.* In deciding whether the communication was made during the marriage, the court may not inquire into the viability of the marriage at the time of the communication. *People v Vermeulen,* 432 Mich 32, 37-38 (1989). In addition, the court must extend the communication privilege to a marriage properly contracted under the laws of another jurisdiction, even though Michigan law does not recognize that form of marriage. *People v Schmidt*, 228 Mich App 463 (1998) (extending privilege to communications between spouses married at common law under the laws of Alabama).

*The 2000-2001 amendments to the statute do not appear to have altered these characteristics.

The Michigan appellate courts have held that the statutory language "any communication made . . . during the marriage" refers only to "confidential" communications between the spouses. The following cases address the nature of "confidential" communications:

♦ *People v Vermeulen*, 432 Mich 32 (1989):

Defendant filed for divorce from his first wife on October 28, 1985. He married his second wife on November 11, 1985, before his divorce was final. His second wife was killed on December 26, 1985. The judgment of divorce from his first wife was entered on February 7, 1986. Defendant was charged with murdering his second wife. Approximately one week before her death, defendant had spoken to his first wife and allegedly stated that he would kill his second wife if she left him. The prosecutor sought at trial to have the first wife testify as to this conversation, to refute the defendant's claim that his second wife's death was an accident. The Supreme Court held that the first wife's testimony was barred by the spousal communication privilege:

> "Although the statute speaks of 'any communication,' it is well-established in this state . . . that only confidential communications are protected by the communication privilege. It has been said that 'a variety of factors, including the nature of the message or the circumstances under which it was delivered, may serve to rebut a claim that confidentiality was intended'. . . .The nature of the marriage relationship immediately preceding or immediately after the communication is not, however, a circumstance respecting the communication that may be considered in determining whether it is confidential. . . . The nature and circumstances of the communication in the instant case do not rebut a claim that the communication was confidential." 432 Mich at 39-40.

♦ *People v Zabijak*, 285 Mich 164 (1938):

Defendant went to the home of his estranged wife with a gun and threatened to kill her and her baby. After shooting and killing the baby and shooting his wife through the mouth, he said that he was going to kill her mother. He then went to his mother-in-law's house and killed her. He was convicted of murdering his mother-in-law. At trial, defense counsel objected to the admission of the wife's testimony concerning defendant's threatening

statements made to her at the time of the shootings. The Supreme Court held that defendant's statements to his wife were not confidential communications subject to privilege:

> "[Defendant's communications to his wife] were not in the nature of an admission or confession or an act of which she otherwise might not be cognizant. Nothing was revealed in consequence of the privacy of the marriage relation. The statements testified to were in the nature of threats. They were made after the door of the house was closed and locked, but this was done . . . not to secure secrecy with regard to the statements made, but to prevent the escape of the wife and child to safety, and to insure that there would be no interference from others in the carrying out by the defendant of his murderous intentions." 285 Mich at 182.
>
> **Note:** In *Vermeulen, supra,* 432 Mich at 40, the Supreme Court explained that *Zabijak* was decided based on the nature of the communication and the circumstances in which it was delivered, as follows: "The statement in 'the nature of threats' in *Zabijak* concerned a contemplated assault that was an aspect of the same felonious transaction in which, and was uttered immediately after, the witness spouse had been shot and their baby killed." The *Vermeulen* Court rejected the notion that a threat against a third person communicated to a spouse would fall per se outside the definition of a confidential communication. 432 Mich at 40, n 9.

♦ *People v Byrd*, 207 Mich App 599 (1994):

Defendant was convicted of delivery of marijuana. On appeal, she challenged the trial court's denial of her motion to quash the information based on entrapment. According to the defendant, her estranged husband, acting as a confidential police agent, coerced her to deliver marijuana to an undercover police officer using threats and promises not to contest their divorce. At the entrapment hearing, the defendant's husband successfully invoked the marital communication privilege through the prosecutor, asserting that his conversations with the defendant were confidential and could not be admitted through the defendant's testimony. Because the defendant could not present her account of her conversations with her husband to support her motion to quash, the motion was denied. The Court of Appeals held that the defendant should have been permitted to testify at the entrapment hearing:

> "A party may rebut a claim of confidential communication by showing, among other things, that the communication concerned 'business matters transacted by one spouse as agent for the other.' [Citations omitted.]
>
> "Defendant alleged that her estranged husband called her repeatedly, pleading and making threats, and thereby induced her to act criminally. Then, the undercover officer came to defendant's house, posing as the buyer . . . and obtained the marijuana pursuant

> to the husband's prearrangement. Accepting defendant's allegations as true, it is reasonable to infer that defendant acted as an agent for her husband.
>
> "Moreover, it is equally reasonable to infer that the conversations between defendant and her husband were not intended by either party to be confidential. The sequence of events leading up to the first sale of marijuana makes it probable that defendant revealed to the officer at least some portions of the conversations with her husband, for example, the fact that she had spoken with her husband, that she knew the officer was coming, and that her husband told her what to arrange. It is even more likely that defendant's husband revealed portions of the conversation to the officer." 207 Mich App at 602-603.

C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

Effective October 1, 2000, MCL 600.2162 was amended* to provide that the decision of whether to testify about marital communications lies with the person testifying. Prior to the amendments either spouse could assert the privilege and prevent the other spouse from testifying against them. In *People v Dolph-Hostetter*, 256 Mich App 587 (2003), the Michigan Court of Appeals held that the retroactive application of amended MCL 600.2162 does not violate the constitutional prohibition against *ex post facto* laws.

*See 2000 PA 182.

In *Dolph-Hostetter*, the defendant, the defendant's ex-husband (Ronald Hostetter), and a third individual were arrested in 2000 for their involvement in a 1996 murder. 256 Mich App at 589. The defendant and Hostetter were married at the time of the murder but had divorced in 1997 before they were arrested. In an agreement to provide testimony against the defendant and the third individual, Hostetter pleaded guilty to second-degree murder. 256 Mich App at 589-90.

The defendant objected to the testimony of her ex-husband and argued that it was protected under the marital privilege as a confidential communication made between her and her spouse during their marriage. The defendant argued that the amendment to MCL 600.2162, as applied to this case, amounted to an *ex post facto* law. The circuit court agreed with the defendant that retroactive application of the amended marital communications privilege in MCL 600.2162(7) would violate the prohibition against *ex post facto* laws, and the court excluded Hostetter's testimony. 256 Mich App at 590. Initially, the Michigan Supreme Court remanded the case to the Michigan Court of Appeals and directed the Court to "address the ex post facto issue presented in [*Dolph-Hostetter*] in light of *Carmell v Texas* [citations omitted]." *People v Dolph-Hostetter*, 466 Mich 883 (2002). The Michigan Court of Appeals considered the *ex post facto* issue in light of *Carmell v Texas*, 529 US 513 (2000), and reversed the circuit court's ruling.

Carmell involved the expansion of an age-based exception to a Texas law requiring that a child-victim's allegations of a sex offense be corroborated. For the same reasons emphasized by the United States Supreme Court in *Carmell*, 529 US at 530–532, the Michigan Court of Appeals concluded that although retroactive application of the amended Texas statute violated the prohibition against *ex post facto* laws, retroactive application of Michigan's amended marital communications privilege did not constitute an *ex post facto* violation. 256 Mich App at 594. The Texas law was a clear violation of the prohibition against *ex post facto* laws because "[the statute] essentially lowered the quantum of proof necessary to convict the accused." 256 Mich App at 593. According to the Court, the statutory amendment at issue in Michigan was dissimilar to the *Carmell* amendment in that "the amendment to the marital-communications privilege does not alter the quantum of evidence necessary to convict a person of any crimes; it simply affects what evidence may be introduced at a criminal trial." 256 Mich App at 594.

The Court explained that the change in evidence under MCL 600.2162(7) was limited to the quantum of evidence *admissible* without the defendant's consent; the amendment had no effect on a defendant's presumptive innocence and the amount of evidence necessary to overcome that presumption. 256 Mich App at 594-95. "The amended statute only renders witnesses competent to testify, if they choose, or permits the admission of evidence that previously was inadmissible. It does not make criminal any prior act not criminal when done; it does not increase the degree, severity or nature of any crime committed before its passage; it does not increase punishment for anything done before its adoption; and it does not lessen the amount or quantum of evidence that is necessary to obtain a conviction when the crime was committed." 256 Mich App at 599.

5.10 Privileged Communications with Medical or Mental Health Service Providers

The Michigan Legislature has enacted a number of statutes that limit the use of communications with medical or mental health service providers as evidence in civil or criminal trials. Sections 5.10(A)-(F) contain brief descriptions of these statutory privileges as they apply to the service providers who are likely to be consulted by the parties to relationships involving domestic violence. Following the descriptions of the communications subject to privilege, Sections 5.10(G)-(H) will address the exceptions to these privileges that apply in cases involving suspected child abuse or neglect, and in cases where exceptions are necessary to protect a defendant's due process rights.

> **Note:** Further information about privileged communications can be found in Hagen and Rattet, *Communications and Violence Against Women: Michigan Law on Privilege, Confidentiality, and Mandatory Reporting*, 17 T M Cooley L Rev 183 (2000). The discoverability of crime victim statements to "victim-witness

assistants" or "victim-witness advocates" acting as liaisons between crime victims and prosecutors is addressed in *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Section 5.7. On this topic see also *Commonwealth v Liang*, 747 NE2d 112 (Mass, 2001) (work of victim-witness advocates employed by prosecutor was subject to the same legal discovery obligations as that of prosecutors).

A. Sexual Assault or Domestic Violence Counselors

Communications between a domestic violence victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2), as follows:

> "Except as provided by . . . section 722.631 of the Michigan Compiled Laws, a confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."

The scope of this victim/counselor privilege is determined by MCL 600.2157a(1), which provides the following definitions:

> "(a) 'Confidential communication' means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim.
>
> . . .
>
> "(c) 'Sexual assault' means assault with intent to commit criminal sexual conduct.
>
> "(d) 'Sexual assault or domestic violence counselor' means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families.
>
> "(e) 'Sexual assault or domestic violence crisis center' means an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.

> "(f) 'Victim' means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence."

MCL 600.2157a(1)(b) defines "domestic violence" with reference to MCL 400.1501(d). That statute is contained in the act creating the Michigan Domestic Violence Prevention and Treatment Board, and defines "domestic violence" as follows:

> "(d) 'Domestic violence' means the occurrence of any of the following acts by a person that is not an act of self-defense:
>
> > "(*i*) Causing or attempting to cause physical or mental harm to a family or household member.
> >
> > "(*ii*) Placing a family or household member in fear of physical or mental harm.
> >
> > "(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
> >
> > "(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

MCL 400.1501(e) defines "family or household member" to include any of the following:

> "(*i*) A spouse or former spouse.
>
> "(*ii*) An individual with whom the person resides or has resided.
>
> "(*iii*) An individual with whom the person has or has had a dating relationship.
>
> "(*iv*) An individual with whom the person is or has engaged in a sexual relationship.
>
> "(*v*) An individual to whom the person is related or was formerly related by marriage.
>
> "(*vi*) An individual with whom the person has a child in common.
>
> "(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)."

"Dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." Dating relationship does not include a casual relationship or an ordinary

fraternization between two individuals in a business or social context." MCL 400.1501(b).

The privilege created in MCL 600.2157a does not apply to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G) below. MCL 600.2157a(2).

The privilege created in MCL 600.2157a renders victim/counselor communications inadmissible as evidence absent a victim's written consent. The Michigan Attorney General has opined that the statute does *not* prohibit other non-evidentiary uses of such communications. Accordingly, the Attorney General has concluded that the statute does not prohibit a domestic violence counselor from disclosing an alleged victim's whereabouts to law enforcement authorities. A domestic violence shelter or other crisis center is free to adopt whatever policies it wishes regarding the voluntary disclosure of such information. OAG, 1997, No 6953 (September 16, 1997).

> **Note:** If a sexual assault or domestic violence counselor is also licensed as a social worker or psychologist, other privileges (discussed below) may apply in addition to the privilege created in MCL 600.2157a.

B. Social Workers

MCL 333.18513 protects communications between a social worker and a client. This privilege does not apply to:

- Disclosures required for internal supervision of the social worker MCL 333.18513(2)(a).
- Disclosures made under the duty to warn third parties of threats of physical violence as set forth in MCL 330.1946. MCL 333.18513(4).
- Disclosures made after the client (or a person authorized to act on the client's behalf) has waived the privilege. MCL 333.18513(2)(b).

The social worker/client privilege is also abrogated with respect to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G).

C. Psychologists or Psychiatrists

With certain exceptions, the Mental Health Code shields communications made to a psychiatrist* or psychologist from disclosure in "civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege." The fact of treatment is also privileged from disclosure. MCL 330.1750(1) and (3). See also MCL 333.18237, providing that without client consent, a psychologist or an individual under his or her supervision "cannot be compelled to disclose confidential information acquired from an individual

*Regarding psychiatrists, see also Section 5.10(E), which addresses privileged communications with physicians.

consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services."

Many of the exceptions to this privilege arise in the context of civil or administrative proceedings that are beyond the scope of this benchbook. In a criminal context, the following exceptions are pertinent:

- Upon request, a privileged communication shall be disclosed in a criminal action arising from the treatment of the patient against the mental health professional for malpractice. MCL 330.1750(2)(d).
- Upon request, a privileged communication shall be disclosed if it was made during an examination ordered by a court, if the patient was informed prior to the examination that the communication would not be privileged. Under these circumstances the communication may only be used with respect to the particular purpose for which the examination was ordered. MCL 330.1750(2)(e).
- A privileged communication may be disclosed pursuant to MCL 330.1946, which sets forth a duty to warn third parties of threats of physical violence. MCL 330.1750(4).
- The privilege is abrogated with respect to information that must be disclosed under the Child Protection Law, which is discussed in Section 5.10(G).

Additionally, in *People v Adamski*, 198 Mich App 133, 136-137 (1993), the Court of Appeals held that a complainant's prior inconsistent statements made to a mental health therapist—that the defendant had not acted inappropriately to her—were admissible for impeachment purposes despite the bar of the statutory psychologist-patient privilege under MCL 330.1750. The Court of Appeals found that the privilege, even if absolute, must yield to a defendant's right of cross-examination.

See also MCL 330.1748 on the confidentiality of records of recipients of mental health services.

D. Records Kept Pursuant to the Juvenile Diversion Program

MCL 722.828(1) provides that records kept under the Juvenile Diversion Act "shall be open only by order of the court to persons having a legitimate interest."* MCL 722.828(2) further explains that "a record required to be kept under this act shall be open to a law enforcement agency or court intake worker for only the purpose of deciding whether to divert a minor." Persons (including law enforcement or court officials) who use diversion records for any other purpose are subject to misdemeanor penalties. MCL 722.829.

In *People v Stanaway*, 446 Mich 643, 660-661 (1994), the Michigan Supreme Court stated that the "legitimate interest" in these records is arguably limited to situations in which a decision is being made whether to divert a minor. In light of this limited purpose, the Court in *Stanaway* held that records subject to these statutes were privileged from pretrial discovery in a criminal proceeding, except to the extent required to protect the defendant's due process rights. 446 Mich at 678-680. More discussion of *Stanaway* appears at Section 5.10(H).

*For more discussion of juvenile diversion records, see Miller, *Juvenile Justice Benchbook: Delinquency and Criminal Proceedings (Revised Edition*) (MJI, 2003-April 2009), Sections 4.4 and 25.5. Information about confidentiality of records in juvenile delinquency cases also appears at Section 4.16(B).

E. Physicians

MCL 600.2157 provides in pertinent part:

> "Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon."

This privilege prohibits disclosure of verbal communications of confidential information to a physician, as well as "any information" that is "acquired" by a physician in the course of treating a patient, as long as the information is necessary to treat the patient. The privilege thus applies even if the patient is unconscious at the time the information is acquired. *People v Childs,* 243 Mich App 360, 368 (2000).

Under MCL 750.411(1)-(2), physicians and surgeons who are in charge of or caring for a person "suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence," must immediately report the following to local law enforcement officials, both by telephone and in writing:*

*See MCL 750.411(1) on these reporting requirements.

- The name and residence of the wounded person, if known.
- The whereabouts of the wounded person.
- The cause, character, and extent of the injury.

*See also Section 5.6 on the hearsay exception for statements made for purpose of medical diagnosis or treatment.

This duty also extends to "[a] person, firm, or corporation conducting a hospital or pharmacy in this state, the person managing or in charge of a hospital or pharmacy, or the person in charge of a ward or part of a hospital." The report may include the identification of the perpetrator, if known.* MCL 750.411(1).

Failure to make the required report is a misdemeanor. MCL 750.411(3).

Further, MCL 750.411(6) provides that the physician-patient privilege and other health professional-patient privileges are not violated when the required report is made:

> "(6) The physician-patient privilege created under . . . MCL 600.2157, a health professional-patient privilege created under . . . MCL 333.16101 to 333.18838 and any other health professional-patient privilege created or recognized by law do not apply to a report made under subsection (1) or (2), are not valid reasons for a failure to comply with subsection (1) or (2), and are not a defense to a misdemeanor charge filed under this section."
>
> **Note:** Prior to April 1, 2001, MCL 750.411 did not expressly abrogate health professional-patient privileges in cases where injuries were required to be reported. Nonetheless, in *People v Traylor*, 145 Mich App 148, 150-152 (1985), the Court of Appeals held that the statutory physician-patient privilege was qualified by the reporting statute. In that case, the Court ruled that a doctor could testify concerning matters he was statutorily required to report, i.e., his observations during treatment of the defendant's gunshot wounds.

Other exceptions to the physician-patient privilege exist in malpractice cases. MCL 600.2157.

The privilege is abrogated in child protective proceedings. See MCL 722.631, discussed in Section 5.10(G).

F. Clergy

MCL 600.2156 provides the following protection for communications made to a member of the clergy:

> "No minister of the gospel, or priest of any denomination whatsoever, or duly accredited Christian Science practitioner, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."

Unlike all other legally recognized privileges except the attorney-client privilege, this privilege is retained under the Child Protection Law. See MCL 722.631, quoted in Section 5.10(G).

The privilege that applies to communication made directly to a clergy in his/her professional capacity does not extend to private writings. *Varner v Stovall*, ___ F3d ___, ___ (CA 6, 2007), citing *People v Varner*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 224865); MCL 600.2156. According to the *Varner* Court:

> "[N]either Michigan nor any other State (to our knowledge) treats the clergy-penitent privilege as a broad cloak protecting *all* religious communications. . . . Because the objective of the privilege is to protect the 'human need' to place 'total and absolute confidence' in a spiritual counselor without risk that the law will extract those confidences from the counselor, the Michigan Court of Appeals had ample reason to hold that privilege does not apply to 'private writings.' . . . The privilege requires the communication to be directed to a member of the clergy—just as the other privileges require the communication to be directed to an attorney or doctor—because it is the clergy who may be subpoenaed to testify against the individual. The same possibility does not exist with private writings to God, who may be petitioned but never subpoenaed." *Varner, supra* at ___.

G. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect

The Child Protection Law, at MCL 722.623(1)(a), imposes a duty to report suspected child abuse or neglect to the Department of Human Services,* as follows:

*Specific DHS employees also have a duty to report. MCL 722.623(1)(b).

> "A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or

> school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. A notification to the person in charge of a hospital, agency, or school does not relieve the member of the staff of the hospital, agency, or school of the obligation of reporting to the department as required by this section. One report from a hospital, agency, or school is adequate to meet the reporting requirement. A member of the staff of a hospital, agency, or school shall not be dismissed or otherwise penalized for making a report required by this act or for cooperating in an investigation."* MCL 722.623(1)(a).

MCL 722.631 abrogates most legally recognized privileges in the context of child protective investigations and proceedings. That statute states as follows:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under section 3 if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under section 3."

A "member of the clergy" is defined as "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization." MCL 722.622(*l*). MCL 722.631 preserves the "clergy-penitent" privilege in MCL 600.2156. The preservation of this privilege exempts a "member of the clergy" from the mandatory reporting requirements of MCL 722.631 if information concerning suspected child abuse or neglect is communicated during confession or a similarly confidential communication. This exemption allows a "member of the clergy" to keep secret information obtained during confession regarding the sexual abuse of a child by another "member of the clergy" or other person. For background information, see House Legislative Analysis 2002 PA 693 (EHB 5984), January 9, 2003.

MCL 600.2157a(2) specifically abrogates the privilege for communications between a sexual assault or domestic violence victim and a sexual assault or domestic violence counselor in cases where a report is required under the foregoing provisions of the Child Protection Law.

See also MCL 330.1748a and MCL 333.16281 (abrogation of physician-patient, dentist-patient, counselor-client, psychologist-patient, and other health professional-patient privileges when mental health or medical records or information is released, upon request, to the Family Independence Agency for investigation of suspected child abuse or neglect).

H. Pretrial Discovery of Privileged Records in Felony Cases

In felony cases, MCR 6.201(C) governs pretrial discovery of records protected by privilege. This rule states:

> "(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
>
> "(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.
>
> > "(a) If the privilege is absolute,* and the privilege holder refuses to waive the privilege to permit an in-camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
> >
> > "(b) If the court is satisfied, following an in-camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
> >
> > "(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
> >
> > "(d) The court shall seal and preserve the records for review in the event of an appeal
> >
> > > (*i*) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> > >
> > > (*ii*) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
> >
> > "(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used

*An absolute privilege is one requiring express waiver by the holder. *People v Stanaway,* 446 Mich 643, 683 (1994).

> only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

For a discussion of what constitutes "material" evidence under MCR 6.201(C)(2), see *People v Fink*, 456 Mich 449, 459 (1998):

> "[T]he touchstone of materiality . . . is a 'reasonable probability' of a different result. The question is whether, in the absence of the disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence. The suppressed evidence must be considered collectively, not item by item."

The definition of "materiality" used to establish a discovery violation for nondisclosure of evidence under *Brady v Maryland*, 373 US 83 (1963) is substantially similar. See also *People v Fox (After Remand)*, 232 Mich App 541, 549 (1998), which lists the "materiality" requirement under *Brady* as follows: "[T]hat had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." This "materiality" requirement is satisfied only when the undisclosed evidence "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *People v Lester*, 232 Mich App 262, 282 (1998), quoting *Kyles v Whitley*, 514 US 419, 435 (1995). Further, a "reasonable probability" means "'a probability sufficient to undermine confidence in the outcome.'" *Lester*, *supra* 232 Mich App at 282, quoting *United States v Bagley*, 473 US 667, 682 (1985).

See also *People v Tessin*, 450 Mich 944 (1995), where the Michigan Supreme Court vacated the Court of Appeals' remanding of the case for an in-camera review of the victim's psychological counseling records, holding that the *Stanaway* decision does not automatically require such a hearing simply because psychological harm is alleged as the "personal injury" element of first-degree criminal sexual conduct. The Court held that for a defendant to be entitled to an in-camera hearing, he or she must first establish a reasonable probability that the records contain information material to the defense.

MCR 6.201(C)(2) is a codification of procedures set forth in *People v Stanaway*, 446 Mich 643 (1994). In *Stanaway*, the Michigan Supreme Court considered the circumstances under which two defendants charged with criminal sexual conduct could discover records of psychologists, sexual assault counselors, social workers, and juvenile diversion officers who counseled the complainants. The Court held:

> "[W]here a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense.

> Only when the trial court finds such evidence, should it be provided to the defendant." 446 Mich at 649-650.

The Supreme Court further held that before a trial court may conduct an in camera inspection of privileged records, the defendant must articulate "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." 446 Mich at 677. In the cases before it in *Stanaway*, the Court determined that:

- A general assertion that privileged records might contain evidence useful for impeachment was insufficient to justify an in camera inspection by the trial court. 446 Mich at 681.
- A defense theory that a past trauma had caused the complainant to make false accusations was specific enough to justify an in camera inspection of the complainant's privileged counseling records. 446 Mich at 682-683.

Regarding procedures for considering defense requests for privileged records, the Supreme Court in *Stanaway* set forth these guidelines:

- The trial court should supply evidence to defense counsel only after it has conducted the in camera inspection and determined that the records reveal evidence necessary to the defense. 446 Mich at 679.
- The presence of defense counsel at the in camera inspection is not essential to protect the defendant's constitutional rights and would undermine the privilege unnecessarily. 446 Mich at 679.
- Where a defendant is precluded by statutory privilege from examining counseling communications, the prosecution should not mention the content of these communications in its argument to the jury; such conduct improperly argues facts not in evidence or vouches for a witness's credibility. 446 Mich at 685-687.

5.11 Privileged Communications to a Crime Stoppers Organization

With certain exceptions, MCL 600.2157b(1) prohibits requiring a person to:

> "(a) Disclose, by way of testimony or otherwise, a confidential communication to a crime stoppers organization.
>
> "(b) Produce, under subpoena, any records, documentary evidence, opinions, or decisions relating to a confidential communication to a crime stoppers organization by way of any discovery procedure."

Records of confidential communication to a crime stoppers organization may be subject to disclosure under the following circumstances:

> "(2) An individual arrested and charged with a criminal offense . . . may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization concerning that individual. The petition shall allege facts showing that the records would provide evidence favorable to the defendant . . . and relevant to the issue of guilt or punishment . . . . If the court determines that the person is entitled to all or any part of those records, the court may order production and disclosure as it deems appropriate.
>
> "(3) The prosecution in a criminal proceeding may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization that the prosecution contends was made by the defendant, or by another individual acting on behalf of the defendant, for the purpose of providing false or misleading information to the crime stoppers organization. The petition shall allege facts showing that the records would provide evidence supporting the prosecution's contention and would be relevant to the issue of guilt or punishment. If the court determines that the prosecution is entitled to all or any part of those records, the court may order production and disclosure as it deems appropriate.
>
> "(4) As used in this section:
>
> > "(a) 'Confidential communication to a crime stoppers organization' means a statement by any person, in any manner whatsoever, to a crime stoppers organization for the purpose of reporting alleged criminal activity.
> >
> > "(b) 'Crime stoppers organization' means a private, nonprofit organization that distributes rewards to persons who report to the organization information concerning criminal activity and that forwards the information to the appropriate law enforcement agency." MCL 600.2157b(2)-(4).

5.12 Rape Shield Provisions

*On abusive tactics, see Section 1.5.

Because sexual abuse is one tactic employed to control victims in violent domestic relationships,* allegations of criminal sexual conduct between intimate partners are not uncommon. Michigan law permits prosecution of such offenses. See MCL 750.520*l*, which provides that an individual may be convicted of criminal sexual conduct even though the complainant is the individual's spouse.

> **Note:** A spouse may not be charged with or convicted of criminal sexual conduct against a spouse "solely because [the other spouse] is under 16, mentally incapable, or mentally incapacitated." MCL 750.520*l*.

In cases involving sexual conduct crimes, MCL 750.520j and MRE 404(a)(3) generally prevent the defendant from introducing evidence of the complainant's past sexual conduct except in two narrow circumstances:

- When the evidence would pertain to a specific instance of sexual activity and show the source or origin of semen, pregnancy, or disease; or,
- When the complainant's past sexual conduct was with the defendant.

Additionally, evidence of a complainant's past sexual conduct with a person other than the defendant may be admissible in limited circumstances to show bias, prior false accusations of improper sexual conduct, or ulterior motives for making a false charge. This exception to the general rule applies in cases where admission of such evidence is necessary to protect the defendant's constitutional right to confrontation and cross-examination.

This section discusses the substantive and procedural prerequisites for the introduction of evidence in the foregoing exceptional circumstances.

A. Authorities Governing Admission of Evidence of Past Sexual Conduct

MCL 750.520j restricts the defendant from introducing evidence of the complainant's sexual conduct as follows:

> "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b to 750.520g]* unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > "(a) Evidence of the victim's past sexual conduct with the actor.
> >
> > "(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

*The cross-referenced statutes govern criminal sexual conduct offenses.

MRE 404(a)(3) provides:

> "(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except
>
> . . .
>
> > "(3) *Character of alleged victim of sexual conduct crime.* In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;"

The foregoing statute and court rule reflect the policy determination that unlimited inquiry into the sexual history of a complainant in a criminal sexual conduct case may violate the complainant's legitimate expectations of privacy, harass or humiliate the complainant, deter the reporting and prosecution of sexual offenses, and unfairly prejudice and mislead the jury. See *People v Arenda*, 416 Mich 1, 8-11 (1982). In applying the Michigan rape shield provisions and reviewing related constitutional claims, trial courts are to proceed on a case-by-case basis. *People v Adair*, 452 Mich 473, 483 (1996). It is important to note that evidence deemed admissible under the rape-shield statute can still be deemed inadmissible on other grounds, such as hearsay statements that do not fit within a hearsay exception. See *People v Ivers*, 459 Mich 320, 332, 334 (1998) (Boyle, J, concurring).

> **Note:** MCL 750.520j(1) and MRE 403 contain different expressions of the principle that relevant evidence may be excluded if its inflammatory or prejudicial nature outweighs its probative value. MRE 403 provides for exclusion of evidence where "its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The statute states that evidence may be excluded if "its inflammatory or prejudicial nature *does not outweigh* its probative value." [Emphasis added.] The Michigan Supreme Court has not squarely addressed the questions that arise from these two different standards. The Court indicated that MRE 403 should control in *People v Hackett,* 421 Mich 338, 351 (1984), but later indicated a preference for the statute's approach in *People v Adair*, 452 Mich 473, 485 (1996). Although the Court did not specify that the factual situation before it in these cases was significant regarding the standard for excluding otherwise relevant evidence, it is interesting to note that *Hackett* involved the complainant's prior conduct with persons other than the defendant, while *Adair* involved conduct with the defendant. For discussion of the questions arising from the different language in the statute and MRE 403, see *McDougall v*

Schanz, 461 Mich 15, 44-46 (1999), (dissenting opinion of Justice Cavanagh), and *People v LaLone*, 432 Mich 103, 118-119, 134-138 (1989) (concurring and dissenting opinion of Justice Archer).

In addition to MCL 750.520j and MRE 404(a)(3), courts must consider the defendant's rights to confrontation and cross-examination under the Sixth Amendment to the U.S. Constitution and Const 1963, art 1, §20. These constitutional provisions protect the defendant's right to present evidence that is relevant to the defense and to test the truth of a witness's testimony. In cases where evidence concerns a complainant's sexual conduct with a person other than the defendant, the Michigan Supreme Court has held that it may be admissible in limited situations to show bias, ulterior motives for making a false charge, or prior false accusations. However, the Court has noted that such evidence is generally not admissible to prove consent or to impeach the complainant's credibility. *People v Hackett*, *supra*, 421 Mich at 347-348.

In determining the admissibility of evidence of a complaining witness's past sexual conduct, a trial court is to proceed on a case-by-case basis. *People v Arenda*, *supra*, 416 Mich at 13, *People v Adair*, *supra*, 452 Mich at 483. See also *People v Lucas (On Remand)*, 193 Mich App 298, 302 (1992). To decide whether evidence should be excluded, courts should balance the following concerns:

- The defendant's rights to confrontation and cross-examination are not unlimited and must be balanced against the competing policies expressed in Michigan's rape shield provisions. The determination of admissibility is addressed to the sound discretion of the trial court and exclusion of evidence of a complainant's sexual conduct should be favored unless exclusion would abridge the defendant's right to confrontation. *People v Hackett*, *supra*, 421 Mich at 346-349.

- If admission of evidence of a complainant's sexual conduct is necessary to protect the defendant's constitutional right to confrontation, the court should take steps to minimize harassment or humiliation of the complainant, or invasion of the complainant's legitimate expectations of privacy. Such steps might include guarding against excess cross-examination or adducing the evidence from a source other than the complainant. *People v Morse*, 231 Mich App 424, 435-436, 438 (1998).

- The right to confrontation does not include the right to present irrelevant evidence. MRE 402 and *People v Arenda*, *supra*, 416 Mich at 8.

B. Illustrative Cases

1. Nature of Admissible Evidence

- *People v Ivers*, 459 Mich 320 (1998):

The defendant was convicted of third-degree criminal sexual conduct. The complainant was a young woman who met the defendant on the day of the alleged assault. The defense was consent. Pursuant to the prosecutor's request, the trial court excluded testimony by the complainant's friend that, on the night of the alleged assault, the complainant said that she had discussed birth control with her mother and was "ready to have sex." The trial court ruled that admission of the evidence was precluded under the rape shield statute. Over defense objection, the trial court also excluded testimony by the complainant's friend that the complainant had asked her friend to "find her a guy" on the night of the alleged assault. Affirming the Court of Appeals' reversal of the defendant's conviction, the Supreme Court found that the excluded evidence was not inadmissible under the rape shield statute since it did not reveal any prior sexual activity by the complainant. 459 Mich at 328. The Court explained that, under different circumstances, evidence of a complainant's statements may be excluded under the statute:

> "This is not to say, however, that no 'statement' would ever be precluded under the rape-shield statute. For example, hypothetically, had the complainant's statement referenced particular acts, i.e., 'I'm ready to have sex at college since I had sex with X after our high school graduation party,' that would clearly seem to be inadmissible as evidence of 'specific instances of the victim's sexual conduct,' despite having some bearing on the victim's present mental state. Likewise, 'statements' or references to 'statements' made in the course of what is referred to in common parlance as 'phone sex' themselves would seem to amount to a prior instance of sexual conduct, and thus be precluded. The important distinction, however, is not so much 'statements' versus 'conduct' as whether the statements do or do not *amount* to or *reference* specific conduct. Here it is plain that they do neither, and, thus, evidence of the statements would not be barred by rape-shield concerns." 459 Mich at 328-329.

♦ *People v Wilhelm,* 190 Mich App 574, 584-586 (1991):

To support his defense of consent to charges that he had sexually assaulted the complainant, defendant sought to introduce evidence that she had exposed her breasts to two other men in a bar on the night of the assault and permitted one of the men to touch them. The Court of Appeals found that the complainant's conduct with the other men amounted to "sexual conduct" for purposes of the rape shield statute, but held that this evidence was properly excluded under the statute because it was not conduct with the defendant, even though the defendant viewed it. The Court further found that exclusion of the evidence did not violate defendant's constitutional right to confrontation because the evidence was not relevant to whether the complainant consented to sexual intercourse with him.

♦ *People v Mikula,* 84 Mich App 108, 115 (1978):

In a prosecution for first-degree criminal sexual conduct in which the prosecutor introduced expert testimony about the condition of the complainant's genital area to establish penetration, evidence of prior specific instances of the complainant's sexual activity was admissible to show the origin of her physical condition, even though the particular condition was not specifically listed in the rape shield statute.

2. Evidence of Prior Sexual Conduct Involving the Defendant

♦ *People v Adair*, 452 Mich 473 (1996):

The defendant was charged with sexually assaulting his wife. The alleged assault occurred a few days after the complainant had been served with divorce papers. She had been married to the defendant for six years at the time, and was sharing the same house with him. At the time of the alleged assault, the complainant was sleeping in the basement. She testified at the preliminary examination that the defendant awakened her in the early morning hours and committed acts of digital-anal and digital-oral penetration against her will. At a pretrial hearing held five days prior to the preliminary examination, the complainant stated that she had engaged in consensual sexual relations with the defendant after the alleged assault, and that digital-anal sexual activity was a common practice in the couple's marriage. Defendant sought to introduce evidence of specific instances of the complainant's subsequent consensual sexual relations with him and the marital practice of digital-anal sexual activity. The trial court allowed introduction only of complainant's subsequent consensual sexual relations with the defendant that occurred within 30 days after the alleged assault, and an interlocutory appeal was taken.

The Supreme Court first considered whether the word "past" in MCL 750.520j(1)(a) refers to the period of time before the alleged assault or before the evidence is offered at trial. Finding this provision ambiguous, the Court noted that the primary legislative purpose of the statute is to exclude irrelevant evidence of the victim's sexual conduct with persons other than the defendant. 452 Mich at 480. With this purpose in mind, the Court held that "past" sexual conduct refers to conduct that has occurred before the evidence is offered at trial. The Court reasoned as follows:

> "The rape-shield statute was grounded in the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues. Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case evaluation.

> "It is axiomatic that relevance flows from the circumstances and the issues in the case. It is primarily for this reason that we reject the argument that otherwise relevant evidence becomes legally irrelevant and inadmissible merely because it occurred after an alleged sexual assault and not before." 452 Mich at 483.

The Court remanded the case to the trial court for a determination of whether the materiality of the proposed evidence was outweighed by its prejudicial nature. In making this determination, the Court advised the trial court to consider: 1) the proximity in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant; and 2) the circumstances and nature of the relationship between the complainant and defendant. 452 Mich at 486-488. The Court further held that evidence of the couple's digital-anal sexual activity was properly excluded because it was not relevant to an element of the charges against defendant or to his claim that the assault never occurred. 452 Mich at 488-489.

♦ *People v Johnson*, 245 Mich App 243 (2001):

The defendant was convicted of two counts of kidnapping and one count of domestic violence. The complainant was a woman who dated the defendant for six weeks but whose relationship with the defendant ended one week before the events at issue. The defense theory was that the complainant made false allegations against the defendant in retaliation for her having contracted herpes from him. The prosecutor moved before trial to exclude evidence that the defendant had transmitted herpes to the complainant. The trial court granted the motion, finding that the evidence was irrelevant. On appeal, Judge O'Connell, with Judge Kelly concurring in the result only and Judge Whitbeck dissenting on another ground, found the evidence relevant to establish that the complainant was biased and that her testimony was fabricated. However, Judge O'Connell found no reversible error in the exclusion of the evidence, because he found that it was inflammatory and that its prejudicial nature outweighed its probative value. Judge O'Connell further noted that, even without this evidence, defense counsel had cross-examined the complainant extensively in his attempt to impeach her credibility.

♦ *People v McLaughlin*, 258 Mich App 635 (2003)

*See Section 5.11(C)(1) for information on the notice requirements of MCL 750.520j.

In *McLaughlin,* the victim testified that, prior to the sexual assault, she had suffered a severe spinal injury, and that she was in too much pain to have consensual sexual relations with anyone. The defendant sought to admit evidence of consensual sexual relations between him and the victim that occurred both before and after the victim's spinal injury. The defendant did not provide any notice prior to the trial, as required by MCL 750.520j.* The trial court excluded the evidence. On appeal, the Court of Appeals reiterated its holdings in *People v Lucas (On Remand),* 193 Mich App 298 (1992) and *People v Lucas (After Remand),* 201 Mich App 717 (1993), and found that it

was error for a trial court to exclude evidence *solely* on the basis of defendant's failure to give notice.

The Court of Appeals concluded that the defendant's proposed evidence of consensual sexual relations prior to the victim's injury would not have served a legitimate purpose because the evidence had already established that the defendant and victim had such relations. Evidence that the defendant and victim had engaged in anal intercourse prior to the victim's injury only had a "tenuous connection" to the issue of consent but a "great potential for embarrassment, harassment, and unnecessary intrusion into privacy." *McLaughlin, supra, 258* Mich App at 655, citing *Lucas* (*On Remand*), *supra,* 193 Mich App at 302-303. The Court of Appeals also concluded that evidence of consensual sexual relations between the defendant and victim after the victim's injury would have undermined the victim's credibility and bolstered the defendant's defense. However, the Court of Appeals found exclusion of this evidence harmless error because the defendant was able to introduce testimony describing such relations and other activities the victim engaged in despite her back injury. Furthermore, defendant's delay in introducing the evidence suggested "wilful misconduct designed to create a tactical advantage." *McLaughlin, supra,* 258 Mich App at 656, citing *Lucas* (*On Remand*), *supra,* 193 Mich App at 302-303.

3. Evidence of Prior Sexual Conduct Involving a Person Other Than the Defendant

♦ *People v Arenda,* 416 Mich 1 (1982):

In this case the defendant sought to admit evidence of an eight-year-old complainant's possible sexual conduct with others to explain the complainant's ability to describe the sexual acts that allegedly occurred and to dispel the inference that this ability resulted from experiences with the defendant. The Supreme Court balanced the potential prejudicial nature of this evidence against its probative value and found that application of the rape shield statute to preclude it did not infringe on the defendant's right to confrontation. The Court noted that other means were available by which the defendant could cross-examine the complainant as to his ability to describe the alleged conduct. 416 Mich at 14. The Court left for future case-by-case determination the question whether under different sets of circumstances the statute's prohibitions would be unconstitutional as applied. 416 Mich at 13.

♦ *People v Hackett,* 421 Mich 338 (1984):

In two cases consolidated on appeal, each defendant challenged the trial court's decision to exclude evidence of the complainant's sexual reputation and prior sexual conduct with persons other than the defendant. In each case, the evidence was offered to show the complainant's consent; the defendant in *Hackett* further sought to impeach the complainant's credibility. Each defendant asserted on appeal that exclusion of the evidence violated the Sixth Amendment right to confrontation and cross-examination. The Supreme

Court found in each case that the trial court's exclusion of the evidence under the rape shield statute was consistent with constitutional requirements, holding that evidence of reputation and prior sexual conduct is not relevant to questions of consent or credibility. The Court further stated that the prohibitions in the rape shield statute do not apply to all cases in which a defendant seeks to introduce evidence of reputation or prior sexual conduct with persons other than the defendant —it described certain limited circumstances in which admission of such evidence would be necessary to preserve the right to confrontation:

> "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. . . . Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. . . . Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. . . . The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." 421 Mich at 348-349.

♦ *Lewis v Wilkinson*, 307 F3d 413 (CA 6, 2002):

In this federal habeas corpus case, a jury in the Ohio Court of Common Pleas convicted the defendant of rape after he sexually penetrated the victim in her dorm room at the University of Akron. The defendant and victim were friends who met during their first year of college. The defense at trial was consent. At issue on appeal was the trial judge's refusal to admit into evidence specific portions of the victim's diary under Ohio's rape shield statute, which is substantially similar to Michigan's rape shield statute under MCL 750.520j. The diary entry at issue during the trial and on appeal was as follows (the excluded statement is italicized):

> "I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate [the defendant] locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life.

> Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . *and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends*. 307 F3d at 417-418. [Emphasis added.]

The defendant claimed that the trial judge's failure to admit the italicized statements amounted to a denial of his Sixth Amendment right to confront the witness. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's denial of habeas relief, remanding with directions to issue a conditional writ of habeas corpus. The Sixth Circuit Court of Appeals held that the trial court violated defendant's Sixth Amendment right to confront witnesses when it refused to admit the foregoing italicized statements, finding that the judge could have reduced the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and reputation:

> "[Defendant] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. This court recognizes the difficulty a trial judge faces in making an evidentiary decision with the urgency that surrounds the wrapping up of pretrial loose ends prior to the start of jury selection. The trial court took the state's interests in protecting rape victims into account in excluding the statement, but did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination [sic], from which they could have inferred, if they chose, that the alleged victim consented to have sex with the [defendant] and/or that the alleged victim pursued charges against the [defendant] as a way of getting back at other men who previously took advantage of her. The trial court can reduce the prejudicial effect of such evidence by limiting the scope of cross-examination as to the victim's prior sexual activity and her reputation." 307 F3d at 422-423.

♦ *People v Williams*, 191 Mich App 269, 272-275 (1991):

Defendant was convicted of third-degree criminal sexual conduct against a 14-year-old girl who was the babysitter of defendant's girlfriend's children. At trial, defense counsel sought to question the victim about an alleged prior sexual assault by her uncle five years before the trial. Defendant wanted to prove that the victim falsely accused her uncle and that, because of this, her credibility was undermined in the instant case. The trial court, relying upon the rape shield statute, MCL 750.520j(1), refused to allow the defense to

question the victim about this prior act. For reasons other than those cited by the trial court, the Court of Appeals affirmed defendant's conviction and held that the trial court reached the correct resolution. The Court found that defense counsel was unable to offer any concrete evidence to establish that the victim made a prior false accusation. The Court also stated that the defense counsel had no idea whether the prior false accusation was in fact false and was simply engaging in a "fishing expedition." However, the Court stated that, had defendant introduced concrete evidence of the prior false allegation, the trial court would have erred by refusing to allow such testimony under the rape shield statute. The Court found that the rape shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. These accusations of sexual assault bear directly on the victim's credibility and the credibility of the victim's accusations in the instant case. The Court held that preclusion of such evidence would unconstitutionally abridge the defendant's right of confrontation.

♦ *People v Morse*, 231 Mich App 424, 429-438 (1998):

The defendant was charged with seven counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct against two of his former wife's daughters. The trial court ruled that the rape-shield statute prohibited admission of evidence of the child victims' prior sexual mistreatment by someone other than the defendant. The evidence was proffered to show that the victims' age-inappropriate sexual knowledge was not learned from the defendant and to show the victims' motive to make false charges against the defendant. The Court of Appeals found that, to preserve the defendant's constitutional right to confrontation, "the trial court may admit such evidence after adhering to certain safeguards." 231 Mich App at 436. The trial court was directed to conduct an in-camera hearing to determine whether: (1) the proffered evidence was relevant; (2) the defendant could show that another person was convicted of criminal sexual conduct involving the complainants; and (3) there was sufficient similarity between the facts underlying the previous conviction and the instant charges. 231 Mich App at 437.

4. Evidence of Complainant's Virginity

In *People v Bone*, 230 Mich App 699 (1998), the defendant's defense to charges of third-degree criminal sexual conduct was consent. The Court of Appeals found reversible error in the prosecutor's references to the 16-year-old complainant's virginity and in admission of the complainant's testimony that she did not scream or resist the defendant's sexual assaults because she had never had sexual intercourse and she was afraid the defendant would hurt her. The Court of Appeals found that MRE 404(a)(3) precludes the use of a complainant's virginity to show unwillingness to consent to sexual conduct. 230 Mich App at 702.

C. Procedures Under MCL 750.520j(2)

The Michigan Legislature and Supreme Court have set forth notice and hearing procedures for defendants who wish to introduce evidence of a complainant's prior sexual conduct under an exception to the rape shield provisions. The U.S. Supreme Court has considered whether the trial court may constitutionally exclude such evidence in a case where the defendant failed to conform to the statutory notice requirements.

1. Notice and Hearing Requirements

MCL 750.520j(2) requires the defendant to provide notice of his or her intent to offer evidence of the complainant's prior sexual conduct:

> "If the defendant proposes to offer evidence [of the complainant's sexual conduct with the defendant or of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease] described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

In *People v Hackett*, 421 Mich 338, 349-350 (1984), the Supreme Court extended the purpose of the statutory in camera hearing to include consideration of the defendant's right to confrontation in cases where the exceptions listed in MCL 750.520j(1) do not apply. The Court then gave the following description of how the trial court should conduct the proceedings:

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions." 421 Mich at 350-351. [Citations omitted.]

See also *People v Morse*, 231 Mich App 424 (1998), in which the defendant was charged with multiple counts of criminal sexual conduct against the daughters of his former wife. The trial court ruled that the rape shield statute prohibited admission of evidence of the complainants' prior sexual mistreatment by someone other than the defendant. The evidence was proffered to show that the complainants' age-inappropriate sexual knowledge was not learned from the defendant and to show their motive to make false charges against the defendant. The Court of Appeals found that to preserve the defendant's constitutional right to confrontation, "the trial court may admit such evidence after adhering to certain safeguards." 231 Mich App at 436. The trial court was directed to conduct an in camera hearing to determine whether: 1) the proffered evidence was relevant, 2) the defendant could show that another person was convicted of criminal sexual conduct involving the complainants, and 3) there was sufficient similarity between the facts underlying the previous conviction and the instant charges. 231 Mich App at 437.

The sufficiency of a defendant's offer of proof was at issue in *People v Williams*, 191 Mich App 269, 273-274 (1991). Here, the trial court refused to permit the defendant to question the complainant about an alleged prior sexual assault against her by her uncle. On appeal, defendant asserted that this inquiry would have impeached the complainant's credibility by showing that she had made a prior false accusation of sexual assault. The Court of Appeals upheld the trial court's decision to limit the defendant's inquiry:

> "[D]efendant has been unable to offer any concrete evidence to establish that the victim had made a prior false accusation of being sexually abused by her uncle. . . . No criminal charges were pursued against the uncle and, therefore, there had never been a determination by a court of the truth or falsity of the accusation. . . . [D]efense counsel had no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false. Counsel merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false."

2. Effect of Defendant's Violation of Notice Requirements

Violation of the notice provisions of the rape shield statute may result in preclusion of the proffered evidence so long as this preclusion does not infringe on the defendant's Sixth Amendment rights. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302 (1992). In the *Lucas* case, the defendant was accused of criminal sexual conduct against his former girlfriend. To support his defense of consent, he sought to introduce evidence of their past sexual relationship by way of an oral motion at the start of trial, without complying with the notice requirements of the rape shield statute. The trial court refused to allow introduction of the evidence, based solely on the defendant's failure to comply with the statutory notice requirements. Defendant was convicted following a bench trial of two counts of third-degree

criminal sexual conduct. After various proceedings on appeal, the U.S. Supreme Court held that the notice requirement in the Michigan rape shield statute does not per se violate the defendant's rights under the Sixth Amendment, but left it to the Michigan courts to decide whether the defendant's rights had been violated in the *Lucas* case. *Michigan v Lucas*, 500 US 145, 152-153 (1991). On remand from the U.S. Supreme Court, the Michigan Court of Appeals held that the constitutionality of preclusions based on the statutory notice requirement must be determined on a case-by-case basis. 193 Mich App at 302. In making this determination, the court should consider the following factors:

- The purpose of the statute to encourage the reporting of assaults by protecting victims from surprise, harassment, unnecessary invasion of privacy, and undue delay. 193 Mich App at 302-303.
- The purpose of the statute to prevent surprise to the prosecution and to allow time to investigate whether the alleged prior relationship existed. 193 Mich App at 302.
- The timing of the defendant's offer to produce evidence. The closer to the date of trial the evidence is offered, the more wilful misconduct designed to create a tactical advantage is suggested. 193 Mich App at 303.

The Court of Appeals remanded the case to the trial court to make findings based on the foregoing factors. The Court of Appeals ultimately affirmed the defendant's conviction in *Lucas*, after the trial court determined that defense counsel was aware of the statute's notice requirements and made a tactical decision to move to admit the evidence on the date of trial. Moreover, preclusion of the evidence did not prevent defense counsel from presenting defendant's defense of consent, because there was sufficient evidence presented of the parties' prior relationship to support it. *People v Lucas* (*After Remand*), 201 Mich App 717, 719 (1993).

In *People v McLaughlin*, 258 Mich App 635 (2003), the victim testified that, prior to the sexual assault, she had suffered a severe spinal injury, and that she was in too much pain to have consensual sexual relations with anyone. The defendant sought to admit evidence of consensual sexual relations between him and the victim that occurred both before and after the victim's spinal injury. The defendant did not provide any notice prior to the trial, as required by MCL 750.520j. The trial court excluded the evidence. On appeal, the Court of Appeals reiterated its holdings in *People v Lucas (On Remand)*, 193 Mich App 298 (1992) and *People v Lucas (After Remand)*, 201 Mich App 717 (1993), and found that it was error for a trial court to exclude evidence *solely* on the basis of defendant's failure to give notice. *McLaughlin*, *supra*, 258 Mich App at 653-655.

The Court of Appeals concluded that the defendant's proposed evidence of consensual sexual relations prior to the victim's injury would not have served a legitimate purpose because the evidence had already established that the

defendant and victim had such relations. Evidence that the defendant and victim had engaged in anal intercourse prior to the victim's injury only had a "tenuous connection" to the issue of consent but a "great potential for embarrassment, harassment, and unnecessary intrusion into privacy." *McLaughlin, supra* 258 Mich App at 655, citing *Lucas* (*On Remand*), *supra,* 193 Mich App at 302-303. The Court of Appeals also concluded that evidence of consensual sexual relations between the defendant and victim after the victim's injury would have undermined the victim's credibility and bolstered the defendant's defense. However, the Court of Appeals found exclusion of this evidence harmless error because the defendant was able to introduce testimony describing such relations and other activities the victim engaged in despite her back injury. Furthermore, defendant's delay in introducing the evidence suggested "wilful misconduct designed to create a tactical advantage." *McLaughlin, supra,* 258 Mich App at 656, citing *Lucas* (*On Remand*), *supra,* 193 Mich App at 302-303.

5.13 Evidence of Other Crimes, Wrongs, or Acts Under MRE 404(b)

This section discusses the substantive and procedural criteria for admitting evidence of other crimes, wrongs, or acts under MRE 404(b), and digests recent cases in which the Michigan appellate courts have ruled on the admissibility of other acts evidence in the context of criminal cases involving family violence.

A. Admissibility of Evidence Under MRE 404(b)

MRE 404(b)(1) governs evidence of other crimes, wrongs, or acts, as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

MRE 404(b) codifies the requirements set forth in *People v VanderVliet,* 444 Mich 52 (1993). In *VanderVliet,* the Michigan Supreme Court directed the state's bench and bar to employ the following standards in assessing the admissibility of evidence of other crimes, wrongs, or acts:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime. 444 Mich at 74.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial. 444 Mich at 74.

- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other facts appropriate for making a decision of this kind. 444 Mich at 74-75.

- Upon request, the trial court may provide a limiting instruction under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the defendant to commit the charged offense. 444 Mich at 75.

The Supreme Court in *VanderVliet* characterized MRE 404(b) as an inclusionary, rather than an exclusionary, rule:

> "There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith . . . Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." 444 Mich at 65.

The *VanderVliet* case underscores the following principles of MRE 404(b):

- There is no presumption that other acts evidence should be excluded. 444 Mich at 65.

- The Rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except criminal propensity. 444 Mich at 65.

- A defendant's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial. 444 Mich at 78-79.

- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. 444 Mich at 68, 71.

The continuing viability of *VanderVliet's* analytical framework was affirmed in *People v Sabin* (*After Remand*), 463 Mich 43, 55-59 (2000), discussed in Section 5.12(C).

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. MCL 768.27a(1) states in part:

> "(1) Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a

> minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

"Listed offenses" are contained in MCL 28.722. MCL 768.27a(2)(a).

In *People v Pattison*, 276 Mich App 613 (2007), the Court found that MCL 768.27a did not violate the Ex Post Facto Clause because admission of propensity evidence occurring before the statute's effective date "[did] not lower the quantum of proof or value of the evidence needed to convict a defendant." *Pattison*, *supra* at 619.

Evidence excluded by MRE 404(b) may be admissible under MCL 768.27a. Because MCL 768.27a "'does not principally regulate the operation or administration of the courts,'" it is a substantive rule of evidence and prevails over MRE 404(b). *People v Watkins*, ___ Mich App ___, ___ (2007), quoting *People v Pattison*, 276 Mich App 613, 619 (2007). In *Watkins, supra*, because some of the proposed testimony described conduct that constituted the commission of at least one of the offenses to which MCL 768.27a applied, the Court found the evidence "plainly relevant" to the likelihood that the defendant committed the charged offenses, and therefore, admissible under MCL 768.27a. *Watkins*, *supra* at ___. Although the woman's testimony was inadmissible under MRE 404(b) because of the dissimilarities between the defendant's conduct with her and the defendant's conduct with the victim, similarity is not a consideration under MCL 768.27a. *Watkins*, *supra* at ___.

*Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006.

Evidence that a defendant committed other acts of domestic violence is admissible in a criminal action against a defendant accused of committing an offense involving domestic violence. MCL 768.27b.* If admissible, such evidence may be introduced "for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403." MCL 768.27b(1). The statutory provisions of MCL 768.27b "do[] not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law." MCL 768.27b(3).

MCL 768.27b contains a temporal requirement. "Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice." MCL 768.27b(4).

MCL 768.27b(5) defines the term "domestic violence" for purposes of this statute as "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(5)(a).

"Family or household member" is defined in MCL 768.27b(5)(b) to mean any of the following:

"(*i*) A spouse or former spouse.

"(*ii*) An individual with whom the person resides or has resided.

"(*iii*) An individual with whom the person has or has had a child in common.

"(*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

B. Procedure for Determining the Admissibility of Evidence of Other Crimes, Wrongs, or Acts; Limiting Instructions

MRE 404(b)(2) generally provides that the prosecution must give advance notice (preferably before trial) of intent to use other acts evidence and of its rationale for admitting the evidence. MRE 404(b)(2) states:

"The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination."

MCL 768.27a, which governs the admissibility of evidence of sexual offenses against minors, also contains a notice requirement. MCL 768.27a(1) requires the prosecuting attorney to disclose evidence admissible under that statute to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements

of witnesses or a summary of the substance of any testimony that is expected to be offered."

MCL 768.27b, which governs the admissibility in criminal cases of evidence of other acts of domestic violence committed by a defendant, also contains a notice requirement. MCL 768.27b(2) requires the prosecuting attorney to disclose evidence admissible under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

In *People v Hawkins*, 245 Mich App 439, 454-455 (2001), the Court of Appeals identified the following purposes of the notice requirement set forth in MRE 404(b)(2): 1) to force the prosecutor to identify and seek admission of only relevant evidence; 2) to ensure that the defendant has an opportunity to object to and defend against evidence offered under MRE 404(b); and 3) to facilitate a thoughtful ruling on admissibility by the trial court based on an adequate record. In *Hawkins*, the Court of Appeals held that the prosecutor's failure to adhere to the requirements of MRE 404(b)(2) was not reversible error because there was no evidence suggesting that the lack of notice affected the defense or outcome of the case. 245 Mich App at 455-456.

Under MRE 104, the trial court may conduct a hearing outside the jury's presence to determine the admissibility of "other-acts" evidence. The trial court is not bound by the rules of evidence, except for those rules governing privileges. MRE 1101(b)(1). Failure to conduct an evidentiary hearing on the admissibility of other acts evidence is not reversible error where the defense makes no motion in limine. *People v Williamson*, 205 Mich App 592, 596 (1994).

*This rule applies to determinations of whether the technical or constitutional rules allow admission of proffered evidence.

MRE 104(a)* states that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." The "preponderance of evidence" standard applies to determinations of whether the technical requirements of the rules of evidence have been met. *Bourjaily v United States*, 483 US 171, 176 (1987).

MRE 104(b) deals with the admissibility of evidence, the relevance of which must be established by proof of other facts. This rule states:

> "(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

"Other-acts" evidence proffered under MRE 404(b) may only be relevant if it is shown that the prior misconduct occurred and that the defendant committed it. The court must find sufficient evidence for the trier of fact to conclude, by a preponderance of the evidence, that the conditional fact, i.e., the prior

misconduct, has been proven. *Huddleston v United States*, 485 US 681, 690 (1988).

For determinations of admissibility under MRE 104(a), the trial court sits as the trier of fact and determines the credibility of witnesses and resolves conflicts in their testimony. *People v Yacks*, 38 Mich App 437, 440 (1972), and *People v Smith*, 124 Mich App 723, 725 (1983). Regarding the admissibility of evidence under MRE 104(b), the court must not determine the credibility of witnesses or resolve conflicts in their testimony. *Huddleston, supra.*

Where pretrial procedures do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the Supreme Court in *VanderVliet* had the following advice:

> "[T]he trial court should employ its authority to control the order of proofs [under MRE 611], require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor's other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues." *People v VanderVliet*, 444 Mich 52, 90 (1993).

Evidence admissible for one purpose is not made inadmissible because its use for a different purpose is precluded. If evidence is admissible for one purpose, but not others, the trial court must give a limiting instruction upon request, pursuant to MRE 105. *People v Sabin*, 463 Mich 43, 56 (2000), *People v VanderVliet, supra*, 444 Mich at 73-75, and *People v Basinger*, 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal, for it denied defendant a fair trial); *People v DerMartzex*, 390 Mich 410, 417 (1973) (failure to give properly requested instruction is reversible error). The trial court has no duty to give a limiting instruction sua sponte, however. *People v Chism*, 390 Mich 104, 120-121 (1973).

For a jury instruction on evidence of other offenses where relevance is limited to a particular issue, see CJI2d 4.11.

C. Other Acts Evidence in Family Violence Cases

The following appellate cases are relevant to the application of MRE 404(b) in situations involving family violence.

- *People v Pattison*, 276 Mich App 613 (2007):

*MCL 768.27b permits trial courts to "admit relevant evidence of other domestic assaults to prove any issue, even the character of the accused, if the evidence meets the standard of MRE 403." *People v Pattison*, ___ Mich App ___, ___ (2007).

The defendant was charged with four counts of first-degree criminal sexual conduct for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. In an interlocutory appeal, the Court of Appeals affirmed the trial court's order allowing the prosecutor to introduce evidence of the defendant's other alleged sexual assaults against his ex-fiancee. However, rather than reviewing the evidence's admissibility under MRE 404(b) as did the trial court, the Court of Appeals relied on MCL 768.27b* in making this determination. The Court concluded that evidence of first-degree criminal sexual conduct against the defendant's ex-fiancee was admissible under MCL 768.27b because the evidence was "probative of whether he used those same tactics to gain sexual favors from his daughter." Pattison, supra at 615-616. Having found the evidence admissible under MCL 768.27b, the Court did not review the evidence's admissibility under MRE 404(b). With regard to evidence of the defendant's alleged sexual misconduct involving his coworker, the Court disagreed with the trial court's order permitting this evidence because there was no evidence of a "personal or family relationship" between the defendant and his coworker. Furthermore, the defendant's conduct directed at his coworker involved "surprise, ambush, and force," while the defendant's conduct directed at his daughter involved "manipulation and parental authority." Pattison, supra at 617.

⌛ *People v Watkins*, ___ Mich App ___ (2007):

The defendant was charged with five counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct for the alleged sexual abuse of a 12-year-old girl in his neighborhood. *Watkins*, *supra* at ___. The prosecutor sought to admit evidence of similar acts through the testimony of a woman who was sexually assaulted by the defendant when she was 15 years old, and who continued in a sexual relationship with the defendant for two additional years. *Id*. at ___. The trial court held that the woman's testimony was not admissible under either MRE 404(b) or MCL 768.27a because the proposed testimony was too different from the victim's description of the charged acts to justify the use of the testimony to prove a common plan or scheme. *Watkins*, *supra* at ___. On remand from the Michigan Supreme Court, the Michigan Court of Appeals resolved the conflict between MCL 768.27a and MRE 404(b) by determining that MCL 768.27a controls because it is a substantive rule of evidence. *Watkins*, *supra* at ___. Because some of the conduct described by the woman constituted the commission of at least one of the offenses to which MCL 768.27a applied, the Court found the evidence "plainly relevant" to the likelihood that the defendant committed the charged offenses, and therefore, admissible under MCL 768.27a. *Watkins*, *supra* at ___. Although the woman's testimony was inadmissible under MRE 404(b) because of the dissimilarities between the defendant's conduct with her and the defendant's conduct with the victim, similarity is not a consideration under MCL 768.27a. *Watkins*, *supra* at ___. The Court instructed the trial court, on remand, to determine which aspects of the woman's testimony were related to the commission of an offense to which MCL 768.27a applied, and to admit those aspects of the woman's testimony at the defendant's trial. *Watkins*, *supra* at ___.

♦ *People v Sabin (After Remand)*, 463 Mich 43 (2000):

The defendant was convicted of first-degree criminal sexual conduct, based on a single incident of sexual intercourse between the defendant and his 13-year-old daughter. According to the complainant, the defendant told her after the assault that, if she told her mother, her mother would be upset with her for breaking up the family again. Over the defendant's objection, his stepdaughter testified that he performed acts of oral sex on her from the time she was in kindergarten until she was in seventh grade. She testified that the defendant told her not to tell anyone about his conduct because it would hurt the family and because her mother would be angry with them.

The Supreme Court affirmed the conviction, finding no error in the trial court's admission of the stepdaughter's testimony as relevant to the defendant's scheme, plan, or system. The Supreme Court identified two situations in which evidence of prior acts may properly be offered to show a defendant's scheme, plan, or system: 1) where the charged act and the uncharged act are parts of a single continuing plan; and 2) where the defendant devised and repeated a plan to perpetrate separate but very similar crimes. 463 Mich at 63-64. The instant case presented the second situation and, notwithstanding dissimilarities between the charged and uncharged acts, the Court found no abuse of discretion in the trial court's admission of the challenged testimony to prove the defendant's scheme, plan, or system. The following common features beyond the commission of acts of sexual abuse supported the trial court's discretionary ruling: the father-daughter relationship, the similar ages of the victims, and the defendant's attempt to silence the victims by playing on their fears of breaking up the family. The evidence was probative of a disputed element — whether sexual penetration occurred — and was properly admitted to show a system that the defendant may have used in sexually assaulting his daughters and, consequently, to rebut the defense of fabrication. The Court noted, however, that, under the facts presented, the evidence was not admissible to show motive, intent or absence of mistake, or to bolster the credibility of the victim. 463 Mich at 66-71.

See also *People v Pesquera*, 244 Mich App 305, 319 (2001), where the Court of Appeals considered similar common factors in upholding the trial court's decision to admit testimony regarding uncharged sexual assaults on persons other than the victim for the purpose of showing a scheme, plan, or system.

♦ *People v Hine*, 467 Mich 242 (2002):

The defendant was convicted by a jury of first-degree felony murder and first-degree child abuse in the death of defendant's girlfriend's two-and-a-half-year-old daughter. 467 Mich at 244. The victim, who died from multiple blunt-force injuries, sustained severe internal injuries, numerous circular bruises on her abdomen, and a bruise across the bridge of her nose. 467 Mich at 244–245. The prosecutor sought to introduce "other acts" evidence under MRE 404(b) to show, among other things, a common scheme, plan, or system in perpetrating assaults. Three of defendant's former

girlfriends, one of whom was the victim's mother, testified at a pretrial hearing. Two of these witnesses testified that defendant perpetrated "fish hook" assaults on them: a method where defendant put his fingers inside their mouths and forcefully stretched their lips. 467 Mich at 246–247. One witness testified that defendant "head-butted" her, using his forehead to strike her nose. 467 Mich at 246. Each of these witnesses also testified that defendant struck, poked, grabbed, threw, and kneed them. The trial court admitted this testimony, but the Court of Appeals reversed defendant's conviction, holding that substantial dissimilarities existed between the assaults on defendant's former girlfriends and the injuries sustained by the victim, and that the danger of unfair prejudice resulting from the admission of such evidence outweighed any marginal probative value. 467 Mich at 249. The Michigan Supreme Court remanded to the Court of Appeals for reconsideration in light of *Sabin*, *supra.* The Court of Appeals again reversed, finding defendant's assaultive behavior inadmissible under *Sabin* since it was used to prove the "very act" that was the object of the proof, and because of the dissimilarities between the uncharged and charged conduct.

The Michigan Supreme Court reversed the Court of Appeals and remanded the case to that court for consideration of the defendant's remaining appellate issues. The Court stated that the alleged "fish hook" assaults against defendant's former girlfriends were similar to the method or system that could have caused fingernail marks on the victim's cheek. In addition, the bruises on the victim's abdomen were consistent with injuries resulting from being forcefully poked in the abdomen. Noting that evidence of uncharged conduct need only support an inference that a defendant employed a common scheme, plan, or system in committing the charged offense, *Sabin*, *supra*, 463 Mich at 65-66, the Court concluded that the testimony of defendant's former girlfriends contained sufficient commonality with evidence of the causes of the victim's injuries to permit such an inference. 467 Mich at 252–253.

♦ *People v Starr*, 457 Mich 490 (1998):

Defendant was convicted of criminal sexual conduct against his six-year-old daughter. At trial, the court permitted the prosecutor to introduce testimony by the defendant's half-sister that the defendant had subjected her to similar uncharged sexual acts over a 14-year period that began when she was four years old. The court gave the jury a limiting instruction regarding this evidence. On appeal from his conviction, the defendant asserted that his half-sister's testimony should not have been admitted into evidence because its prejudicial nature substantially outweighed its probative value. Applying the *VanderVliet* standard, the Supreme Court upheld the trial court's decision to admit the half-sister's testimony. The Court found that this evidence was offered for a proper, noncharacter purpose, to rebut a claim that the complainant's mother had fabricated the allegations of sexual abuse to gain an advantage in a visitation dispute after her divorce from the defendant. 457 Mich at 501-502. The Court further found that the evidence was substantially more probative than prejudicial because it was the only evidence that

effectively refuted the claim of fabrication and explained the mother's two-year delay in reporting the crime. 457 Mich at 502-503.

For another case in which evidence of a similar prior uncharged sexual assault was found admissible to rebut the defendant's theory that the victim of the charged assault fabricated her allegations, see *People v Layher*, 238 Mich App 573, 584-586 (1999), lv granted on other grounds 463 Mich 906 (2000).

♦ *People v Sholl*, 453 Mich 730, 740-742 (1996):

Defendant was convicted of third-degree criminal sexual conduct against a complainant with whom he had a dating relationship. On appeal, he objected to the trial court's decision to admit evidence that he had used marijuana on the evening when he and the complainant had sexual relations. The Supreme Court upheld the trial court's decision to admit this evidence of a prior bad act:

> "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. The presence or absence of marijuana could have affected more than the defendant's memory. It could have affected the behavior of anyone who used the drug. . . . In this case, a jury was called upon to decide what happened during a private event between two persons. The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty. . . . Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." 453 Mich 741-742.

♦ *People v DerMartzex*, 390 Mich 410, 415 (1973):

In this case decided before the adoption of MRE 404(b) in its current form, the Supreme Court held that relevant, probative evidence of other sexual acts between the defendant and the victim of an alleged sexual assault may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. The Supreme Court has declined to extend the holding in this case to sexual acts between a defendant and household members other than the complainant, however. *People v Jones*, 417 Mich 285 (1983).

> **Note:** The Supreme Court has declined to reconsider its decision in *Jones*. *People v Sabin*, *supra*, 463 Mich at 69-70.

♦ *People v Knox*, 256 Mich App 175 (2003); 469 Mich 504 (2004):

The defendant was convicted by a jury of second-degree murder and first-degree child abuse in the death of his four-month old son. The prosecutor argued that the victim sustained the injuries that led to his death while in the defendant's care. The defendant argued that the victim sustained the injuries

while in the victim's mother's care. At trial, during the case-in-chief, the prosecutor introduced evidence of "other acts" of the victim's mother, including evidence of her assets as a mother, her love for her children and her knowledge of child rearing. The defendant did not object to the admission of this evidence. On appeal, the defendant objected to the evidence as improper character evidence. The Court of Appeals held:

> "[T]he rules of evidence do not provide that the prosecution may preempt a defense that someone other than defendant committed the crime by arguing that the person the defense blames was 'too good' to have committed the crime. Additionally, the evidence of [the victim's mother's] good character was improper under MRE 404(b) because it did not serve one of the noncharacter purposes articulated in that rule. This evidence was used to demonstrate that [the victim's mother] acted in conformity with her good character on the night of the incident, in contrast to [the defendant's] alleged bad character, and thus that [defendant's] defense should not be believed. Therefore, we conclude, even in light of [*People v*]*Hine*, [*supra*, 467 Mich 242 (2002)] that [the defendant] has demonstrated that it was plain error for the trial court to admit the evidence that [the victim's mother] was a good, loving parent who could not have committed the crime." 256 Mich App at 495-496.

Although admission of the evidence was plain error, the Court determined that the error in admitting this evidence did not affect the outcome of the trial and defendant was not entitled to relief. *Id.*

The Michigan Supreme Court reversed. *People v Knox*, 469 Mich 502 (2004). The Michigan Supreme Court stated:

> "Although we agree with the Court of Appeals majority's assessment that this matter should be analyzed from the standpoint of whether admission of the contested evidence discussed above constituted plain error affecting defendant's substantial rights, we agree with the dissenting judge that plain error requiring reversal did, in fact, occur." 469 Mich at 508.

The court concluded that evidence of the defendant's anger during arguments with the victim's mother was irrelevant to the issue of whether defendant committed the charged acts. The defendant's actions during his arguments with the victim's mother and the acts that caused the victim's death were entirely dissimilar. Although the evidence of the victim's prior injuries was relevant to prove that the fatal injuries were not accidental, there was no evidence that defendant committed the past abuse. Finally, the evidence of the victim's mother's "good character" "improperly undermined defendant's credibility." 469 Mich at 512-514. Thus, all of the challenged evidence was admitted improperly to show defendant's bad character and propensity to commit the charged acts. The Court stated:

> "The improper admission of the evidence of [the victim's mother's] good character, like the admission of the evidence of defendant's anger problems and the improper use of the evidence regarding [the victim's] prior injuries, created far too great a risk of affecting the outcome of the case, given the absence of any direct evidence that defendant committed the acts that resulted in [the victim's] death. Consequently, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for a new trial." 469 Mich at 514-515.

♦ *People v Ortiz*, 249 Mich App 297 (2001):

The defendant was convicted of the first-degree murder of his ex-wife. At trial, he claimed that he had consensual sexual relations with his ex-wife and that she later died in a car accident, despite some testimony showing that she died of asphyxiation by smothering or chest compression. The prosecutor successfully admitted, under MRE 404(b), evidence of sexual misconduct between the defendant and two other women. On appeal, the Court of Appeals upheld the trial court's admission of this 404(b) evidence, finding that (1) the evidence was relevant to rebut defendant's theory of consensual sexual relations; (2) that it was logically relevant to support the theory that defendant had a motive *and* opportunity to kill his ex-wife, since it was established that his ex-wife refused to reconcile with the defendant because of defendant's sexual deviance, and that defendant was released from jail ten days before the murder; and (3) that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the prior sexual misconduct was not the same crime for which defendant was on trial, a fact which greatly lessened the danger that the jury would conclude that "'if he did it before, he probably did it again.'" 249 Mich App at 305-307.

♦ *People v Watson*, 245 Mich App 572 (2001):*

**People v Watson* is also discussed in Section 5.4(B).

The defendant was convicted of several offenses, including three counts of first-degree criminal sexual conduct against his stepdaughter, who was between 11 and 13 years old at the time of the offenses. On appeal, the defendant challenged the trial court's admission into evidence of a cropped photograph found in the defendant's wallet, which showed the victim's naked buttocks. The defendant also challenged the admission of an enlargement showing the entire, uncropped photograph. The Court of Appeals found no reversible error in admission of this evidence, ruling that it was properly admitted under MRE 404(b) to show the defendant's motive:

> "[E]vidence in the instant case that defendant had a sexual interest specifically in his stepdaughter would show more than simply his sexually deviant character — it would show his motive for sexually assaulting his stepdaughter. Thus, evidence that defendant carried a photograph of his stepdaughter's naked buttocks in his wallet had probative value to show that the victim's allegations were true. Defendant denied sexually assaulting his stepdaughter, but the other-acts evidence demonstrated that he had

> a motive to engage in sexual relations with her . . . [T]he other-acts evidence involved the specific victim herself, not someone else. . . . Thus, the other-acts evidence showed more than defendant's propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults." 245 Mich App at 418.

The Court of Appeals further found no showing by the defendant that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

*This case is also discussed in Section 5.8(B).

♦ *People v Daoust*, 228 Mich App 1, 11-14 (1998):*

Defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child suffered numerous bruises. The child's mother was also charged with first-degree child abuse. She initially denied involvement with the defendant and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant asserted that the trial court erroneously admitted testimony regarding a prior incident in which bruises on the child's body had been reported to the police. The child's baby-sitter testified that defendant was angry with her for reporting the bruises to the police. She further stated that defendant had told her that he liked to spank children "hard enough to where they'll feel it." Although both defendant and the child's mother told the baby-sitter that the mother had caused the bruises, the mother later testified at trial that defendant had been responsible. The Court of Appeals upheld the trial court's decision to admit this evidence, finding that it was offered for the proper purpose of explaining the relationship between the defendant, the child, and the child's mother with respect to the care and discipline of the child. Defendant testified at trial that he had never participated in the child's discipline, explaining that discipline was the mother's responsibility. The prior acts evidence tended to disprove this testimony, showing that defendant believed in extreme physical discipline and that he participated in the child's discipline. The evidence was thus probative of defendant's possible motivation for causing the charged injuries. 228 Mich App at 13-14.

♦ *People v Hoffman*, 225 Mich App 103 (1997):

Defendant was convicted of kidnapping and assault with intent to murder his girlfriend. During the trial, the prosecutor attempted to establish that the

assault was motivated by defendant's hatred of women by calling two of defendant's former girlfriends, who testified that he had beaten and threatened them. One of these witnesses testified that defendant told her that "women are all sluts and bitches and deserve to die." Defendant sought reversal based on the assertion that the trial court abused its discretion in admitting the testimony of these witnesses. The Court of Appeals disagreed, holding that the testimony was properly admitted to establish motive under MRE 404(b). In so holding, the panel adopted the following dictionary definition of "motive":

> "Cause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act. In common usage intent and 'motive' are not infrequently regarded as one and the same thing. In law there is a distinction between them. 'Motive' is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. 'Motive' is that which incites or stimulates a person to do an act." 225 Mich App at 106, citing Black's Law Dictionary (rev 5th ed) [citations omitted].

Acknowledging that the distinction between admissible evidence of motive and inadmissible evidence of character or propensity is "often subtle," the panel gave the following hypothetical by way of illustration:

> "In mid-afternoon, on the outskirts of a rural Michigan village, an African-American man is savagely assaulted and battered by a white assailant. The assailant neither demands nor takes any money or property. The assailant is a total stranger to the victim. The defendant is later apprehended and charged with the attack. After the arrest, the prosecutor discovers that the defendant had been involved in several other violent episodes in the past, including bar fights, an assault on a police officer, and a violent confrontation with a former neighbor." 225 Mich App at 107.

Absent a proper purpose, the court noted that the foregoing other acts evidence would be inadmissible because its only relevance is to establish the defendant's violent character or propensity towards violence. However, if the evidence showed that all of the defendant's prior victims were African-Americans and that defendant had previously expressed hatred toward blacks, then evidence of the prior assaults would be admissible to prove motive for his conduct. This evidence goes beyond establishing a propensity toward violence, and tends to show why defendant perpetrated a seemingly random and inexplicable attack. Applying the rationale of the foregoing example to the instant case, the panel held:

> "[E]vidence that defendant hates women and previously had acted on such hostility establishes more than character or propensity. Here, the other-acts evidence was relevant and material to defendant's motive for his unprovoked, cruel, and sexually

> demeaning attack on his victim. . . . Absent the other-acts evidence establishing motive, the jurors may have found it difficult to believe the victim's testimony that defendant committed the depraved and otherwise inexplicable actions. The evidence also tends to counter defendant's self-serving testimony that the victim provoked the incident by stealing his money." 225 Mich App at 109-110.

♦ *People v Ullah*, 216 Mich App 669, 674-676 (1996):

Defendant was convicted of two counts of first-degree criminal sexual conduct arising from a sexual assault upon his estranged wife. On appeal, defendant objected to the trial court's admission of his wife's testimony concerning a previous beating he had allegedly inflicted upon her. The Court of Appeals reversed defendant's conviction. It found that: 1) the trial court intervened too late to strike the unfairly prejudicial testimony that was not relevant to the charged offenses; 2) the prosecution had not provided notice that it intended to elicit prior acts evidence pursuant to MRE 404(b)(2); 3) the prosecution cited an improper purpose for admitting the prior acts evidence; and 4) the jury may have given undue weight to the prior acts testimony. With regard to relevance, the Court of Appeals stated:

> "On this record the testimony regarding the prior beating was not logically relevant to an element of the charged offenses. The prior beating was not accompanied by a demand from defendant for sex. We also find that the prior beating was not relevant to the issue of consent to sexual intercourse because the complainant never testified that she, aware of how violent he could get from the earlier incident, stopped resisting him. If the complainant had testified that she fearfully submitted, the earlier beating would be relevant to vitiate the apparent consent. That situation is not found here because the complainant's resistance never wavered, and, from reviewing her testimony, we can conclude that defendant was, on this occasion, even more physically violent when he demanded sex than he had been when he physically assaulted her months earlier. We also note that the trial court determined, after the fact, that the testimony regarding the first beating was more prejudicial than probative." 216 Mich App at 675.

♦ *People v Fisher*, 193 Mich App 284, 289-290 (1992):

The defendant was convicted of involuntary manslaughter in connection with the disappearance of his estranged wife. The Court of Appeals reversed, finding insufficient evidence to support the conviction. The Court also commented on the admission of evidence of other acts of the defendant, including his previous assaults on his wife and subsequent acts of violence against others. Noting that evidence of prior acts of marital violence was admissible to show the defendant's motive and his relationship with his wife, the Court found reversible error in the prosecutor's use of the evidence in his

closing argument to show the defendant's violent character and his alleged conformity with that character in the disappearance of his wife.

♦ *People v Katt*, 248 Mich App 282 (2001):

Defendant was convicted of three counts of first-degree criminal sexual conduct against a seven-year-old boy and a five-year-old girl who lived with defendant, their mother, her ex-husband, and another person. At trial, defendant took the stand and denied sexually assaulting either child, further stating that "[I]t's not my nature to go around and have sex with children." Because of this statement, the prosecutor renewed a previous motion, denied twice previously by the trial court, to introduce evidence *in rebuttal* of an alleged prior sexual assault against a nine-year-old boy, in which defendant allegedly touched the boy's "privates" while they both were disrobed after taking a bath together. The trial court admitted the evidence in rebuttal.

The Court of Appeals affirmed the trial court's decision, finding that the alleged prior act was properly admitted under the common scheme, plan, or system of logical relevance, because the charged and uncharged conduct were "sufficiently similar" to support an inference that they were manifestations of a common system. The Court found the following similarities: (1) the victims and defendant knew each other; (2) the victims were all of tender age; (3) the alleged sexual abuse occurred when defendant was alone with the children; and (4) the improper contact alledgedly involved the touching of the children's sex organs when defendant and the victims were disrobed. The Court found that the trial court correctly determined that the prior act had significant probative value that was not substantially outweighed by its prejudicial effect. The Court also found it noteworthy that the trial court decided to admit the other act evidence after it had the opportunity to view the proofs at trial. 248 Mich App at 306-309.

5.14 Testimonial Evidence of Threats Against a Crime Victim or a Witness to a Crime

This section digests cases illustrating how Michigan's appellate courts have handled testimonial evidence of a defendant's threats of physical harm against a crime victim or a witness to a crime.* While evidence of a threat is often subject to hearsay objections, it may nonetheless be admissible on various grounds, either because the threat is not hearsay, or because it falls under an exception to the hearsay rule.

*For a case involving threats to a witness's relative, see *People v Johnson*, 113 Mich App 650, 654 (1982) (evidence of threat irrelevant where witness testified).

♦ A threat may be a non-assertive "verbal act," rather than a "statement," offered for some other purpose than to prove the truth of the matter asserted. For example, a threat may be circumstantial evidence of the declarant's state of mind (such as consciousness of guilt).

- A threat may constitute an admission by a party-opponent, which is not hearsay under MRE 801(d)(2).
- A witness's account of a threat may be admissible as an excited utterance under MRE 803(2).
- Evidence of a threat may be admissible as a statement of the declarant's then existing mental, emotional, or physical condition under MRE 803(3).

  Note: Threats against a crime victim or witness to a crime may also constitute a criminal offense, such as witness tampering, extortion, or obstruction of justice. For more information about these crimes, see Sections 3.13-3.14.

A. Threats That Are Not Hearsay

MRE 801(c) defines "hearsay" 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." MRE 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

MRE 801(d)(2) specifically excludes admissions by a party-opponent from the definition of hearsay. Such statements are "offered against a party" and are "the party's own statement." *Id.*

In the following cases, the Michigan appellate courts found that testimony regarding threats against a crime victim or a witness to a crime did not constitute hearsay as defined in MRE 801. In these cases, the courts found that the threatening statement was either: 1) non-assertive verbal conduct offered for a purpose other than to prove the truth of the matter asserted; or 2) a party admission.

- *People v Sholl*, 453 Mich 730, 739-740 (1996) (verbal conduct showing consciousness of guilt):

The defendant was charged with third-degree criminal sexual conduct against a complainant with whom he had a dating relationship. At trial, the investigating officer testified that after the criminal proceeding against the defendant was underway, the complainant called him to report the defendant's threats against her. The officer further testified that he had asked the defendant whether the defendant had talked about killing the complainant. The defendant acknowledged that, while intoxicated, he "probably would have said something like that." The Supreme Court found no error in the trial court's admission of the officer's testimony about his conversation with the defendant:

> "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt. As the

> circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." 453 Mich at 740 [citations omitted].

- *People v Kelly*, 231 Mich App 627, 639-640 (1998) (threat as evidence explaining witness's inability to identify defendant):

The defendant was convicted of the armed robbery and murder of his former girlfriend. At trial, a prosecution witness testified that two men had offered to sell him items allegedly taken from the victim's home. When asked if he saw either of the two men in the courtroom, the witness testified, "No. I don't know." When asked if he was afraid to come to court, the witness testified that he was "a little bit afraid." The prosecutor then asked the witness three times if he was afraid to identify either of the two men. On appeal, the Court of Appeals, noting that evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt, found that the prosecutor's questions were appropriate attempts to elicit testimony that might explain the witness's inability to identify the defendant.

- *People v Falkner*, 36 Mich App 101, 108 (1971), rev'd on other grounds 389 Mich 682 (1973) (conduct showing consciousness of guilt):

Defendant was convicted of first-degree murder. On appeal, he objected to a witness's testimony that he had threatened to kill anyone who testified against him. The Court of Appeals found no error in the trial court's decision to admit this testimony:

> "Testimony showing conduct and declarations of the defendant subsequent to commission of a crime, when the behavior indicates a consciousness of guilt or is inconsistent with innocence, is admissible. Evidence of attempts by the accused to induce witnesses not to testify may properly be considered by the fact finders."

- *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (admission by a party-opponent):

The defendant was charged with the first-degree murder of his mother. At the defendant's preliminary examination, a witness testified that she had spoken with the victim shortly before her death. According to the witness, the victim stated that she was "petrified" because the defendant had threatened to kill her. Applying MRE 801(d)(2), the Court of Appeals concluded that the defendant's threat against the victim was not hearsay because it was an admission by a party-opponent.*

*****This case is also discussed in Sections 5.3(B)(2) and 5.13(B).

B. Exceptions to the Hearsay Rule

MRE 803 governs hearsay exceptions in cases where the declarant's availability as a witness is immaterial. The Michigan appellate courts have admitted testimony regarding a defendant's threats under subsections (2) and (3) of this rule, which provide:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> "(2) *Excited Utterance.* 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.
>
> "(3) *Then Existing Mental, Emotional, or Physical Condition.* 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 unless it relates to the execution, revocation, identification, or terms of declarant's will."

MRE 803(2) and (3) were applied in deciding the following cases:

♦ *People v Cunningham,* 398 Mich 514 (1976) (excited utterance):

*See Section 5.3(B)(2) for more discussion of the excited utterance exception.

The defendant was convicted of the second-degree murder of her husband. The victim was shot to death with a rifle during an argument with the defendant. A police officer called to the scene during the fight testified at trial that he took a pistol from the victim approximately one hour before the fatal shooting. According to the officer's testimony, the victim explained that he had taken the pistol from the defendant because she had threatened to shoot him. The defendant objected to the officer's testimony regarding the threat on the basis of hearsay. The trial court overruled the objection, stating that the victim's statement was an "excited utterance." On appeal from the trial court's decision that the testimony was admissible, the defendant's conviction was affirmed by an equally divided Supreme Court. Four Justices agreed, however, that the husband's statement was inadmissible hearsay because it was not made immediately after a startling event so as to be "spontaneous and unreflecting." 398 Mich at 520 (opinion by Chief Justice Kavanagh).*

♦ *People v Kowalak (On Remand),* 215 Mich App 554 (1996) (excited utterance):

The defendant was charged with the first-degree murder of his 82-year-old mother. On the day of her death, the victim had testified against the defendant

at a child custody/visitation hearing. As a result of the victim's testimony, the defendant was denied visitation rights with his children. At the defendant's preliminary examination, a witness testified that she had spoken with the victim shortly after the visitation hearing. Over the objection of defense counsel, the witness further testified that the victim was "petrified" because the defendant had threatened to kill her for testifying against him. The trial court denied the defendant's motion to suppress the witness's testimony, ruling that the victim's statement was admissible under MRE 803(2) as an excited utterance. On appeal, the Court of Appeals affirmed the trial court's decision to admit the witness's testimony. In so doing, the Court engaged in a two-part analysis. First, the Court considered the defendant's alleged statement to his mother that he was going to kill her. Applying MRE 801(d)(2), the Court concluded that this statement was not hearsay because it was an admission by a party-opponent, i.e., a party's own statement offered against that party. Second, the Court considered whether the witness' hearsay testimony referencing the victim's statement about the alleged threat was admissible as an excited utterance. The Court concluded that it fell within the exception to the hearsay rule articulated in MRE 803(2). 215 Mich App at 556-559.

- *People v Paintman*, 92 Mich App 412, 420 (1979), rev'd on other grounds 412 Mich 518 (1982) (evidence of a then existing mental, emotional, or physical condition):

The defendant was convicted by a jury of four counts of first-degree murder. At trial, a witness testified that he saw the defendant and a codefendant leave a victim's apartment just before the bodies of that victim and two others were found in that apartment. The witness further testified that the codefendant had threatened to kill one of the victims found in the apartment. The defendant objected on appeal to the admission of testimony concerning his codefendant's threats against the victim. The Court of Appeals upheld the trial court's decision to admit this testimony, stating that it was a declaration of the codefendant's state of mind admissible as an exception to the hearsay rule. The statement was relevant to the codefendant's intent in killing the victims and therefore to the defendant's guilt as an aider and abettor.

- *People v Coy*, 258 Mich App 1 (2003) (evidence of then existing mental, emotional, or physical condition):

The defendant was convicted of second-degree murder. At trial, a witness testified that the victim told her that she had planned to meet the defendant on the night of the murder and asked her to page the defendant to remind him about the meeting. The defendant objected to the admission of the statement on hearsay grounds. The trial court found the statement relevant to the victim's intention or plan to meet the defendant at her apartment on the night of the murder and therefore admissible pursuant to MRE 803(3). The Court of Appeals upheld the trial court's determination and indicated that the victim's statement of future intent or plan to meet with defendant on the night of her murder fell within the plain meaning of MRE 803(3). 258 Mich App at 14.

- *People v Smelley*, 285 Mich App 314 (2009), rev'd on other grounds ___ Mich ___ (2010) (evidence of victim's state of mind)

"[A] victim's state of mind is usually only relevant in homicide cases when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 320-321 (2009). In *Smelley*, the victim's statements showing his fear of being killed by the defendant were inadmissible under MRE 803(3), where the defendant claimed he did not commit the murder. *Smelley*, *supra* at 325-327.

C. Statutory Authority for the Admission of Threat Evidence in Cases Involving Domestic Violence

MCL 768.27c establishes a new exception to the hearsay rule for statements purporting to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. This exception applies only to offenses involving domestic violence. A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> "(b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> "(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> "(d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> "(e) The statement was made to a law enforcement officer." MCL 768.27c(1).

For purposes of subsection (1)(d) of MCL 768.27c, "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

For purposes of MCL 768.27c, the term "domestic violence" means "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27c(5)(b).

"Family or household member" is defined in MCL 768.27c(5)(c) to mean any of the following:

> "(*i*) A spouse or former spouse.
>
> "(*ii*) An individual with whom the person resides or has resided.
>
> "(*iii*) An individual with whom the person has or has had a child in common.
>
> "(*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

MCL 768.27c also contains a notice requirement. MCL 768.27c(3) requires the prosecuting attorney to disclose evidence admissible under the statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

Chapter 6: Issuing Personal Protection Orders — Statutory Overview

6

6.1 Chapter Overview

*MCL 600.2950 governs domestic relationship PPOs. MCL 600.2950a governs non-domestic stalking PPOs.

Because domestic violence frequently involves criminal behavior, the main focus of the preceding chapters of this benchbook has been on Michigan's criminal justice response to abusive behavior. Like all other states, however, Michigan also makes use of civil injunctive remedies to protect its citizens from domestic violence. In 1994, the Michigan Legislature created two types of "personal protection order" ("PPO"). These two civil remedies are distinguished according to the relationship between the parties. The "domestic relationship PPO" enjoins abuse in certain domestic relationships that are defined by statute. The "non-domestic stalking PPO" protects victims of stalking, regardless of the relationship between the parties.* These two remedies are the subject of this chapter and Chapters 7 and 8. This chapter surveys the statutory and court rule provisions for issuing PPOs. Chapter 7 discusses common practical concerns in issuing PPOs that are not addressed in the statutes and court rules. Enforcement proceedings are the subject of Chapter 8.

This chapter contains information about:

- The evolution of PPOs.
- The difference between domestic relationship PPOs and non-domestic stalking PPOs.
- The substantive and procedural requirements for issuing PPOs.
- The procedures for dismissing PPO actions.
- The procedures for modifying, extending, and terminating PPOs.
- The limitations of district court peace bonds in domestic violence cases.

6.2 Introduction to Personal Protection Orders

Civil protection orders against domestic violence supplement the protections of the criminal law. This section briefly explores the role that such orders play in combatting domestic violence. It also outlines the development of Michigan's two types of "personal protection order" and highlights the most important features of these orders.

A. The Role of Protection Orders in Combatting Domestic Violence

Every state in the United States has enacted statutes authorizing courts to issue civil protection orders against domestic violence. The relief provided in these statutes is typically tailored to meet the unique circumstances of domestic violence, and so differs from traditional injunctive relief in certain respects. To protect petitioners in emergency situations, for example, state statutes generally give the courts broad authority to award ex parte relief upon a showing of immediate danger or irreparable injury. Moreover, as part of a consistent policy to treat domestic violence as a crime, most states provide for criminal enforcement measures against individuals who violate civil protection orders. Some states mandate warrantless arrest upon probable cause to believe that the restrained party has violated the protection order. Other states, including Michigan, authorize warrantless arrest under those circumstances. In some jurisdictions, including Michigan, violation is subject to criminal contempt sanctions. In other states, violation of a civil protection order constitutes a misdemeanor; in many of these states, contempt is an alternative or additional charge that may be lodged against the violator.*

*See Hart, *State Codes on Domestic Violence*, p 5-22 (Nat'l Council of Juvenile & Family Court Judges, 1992).

In a study of the effectiveness of civil protection orders, the National Center for State Courts ("NCSC") found that such orders were effective to deter domestic abuse, particularly when linked with accessible court processes and public and private support services. After interviewing women who received protection orders in the Family Court in Wilmington, Delaware, the County Court in Denver, Colorado, and the District of Columbia Superior Court, the NCSC study reported the following findings:*

*_Civil Protection Orders: The Benefits & Limitations for Victims of Domestic Violence,_ p i-xi (Nat'l Center for State Courts, 1997).

- **Civil protection orders assisted petitioners in regaining a sense of well-being.**

  Approximately one month after receiving a civil protection order, three-quarters of the study participants reported that the order had a positive effect on their sense of well-being. After six months, the proportion of participants reporting life improvement increased to 85%. Ninety-five percent of study participants stated that they would seek a protection order again if necessary.*

*_Id_. at v, 47-48.

- **In a majority of cases, civil protection orders deterred repeated incidents of physical and psychological abuse.**

  Slightly more than 72% of the study participants reported no violation of their protection orders within the first month after issuance. Slightly more than 65% of participants reported no violation within six months after issuance.*

*_Id_. at 48-49.

- **A combination of civil and criminal remedies may be needed to prevent abuse by persons with a criminal history.**

  Study participants reported a greater number of problems with their protection orders in cases where the restrained party had a prior criminal history. Nonetheless, these same participants were more likely to report an

*_Id_. at 56-58.

improved sense of well-being after issuance of the civil protection order. The study authors suggest that these findings show the need for both civil and criminal intervention in cases where an abuser has a history of violent crime. Additionally, the study authors noted that safety planning for the abused individual is likely to play a role in the effectiveness of protection orders and other interventions to deter domestic violence.*

*Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement,* p 1-3 (Nat'l Inst of Justice, 1990).

Some researchers have pointed out that a civil protection order can be particularly useful in situations where criminal prosecution is not practicable. Such situations may involve abusive behavior that is not criminal but is nonetheless serious in its long-range potential for harm. Keeping in mind that domestic violence may tend to escalate in severity and frequency over time, a court can issue a civil protection order in the early stages of a violent relationship to address non-criminal abusive behavior before it escalates to the point of serious injury. A civil protection order may also be a useful alternative when the abuse involves misdemeanor conduct (e.g., threats or shoving), and sufficient evidence to prosecute is lacking. In both of these cases, a civil protection order can offer protection and send the abuser a message that the court and society will not tolerate violent behavior.*

B. Development of Protection Orders in Michigan

*See Hood & Field, *Domestic Abuse Injunction Law & Practice: Will Michigan Ever Catch Up to the Rest of the Country?* 73 Mich Bar J 902 (1994).

In Michigan, a civil protection order against domestic abuse is known as a "personal protection order" or "PPO." Although PPOs were first created by the Legislature in 1994, they evolved from earlier forms of injunctive relief against domestic violence.* In 1983, the Michigan Legislature enacted MCL 600.2950, which criminalized the enforcement proceedings for certain injunctions against domestic abuse by providing that violators would be subject to warrantless arrest and criminal contempt sanctions. These stringent enforcement measures applied only under the following limited circumstances, however:

- As enacted in 1983, MCL 600.2950 protected only those victims who had a past or present marriage or cohabitation relationship with the abuser.
- The types of behavior that the court could restrain under MCL 600.2950 were restricted to entry onto premises, assaultive behavior, and unauthorized removal of minor children from the person having legal custody.

In addition to the foregoing limitations, MCL 600.2950 was inapplicable where a divorce action was pending between the parties. Victims involved in divorce proceedings could obtain similar relief under MCL 552.14, however.

*For discussion of the other provisions of the 1992 anti-stalking legislation, see Section 3.7.

Michigan's 1992 anti-stalking legislation filled some of the gaps in MCL 600.2950. In 1992, the Legislature enacted MCL 600.2950a, which authorized the circuit court to issue injunctions against stalking.* Like MCL 600.2950, the 1992 statute provided that violation of an anti-stalking injunction would be subject to warrantless arrest and criminal contempt

sanctions. However, the 1992 statute's protections from abuse were broader than those afforded in MCL 600.2950 in the following respects:

- The protections of MCL 600.2950a extended to any person who was stalked by another, regardless of the stalker's relationship to the victim.
- The protections of MCL 600.2950a extended to a broader range of abusive behavior, such as verbal contact that caused a victim to feel threatened.

By covering a wider range of persons and abusive behaviors, MCL 600.2950a improved the protection that courts could give to domestic abuse victims who were being stalked.* For those cases where anti-stalking relief was not applicable, however, domestic abuse victims were still limited to the relief available under MCL 600.2950 and MCL 552.14.

*Although domestic abuse does not always include stalking, abusers often stalk their victims. See Section 3.7. Stalking is one factor that may indicate that an abuser is likely to resort to lethal violence. See Section 1.4(B).

In 1994, the Michigan Legislature gave the courts' injunctive authority over domestic abuse its current basic shape. Amendments to MCL 600.2950 and MCL 600.2950a created two types of "personal protection order" ("PPO"). These two civil remedies are distinguished according to the relationship between the parties. The "domestic relationship PPO" created under MCL 600.2950 enjoins abuse in certain domestic relationships that are defined by statute. The "non-domestic stalking PPO" created under MCL 600.2950a protects victims of stalking, regardless of the relationship between the parties. As was the case under the earlier versions of these statutes, violators of PPOs issued under the amended statutes are subject to warrantless arrest and criminal contempt sanctions. However, the protections available in a PPO are broader, extending to victims in more categories of relationships, and to more types of abusive behavior.

Since 1994, the Michigan Legislature has enacted many amendments to the PPO and other related statutes to clarify uncertainties about this novel form of relief that have arisen in practice. Of particular significance are amendments enacted in 1999 that provide for issuance and enforcement of a PPO against a respondent under age 18. In 2001, the Michigan Legislature enacted amendments to the PPO and related statutes to ensure that the PPOs are enforced by other states, Indian tribes, and U.S. territories. The amendments also prohibit Michigan courts from issuing a PPO against a respondent under the age of ten.

Because PPO practice continues to evolve, this subject is likely to remain a legislative priority for some time. Accordingly, the reader is cautioned to be alert for statutory and court rule changes that may take place after the publication date of this benchbook.

C. Overview of Michigan's PPO Statutes

Michigan personal protection orders have the following features:

- **PPOs are available to restrain domestic abuse and stalking**.

The 1994 PPO legislation created two types of protection order, differentiated according to the relationship between the parties. Because domestic abuse is not always confined to parties living in the same household, these two types of PPO encompass a broad range of interpersonal contexts. Under MCL 600.2950(1), the "domestic relationship PPO" protects individuals who live or have lived with the abuser, have a child in common with the abuser, or who have a past or present marriage or dating relationship with the abuser. Under MCL 600.2950a(1), the "non-domestic stalking PPO" protects victims of stalking, regardless of whether they have a relationship with the abuser.

A PPO should not be used for any dispute that does not involve domestic abuse or stalking as described in the PPO statutes. Neighborhood or work place disputes that do not meet the criteria for a PPO are better addressed by community dispute resolution and district court peace bonds. PPOs are also inappropriate to address domestic relations disputes regarding custody, parenting time, support, or property division. See Section 6.8 on peace bonds. See Sections 7.7, 10.7, and 12.5(B) on the relationship between PPO and domestic relations proceedings.

♦ **PPOs are available to restrain a broad range of abusive behavior**.

*See Section 1.5 on abusive tactics.

Domestic violence perpetrators exhibit behavior that includes property destruction, threats, abuse of economic power, and psychological abuse in addition to physical assault of the victim.* Accordingly, the PPO statutes authorize Michigan's courts to restrain a broad range of abusive actions. A "domestic relationship PPO" is available to restrain a number of specified abusive acts, as well as "[a]ny other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." MCL 600.2950(1)(j). MCL 600.2950a authorizes the court to restrain conduct that is prohibited under the criminal stalking statutes.

The type of PPO to use in a given situation is determined by the *relationship* between the parties, *not* by the type of behavior to be restrained. Therefore, if the parties are involved in one of the four types of domestic relationships described in MCL 600.2950(1), a domestic relationship PPO should be used, even if the abusive behavior constitutes stalking. See MCL 600.2950(1)(i).

♦ **Upon an appropriate factual showing, relief is available on an ex parte basis without notice to the restrained individual.**

*The parties' recent separation is one factor that may indicate that an abuser is likely to resort to lethal violence. See Section 1.4(B).

Because domestic violence perpetrators seek to control their intimate partners, domestic violence may escalate when the abused individual takes steps to escape it.* Since court intervention threatens the abuser's control, initiation of court proceedings may actually increase the danger. Accordingly, a court *must* issue an ex parte PPO if it clearly appears from specific facts that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice, or that notice itself will precipitate adverse action before a PPO can be issued. An ex parte PPO is effective when signed by a judge without written or oral notice to the

restrained individual and is immediately enforceable. MCL 600.2950(9), (11)(b), (12), and MCL 600.2950a(6), (8)(b), (9).

- **A person under age 18 or a legally incapacitated individual may be a party to a PPO action.**

  The PPO statutes prohibit issuing a PPO against a respondent who is under ten years of age. However, PPOs may be entered for parties under the age of 18. Legislation enacted in 1999 and corresponding court rule amendments set forth specific procedures for cases involving a respondent under age 18. In general, PPO actions with a minor party are subject to the same issuance procedures that apply in actions involving adults, although MCR 3.703(F)(1) requires a petitioner under age 18 or a legally incapacitated individual to proceed through a next friend. Enforcement proceedings against a respondent under age 18 differ significantly from adult enforcement proceedings and are governed by subchapter 3.900 of the Michigan Court Rules. See MCR 3.701(A) and 3.981 on the rules applicable to minor respondents. Moreover, PPO violations by persons under age 17 are subject to the dispositional alternatives listed in the Juvenile Code, MCL 712A.18. The 1999 legislation did not affect the substantive nature of PPOs with minor respondents, so that statutory distinctions between domestic relationship PPOs and non-domestic stalking PPOs (which are described at Sections 6.3 and 6.4) apply regardless of the age of the parties.*

*See Section 8.11 on enforcement of a PPO with a respondent under 18.

- **A PPO may not be issued if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor.**

  This restriction reflects a legislative policy determination that juvenile delinquency, "incorrigibility," or abuse/neglect proceedings may be better suited for abusive situations involving a parent and child. See MCL 600.2950(27)(a)–(b) and MCL 600.2950a(25)(a)–(b).

- **An ex parte PPO must be valid for at least 182 days**.

  Ex parte PPOs differ from traditional temporary restraining orders in that they are of longer duration. Except in domestic relations actions, a temporary restraining order issued under MCR 3.310(B)(3) expires in 14 days unless extended after a hearing with notice to the adverse party. Because a 14-day period is not long enough to protect victims in many cases, Michigan's PPO statutes set a minimum duration of 182 days for an ex parte PPO and place no maximum limitation on the duration of any PPO. MCL 600.2950(13) and MCL 600.2950a(10). MCR 3.310 is not applicable to petitions for a personal protection order. MCR 3.701(A).

- **Violation of a PPO subjects the alleged offender to warrantless arrest**.

  MCL 764.15b authorizes police to make a warrantless arrest upon reasonable cause to believe that the respondent is violating or has violated a PPO, provided that certain notice requirements are met. To facilitate the warrantless arrest of alleged offenders in emergencies, the PPO statutes

provide for entry of the court's order into the LEIN system immediately after issuance. LEIN entry is not a prerequisite for warrantless arrest authority, however. MCL 600.2950(17), (22), and MCL 600.2950a(14), (19).

- **Persons found guilty of violating a PPO are subject to criminal and/or civil contempt sanctions**.

  The Michigan Legislature has determined that persons found guilty of violating a PPO shall be subject to both the criminal and civil contempt powers of the court.* Upon conviction of criminal contempt, an offender age 17 or older shall be imprisoned for not more than 93 days, and additionally, may be fined not more than $500.00. Contempt penalties may be imposed in addition to any criminal penalty that may be imposed for another criminal offense arising from the same conduct. MCL 600.2950(23) and MCL 600.2950a(20).

*Criminal contempt sanctions are far more common. See Chapter 8 on contempt sanctions for violation of a PPO.

6.3 Domestic Relationship Personal Protection Orders Under MCL 600.2950

The Legislature has created two types of personal protection orders, distinguished by the categories of persons who may be restrained:

- "Domestic relationship PPOs" under MCL 600.2950 are available to restrain behavior (including stalking) that interferes with the petitioner's personal liberty, or that causes a reasonable apprehension of violence, if the respondent is involved in certain domestic relationships with the petitioner as defined by the statute.
- "Non-domestic stalking PPOs" under MCL 600.2950a are available to enjoin stalking behavior by any person, regardless of that person's relationship with the petitioner.

This section addresses the substantive prerequisites for issuing domestic relationship PPOs. The substantive prerequisites for issuing non-domestic stalking PPOs are discussed in Section 6.4. Procedures for issuing both types of PPOs are the subject of Section 6.5.

A. Persons Who May Be Restrained

If the respondent falls into any one of the following categories described in MCL 600.2950(1), a domestic relationship PPO is appropriate (even if the offensive behavior amounts to stalking):

- The petitioner's spouse or former spouse.
- A person with whom the petitioner has had a child in common.
- A person who resides *or* who has resided in the same household as the petitioner.

- A person with whom the petitioner has *or* has had a "dating relationship."

The statute puts no time limitation on the foregoing domestic relationships that have occurred in the petitioner's past.

"Dating relationship" is defined in the statute as: "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 600.2950(30)(a).

A domestic relationship PPO may not be issued if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950(27)(a)–(b). If there is no such parent/child relationship, however, a person under age 18 may be a party to a PPO action.* A PPO may not be issued if the respondent is less than ten years of age. MCL 600.2950(27)(c).

*See Section 6.5(A) for more information.

1. Residents of the Petitioner's Household

MCL 600.2950(1) permits the court to restrain "an individual residing or having resided in the same household as the petitioner." Although the statute specifically prohibits issuance of a domestic relationship PPO if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor, MCL 600.2950(27), it contains no other limitations as to the nature of the relationship between a petitioner and respondent living in the same household.

Note: The Court of Appeals has addressed the scope of similar language in the criminal domestic assault statute, MCL 750.81(2).* In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition charging a 16-year-old girl with assaulting her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts' decision, holding that:

> "When a statute is clear and unambiguous, judicial interpretation is precluded. . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault. . . regardless of the victim's relationship with the offender." 226 Mich App at 87.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaultive behavior between college roommates who were not romantically

*The domestic assault statute applies to a person who assaults "a resident or former resident of his or her household." This statute is discussed in Section 3.2.

involved. The dissenting judge on the *Lovell* panel would have required residence in the household plus a romantic involvement to trigger coverage under MCL 750.81(2).

2. Mutual Orders Prohibited

*See also Section 7.4(E) on practical problems with mutual orders.

The court may not issue mutual personal protection orders. However, correlative separate orders are permitted if both parties properly petition the court, and the court makes separate findings that support an order against each party.* MCL 600.2950(8) and MCR 3.706(B). The court has no authority under the Michigan PPO statutes to accept the parties' stipulation to a mutual protection order.

Note: The federal statute requiring that full faith and credit be given to civil protection orders has limited application to mutual protection orders. See 18 USC 2265(c), discussed in Section 8.13(B)(2).

B. Prohibited Conduct

Under MCL 600.2950(1)(a)–(j), a domestic relationship PPO may enjoin one or more of the following acts:

"(a) Entering onto premises.

"(b) Assaulting, attacking, beating, molesting, or wounding a named individual.

*The named individual need not be the petitioner.

"(c) Threatening to kill or physically injure a named individual.*

"(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

*See Sections 6.5(B)(4) and 6.7(B) regarding respondents who carry a firearm as a condition of employment. See Sections 7.5(B) and 9.7-9.8 on firearms disabilities resulting from entry of a PPO.

"(e) Purchasing or possessing a firearm.*

"(f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

"(g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.

"(h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.

> "(i) Engaging in conduct that is prohibited under . . . MCL 750.411h and 750.411i [i.e., stalking and aggravated stalking].
>
> "(j) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence."

In *Brandt v Brandt*, 250 Mich App 68, 69 (2002), the trial court entered a PPO prohibiting the respondent from contacting his children. The trial court later modified the PPO to allow the respondent parenting time with his children. The respondent argued on appeal that the trial court did not have the authority to modify a PPO to include parenting time. The respondent asserted that custody and parenting time determinations may only be made in a child custody proceeding after a court has examined the "best interests of the child" factors. The Court of Appeals upheld the trial court's order, indicating that a trial court may restrain individuals from doing certain acts under MCL 600.2950(1). The Court further stated that MCL 600.2950(1)(j), the "catchall" provision, clearly provides a trial court with the authority to restrain a respondent from any action that "interferes with personal liberty" or might cause "a reasonable apprehension of violence." 250 Mich App at 70. The Court stated:

> "This statutory provision allows the trial court to restrain respondent from 'any other specific act or conduct . . . that causes a reasonable apprehension of violence.' [MCL 600.2950(1)(j)]. There is no question that it would be reasonable for petitioner to fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. Additionally, this interpretation is entirely consistent with the remainder of the statute, which makes it clear that the Legislature recognized that access to the children may need to be restrained to protect the safety of a parent. See MCL 600.2950(1)(d), (f) and (h)." 250 Mich App at 70–71.

The respondent also argued that there was no statutory basis to restrain his contact with his children because the petitioner did not allege that the respondent was violent towards the children. The Court of Appeals disagreed, finding that the petitioner did not need to allege that the respondent was physically violent towards the children. The petitioner's allegations that the respondent was physically violent toward her while in the children's presence and was becoming increasingly more violent provided a sufficient basis for the trial court to enter an order that included prohibiting contact with the children. 250 Mich App at 71.

Under MCL 600.2950(5), the court may *not* restrain the respondent from entering onto premises if *all* of the following apply:

> "(a) The individual to be restrained or enjoined is not the spouse of the moving party.

> "(b) The individual to be restrained or enjoined or the parent, guardian, or custodian of the minor to be restrained or enjoined has a property interest in the premises.
>
> "(c) The moving party or the parent, guardian, or custodian of a minor petitioner has no property interest in the premises."

A PPO restraining the respondent from entering onto premises is likely to affect significant parental and property rights. If the situation does not involve domestic abuse or stalking as described in the PPO statutes, a PPO is inappropriate to address domestic relations disputes regarding custody, parenting time, support, or property division.*

*For discussion of constitutional concerns with PPOs, see Section 7.5. The relationship between PPO and domestic relations actions is addressed in Sections 7.7, 10.7, and 12.5(B).

C. Standard for Issuing a Domestic Relationship PPO

The burden of proof that a domestic relationship PPO should issue is on the petitioner because the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO. *Kampf v Kampf*, 237 Mich App 377, 386 (1999).

MCL 600.2950(4) articulates the standard for issuing a domestic relationship PPO as follows:

> "The court *shall* issue a personal protection order under this section if the court determines that there is *reasonable cause* to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in [MCL 600.2950(1)].* In determining whether reasonable cause exists, the court shall consider all of the following:
>
> > "(a) Testimony, documents, or other evidence offered in support of the request for a personal protection order.
> >
> > "(b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in [MCL 600.2950(1)]." [Emphasis added.]

*These acts are listed in Section 6.3(B).

In a criminal case, "reasonable cause" is shown by facts leading a fair-minded person of average intelligence and judgment to believe that an incident has occurred or will occur. See *People v Richardson,* 204 Mich App 71, 79 (1994), construing the term "reasonable cause" in the warrantless arrest statute, MCL 764.15(1)(c). In a case involving a warrantless arrest for violation of a PPO, the Court of Appeals noted that "reasonable cause" to make an arrest means "having enough information to lead an ordinarily careful person to believe that the defendant committed a crime. CJI2d 13.5(4)." *People v Freeman,* 240 Mich App 235 (2000).

Under MCL 600.2950(6), the court may not refuse to issue a PPO solely due to the absence of:

- A police report;*
- A medical report;
- An administrative agency's finding or report; or,
- Physical signs of abuse or violence.

*See Section 4.2 on police reports.

MCL 600.2950(12) sets forth the following standard for cases in which the petition requests an ex parte PPO:

> "An ex parte personal protection order shall be issued and effective without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued."*

*See also MCR 3.703(G), which contains similar language. Ex parte proceedings are further discussed in Sections 6.5(C), 7.3, and 7.5.

The mandatory language in the above provision differs from the corresponding standard for issuing an ex parte PPO under the non-domestic stalking PPO statute. See MCL 600.2950a(9), cited in Section 6.4(D), which provides that an ex parte stalking PPO "shall *not* be issued . . . *unless* it clearly appears from specific facts . . . that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued."

The Michigan Court of Appeals has held that an ex parte personal protection order issued under MCL 600.2950(12) does not violate due process. *Kampf v Kampf, supra*, 237 Mich App at 383-385. For further discussion, see Section 7.5.

6.4 Non-domestic Stalking Personal Protection Orders Under MCL 600.2950a

The Legislature has created two types of personal protection orders, distinguished by the categories of persons who may be restrained:

- "Non-domestic stalking PPOs" under MCL 600.2950a are available to enjoin stalking behavior by any person, regardless of that person's relationship with the petitioner.
- "Domestic relationship PPOs" under MCL 600.2950 are available to enjoin behavior (including stalking) that interferes with the

petitioner's personal liberty, or that causes a reasonable apprehension of violence if the respondent is involved in certain domestic relationships with the petitioner as defined by the statute.

This section addresses the substantive prerequisites for issuing non-domestic stalking PPOs. The substantive prerequisites for issuing domestic relationship PPOs are discussed in Section 6.3. Procedures for issuing both types of PPOs are addressed in Section 6.5.

A. Persons Who May Be Restrained

MCL 600.2950a authorizes the family division of circuit court to issue a PPO restraining stalking as defined in MCL 750.411h, or aggravated stalking as defined in MCL 750.411i. This relief is available without the need to establish a prior relationship between the petitioner and the respondent. A non-domestic stalking PPO is thus available to restrain *anyone* ten years of age or older who is stalking, including a stranger to the petitioner.

> **Note:** Since non-domestic stalking PPOs are distinguished from domestic relationship PPOs by the *relationship* between the parties, the Advisory Committee for this chapter of the benchbook recommends that the domestic relationship PPO be used if the parties are involved in one of the four types of relationships described in MCL 600.2950(1), even if the abusive behavior constitutes stalking. Note that the domestic relationship PPO statute specifically authorizes the court to restrain stalking. MCL 600.2950(1)(i).

*See also Section 7.4(E) on practical problems with mutual orders.

The court may not issue mutual personal protection orders. However, correlative separate orders are permitted if both parties properly petition the court, and the court makes separate findings that support an order against each party.* MCL 600.2950a(5) and MCR 3.706(B). The court has no authority under the Michigan PPO statutes to accept the parties' stipulation to a mutual protection order.

> **Note:** The federal statute requiring that full faith and credit be given to civil protection orders has limited application to mutual protection orders. See 18 USC 2265(c), discussed in Section 8.13(B)(2).

A non-domestic stalking PPO may not be issued if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950a(25)(a)–(b). If there is no such parent/child relationship, however, a person under age 18 may be a party to a PPO action. See Section 6.5(A) for more information. A non-domestic stalking PPO may not be issued against a respondent under the age of ten. MCL 600.2950a(25)(c).

B. Petitioner May Not Be a Prisoner

A court must not enter a non-domestic stalking PPO if the petitioner is a prisoner. MCL 600.2950a(28). A "prisoner" is a "person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of federal, state, or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program." MCL 600.2950a(29)(d).

If a PPO is issued in violation of the foregoing prohibition, the court must rescind the PPO upon notification and verification that the petitioner is a prisoner. MCL 600.2950a(28).

C. Prohibited Conduct — Stalking and Aggravated Stalking

MCL 600.2950a permits the circuit court to restrain **stalking** and **aggravated stalking** as defined in the criminal stalking statutes.*

*The PPO statutes do not mention electronic stalking, discussed in Section 3.10.

"**Stalking**" is a misdemeanor under MCL 750.411h. Subsection (1)(d) of this statute defines "stalking" as:

- "[A] willful course of conduct involving repeated or continuing harassment of another individual";
- "[T]hat would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and,
- "[T]hat actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

  Note: In a criminal prosecution for stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4).

The following definitions further explain this offense:

- A "course of conduct" means "a pattern of conduct composed of a series of 2 or more separate, non-continuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a).
- "Harassment" means conduct including, but not limited to, "repeated or continuing unconsented contact, that would cause a reasonable individual 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." MCL 750.411h(1)(c).

- Under MCL 750.411h(1)(e), "unconsented contact" means "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Unconsented contact includes, but is not limited to:
  - Following or appearing within the victim's sight.
  - Approaching or confronting the victim in a public place or on private property.
  - Appearing at the victim's workplace or residence.
  - Entering onto or remaining on property owned, leased, or occupied by the victim.
  - Contacting the victim by phone, mail, or electronic communications.
  - Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.
- "Emotional distress" means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).

In *Poboursky v Gee*, 249 Mich App 44 (2001), the Court of Appeals found a single unwanted contact that included a threat and an assault did not amount to stalking and therefore the non-domestic stalking PPO should not have been entered. The petitioner obtained a PPO on the ground that the respondent had attacked him. The attack consisted of the respondent hurling the petitioner over a bench and into a wall, where the respondent proceeded to choke and threaten to kill the petitioner. 249 Mich App at 45. The respondent moved to terminate the order, arguing that the petition was insufficient to justify entry of a PPO because it alleged a single unwanted contact that did not constitute stalking. The trial court denied the motion to terminate the order. The Court of Appeals reversed the trial court's denial of the motion. 249 Mich App at 48. The Court of Appeals turned to the definition of stalking contained in MCL 750.411h(2), which provides, in part, that stalking is a "willful course of conduct involving repeated or continuing harassment of another individual . . . ." The Court of Appeals noted that "course of conduct" is defined as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." The Court held that "two or more separate noncontinuous acts are acts distinct from one another that are not connected in time and space." 249 Mich App at 47. The Court concluded that although the petitioner alleged a series of acts evidencing a continuity of purpose, the acts were not separate and noncontinuous and therefore they did not meet the definition provided under the stalking statute. 249 Mich App at 48.

Under MCL 750.411i(2)(a)–(d), a person who engages in stalking is guilty of the felony of **aggravated stalking** if the violation involves any of the following circumstances:

- At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court — violations of other state or tribal protection orders may also constitute aggravated stalking.

- At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.

- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. Under MCL 750.411i(1)(b), a "credible threat" is a "a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual."

- The offender has been previously convicted of violating either of the criminal stalking statutes.

In addition to conduct prohibited under the criminal stalking and aggravated stalking statutes, a non-domestic stalking PPO may enjoin an individual from purchasing or possessing a firearm. MCL 600.2950a(23). Special procedural requirements apply where the restrained party is issued a license to carry a concealed weapon and is required to carry a firearm as a condition of his or her employment. See Sections 6.5(B)(4) and 6.7(B) for more details.*

*See also Sections 7.5(B) and 9.7-9.8 on firearms disabilities resulting from entry of a PPO.

A non-domestic stalking PPO is not an appropriate method for dealing with disputes between neighbors or coworkers in which the parties' behavior is not of the type described in the criminal stalking and aggravated stalking statutes. Community dispute resolution and district court peace bonds are better ways of addressing such disputes.*

*See Section 6.8 on peace bonds.

D. Standard for Issuing a Non-Domestic Stalking PPO

Relief under the non-domestic stalking PPO statute shall *not* be granted *unless*:

> "the petition alleges facts that constitute stalking as defined in . . . MCL 750.411h and 750.411i. Relief may be sought and granted under this section whether or not the individual to be restrained or

> enjoined has been charged or convicted under . . . MCL 750.411h and 750.411i, for the alleged violation." MCL 600.2950a(1).

MCL 600.2950a(9) sets forth the following standard for cases in which the petition requests an ex parte PPO:

> "An ex parte personal protection order shall not be issued and effective without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued."*

*See also MCR 3.703(G), which contains similar language. Ex parte proceedings are further discussed in Sections 6.5(C), 7.3, and 7.5.

This standard does not contain the mandatory language that appears in the corresponding provision of the domestic relationship PPO statute. See MCL 600.2950(12), cited in Section 6.3(C).

6.5 Procedures for Issuing PPOs

*On the substantive prerequisites for issuing PPOs, see Sections 6.3 (domestic relationship PPOs) and 6.4 (non-domestic stalking PPOs).

In cases where the parties are age 18 or older, identical procedural requirements apply to the issuance of both domestic relationship PPOs under MCL 600.2950 and non-domestic stalking PPOs under MCL 600.2950a.* In addition to the PPO statutes, subchapter 3.700 of the Michigan Court Rules governs issuance procedures for both types of PPO.

PPO actions with a petitioner under age 18 are generally subject to the same issuance procedures that apply in actions with an adult petitioner, although MCR 3.703(F)(1) requires a minor petitioner or a legally incapacitated individual to proceed through a next friend. See Section 6.5(A) for more information about minor parties to PPO actions.

If the respondent is under age 18, issuance of either type of PPO is subject to the Juvenile Code, MCL 712A.1 to 712A.32. MCL 600.2950(28) and MCL 600.2950a(26). Issuance proceedings in PPO actions under the Juvenile Code are governed by subchapter 3.700 of the Michigan Court Rules, so that they are substantially similar to actions involving an adult respondent. See MCR 3.701(A), 3.981. Subchapter 3.700 contains some special provisions for issuing PPOs with a minor respondent, however, particularly in the areas of venue and service of process.

Generally, the provisions of MCR 3.310 (regarding injunctions) and MCR 2.119 (regarding motions) do not apply to a PPO action. See MCR 3.701(A) and 3.702(2). However, the procedures contained in MCR 3.310 apply to PPO actions only to the extent that they do not conflict with special procedures prescribed by the statute or the rules governing a specific action. MCR 3.310(I). In *Pickering v Pickering*, 253 Mich App 694, 699 (2002), the Court

held that the PPO statutes and the court rules are silent on the issue of the burden of proof in a hearing on a motion to rescind or terminate a PPO and that the procedures in MCR 3.310(B)(5) do not conflict with the PPO statutes or court rules. Therefore, the procedures in MCR 3.310(B)(5) are controlling.

A. Minors and Legally Incapacitated Individuals as Parties to a PPO Action

A PPO may not be issued if the petitioner and respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950(27) and MCL 600.2950a(25)(a)–(b). If there is no such parent/child relationship, however, a person under age 18 may be a party in a PPO action. A child under the age of ten may not be a respondent in a PPO action. MCL 600.2950a(25)(c).

1. Minors as Petitioners

If the petitioner is a minor* or a legally incapacitated individual, MCR 3.703(F)(1) provides that he or she "shall proceed through a next friend." The petitioner must certify that the next friend is an adult who is not disqualified by statute. *Id.* MCR 3.703(F)(2) provides that:

> "Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment. However, the court *shall* appoint a next friend if the minor is less than 14 years of age. The next friend is not responsible for the costs of the action." [Emphasis added.]

*A "minor" is a person under age 18 for purposes of subchapter 3.700. MCR 3.702(6).

2. Minors as Respondents

MCL 712A.2(h) gives the family division of circuit court jurisdiction over minor respondents in PPO proceedings under both the domestic relationship and non-domestic stalking PPO statutes. If the court exercises its jurisdiction under this provision, jurisdiction continues until the order expires, even if the respondent reaches adulthood during that time. MCL 712A.2a(3). However, "action regarding the personal protection order after the respondent's eighteenth birthday shall not be subject to [the Juvenile Code]." *Id*. Instead, the court would apply adult PPO laws and procedures to actions regarding the PPO after the respondent's 18th birthday. MCR 3.708(A)(2).*

*Violations committed on or after the respondent's 17th birthday are subject to adult *penalties*, however. MCL 600.2950(11)(a)(i) and MCL 600.2950a(8)(a)(i). See Section 8.11(I) for more information.

A court may appoint a guardian ad litem for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). See MCL 712A.17c(10), which provides:

> "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under [the Juvenile Code]."

A guardian ad litem is an officer of the court, not a representative of a party. A guardian ad litem may be called as a witness in the proceeding. For a court rule governing guardians ad litem, see MCR 3.916(A), which provides that "[t]he court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it." This court rule applies to delinquency and child protective proceedings (MCR 3.901(B)(1)), and appears to apply to PPO enforcement proceedings (see e.g., MCR 3.985(B)(1)).

B. Filing Requirements; Concurrent Proceedings

*MCR 1.104.

A petition for a PPO is filed in family division of circuit court. See MCL 600.1021(1)(k) (adult respondent) and MCL 712A.2(h) (minor respondent). The petition must be filed as an independent action. MCR 3.702(2). A PPO action may not be commenced by filing a motion in an existing case or by joining a claim to an action. MCR 3.703(A). Because court rules supersede procedural rules set forth in statute, MCR 3.703(A) abrogates statutory provisions that would permit a PPO petition to be joined as a claim with another action or filed as a motion in a pending action.* Treatment of the PPO petition as a separate action protects the petitioner by ensuring that the PPO will not automatically terminate upon conclusion of the separate matter in which it would otherwise have been filed or joined under the statutes.

1. Venue

In cases with a respondent age 18 or older, venue to issue a PPO lies in any county in Michigan, regardless of the parties' residency. MCR 3.703(E)(1). This broad venue provision protects petitioners who have fled from their places of residence to escape violence.

In cases where the respondent is under age 18, venue is proper in the county of residence of either the petitioner or respondent. If the respondent does not live in this state, venue for the initial action is proper in the petitioner's county of residence. MCL 712A.2(h) and MCR 3.703(E)(2).

> **Note:** A Michigan court has personal jurisdiction over Native Americans who initiate actions under Michigan's PPO statutes. Native Americans are citizens of the United States and of the states and counties where they reside. US Const, Am XIV; 8 USC 1401(b). To ensure the validity of orders issued in PPO actions brought by Native Americans, a Michigan court should also consider whether it has personal jurisdiction over the respondent and subject matter jurisdiction to issue the relief requested. See Section 8.13(A)(1) for more discussion of Michigan courts' jurisdictional limitations in cases involving Native American persons and property.

2. Filing Fee

There is no fee for filing a PPO petition, and no summons is issued. MCL 600.2529(1)(a) and MCR 3.703(A).

Note: Under the federal Violence Against Women Act, 42 USC 3796gg-3796gg-5, Michigan receives financial assistance for developing and strengthening effective law enforcement and prosecution strategies and victim services in cases involving violent crimes against women. To be eligible to receive federal grants under this program, a state must certify that its "*laws, policies, and practices do not require*, in connection with the prosecution of any misdemeanor or felony domestic violence offense, *that the victim bear* the costs associated with the filing of criminal charges against the domestic violence offender, or *the costs associated with the issuance or service of a* warrant, *protection order*, and witness subpoena (arising from the incident that is the subject of the arrest or criminal prosecution)." 28 CFR 90.15(a)(1) [emphasis added].

3. Distributing and Completing Forms

Pursuant to MCL 600.2950b and MCR 3.701(B), the State Court Administrative Office has approved standardized PPO forms. These forms are intended for use by parties who wish to proceed without an attorney. Regarding distribution of the forms, MCL 600.2950b(4) provides as follows:

> "The court shall provide a form prepared under this section without charge. Upon request, the court may provide assistance, but not legal assistance,* to an individual in completing a form prepared under this section and the personal protection order form if the court issues such an order, and may instruct the individual regarding the requirements for proper service of the order."

*For information on providing assistance, see *Legal Advice v Access to the Courts, Do YOU Know the Difference?* (MJI, 1997).

MCR 3.701(B) similarly provides that PPO forms approved by the State Court Administrative Office "shall be made available for public distribution by the clerk of the circuit court."

Courts are authorized by statute to provide domestic violence victim advocates to assist petitioners in obtaining a PPO. A court may use the services of a public or private agency or organization that has a record of service to victims of domestic violence to provide the assistance. MCL 600.2950c(1). For more information about this type of assistance, see Section 7.2(B).

4. Contents of the Petition

MCR 3.703(B) and (D) address the contents of the petition. Under MCR 3.703(B), the petition must:

> "(1) be in writing;
>
> "(2) state with particularity the facts on which it is based;
>
> "(3) state the relief sought and the conduct to be restrained;

> "(4) state whether an ex parte order is being sought;
>
> "(5) state whether a personal protection order action involving the same parties has been commenced in another jurisdiction; and
>
> "(6) be signed by the party or attorney as provided in MCR 2.114. The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address."*

*See also MCL 600.2950(3), MCL 600.2950a(3), and Section 7.4(C) on protecting the petitioner's address.

Under MCR 3.703(D)(1), the petitioner must notify the court about other pending actions, orders, or judgments affecting the parties to a personal protection action. The court rule provides:

> "The petition must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known."

Where the respondent is under age 18, MCR 3.703(C) additionally requires that the petition must list the respondent's name, address and either age or date of birth. Moreover, the petition must list the names and addresses of the respondent's parent or parents, guardian, or custodian, if this is know or can be easily ascertained.

Petitioners are required to notify the court if they know that the respondent has been issued a license to carry a concealed weapon and is required to carry a weapon as:

- A condition of his or her employment;
- A police officer certified under MCL 28.601 to 28.616;
- A sheriff;
- A deputy sheriff or a member of the Michigan Department of State Police;
- A local corrections officer;
- A Department of Corrections employee; or
- A federal law enforcement officer who carries a firearm during the normal course of his or her employment. MCL 600.2950(2) and MCL 600.2950a(2).

This notice requirement does not apply to petitioners who do not know the respondent's occupation. MCL 600.2950(2) and MCL 600.2950a(2).

A "federal law enforcement officer" means "an officer or agent employed by a law enforcement agency of the United States government whose primary

responsibility is the enforcement of laws of the United States." MCL 600.2950(30)(b) and MCL 600.2950a(29)(a).

Persons who knowingly and intentionally make false statements to the court in support of a PPO petition may be in contempt of court. MCL 600.2950(24) and MCL 600.2950a(21).

> **Note:** Some courts consider a petitioner's resumption of contact with the respondent to be an act in contempt of court. The PPO statutes and court rules do not address this circumstance. See Section 1.6 on the dynamics of domestic violence that might be present when an abused individual returns to an abuser. Suggestions for dealing with a petitioner who resumes contact with a respondent or otherwise abandons a PPO proceeding are found at Section 7.6.

5. Other Proceedings Prior to or Concurrent with PPO

MCR 3.703(D) and MCR 3.706(C) contain procedural requirements for situations where there are other pending actions or prior orders or judgments affecting the parties to the PPO petition:

- If the PPO petition is filed in the same court where the pending action was filed or the prior order or judgment was entered, the PPO petition shall be assigned to the same judge. MCR 3.703(D)(1)(a).

- If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court in which the PPO petition was filed should contact the other court, if practicable, to determine any relevant information. MCR 3.703(D)(1)(b).

- If a prior court action resulted in an order providing for continuing jurisdiction of a minor, and the petition requests relief with regard to the minor, the court considering the PPO petition must comply with the notice requirements of MCR 3.205. MCR 3.703(D)(2).

- If there is an existing custody or parenting time order between the parties, "[t]he court issuing a personal protection order must contact the court having jurisdiction over the parenting time or custody matter as provided in MCR 3.205, and where practicable, the judge should consult with that court, as contemplated in MCR 3.205(C)(2), regarding the impact upon custody and parenting time rights before issuing the personal protection order." MCR 3.706(C)(1).

- MCR 3.706(C)(2)-(3) provide as follows regarding the relationship between a PPO and an existing custody or parenting time order:

  > "(2) Conditions Modifying Custody and Parenting Time Provisions. If the respondent's custody or parenting time rights will be adversely affected by the personal protection order, the issuing court shall determine whether conditions

should be specified in the order which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions.

"(3) Effect of Personal Protection Order. A personal protection order takes precedence over any existing custody or parenting time order until the personal protection order has expired, or the court having jurisdiction over the custody or parenting time order modifies the custody or parenting time order to accommodate the conditions of the personal protection order.

"(a) If the respondent or petitioner wants the existing custody or parenting time order modified, the respondent or petitioner must file a motion with the court having jurisdiction of the custody or parenting time order and request a hearing. The hearing must be held within 21 days after the motion is filed.

"(b) Proceedings to modify custody and parenting time orders are subject to subchapter 3.200."

For more discussion of the relationship between a PPO and an existing custody or parenting time order, see Sections 7.7 and 12.5(B).

6. Assignment to Judge

If a PPO petition is filed in the same court as a pending action or where a prior order or judgment has been entered affecting the parties, the PPO petition shall be assigned to the same judge. MCR 3.703(D)(1)(a).

If the respondent is under age 18, the court may *not* assign a referee to preside at a hearing on the issuance of a PPO. MCR 3.912(A)(4).* A judge must preside at proceedings to issue a minor PPO. *Id*.

*Nonattorney referees may conduct preliminary hearings for enforcement of a PPO. Referees licensed to practice law may preside at a hearing to enforce a minor PPO. MCR 3.913(A)(2)(d). See Section 8.11(B).

C. Ex Parte Proceedings

The court must rule on a request for an ex parte PPO within 24 hours of the filing of the petition. MCR 3.705(A)(1).

Note: The standard for issuing an ex parte PPO differs depending on whether the PPO is a domestic relationship PPO or a non-domestic stalking PPO. See Sections 6.3(C) and 6.4(D) for comparison of the two standards.

If the court issues an ex parte PPO, MCR 3.705(A)(2) requires that "[a] permanent record or memorandum must be made of any nonwritten evidence,

argument or other representations made in support of issuance of an ex parte order." The court has some flexibility in making this record or memorandum. Some judges require the petitioner to appear on the record before the court, while others consider only the allegations in the petition. For more discussion of making a record in ex parte proceedings, see Section 7.3.

"In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order." *Id*. MCL 600.2950a(4) requires the court to immediately state in writing and, if a hearing is held, on the record the specific reasons for issuing a non-domestic stalking PPO. MCL 600.2950a(4) provides:

> "*If a court refuses to grant a personal protection order*, the court shall immediately state in writing the specific reasons for *issuing* or refusing to issue a personal protection order. If a hearing is held, the court shall also immediately state on the record the specific reasons for issuing or refusing to issue a personal protection order." [Emphasis added.]
>
> **Note:** MCL 600.2950a(4) begins with the qualifying phrase, "If a court refuses to grant a personal protection order," and then requires a court to state the reasons for *issuing* or denying a personal protection order. Although the statute has contradictory language, the recommended procedure when issuing or denying a non-domestic stalking PPO is to state in writing and, if a hearing is held, on the record the specific reasons for issuing or denying the PPO. The requirement to state the reasons for issuing a PPO does not apply to domestic relationship PPOs. See MCL 600.2950(7).

If the court denies the petition for ex parte relief, it must:

- Immediately state specific reasons in writing. If a hearing is held, the court shall also immediately state on the record the specific reasons it refused to issue a PPO. MCL 600.2950(7), MCL 600.2950a(4), and MCR 3.705(A)(5).

- Advise the petitioner of the right to request a hearing. The court is excused from giving this advice if it "determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing." MCR 3.705(A)(5).

- Schedule a hearing as soon as possible if the petitioner requests one. MCR 3.705(B)(1)(b). If the petitioner does not request a hearing within 21 days of entry of the court's order denying the request for an ex parte PPO, the court's order is final. MCR 3.705(A)(5). The court does not have to schedule a hearing if it "determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing." MCR 3.705(B)(1).

The Michigan Court of Appeals has held that an ex parte personal protection order issued under MCL 600.2950(12) does not violate due process. *Kampf v Kampf*, 237 Mich App 377, 383-385 (1999). For further discussion, see Section 7.5.

D. Hearing Procedures

1. Scheduling a Hearing

Under MCR 3.705(B)(1), the court must schedule a hearing as soon as possible if:

- The petition does not request an ex parte order; or
- The court denies the petitioner's request for an ex parte order and the petitioner requests a hearing.

In both of the above circumstances, the court is excused from scheduling a hearing if it "determines after interviewing the petitioner that the claims are sufficiently without merit that the action should be dismissed without a hearing." MCR 3.705(B)(1).

If the respondent is under age 18, the court may *not* assign a referee to preside at a hearing on the issuance of a PPO. MCR 3.912(A)(4).* A judge must preside at proceedings to issue a minor PPO. *Id.*

*Nonattorney referees may conduct preliminary hearings for enforcement of a PPO. Referees licensed to practice law may preside at a hearing to enforce a minor PPO. MCR 3.913(A)(2)(d). See Section 8.11(B).

2. Service of Notice of Hearing

After the court schedules a hearing, the petitioner must arrange for service of the petition and notice of the hearing on the respondent at least one day before the hearing. MCR 3.705(B)(2). The petitioner may not make service; service must be made by a legally competent adult who is not a party to the action. MCR 2.103(A). Service on the respondent shall be made pursuant to MCR 2.105(A), which provides for service on a resident or nonresident by:

- Delivery to the respondent personally; or
- Delivery by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the respondent acknowledges receipt of the mail. A copy of the return receipt signed by the respondent must be attached to the proof showing service.

If the respondent is under age 18, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, service must also be similarly made on one of these individuals. MCR 3.705(B)(2).

3. Making a Record

The court must hold any hearing on a PPO petition on the record. MCR 3.705(B)(3). At the conclusion of a hearing on a PPO petition, the court shall immediately state the reasons for granting or denying a personal protection order on the record and enter an appropriate order. In addition, the court shall immediately state its reasons for denying a personal protection order in writing. MCL 600.2950(7), MCL 600.2950a(4), and MCR 3.705(B)(6). If the petition sought a non-domestic relations stalking PPO, the court must immediately state in writing the specific reasons for issuing the PPO. MCL 600.2950a(4) and MCR 3.705(B)(6).

> **Note**: The court should indicate the grounds for issuing the PPO, regardless of the type of PPO, in the order itself in order to help facilitate the enforcement of federal firearms restrictions. See Section 6.5(E) for information on the contents of PPOs and Section 7.5(B) for information on firearms restrictions.

4. Effect of a Party's Failure to Attend a Scheduled Hearing

If the **petitioner** fails to attend a hearing scheduled on the PPO petition, the court may *either* adjourn and reschedule the hearing *or* dismiss the petition. MCR 3.705(B)(4).

> **Note:** Domestic abusers may use coercive measures to impede their intimate partners' participation in court proceedings. See Sections 1.6(C) and 7.6(B) for more discussion of factors that may cause petitioners to abandon PPO actions.

If the **respondent** fails to appear at a hearing on a PPO petition and the court determines that the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the PPO may be entered without further notice to the respondent if the court determines that the petitioner is entitled to relief. MCR 3.705(B)(5).

E. Required Provisions in a PPO

If the court grants a PPO petition restraining a respondent age 18 or older, MCL 600.2950(11) and MCL 600.2950a(8) require that the order contain the following information, in a single form "to the extent practicable":*

*MCR 3.706(A) provides similar requirements.

- A statement that the PPO has been entered to enjoin or restrain conduct listed in the order. MCL 600.2950(11)(a) and MCL 600.2950a(8)(a).
- A statement regarding the penalties for violation of a PPO. *Id.*
  - If the respondent is age 17 or older, the PPO must state that a violation will subject the respondent to immediate arrest and to the civil and criminal contempt powers of the court, and that if the

respondent is found guilty of criminal contempt, he or she shall be imprisoned for not more than 93 days and may be fined not more than $500.00. MCL 600.2950(11)(a)(*i*), MCL 600.2950a(8)(a)(*i*), and MCR 3.706(A)(3)(a).

– If the respondent is less than 17 years of age, the PPO must state that a violation will subject the respondent to immediate apprehension or being taken into custody and to the dispositional alternatives listed in the Juvenile Code, MCL 712A.18.* MCL 600.2950(11)(a)(*ii*), MCL 600.2950a(8)(a)(*ii*), and MCR 3.706(A)(3)(b).

*See Section 8.11(I) for more information on dispositional alternatives under the Juvenile Code.

♦ A statement that the PPO is "effective and immediately enforceable anywhere in this state when signed by a judge, and that, upon service, a personal protection order also may be enforced by another state, an Indian tribe, or a territory of the United States." MCL 600.2950(11)(b) and MCL 600.2950a(8)(b). See also MCR 3.706(A)(2).

♦ A statement listing the type or types of conduct enjoined. MCL 600.2950(11)(c) and MCL 600.2950a(8)(c). See also MCR 3.706(A)(1). In listing the conduct enjoined, the following principles are helpful:

– The prohibited acts listed in MCL 600.2950(1) and in the criminal stalking statutes are not automatically incorporated into every PPO; a PPO restrains the respondent only from doing the particular acts specified in the order.*

*Sections 6.3(B) and 6.4(C) describe the conduct that may be restrained in a PPO. Section 7.4 contains suggestions for promoting safety in PPO provisions.

– **The most effective PPO provisions fully specify the precise conditions of relief granted to the petitioner.** Highly specific orders are easier to enforce because they give clear notice of the behavior that is prohibited, thus discouraging manipulative behavior by the parties. The order should be precise about times, locations, people, and duration. The court should avoid vague and unenforceable terms such as "reasonable."

♦ An expiration date stated clearly on the face of the order. MCL 600.2950(11)(d), MCL 600.2950a(8)(d), and MCR 3.706(A)(4). The following rules apply with regard to the duration of a PPO:

– The statutes place no maximum limit on the duration of a PPO. **Ex parte orders must be valid for at least 182 days.** The statutes have no minimum time provision for the duration of orders entered after a hearing with notice to the respondent. MCL 600.2950(13) and MCL 600.2950a(10).

– If the respondent is under age 18, the issuing court's jurisdiction continues over the respondent until the PPO expires, even if the expiration date is after the respondent's 18th birthday. MCL 712A.2a(3). Violations committed on or after the respondent's 17th birthday are subject to adult *penalties*, however. MCL 600.2950(11)(a)(*i*) and MCL 600.2950a(8)(a)(*i*). If a violation

occurs after the respondent's 18th birthday, adult enforcement *procedures* apply, as well as adult penalties. MCL 712A.2a(3) and MCR 3.708(A)(2).

  - A specific expiration date is needed for LEIN entry.* Because orders of "permanent" or "99 years" duration are difficult for police to enforce, the order must state the specific month, day, and year of expiration.

*See Section 6.5(F) on LEIN entry.

- A statement that the PPO is "enforceable anywhere in Michigan by any law enforcement agency." MCL 600.2950(11)(e), MCL 600.2950a(8)(e), and MCR 3.706(A)(5).

- A statement that "[i]f the respondent violates the personal protection order in a jurisdiction other than this state, the respondent is subject to the enforcement procedures and penalties of the state, Indian tribe, or territory of the United States under whose jurisdiction the violation occurred." MCL 600.2950(11)(a)(*iii*), MCL 600.2950a(8)(a)(*iii*), and MCR 3.706(A)(5).

- The name of the law enforcement agency that the court has designated for entering the PPO into the LEIN network. MCL 600.2950(11)(f), MCL 600.2950a(8)(f), and MCR 3.706(A)(6).

- If the PPO was issued ex parte, a statement that the restrained person may move to modify or terminate it, and may request a hearing within 14 days after service or actual notice of the order.* The PPO must state that motion forms and filing instructions for this purpose are available from the court clerk. MCL 600.2950(11)(g), MCL 600.2950a(8)(g), and MCR 3.706(A)(7).

*See Section 6.7 on motions to modify or terminate.

In order to comply with the Full Faith and Credit provisions of 18 USC 2265, a court should also include the following information in the personal protection order:

- A statement that the respondent had notice and an opportunity to be heard.

- Citations for the statutes upon which the order is based.

- The court's telephone number.

- A statement indicating that the order complies with the Full Faith and Credit provision of 18 USC 2265.

- A statement indicating that in addition to any state law or tribal sanction, a violation of the order may be subject to prosecution for such federal crimes as firearms possession, interstate travel to commit domestic violence, interstate stalking, and interstate violation of a PPO.

*See Section 7.5(B) and Chapter 9 for information on firearms restrictions.

Note: The court should also indicate the grounds for issuing the PPO to help facilitate enforcement of federal firearms restrictions.* See Section 6.5(D)(3).

F. Entry Into LEIN System

After issuance of a PPO, the clerk of the court has the following responsibilities to facilitate entry of the PPO and other related documents into the Law Enforcement Information Network (LEIN) system:

- Immediately upon issuance, and without requiring proof of service, the court clerk must file a true copy of the PPO with the court-designated law enforcement agency that will enter it into the LEIN network. MCL 600.2950(15)(a) and MCL 600.2950a(12)(a).

*Section 7.6(D) discusses the court's response to the possibility that the petitioner may alter the PPO.

- The court clerk must provide the petitioner with no less than two true copies of the PPO and inform the petitioner that he or she may take a copy to the designated law enforcement agency for entry into the LEIN network.* MCL 600.2950(15)(b), (16) and MCL 600.2950a(12)(b), (13). The fact that the petitioner may take a copy of the PPO to a law enforcement agency for LEIN entry does *not* relieve the court clerk of the responsibility for doing so.

- The court clerk must notify the designated law enforcement agency upon receipt of proof of service on the restrained person. MCL 600.2950(19)(a) and MCL 600.2950a(16)(a).

*See Section 6.7 on termination, extension, and modification of a PPO.

- The court clerk must notify the designated law enforcement agency if the court terminates, modifies, or extends the PPO.* MCL 600.2950(19)(b) and MCL 600.2950a(16)(b).

The PPO statutes do not specify any particular law enforcement agency that must be designated for purposes of LEIN entry. In choosing an agency, a court might consider the need for immediate enforcement of the PPO and ready access to information by police officers in the area where the petitioner is living. The Advisory Committee for this chapter of the benchbook suggests that courts communicate with local law enforcement agencies to determine the best agency for LEIN entry. Factors the court might consider in designating an agency include 24-hour accessibility of information, and the availability of a central dispatch.

The LEIN policy council recommends that the PPO contain the following information:

- Respondent's name.

- The specific month, day, and year of expiration. PPOs with specific date provisions are more readily enforced than are orders of "permanent" or "99 years" duration. If the court wishes its order to be effective for a long period of time, the Advisory Committee for this

chapter of the benchbook suggests that it list a specific date 99 years from the date of issuance.

- Physical description of the respondent, e.g., height, weight, race, sex, hair color, eye color. Although information regarding race and sex is required, most jurisdictions will accept approximate physical descriptions for LEIN entry.
- Date of birth or age of respondent. In most jurisdictions, an approximate age or date of birth will suffice for LEIN entry.
- Other identifying information, e.g., scars, tattoos, physical deformities, nicknames.
- The respondent's social security and driver's license numbers, if known. This information is helpful, but not required for LEIN entry.

Although the LEIN policy council discourages local agencies from requiring additional information for LEIN entry, some agencies may nonetheless do so. The Advisory Committee suggests that courts communicate with the agency it designates to determine whether any different or additional information is required.

> **Note:** In cases where the petitioner cannot provide the respondent's address, some courts request local law enforcement agencies to look up this information in the Law Enforcement Information Network (LEIN) system. Because disclosure of any LEIN information to any non-criminal justice agency is a misdemeanor (MCL 28.214(3)) courts following this practice should take care not to include the respondent's address in the petitioner's copy of the PPO. Address information obtained from the LEIN system should only be included on the copy given to a law enforcement agency for purposes of LEIN entry or service of the PPO. The document containing the respondent's address should then be designated non-public information and treated as such for purposes of public access.

G. Other Notices by the Clerk of the Court

In addition to notifying the designated law enforcement agency for purposes of LEIN entry,* the clerk of the court that issues a PPO is required to make the following notices "immediately upon issuance and without requiring a proof of service on the individual restrained or enjoined," pursuant to MCL 600.2950(15)(c)-(f) and MCL 600.2950a(12)(c)-(f):

*See Section 6.5(F) on LEIN entry.

> "(c) If respondent is identified in the pleadings as a law enforcement officer, notify the officer's employing law enforcement agency, if known, about the existence of the personal protection order.

"(d) If the personal protection order prohibits respondent from purchasing or possessing a firearm, notify the concealed weapon licensing board in respondent's county of residence about the existence and contents of the personal protection order.

"(e) If the respondent is identified in the pleadings as a department of corrections employee, notify the state department of corrections about the existence of the personal protection order.

"(f) If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify the friend of the court for the county in which the information is located about the existence of the personal protection order."

H. Service of the Petition and Order

*The clerk must notify the LEIN agency upon receipt of the proof of service. See Section 6.5(F).

The petitioner is responsible to arrange for service of the PPO (and the underlying petition, if the PPO was issued ex parte) on the respondent. Service may be made by any legally competent adult who is not a party to the action. MCR 2.103(A). The petitioner is also responsible for filing the proof of service with the clerk of the court issuing the PPO. MCL 600.2950(18), MCL 600.2950a(15), MCR 3.705(A)(4), and MCR 3.706(D).*

Note: A PPO is effective and enforceable upon a judge's signature without written or oral notice to the respondent, so that failure to make service does not affect the PPO's validity or effectiveness. MCR 3.705(A)(4) and 3.706(D). Nonetheless, the petitioner should have the respondent served with the PPO if at all possible because service facilitates its enforcement both in Michigan and in other states. See Section 8.5 regarding the impact of service on enforcement in Michigan. Section 8.13(A)(2) addresses notice requirements for interstate enforcement of a PPO.

Pursuant to MCR 3.705(A)(4) and 3.706(D), service of the PPO may be made as provided in MCR 2.105(A):

- By delivery to the respondent personally; or
- By registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the respondent acknowledges receipt of the mail. A copy of the return receipt signed by the respondent must be attached to the proof showing service.

If the respondent is under age 18, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, service must also be similarly made on one of these individuals. MCR 3.706(D).

On an appropriate showing, the court may allow service of the petition and order in another manner as provided in MCR 2.105(I). MCR 3.705(A)(4) and 3.706(D). MCR 2.105(I) provides:

> "(1) On a showing that service of process cannot reasonably be made as provided . . . the court may by order permit service of process to be made in any other manner reasonably calculated to give the [respondent] actual notice of the proceedings and an opportunity to be heard.
>
> "(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the [respondent's] address or last known address, or that no address of the [respondent] is known. If the name or present address of the [respondent] is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.
>
> "(3) Service of process may not be made under this subrule before entry of the court's order permitting it."

If the respondent has not been served, a law enforcement officer* or clerk of the court may make service as follows:

*State Police officers may serve a PPO. MCL 28.6(5).

> "If the individual restrained or enjoined has not been served, a law enforcement officer or clerk of the court who knows that a personal protection order exists may, at any time, serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined about the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. . . ." MCL 600.2950(18) and MCL 600.2950a(15).

If the respondent has not been served and a law enforcement officer is called to the scene of an alleged violation of the PPO, MCL 600.2950(22) and MCL 600.2950a(19) provide that the officer may give the respondent oral notice of the PPO.* If oral notice is made in this manner, the law enforcement officer must file proof of the notification with the court. MCR 3.706(E). To ensure LEIN entry, the court clerk must then notify the designated law enforcement agency upon receipt of the proof of service. MCL 600.2950(19)(a) and MCL 600.2950a(16)(a).

*More information about this procedure is found in Section 8.5.

Fees for service of a PPO may violate provisions of the federal Violence Against Women Act, 42 USC 3796gg-3796gg-5, under which Michigan receives financial assistance for developing and strengthening effective law enforcement and prosecution strategies and victim services in cases involving violent crimes against women. To be eligible to receive federal grants under

this program, a state must certify that its "laws, policies, and practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence offense, *that the victim bear* the costs associated with the filing of criminal charges against the domestic violence offender, or *the costs associated with the issuance or service of a* warrant, *protection order*, and witness subpoena (arising from the incident that is the subject of the arrest or criminal prosecution.)" 28 CFR 90.15(a)(1).

I. Appeal From Issuance or Denial of a PPO

Regarding appeals from issuance or denial of a PPO, MCR 3.709 provides:

> "(A) Rules Applicable. Except as provided by this rule, appeals involving personal protection order matters must comply with subchapter 7.200. Appeals involving minor personal protection actions under the Juvenile Code must additionally comply with MCR 3.993.*
>
> "(B) From Entry of Personal Protection Order.
>
> > "(1) Either party has an appeal of right from
> >
> > > (a) an order granting or denying a personal protection order after a hearing under subrule 3.705(B)(6), or*
> > >
> > > (b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.
> >
> > "(2) Appeals of all other orders are by leave to appeal."

*"Minor personal protection action" refers to a PPO action in which the respondent is under age 18. MCR 3.702(6)-(7).

*See Section 6.5(D) for information on a hearing pursuant to MCR 3.705(B)(6).

MCR 3.993 provides in pertinent part:

> "(A) The following orders are appealable to the Court of Appeals by right:
>
> > "(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
> >
> > * * *
> >
> > "(3) any order required by law to be appealed to the Court of Appeals, and
> >
> > "(4) any final order.
>
> "(B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.

6.6 Dismissal of a PPO Action

Dismissals of PPO actions are governed by MCR 3.704 and 3.705(A)(5) and (B). These rules apply to:

- Voluntary and involuntary dismissals of PPO actions,
- Domestic relationship and non-domestic stalking petitions, regardless of the age of the petitioner, and
- Actions with adult respondents and respondents under age 18.*

*See MCR 3.981 on the applicability of subchapter 3.700 of the court rules to PPOs involving a respondent under age 18.

A. Involuntary Dismissal

An involuntary dismissal of a PPO action can *only* be initiated by the court under the following circumstances:

- The court has determined after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing. MCR 3.705(A)(5), (B)(1).
- The petitioner has failed to attend a hearing scheduled on the petition. In this situation, the court may *either* adjourn and reschedule the hearing *or* dismiss the petition. MCR 3.705(B)(4).

The court rules require judicial action for involuntary dismissal of a PPO action to permit assessment of coercion or danger to the petitioner; therefore, court clerks should not sign PPO dismissals without explicit court direction on a particular petition. Factors such as coercion, lack of information, or belief that the abuse will stop may cause a petitioner's failure to appear at a court proceeding. For more discussion of factors that cause petitioners to abandon PPO proceedings, see Sections 1.6(C) and 7.6(B).

The respondent is not permitted to move for dismissal of a PPO action prior to issuance of the order. MCR 3.704.

PPO actions are not subject to dismissal for no progress or failure to serve a respondent under MCR 2.502 or MCR 2.102(E).* Moreover, the court rules governing PPO actions make no provision for court clerks to sign dismissals of PPO petitions prior to issuance of the order.

*Note that failure to serve the PPO does not affect its validity or effectiveness. MCR 3.705(A)(4) and 3.706(D).

The Advisory Committee for this chapter of the benchbook suggests that the inapplicability of the no progress court rules should not prevent the court from administratively closing PPO cases for statistical purposes. When the court administratively closes a case, any PPO issued will remain in effect until its expiration date, and if modification is necessary, the case may be reopened on the merits. The Committee notes that:

- The case may be closed 21 days after a PPO petition is denied if no hearing is requested. MCR 3.705(A)(5).

- If a PPO petition is granted, the case may be closed 14 days after the date of service. See MCL 600.2950(13) and MCL 600.2950a(10), which give the respondent 14 days from the date of service or actual notice to file a motion to terminate or modify the PPO.

Because MCR 3.703(A) requires a PPO petition to be brought as an independent action, a PPO should not be dismissed upon conclusion of a related matter (e.g., a divorce) between the parties. By abrogating the provisions in MCL 600.2950(1) and MCL 600.2950a(1) that would permit a PPO petition to be joined as a claim with another action or filed as a motion in a pending action, MCR 3.703(A) prevents unintentional dismissal of the PPO upon conclusion of a matter in which it might otherwise have been filed or joined.

*See Section 6.5(I) for additional rules governing appeals in cases involving a respondent under age 18.

Appeals from involuntary dismissals are by leave granted. MCR 3.709(B) provides:*

> "(1) Either party has an appeal of right from
>
> > "(a) an order granting or denying a personal protection order after a hearing . . . or
> >
> > "(b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.
>
> "(2) *Appeals of all other orders are by leave to appeal*." [Emphasis added.]

B. Voluntary Dismissal

MCR 3.704 permits the petitioner to move for dismissal of a PPO action prior to the issuance of an order. There is no fee for filing this motion. *Id.* Because most PPO petitions request ex parte relief, and because courts must take action on such petitions within 24 hours after filing (MCR 3.705(A)(1)), cases involving voluntary dismissal of the petition will be relatively rare. If the petition is set for hearing, however, a petitioner may move the court to dismiss the petition before the hearing takes place. MCR 3.704 makes no provision for the respondent to move for dismissal of a PPO action prior to issuance of the order.

Because MCR 3.704 provides that a PPO action "may only be dismissed upon motion by the petitioner," the court should *not* permit:

- Dismissal without a court order upon filing of a notice of dismissal as described in MCR 2.504(A)(1)(a); or
- Stipulated dismissals without a court order as described in MCR 2.504(A)(1)(b).

The court rules require judicial action for dismissal of a PPO action to permit assessment of coercion or danger to the petitioner; therefore, court clerks should not sign PPO dismissals without explicit court direction on a particular petition. Factors such as coercion, lack of information, or belief that the abuse will stop may cause a petitioner to abandon a court proceeding. For more discussion these factors, see Sections 1.6(C) and 7.6(B).

6.7 Motion to Modify, Terminate, or Extend a PPO

Modification or termination of a PPO is governed by the PPO statutes and by MCR 3.707. These authorities apply to:

- Domestic relationship and non-domestic stalking petitions, regardless of the age of the petitioner, and
- Actions with adult parties and parties under age 18.* However, parties who are minors or legally incapacitated individuals must proceed through a next friend. MCR 3.707(C). MCR 3.703(F) governs proceedings through a next friend and is discussed in Section 6.5(A)(1).

*See MCR 3.981 on the applicability of subchapter 3.700 of the court rules to PPOs involving a respondent under age 18.

A. Time and Place to File Motion

The following timelines apply to motions to modify, terminate, or extend a PPO. There are no motion fees for filing any of these motions. MCR 3.707(D) and MCL 600.2529(1)(e).

1. Petitioner's Motion to Modify or Terminate

Under MCR 3.707(A)(1)(a), a petitioner may file a motion to modify or terminate a PPO and request a hearing at any time after the PPO is issued. Although an earlier version of MCR 3.707 required that a motion to modify or terminate a PPO had to be filed with the issuing court, the current version of MCR 3.707(A)(1)(a) does not specify where the motion must be filed.

2. Petitioner's Motion to Extend the PPO

The petitioner may file an ex parte motion to extend the effectiveness of a PPO, without a hearing, by requesting a new expiration date. This motion must be filed with the court that issued the PPO no later than three days prior to the order's expiration date. Failure to timely file this motion does not preclude the petitioner from commencing a new PPO action regarding the same respondent. MCR 3.707(B)(1).

The court must act on the petitioner's motion to extend the PPO within three days after it is filed. *Id*.

3. Respondent's Motion to Modify or Terminate the PPO

*See also MCL 600.2950(13) and MCL 600.2950a(10).

Under MCR 3.707(A)(1)(b), the respondent may file a motion to modify or terminate a PPO and request a hearing within 14 days after receipt of service or actual notice of the PPO. This 14-day period may be extended upon good cause shown.* Unlike an earlier version of MCR 3.707 that required that a motion to modify or terminate a PPO be filed with the issuing court, the current version of MCR 3.707(A)(1)(a) does not specify where the respondent's motion must be filed.

> **Note:** As a practical matter, the court may have difficulty determining when the PPO was served, which in turn causes difficulty in determining whether the respondent's motion for modification or termination was timely filed. Given the practical difficulties of determining when service occurs, and the "good cause" exception to the statutory 14-day limit, court clerks should be instructed to accept respondents' motions for filing even if they are submitted more than 14 days after service. This practice will allow a judicial determination of whether "good cause" exists to extend the 14-day filing period.

B. Time to Hold Hearings

Under MCR 3.707(A)(2), the court must schedule and hold a hearing on a motion to terminate or modify a PPO within 14 days of the filing of the motion. See also MCL 600.2950(14) and MCL 600.2950a(11). However, the court must schedule the hearing within five days after the filing of the motion in cases where the PPO prohibits the respondent from purchasing or possessing a firearm, *and* the respondent is licensed to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment. *Id.* Occupations included in these provisions are:

- A police officer certified under MCL 28.601-28.616;
- A sheriff;
- A deputy sheriff or a member of the Michigan Department of State Police;
- A local corrections officer;
- A Department of Corrections employee; or
- A federal law enforcement officer who carries a firearm during the normal course of his or her employment.

MCL 600.2950a(2) and (11) and MCL 600.2950(2) and (14).

A "federal law enforcement officer" means "an officer or agent employed by a law enforcement agency of the United States government whose primary

responsibility is the enforcement of laws of the United States." MCL 600.2950(30)(b) and MCL 600.2950a(29)(a).

If the respondent is under age 18, the court may *not* assign a referee to preside at a hearing on the modification or termination of a PPO. MCR 3.912(A)(4).* A judge must preside at proceedings to modify or terminate a minor PPO. *Id.*

*Nonattorney referees may conduct preliminary hearings for enforcement of a PPO. Referees licensed to practice law may preside at a hearing to enforce a minor PPO. MCR 3.913(A)(2)(d). See Section 8.11(B).

C. Burden of Proof

In *Pickering v Pickering*, 253 Mich App 694, 699 (2002), the Court of Appeals held that the burden of justifying the continuation of an ex parte PPO is on the petitioner. Because the PPO statute and court rules governing motions to rescind or terminate PPOs are silent as to the burden of proof, MCR 3.310(B)(5) is controlling.

MCR 3.310(B)(5) provides, in part:

> ". . . At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause."

In *Pickering*, the Court of Appeals noted that the burden of proof has two aspects: the "burden of persuasion" and the "burden of going forward with evidence." 253 Mich App at 698-699. In the context of a PPO granted ex parte, the "burden of persuasion" is the burden of justifying the continuation of the PPO. The "burden of persuasion" requires the petitioner to demonstrate that the PPO should continue because it is "just, right, or reasonable." 253 Mich App at 699. The Court of Appeals concluded that there was reasonable cause to justify the initial entry of the order and that the respondent's conduct was of a continuous nature. 253 Mich App at 700. Regarding the "burden of going forward with the evidence," the Court stated in a footnote that "[a]lthough the trial court did not offend MCR 3.310(B)(5) by placing the burden of first coming forward with evidence on respondent, we believe it would be more appropriate in these hearings to have the petitioner—who has the burden of justification throughout the proceedings—to also be the party to first come forward with evidence." 253 Mich App at 700, n 1.

D. Service of Motion Papers

1. Motion to Modify or Terminate a PPO

MCR 3.707(A)(1)(c) requires the moving party to serve the motion and notice of hearing at least seven days before the hearing date. However, if the moving party is a respondent who is entitled to an expedited hearing due to the impact of a firearms restriction on his or her employment, notice one day prior to the

hearing is sufficient. *Id.* See Section 6.7(B) on the circumstances requiring an expedited hearing.

MCR 3.707(A)(1)(c) further requires that service of the motion and notice of hearing be effected by registered or certified mail, return receipt requested, and delivery restricted to the addressee, pursuant to MCR 2.105(A)(2). On an appropriate showing, the court may allow service in another manner under MCR 2.105(I), which provides:

> "(1) On a showing that service of process cannot reasonably be made as provided . . . the court may by order permit service of process to be made in any other manner reasonably calculated to give the [respondent] actual notice of the proceedings and an opportunity to be heard.
>
> "(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the [respondent's] address or last known address, or that no address of the [respondent] is known. If the name or present address of the [respondent] is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.
>
> "(3) Service of process may not be made under this subrule before entry of the court's order permitting it."
>
> **Note:** To prevent a party from manipulating a PPO proceeding by intercepting mail sent from the court, the court might make careful inquiry before permitting first class mail service of court documents on the parties and witnesses to the action.

MCR 3.707 does not address service of a motion to modify or terminate a PPO in cases involving a respondent under age 18. However, the Advisory Committee for this chapter of the benchbook suggests that a good practice in these cases might be to make service on both the respondent and the respondent's parent or parents, guardian, or custodian, if practicable. See MCR 3.705(B)(2) (service of notice of hearing on issuance of PPO on respondent's parent/guardian/custodian) and MCR 3.706(D) (service of PPO on respondent's parent/guardian/custodian).

*See MCR 2.107(C)(4).

If the court grants modification or termination, the modified or terminated order must be served under MCR 2.107, which permits service by delivery to a party or an attorney for a party, by first class mail, or by e-mail.* MCR 3.707(A)(3).

2. Notice of Extension of a PPO

If the expiration date on a PPO is extended, an amended order must be entered. The order must be served on the respondent as provided in MCR 2.107, which permits service by delivery to a party or an attorney for a party, by first class mail, or by e-mail.* MCR 3.707(B)(2).

*See MCR 2.107(C)(4).

E. LEIN Entry

If the court modifies or terminates a PPO, or if the expiration date on a PPO is extended, the clerk must immediately notify the designated law enforcement agency of the court's order for entry into the LEIN system. MCR 3.707(A)(3), MCR 3.707(B)(2), MCL 600.2950(19)(b), and MCL 600.2950a(16)(b).

F. Appeals From Decisions on Motions to Terminate or Modify a PPO

If the PPO was entered ex parte, MCR 3.709(B)(1)(b) provides for an appeal of right from the ruling on the respondent's first motion to terminate or modify the order. Appeals in all other cases are by leave to appeal. MCR 3.709(B) provides:

> "(1) Either party has an appeal of right from
>
> > "(a) an order granting or denying a personal protection order after a hearing . . . or
> >
> > "(b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.
>
> "(2) *Appeals of all other orders are by leave to appeal*." [Emphasis added.*]

*See Section 6.5(I) for additional rules governing appeals in cases involving a respondent under age 18.

6.8 A Word About Peace Bonds

The peace bond statutes (MCL 772.1-772.15) specifically address domestic violence situations, thus providing the only civil remedy against domestic violence available from the district court. However, the Advisory Committee for this chapter of the benchbook has concluded that PPOs afford more complete protection than do peace bonds. In the Committee's opinion, peace bonds are better suited for dealing with disputes among unrelated parties than for cases involving domestic violence.* The Committee's opinion is based upon the following characteristics of peace bond proceedings:

*See Findlater & Van Hoek, *Prosecutors & Domestic Violence: Local Leadership Makes a Difference,* 73 Mich Bar J 908, 910 (1994). On peace bonds generally, see *Gosnell v Twelfth District Court*, 234 Mich App 326 (1999) (statutes found constitutional) and *In re Rupert*, 205 Mich App 474 (1994) (addressing procedures).

- **Peace bonds cannot be issued ex parte in emergency situations.**

  Peace bonds are issued after the aggrieved party files a complaint in district court alleging that a person has threatened to commit an offense against person or property. Upon filing of the complaint, the judge must examine on oath the complainant and any other witnesses. MCL 772.2. If the judge determines that "there is just reason to believe the person will commit" an offense against person or property, the judge may enter an order directing the person to appear within seven days. MCL 772.3. If the person named in the complaint does not agree to post a recognizance, the court must conduct a trial to determine if a recognizance will be required. The person named in the complaint is entitled to a jury trial. MCL 772.4(1).

  Domestic violence may escalate when the abused individual takes steps to escape the abuse. Moreover, violence is more likely when the abuser has free access to an intimate partner.* The foregoing peace bond proceedings may increase the danger, for they require notice to the abuser of potential judicial intervention, followed by a waiting period of up to seven days — perhaps in the same household with the abuser — before the court takes action on the complaint. This waiting period, as well as the period required to conduct a jury trial, may give the abuser time and opportunity to injure an intimate partner, or to coerce the partner to abandon the proceedings. In contrast, the PPO statutes authorize the court to issue ex parte relief without notice to the abuser in emergency situations. See Section 6.5(C).

*These factors may indicate that the abuser is at risk for committing lethal violence. See Section 1.4(B).

- **Peace bonds cannot be entered into the LEIN network.**

  MCL 772.13 requires the court clerk to file a true copy of a peace bond with the law enforcement agency or agencies having jurisdiction of the area in which the complainant resides or works. The peace bond statutes make no provision for entry of the bond into the LEIN system, however; LEIN entry is only required in cases where the court has issued an arrest warrant pursuant to MCL 772.3 or MCL 772.13b. Accordingly, if the complainant flees the jurisdiction where the peace bond is on file, law enforcement officers in the new jurisdiction will have no way of verifying the existence of the peace bond. The PPO statutes better protect persons who have relocated, by requiring the court clerk to notify a designated law enforcement agency of the PPO immediately upon issuance of the order. The designated law enforcement agency is in turn responsible for entering the PPO into the LEIN system. See Section 6.5(F).

♦ **The court may only use criminal contempt sanctions to enforce a peace bond in limited categories of domestic relationships**.

In addition to forfeiting the bond, a person who violates an order to keep the peace in certain domestic relationships is subject to the contempt powers of the court. Such offenders may be imprisoned for not more than 90 days and/or fined a maximum of $500.00. MCL 772.14a. However, criminal contempt sanctions only apply where the offender has breached the peace toward: a spouse or former spouse; a person residing or having resided in the same household with the offender; or, a person with whom the offender has had a child in common. The criminal contempt sanctions imposed under the PPO statutes apply to more categories of offenders, including persons involved in present or past dating relationships with the victim, and any offender who stalks the victim. See Sections 6.3(A) and 6.4(A).

Chapter 7: Practical Considerations for Issuing Personal Protection Orders

7

7.1 Chapter Overview

This chapter explores some of the practical problems that arise in issuing PPOs.* This chapter discusses:

- Accessibility of PPO proceedings to unrepresented parties.
- Management of ex parte proceedings.
- Promoting safety.
- Due process concerns with ex parte orders that interfere with constitutionally protected rights.

*The PPO statutes are MCL 600.2950 (domestic relationship PPO) and MCL 600.2950a (non-domestic stalking PPO).

- PPOs and access to children.
- Responses to frustrating behavior by the parties in PPO proceedings.

The substantive and procedural requirements for issuing a PPO are the subject of Chapter 6. Enforcement proceedings are discussed in Chapter 8.

Michigan's PPO statutes give judges a flexible, potentially far-reaching tool to address domestic violence. Because the statutes allow the courts such broad discretion, and because the scope of this discretion has not been clearly defined by the state's appellate courts, a variety of practices has arisen in issuing PPOs throughout the state. The Advisory Committee for this chapter of the benchbook believes that each court must adopt practices that are compatible with its interpretation of the PPO statutes and with the resources available within its particular community. Recognizing that opinions and circumstances vary, the Committee offers the suggestions in this chapter to promote uniformity of PPO practice where this is possible and to stimulate discussion as courts develop consistent local policies regarding PPO issuance.

*Other sources not noted here will be referenced in the text.

The suggestions in this chapter come from several sources.* Many are drawn from the personal experiences of members of the Advisory Committee for this chapter of the benchbook and represent their best professional judgment on issues that have not been addressed by the Michigan Legislature or appellate courts. Other suggestions are taken from experiences recorded in other states:

- *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (National Center for State Courts, 1997) (hereinafter cited as "NCSC Study"). The authors of this study sought to discover factors influencing the effectiveness of civil protection orders by interviewing women who received protection orders in the Family Court in Wilmington, Delaware, the County Court in Denver, Colorado, and the District of Columbia Superior Court.
- Finn and Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* (National Institute of Justice, 1990) (hereinafter cited as "Finn & Colson"). The authors of this study describe various court practices that have proven effective in combatting domestic violence. These descriptions are based on the authors' review of state statutes and case law regarding civil protection orders in all 50 states, interviews with judges and victim advocates, and examination of nine court sites nationwide that were reported to have taken effective approaches to protection orders.
- Herrell and Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 1 (1990) (hereinafter cited as "Herrell & Hofford"). The recommendations listed in this study were adopted as official policy by the National Council of Juvenile and Family Court Judges in July 1990. These recommendations are based on experiences gathered by the Council's Family Violence Project, which operated family violence intervention projects at courts in

Portland, Oregon, Wilmington, Delaware, and Quincy, Massachusetts.

7.2 Making PPOs Accessible to Unrepresented Parties

Most parties to PPO actions appear pro se, and Michigan's courts have taken a variety of approaches to making the proceedings accessible. Many courts supplement their efforts in this regard by relying on the assistance that local service organizations can provide to pro se litigants — local bar associations, domestic violence service agencies, and domestic violence coordinating councils often provide information and assistance to unrepresented parties who are involved in a PPO action. The following suggestions assume that pro se litigants who have received clear, accurate information about the PPO process will be most likely to make proper, effective use of it. Court staff and community service organizations can best convey this information to pro se litigants if they have received clear direction from the court about the PPO process and their roles in assisting litigants with it.*

*Some suggestions in this section are taken from Tennessee Domestic Abuse Benchbook, p 81-82 (Tenn Task Force Against Domestic Violence, 1996).

A. Explaining the Proceedings Clearly

Clear explanations of PPO proceedings can promote proper use of this remedy. The parties need information about the following subjects:

- What a PPO can and cannot do.
- Eligibility requirements for each type of PPO.
- Procedures for obtaining a PPO.
- Procedures for hearings scheduled in PPO actions.
- Procedures for serving a PPO and entering it into the LEIN system.
- Procedures for modifying or terminating a PPO.
- Procedures for appealing a court's decision to grant or deny a PPO.
- Consequences of violating the PPO.
- Where the PPO is enforceable.
- Procedures for enforcing a PPO after an alleged violation.

Explanations can be given verbally by well-trained court personnel, or in written materials designed for use by unrepresented parties. In areas where many residents do not speak English well, some courts have provided written materials in the languages of these residents. Some Michigan courts provide videotaped explanations of PPO proceedings for parties who cannot read well.

*See Section 2.5 on cross-cultural communication.

> **Note:** Caution should be exercised before allowing a friend or family member to act as an interpreter for an abused individual who does not speak English. The abused individual may not discuss domestic violence when these persons are present for fear that they may disclose the conversation to the abuser or for fear that the information presented may endanger the interpreter. In some cases, the interpreter might not want the violence to be disclosed and may not accurately convey the abused individual's statements to the interviewer.*

The Michigan Judicial Institute has prepared *Staying Safe: A Guide to Personal Protection Orders*, a 16-minute videotape that is designed for courts to show to PPO petitioners. This videotape explains the nature of a PPO, the procedures for obtaining one, and the methods of service on the respondent once it is issued. Safety tips are also presented. It is available in English, Spanish, and Arabic, and comes with close-captioning. An accompanying brochure is also available in English, Spanish, Arabic, and Braille. Copies may be obtained by contacting the Michigan Judicial Institute at 517-373-7171 or at www.courts.michigan.gov/mji/resources/videotapes.htm (last visited March 5, 2004).

B. Using Domestic Violence Service Agencies

Although domestic violence victim advocates may not represent or advocate for domestic violence victims in court, courts may provide advocates to assist petitioners in obtaining a PPO. A court may use the services of a public or private agency or organization that has a record of service to victims of domestic violence to provide the assistance. MCL 600.2950c(1)-(2). Advocates may provide several types of assistance, including, without limitation:

> "(a) Informing a victim of the availability of, and assisting the victim in obtaining, serving, modifying, or rescinding, a personal protection order.
>
> "(b) Providing an interpreter for a case involving domestic violence including a request for a personal protection order.
>
> "(c) Informing a victim of the availability of shelter, safety plans, counseling, other social services, and generic written materials about Michigan law." MCL 600.2950c(1).

*This statute also states that its presumptions regarding advocates do not apply to court employees.

Advocates rendering assistance in accordance with MCL 600.2950c do not violate statutory prohibitions against the unauthorized practice of law. See MCL 600.2950c(3) and MCL 600.916(2). To the extent they are not already protected by the governmental immunity provisions of MCL 691.1401 et seq., advocates acting pursuant to MCL 600.2950c are presumed to be acting in good faith and are not liable in a civil action for damages for acts or omissions

in providing assistance, except acts or omissions amounting to gross negligence or willful and wanton misconduct. MCL 600.2950b(5).*

Domestic violence service agencies may employ paid staff members or rely on volunteers. These workers are typically trained in domestic violence issues and help abused individuals to avail themselves of community resources. Appropriate assistance from a domestic violence victim advocate can often expedite the court's response to a violent situation. An advocate's help in filling out a PPO petition form, for example, can eliminate the delays that occur when such forms are improperly completed.*

*Finn & Colson, *supra,* p 24-26. For more general information about domestic violence service agencies, see Section 2.2.

In addition to the assistance listed in MCL 600.2950c(1), domestic violence service agencies can perform the following services:

- Accompanying petitioners through the filing and hearing process. But see MCL 600.2950c(2), prohibiting domestic violence victim advocates from representing or advocating for victims in court.
- Providing information about court proceedings and preparing the petitioner for the proceedings.
- Explaining the available relief and the limitations of the protection order.
- Arranging to have witnesses appear with the petitioner.
- Notifying petitioners of their duty to attend hearings.
- Identifying cases in which attorney assistance is essential.

Domestic violence victim advocates can best perform their services when they have a clear understanding of the scope of their duties in assisting with court proceedings. If advocates receive clear judicial direction as to the role they perform in the PPO process, they will be less likely to overstep their authority or engage in the unauthorized practice of law.

C. Pro Bono Representation

Although the Legislature intended that Michigan's PPO proceedings would be accessible to unrepresented parties, some cases may be so complex that the parties would benefit from attorney assistance. For example, unrepresented parties may be well advised to seek legal advice in cases involving disputes over custody or parenting time, or in cases where enforcement is sought by way of a show cause proceeding. Judges can promote access to counsel by encouraging pro bono attorneys and legal aid organizations to place a high priority on such cases. Such encouragement may take the form of attendance at local bar meetings, or the organization of training clinics for members of the bar.

Note: A sitting judge may engage in activities designed to promote and encourage attorneys to provide pro bono legal services. However, the judge should not directly solicit individual attorneys to provide pro bono services to specific persons. Formal Opinion J-7 (January 23, 1998). See also Michigan Code of Judicial Conduct, Canon 2, 4 (A)-(C), 5(B), MRPC 6.1.

D. Training for Court Staff

Assistance from court clerks is essential, particularly when victim advocates and attorneys are not available. MCL 600.2950b(4) provides:

> ". . . Upon request, the court may provide assistance, but not legal assistance, to an individual in completing [PPO forms] and the personal protection order if the court issues such an order, and may instruct the individual regarding the requirements for proper service of the order."

*Finn & Colson, *supra*, at 27.

Court clerks and other staff members can most effectively perform their duties when they are properly trained and supervised in handling PPO petitions. They need clear, written instructions, including firm directions to refrain from evaluating the parties' credibility or giving legal advice. To prevent burn-out, one study suggests that clerks be given adequate time to fulfill their responsibilities. Burn-out can also be avoided if clerks periodically rotate into other tasks.*

Note: The Michigan Judicial Institute has produced *The Court Staff Guide to PPOs,* an interactive compact disc program on personal protection orders that is designed to inform court support personnel about their duties in personal protection actions. In addition to information about the relevant law governing PPOs, this program addresses the nature and dynamics of domestic violence, techniques for working with people who are subject to the trauma caused by violence, and principles for providing assistance to unrepresented parties without giving legal advice. An accompanying written reference guide is also available. On the general scope of clerks' duties to provide information to the public, see MJI's training program on interactive compact disc entitled *"I'm Sorry, I Can't Give Legal Advice."* For more information, contact the Michigan Judicial Institute at 517-373-7171 or visit www.courts.michigan.gov/mji/ (last visited March 5, 2004).

E. Conducting PPO Proceedings

Giving docket priority to cases involving domestic violence can promote safety by allowing the court to timely intervene in abusive behavior. Once a scheduled hearing has begun, however, the court might find it helpful to slow the pace of the proceedings to allow time for adequate explanations to

unrepresented parties. If it appears obvious that an unrepresented party cannot function in his or her own best interests, the court might permit a continuance to allow the party to seek legal assistance.

A court can sometimes expedite proceedings involving unrepresented parties by clearly explaining at the outset what is taking place and what information is needed to make a ruling. Setting limits in this way may help to guide the parties away from digressions into extraneous information. If a party digresses, the court can show sensitivity to the situation by acknowledging that the irrelevant information might be important in another context (e.g., in a counseling session, or in another court proceeding). In this situation, some judges provide information about other community resources that can offer appropriate assistance.

Abusive behavior may sometimes occur in the court's presence during PPO proceedings. See Section 1.5 for discussion of abusive tactics.

Note: Canon 3(A) of the Code of Judicial Conduct provides as follows:

> "(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
>
> . . .
>
> "(10) Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court."

F. Respondents Who Are Subject to Criminal Prosecution

If an unrepresented respondent in a PPO proceeding is subject to an ongoing criminal prosecution, the court must be cognizant of his or her constitutional rights. The Advisory Committee for this chapter of the benchbook suggests:

- Advise the respondent of the right against self-incrimination.
- If the respondent is represented by an attorney in the criminal prosecution, notify the attorney regarding the PPO proceeding.

The court is not required to appoint counsel for unrepresented respondents upon issuance of a PPO; however, the respondent has a right to counsel if

contempt proceedings are initiated after the alleged violation of a PPO. See Section 8.4 on due process protections in contempt proceedings.

7.3 Managing Ex Parte Proceedings

This section describes practice alternatives adopted by some Michigan courts in managing ex parte PPO proceedings. For discussion of the substantive and procedural requirements for issuing ex parte PPOs, see Sections 6.3(C), 6.4(D), and 6.5(C).

The PPO statutes and court rules do not require the petitioner to appear on the record before the court to obtain an ex parte PPO, and Michigan practice varies in this regard. The specific facts in support of an ex parte order must be shown by verified complaint, written petition, or affidavit, and some courts rely on these documents as the sole basis for its decisions on ex parte petitions. See MCL 600.2950(12), MCL 600.2950a(9), and MCR 3.705(A)(2). Other courts require the petitioner to appear on the record before it will issue an ex parte PPO. If a court considers information that is not contained in a written complaint, petition, or affidavit, MCR 3.705(A)(2) provides that "[a] permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order."

*See Finn & Colson, *supra*, p 27-28.

The Advisory Committee for this chapter of the benchbook suggests that courts decide on a case-by-case basis whether to go on the record in ex parte PPO proceedings. Courts that base the decision solely on the petitioner's written documents note the following advantages to this practice:*

- Issuing an ex parte PPO based solely on the allegations in the petition avoids due process problems that might arise if the PPO were issued based on verbal allegations not appearing in the petition. If all the allegations on which the PPO is based appear in the petition, the respondent will have adequate notice of the proceedings when the petition is served. (Courts who follow this practice are liberal in permitting amendment of inadequate petitions.)

- Issuing an ex parte PPO based solely on the allegations of the petition speeds the process. Saving time may be important in situations where delay would be dangerous to the petitioner.

- Requiring a court appearance could cause delay and inconvenience to the petitioner in large, multiple-county circuits where a judge is not always present at the location where the petition is filed.

- Requiring a court appearance could intimidate certain petitioners, perhaps deterring them from filing a PPO petition.

Note: The Advisory Committee for this chapter of the benchbook suggests that if the court does not go on the record with the petitioner and denies ex parte relief, the required written statement of its reasoning should also advise the petitioner of the right to request a hearing. See MCR 3.705(A)(5), which excuses the court from giving notice of the right to a hearing where ex parte relief is denied only if it has "interviewed" the petitioner and determined that the petition does not merit a hearing. To save time and to avoid abuse of the PPO process, the Advisory Committee further suggests that courts issuing ex parte PPOs without requiring the petitioner's appearance on the record consider enlisting the aid of trained domestic violence victim advocates to assist in filling out the PPO forms.*

*See Section 7.2(B) for more information about the role of domestic violence victim advocates in PPO proceedings.

Courts that go on the record with the petitioner before issuing an ex parte PPO cite the following advantages to this procedure:

- The court can question the petitioner to determine what dangers may exist and what provisions are necessary to provide adequate protection.
- The court can assess the petitioner's credibility or otherwise resolve doubts about the factual allegations on which the PPO would be based.
- The court can assess any visible injuries to the petitioner. A court's written findings in this regard may be important in subsequent hearings or other court proceedings that take place after the injuries have healed.
- The court can inform the petitioner of the importance of appearing at any hearing held after issuance of the ex parte order.
- The court can answer the petitioner's questions about court proceedings and provide explanations for petitioners who may not have fully understood the written information provided by the court.
- The court can explain to the petitioner what will happen if the respondent violates the order.
- The court can provide support to the petitioner's efforts to end the abuse by assuring the petitioner that abusive behavior is not acceptable.

Note: If the PPO is issued based on allegations not appearing in the written petition, the Advisory Committee for this chapter of the benchbook suggests that the court permit amendment of the petitioner's affidavit after the hearing to include these allegations.

One federal court has stated that a petitioner's appearance before the court on the record is not a due process requirement in proceedings to obtain a civil protection order against domestic violence. In *Blazel v Bradley*, 698 F Supp

756, 764 (WD Wisc, 1988), a party excluded from his home by an ex parte civil protection order challenged the Wisconsin domestic abuse proceeding on due process grounds, in part because the petitioner was not required to appear personally before the issuing judge. The federal district court held that the procedures set forth in the Wisconsin protection order statute comported with due process. The court noted: "Although it might be a better procedure for the presiding judge . . . to require the petitioner to appear personally before the court so that the court may evaluate petitioner's credibility and perhaps see physical evidence of abuse such as bruises or scratches . . . a personal appearance is not a constitutional requirement." For more discussion of due process issues, see Section 7.5.

7.4 Promoting Safety in PPO Provisions

In the following discussion, the Advisory Committee for this chapter of the benchbook offers suggestions for drafting PPO provisions that promote safety. One important step a court can take to promote safety in PPO proceedings is to become informed about the nature of domestic violence. This subject is treated in Chapter 1 — the lethality factors listed in Section 1.4(B) are of particular importance.

A. Give the Abused Individual All Available Legal Remedies

Under Michigan law, a domestic violence victim is not required to choose between civil and criminal remedies as means of protection. Michigan law specifically states that a personal protection order can be obtained regardless of whether a criminal action against the respondent is pending. See MCL 600.2950(23), MCL 600.2950a(20), and MCL 750.411h(5), which provide that steps taken to enforce a PPO do not foreclose arrest or prosecution for criminal offenses arising from the same conduct. Accordingly, the existence of a PPO should have no bearing on the decision to proceed with criminal prosecution, and the pendency of criminal proceedings should not prevent the court from issuing a PPO under appropriate circumstances. Indeed, one study suggests that a combination of civil and criminal remedies may be necessary to prevent abuse, particularly where the abuser has a prior history of criminal behavior.* The National Council of Juvenile and Family Court Judges states:

> "Requiring victims to choose between civil and criminal processes deprives them and the state the ability to fully protect victims and other family members, including children, from violent family members. The denial of criminal prosecution reinforces the rationalization of abusers that family violence does not constitute a crime, and worse, is the fault of the victim. The denial of civil processes leaves victims extremely vulnerable while awaiting trial. Victims of child abuse and neglect should also have equal access to the criminal and civil courts. Cases should be combined or coordinated." Herrell and Hofford, *supra,* p 7.

*NCSC Study, *supra,* p 56-58. On double jeopardy concerns in cases where conduct violating a PPO also constitutes a separate criminal offense, see Section 8.12.

In domestic relations proceedings, the issuance of a domestic relations order, divorce judgment, order for separate maintenance, or decree of annulment does not preclude the court from also issuing a PPO to protect one of the parties from the other. See MCL 552.14(1) and MCR 3.207(A), which specifically authorize courts to issue PPOs incident to domestic relations proceedings. Indeed, the extra safety measures that are attendant to a PPO may make it a necessary supplement to the relief otherwise provided in a domestic relations action. See Section 10.7 for a comparison of PPOs with domestic relations orders issued under MCR 3.207. Questions concerning PPOs and access to children are addressed at Sections 7.7 and 12.5(B).

B. Fully Explain the Relief Provided in the Protection Order

Effective protection orders fully specify the precise conditions of relief granted to the petitioner. Specific orders limit opportunities for manipulation by making the court's requirements clear. Specific orders are also easier for the police and other courts to enforce in the event of violation.* In specifying the relief granted in a PPO, the court might consider the issues in the following discussion.

*Finn & Colson, *supra,* p 33, 42 and Herrell & Hofford, *supra,* p 17.

1. Descriptive Information

Complete descriptive information allows law enforcement officers to accurately identify the petitioner, respondent, and any other persons protected by the PPO. Descriptions for protected locations should also be as complete as safely possible. Descriptive information might include:

- Information required for LEIN entry.*
- Respondent's date of birth, scars, hair color, approximate age, vehicle descriptions, license plate numbers, etc.
- Where the order prohibits contact with persons other than the petitioner (e.g., with the petitioner's children), descriptive information for those persons (e.g., names and birth dates).
- The places where the petitioner or other protected persons are vulnerable to abuse. These might include home, school, or work locations, and parking lots at these locations. If there is no safety issue requiring that the petitioner's address be kept confidential, the order should give specific addresses.*

*On LEIN entry, see Section 6.5(F).

*See Section 7.4(C) on protecting the petitioner's address.

For a case illustrating the importance of clear drafting, see *People v Freeman*, 240 Mich App 235 (2000). In this case, the court listed two different addresses for the petitioner in the body and caption of the order. One of these addresses was the respondent's residence, which he maintained separately from the petitioner's residence. The Court of Appeals noted: "Surely, a defendant must question the wisdom of an order that makes it a violation of a court order to be in his own home, particularly when the complainant has a separate residence and makes the complaint to the police while at defendant's

residence. This would appear to allow personal protection orders to be used as a sword rather than a shield, contrary to the intent of the legislation that was quite properly designed and intended to protect spouses and others from predators. When personal protection orders are allowed to be misused due to careless wording or otherwise, then the law is correspondingly undermined because it loses the respect of citizens that is important to the effective operation of our justice system." 240 Mich App at 237, n 1.

2. Types of Contact Prohibited

To prevent the parties from manipulating an ambiguous order, a PPO should clearly specify the types of contact restrained. The order might address:

- Whether the respondent should be restrained from entering the petitioner's home or other premises. The National Council of Juvenile and Family Court Judges recommends that if a court must separate parties who are living together, it should remove the abuser from the home and allow the abused individual and children to remain with appropriate provisions for protection. The Council recommends this practice even if the home legally belongs to the abuser because it "gives a clear message to the offender that such behavior will not be tolerated regardless of who holds legal title, and that the state intends to protect victims from further abuse." The Council further notes that requiring an abused individual to vacate the home does not deter criminal behavior. Instead, it may reward the abuser for a crime and discourage an abused individual who has no alternative housing from seeking needed protection.*

*Herrell & Hofford, *supra,* p 18. See also Attorney General's Task Force on Family Violence, p 43, (Final Report, 1984). See Section 7.5(A) on due process concerns with such orders.

- How a respondent who has been excluded from premises may obtain his or her property from the premises. Provisions for removal of the respondent's property should specify a date and time for removal. In appropriate cases, the court might consider providing for removal under police supervision.

- Whether the respondent should be prohibited from telephone, mail, or electronic contact with the petitioner.

- Whether specified people acting on the respondent's behalf (e.g., the respondent's parents) must refrain from contacting the petitioner.

- Whether or not the parties may meet together in the presence of their attorneys.

3. Access to Weapons

The presence of firearms or other weapons can greatly increase the lethal potential of domestic violence. If weapons are to be removed from the home or the respondent's possession, it is helpful to give specific instructions for doing so to prevent the parties from manipulating the order. Such instructions might provide for the police to remove weapons from the respondent's home, or specify a time and place for the respondent to turn them in.*

*See Sections 1.4(B) on lethality factors and 9.7-9.8 on firearms disabilities resulting from entry of a PPO.

4. To the Extent Permitted by Law, Access to Children of the Relationship

The safety of an abused individual may be inextricably linked with the abuser's access to children of the relationship. Abusers often use the children in the household to control their partners. In its study of civil protection orders issued in three jurisdictions, the National Center for State Courts reported that petitioners with children were more likely than childless petitioners to experience enforcement problems with their orders.* The study authors believed that petitioners with children reported more problems because they were more likely to come into contact with the respondent for purposes of child visitation. The most frequently reported child-related problems involved abuse when children were exchanged for visitation and respondents' threats to keep the children. See Section 7.7 for more discussion of PPOs and access to children.

*NCSC Study, *supra,* p 51, n 95. See also Section 1.7(A).

5. To the Extent Permitted by Law, Financial Support for the Petitioner and Family Members

Abusers often manipulate the household finances to control their partners.* Accordingly, it is not uncommon that an abuser who has been excluded from premises will seek to maintain control by refusing to make mortgage, utility, or other payments necessary to support a partner and children who remain on the premises. The extent to which the court can respond to this type of abuse in a PPO is probably limited, for the PPO statutes do not specifically authorize provisions regarding family support. In rare cases, the "catch-all" provision in MCL 600.2950(1)(j) might afford relief from severe financial abuse that "imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." In general, however, a PPO is intended for situations in which imminent physical assault or other injury is anticipated due to one party's acts of domestic abuse.

*See Section 1.5.

If the petitioner experiences financial intimidation, the court might consider the following other authorities:

- Prior court orders for support.* If the respondent's behavior violates a prior court order for support, the petitioner should seek relief on the basis of this order. The PPO might restrain the respondent from violating the provisions of the prior order, which could be incorporated into the PPO.

*See Chapter 11 on support.

- The Family Support Act, MCL 552.451 et seq. In cases where no divorce or separate maintenance proceedings are pending, this legislation authorizes an action in circuit court for support brought by "[a] married parent who has a minor child . . . living with him or her and who is living separate and away from his or her spouse who is the noncustodial parent of the child . . . and who is refused financial assistance by the noncustodial parent to provide necessary shelter, food, care, and clothing for the child . . . if the spouse is of sufficient financial ability to provide that assistance . . . ." MCL 552.451.

See also Section 3.14(B)(4) on criminal sanctions applicable to desertion and non-support.

C. Protect Information Identifying the Petitioner's Whereabouts

1. Addresses in Court Documents

*Tennessee Domestic Abuse Benchbook, p 58 (Tenn Task Force Against Domestic Violence, 1996). Lethality factors are discussed at Section 1.4(B).

Persons subjected to domestic violence are at increased risk when their abusers have ready access to them by knowing their whereabouts. Therefore, a petitioner in a PPO action may be endangered by court documents that identify his or her work or residence address.* Michigan's PPO statutes and court rules permit petitioners to omit their residence addresses from court documents as long as they provide a mailing address. MCL 600.2950(3), MCL 600.2950a(3), and MCR 3.703(B)(6).

Where the petitioner is in hiding, the court should take care not to inadvertently disclose an address that would permit the respondent to locate the petitioner. In such instances, the court's order might state that the respondent must stay away from the petitioner's residence, without revealing the location of the residence.

A more extensive discussion of confidentiality in court records is found in Sections 10.4 - 10.5 and 11.4 (regarding domestic relations proceedings) and Section 4.16 (crime victims' identifying information).

2. Protecting Addresses in Children's Records

MCL 722.30 states that non-custodial parents must have access to information in children's records in the absence of a protective order issued by a court:

> "Notwithstanding any other provision of law, a parent shall not be denied access to records or information concerning his or her child because the parent is not the child's custodial parent, *unless the parent is prohibited from having access to the records or information by a protective order*. As used in this section 'records or information' includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education." [Emphasis added.]

Abusers sometimes find their partners who are in hiding by obtaining addresses from children's school, day care, medical, or dental records. For this reason, some abused individuals fail to enroll their children in school or to seek medical care for them to remain in hiding from their abusers. In situations like these, a domestic relationship PPO can prohibit a person from obtaining access to identifying information in children's records. MCL 600.2950(1)(h) provides that the court may restrain a respondent from:

> "Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."

MCL 380.1137a prohibits a school from releasing the foregoing information protected by a PPO, as follows:

> "If a school district, local act school district, public school academy, intermediate school district, or nonpublic school is the holder of records pertaining to a minor pupil, if a parent of the minor pupil is prohibited by a personal protection order . . . from having access to information in records concerning the minor pupil that will inform the parent about the minor's or other parent's address or telephone number or the other parent's employment address, and if the school district, local act school district, public school academy, intermediate school district, or nonpublic school has received a copy of the personal protection order, the school district, local act school district, public school academy, intermediate school district, or nonpublic school shall not release that information to the parent who is subject to the personal protection order."

If the PPO limits a respondent's access to children's records, the court should issue sufficient copies to the petitioner for distribution to those schools or care providers who hold records containing the petitioner's address.

3. Name Changes

In a proceeding for a name change under MCL 711.1, the court may order for "good cause" that no publication of the proceeding take place and that the proceeding be confidential. "Good cause" includes evidence that publication or availability of a record could place the person seeking a name change or another person in physical danger, such as evidence that these persons have been the victim of stalking or an assaultive crime. MCL 711.3(1).

It is a misdemeanor for a court officer, employee, or agent to divulge, use, or publish, beyond the scope of his or her duties with the court, information from a record made confidential under MCL 711.3(1). MCL 711.3(3). Disclosures under a court order are permissible, however. MCL 711.3(3).

D. Avoid Civil Compromise

Strictly speaking, a PPO action is a "civil" proceeding. Nonetheless, a PPO typically addresses criminal behavior and so is different in nature from other "civil" proceedings such as tort claims — the U.S. Supreme Court has characterized civil protection orders as an "anomalous use of the contempt power" to restrain criminal behavior. *U.S. v Dixon*, 509 US 688, 694 (1993).

Accordingly, where criminal conduct is at issue between the parties, civil compromise is not appropriate. Criminal acts are not a subject for negotiation or settlement between the victim and perpetrator because the victim does not have the responsibility for changing the perpetrator's criminal behavior. See Batterer Intervention Standards for the State of Michigan, §7.3C (January, 1999). The Batterer Intervention Standards appear in Appendix C.

*See Sections 2.4(B) and 10.6 on the use of mediation or arbitration in cases involving domestic violence.

For similar reasons, it is inadvisable to refer the parties in a PPO action to alternative dispute resolution services that require cooperative efforts to reach an agreed settlement addressing the abusive behavior. Such services typically include mediation, community dispute resolution, and arbitration. Besides being inappropriate to address criminal behavior, these services — which require equal bargaining power between the parties — cannot operate fairly in situations involving domestic violence. Abusers exercise control in violent relationship, and alternative dispute resolution services afford them a further opportunity to wield this control over their partners.* Alternative dispute resolution is better suited for situations not covered by the PPO statutes, such as neighborhood disputes.

> **Note:** As discussed in Section 6.6(B), MCR 3.704 provides that voluntary dismissal of a PPO action may only be accomplished by a court order upon motion by the petitioner. The Advisory Committee for this chapter of the benchbook believes that this court rule prohibits stipulated dismissals under MCR 2.504(A)(1)(b).

E. Mutual Orders

Mutual protection orders are prohibited under Michigan's PPO statutes and court rules. If the court wishes to restrain each party from abusing the other by way of separate orders, it may only do so if there are separate applications and findings made in conformance with the statutes. MCL 600.2950(8), MCL 600.2950a(5), and MCR 3.706(B).

*See Section 8.13(B)(2) for more discussion of full faith and credit questions in this context.

Michigan's prohibition on mutual protection orders is in accordance with federal law. Under 18 USC 2265(c), an order restraining the petitioner issued without separate application and fact finding as to each party will not be accorded full faith and credit in other U.S. jurisdictions. The portion of a mutual order that restrains the petitioner is eligible for full faith and credit only if: 1) the respondent filed a cross or counter petition, complaint, or other written pleading seeking a protection order; *and* 2) the issuing court made specific findings that each party was entitled to a protection order. The order restraining the respondent is entitled to full faith and credit regardless of whether the restraint on the petitioner meets the foregoing criteria.*

At least one other jurisdiction has concluded that a prohibition on mutual protection orders is consistent with due process standards. In *Deacon v Landers*, 587 NE2d 395, 399 (Ohio App, 1990), the court held that a mutual

order protecting the respondent issued without notice, separate application, or separate fact finding deprived the petitioner of due process.

Even if there are separate applications and findings made in conformance with the PPO statutes, problems can arise if the court issues separate protection orders that restrain each party. In case of a violation, enforcing police officers have no guidance as to who should be arrested. Police often do nothing in these cases, or arrest both parties, thus further victimizing the abused individual. Furthermore, an order protecting the respondent may label an abused individual as an abuser and send a message that the court will tolerate violence. Finn and Colson, *supra*, p 47.

> **Note:** The court has no authority under the Michigan PPO statutes to accept the parties' stipulation to a mutual protection order.

F. Do Not Order Counseling

A court has no authority under the PPO statutes to order counseling for either party upon issuance of a PPO. Some courts, particularly those without trained domestic violence victim advocates to assist them, provide information to parties about other service providers in the community. The Advisory Committee for this chapter of the benchbook recommends that courts following this practice make it clear to the parties that the court is providing them with information and not requiring them to seek outside help.

> **Note:** Traditional couples counseling or family therapy may endanger an abused individual. See Section 2.4(B). Moreover, some constitutional law scholars believe that civil orders mandating participation in counseling may infringe upon constitutionally protected rights of physical liberty and free expression. Counseling is properly ordered as a condition of release — a choice — for persons who face incarceration or other penalties. See Finn & Hylton, Using Civil Remedies for Criminal Behavior, p 18 (National Institute of Justice, 1994).

7.5 Constitutional Concerns with Ex Parte Orders

A. Due Process Concerns

Ex parte personal protection orders may give rise to legitimate due process concerns, particularly where they affect the respondent's parental relationships or property interests. The Michigan Court of Appeals has held that an ex parte personal protection order issued under MCL 600.2950(12) does not violate due process. *Kampf v Kampf*, 237 Mich App 377, 383-385 (1999). For further guidance on this question, it is also useful to consult decisions rendered in other jurisdictions and in other contexts.

The U.S. Supreme Court has held that a person may be deprived of a property right without prior notice to further an important state interest. In *Mathews v Eldridge*, 424 US 319 (1976), the Court held that an ex parte termination of disability benefits did not violate due process. The Court characterized due process as a flexible concept, which calls for "such procedural protections as the particular situation demands," and ruled that due process does not always require a pre-deprivation evidentiary hearing. 424 US at 334, 349. To determine whether a pre-deprivation hearing was necessary, the Court applied a balancing test in which the state's interests were weighed against the individual liberty interests at stake. The Court held that ex parte deprivation of an individual's property interest may be justified by an exigent counterbalancing state interest, where an opportunity for a prompt post-deprivation hearing is provided. The Court identified three factors to consider in deciding whether due process requirements have been met in any situation where there has been a deprivation of private property by state action:

> "*First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 US at 335. [Emphasis added.]*

*See also *Mitchell v WT Grant Co*, 416 US 600, 616 (1974) and *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan,* 414 Mich 247, 267 (1982) (opinion of Justice Fitzgerald).

Like the U.S. Supreme Court, the Michigan Court of Appeals has also recognized that the state's interest in public safety may justify a summary deprivation of property rights. In *Gargagliano v Secretary of State*, 62 Mich App 1, 10 (1975), *Cameron v Secretary of State*, 63 Mich App 753, 756 (1975), and *Nicholas v Secretary of State,* 74 Mich App 64, 70 (1977), the Court of Appeals held that a driver's mental illness or dangerous driving record were extraordinary circumstances that justified the temporary ex parte suspension of a driver's license, where:

- The property owner's danger to the public has been determined in a reliable manner, preferably in a judicial setting; and
- The property owner has been afforded an adequate opportunity for a timely hearing after the deprivation of property.

In *Kampf v Kampf, supra,* the Michigan Court of Appeals applied the foregoing principles to a respondent's challenge to an ex parte domestic relationship PPO issued under MCL 600.2950(12). The Court disagreed with the respondent's contention that his due process rights to notice and an opportunity to be heard were violated by the ex parte proceeding. Citing *Mitchell v WT Grant Co, supra* and *Gargagliano v Secretary of State*, *supra,* the Court held that "[t]here is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order

without prior notice . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued" *Kampf v Kampf, supra*, 237 Mich App at 383-384. The Court found that the following provisions in the PPO statute were sufficient to meet constitutional due process standards:

- The petition for ex parte relief must be supported by a verified complaint, written motion, or affidavit alleging "immediate and irreparable injury, loss, or damage . . . from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued." 237 Mich App at 384, citing MCL 600.2950(12).

- The respondent has a right to bring a motion to terminate a PPO within 14 days of service or actual notice, with the right to an expedited hearing on the motion if the respondent is enjoined from purchasing or possessing a firearm and must carry one as a condition of employment. 237 Mich App at 384, citing MCL 600.2950(13)-(14).

- If the respondent violates the PPO prior to receiving notice of it, a police officer called to the scene of the violation must give the respondent an opportunity to comply with the PPO so that the respondent may avoid arrest. 237 Mich App at 385, citing MCL 600.2950(22).

Courts in Wisconsin, Illinois, New Jersey, Oklahoma, Minnesota, and Missouri have also rejected due process challenges to their states' proceedings for ex parte civil protection orders against domestic violence. In *Blazel v Bradley*, 698 F Supp 756, 764 (WD Wisc, 1988), a federal district court applied the *Mathews v Eldridge* factors to Wisconsin's statutory scheme and held that the due process clause requires *either* a pre-deprivation hearing *or* at least four minimum procedural safeguards, namely:

- Participation by a judicial officer;

- A prompt post-deprivation hearing;

- Verified petitions or affidavits containing detailed allegations based on personal knowledge; and

- Risk of immediate and irreparable harm.

For other state court decisions upholding ex parte civil protection order proceedings over due process objections, see: *State ex rel Williams v Marsh*, 626 SW2d 223, 232 (Mo, 1982); *Schramek v Bohren*, 429 NW2d 501, 505-506 (Wisc App, 1988); *Sanders v Shephard*, 541 NE2d 1150, 1155 (Ill App, 1989); *Grant v Wright*, 536 A2d 319, 323 (NJ App, 1988); *Marquette v Marquette*, 686 P2d 990, 996 (Okla App, 1984); and *Baker v Baker*, 494 NW2d 282, 288 (Minn, 1992).

To promote safety and protect the respondent's due process rights, the Advisory Committee for this chapter of the benchbook offers the following suggestions for cases where an ex parte PPO petition requests that the respondent be restrained from entering onto premises and contains factual allegations sufficient to support this form of relief:

- Grant the relief requested.
- To assure a prompt post-deprivation hearing, schedule the matter for a hearing as soon as possible after issuance of the order.
- To prevent the parties from manipulating the order, the court should make it as specific as possible. For suggestions in this regard, see Section 7.4(B).

For safety reasons, the Committee discourages court policies under which ex parte petitions requesting exclusion of the respondent from premises are automatically denied and scheduled for a later hearing without regard to the contents of the petition. When in doubt about granting ex parte relief affecting property or parental rights, some courts grant other types of relief (e.g., restraining kidnapping, assaulting, beating, molesting, etc.) and set a hearing regarding that portion of the petition giving rise to doubts (e.g., restraining entry onto premises).

B. The Right to Purchase and Possess Firearms

*See Section 9.1 for more information on this issue.

The Michigan Court of Appeals has held that firearms restrictions in a PPO do not unconstitutionally infringe on participation in hunting or other sporting events* because Const 1963, art 1, §6 does not protect the right to bear arms in the context of sport or recreation. *Kampf v Kampf*, 237 Mich App 377, 383 (1999).

In dicta, the Court in *Kampf* further expressed its belief that firearms restrictions in a PPO represent a reasonable exercise of the state's police powers:

> "Respondent has never argued that the restraint against his right to possess and purchase firearms has prohibited him from defending himself or the state. Even if respondent's argument is interpreted to implicate the right to bear arms, this Court has held that the right may yield to a legislative enactment that represents a reasonable regulation by the state in the exercise of its police power to protect the health, safety, and welfare of Michigan citizens. *People v Smelter*, 175 Mich App 153, 155-156 (1989). The PPO statute is clearly addressed to protecting the health, safety, and welfare of victims of domestic violence. Further . . . MCL 600.2950(2), specifically requires a petitioner to notify the court if a respondent must carry a firearm as part of his job. That provision permits the court to make a judgment regarding whether a PPO that would

prohibit the respondent from possessing or purchasing a firearm would affect his constitutional right to defend the state. Therefore, any restriction on the right to bear arms is a reasonable exercise of the police powers of the state." 237 Mich App at 383, n 3.

7.6 Common Frustrations with PPOs

This section considers the court's responses to common situations that cause frustration in PPO proceedings. Because some of these situations arise from the complex nature of domestic violence, the reader may gain insight from reviewing the discussion in Chapter 1 along with this section. Some causes for unwillingness or inability to participate in court proceedings include coercion, ambivalence about the outcome of court proceedings, and lack of confidence that the court proceedings will stop the violence. These factors are discussed in Section 1.6(C).

A. The Petitioner Resumes Contact with the Respondent

A common frustration for court personnel arises when the court issues a PPO restraining the respondent from having contact with the petitioner, and the petitioner subsequently resumes contact with the respondent that violates the PPO. If the respondent faces contempt sanctions under these circumstances, the Advisory Committee for this chapter of the benchbook suggests that the following principles offer some guidance for dealing with the situation:

- Only the court can change a PPO; the parties cannot.
- The respondent may move to modify or terminate the PPO within 14 days after service or actual notice, or for good cause shown after the 14 days have elapsed. A hearing must be held within 14 days from the date the respondent files a request for modification or termination.* MCL 600.2950(13), (14), and MCL 600.2950a(10), (11).
- The PPO is directed to the respondent's behavior, not the petitioner's.
- Regardless of the petitioner's wishes for contact, the respondent has violated the PPO. The petitioner's invitation may mitigate the sanctions, but it is no defense to the violation.
- In deciding whether to mitigate sanctions, the court might inquire whether the petitioner actually consented to resume contact with the respondent, or whether the respondent coerced the petitioner to resume contact.
- Knowing and intentional false statements made in support of a PPO petition are subject to contempt sanctions. MCL 600.2950(24) and MCL 600.2950a(21). See also MCR 2.114(B), imposing contempt sanctions on false declarations in court papers generally. The PPO statutes are otherwise silent on contempt sanctions that may be

*The hearing is expedited if the PPO restricts access to firearms and the respondent must carry a firearm as a condition of employment. See Section 6.7(B).

imposed on petitioners. The Advisory Committee for this chapter of the benchbook suggests that courts exercise extreme caution in ordering contempt sanctions against petitioners who resume contact with respondents who are subject to "no contact" provisions in PPOs. Imposing contempt sanctions against individuals who have been coerced or threatened into such contact sends a clear message to abusers that their control tactics are tolerated by the court and are effective to maintain control over their partners.

*Finn & Colson, *supra,* p 53.

The court might forestall some of the problems caused when the parties resume contact by informing petitioners that if circumstances change, the court must modify the PPO to permit renewed contact with the respondent. Requiring the petitioner to return to request modification has several safety benefits. If the petitioner returns, the court can reassess the situation and make sure that resumed contact is the petitioner's free choice. Moreover, even though the court vacates a no-contact provision, it can still encourage non-violent behavior by continuing the no-abuse provisions in force. Finally, the court can stress to the petitioner that its door remains open if violence should resume after modification or termination of a PPO.*

B. The Petitioner Abandons a PPO Proceeding

*On the factors discussed in this Section, see Ganley, *Domestic Violence: The What, Why & Who, as Relevant to Civil Court Cases,* Appendix C, p 24, in Lemon, Domestic Violence & Children (Family Violence Prevention Fund, 1995). A related discussion appears in Section 1.6.

The following discussion addresses the court's response to three factors that cause petitioners to abandon court proceedings: **lack of information about or confidence in court processes; belief that the abuse will stop;** and **coercion by the abuser**. While the court ultimately has limited authority to deny a PPO petitioner the right to dismiss a PPO petition or terminate a PPO, it can adopt practices that will temper the influence of these factors on the petitioner's decision to abandon court proceedings.*

1. Lack of Information or Confidence About Court Proceedings

Some abused individuals abandon court actions because they lack adequate information about court procedures or do not trust that the court's actions will be effective to stop the violence. The failure to understand the remedies available from the court (or to place trust in such remedies) can stem from many sources:

- Emotional and/or physical trauma, intimidation, poor reading skills, lack of education, or cultural barriers.
- Abusers who provide false information about court procedures or intercept phone calls or mail sent from the court.
- Inadequately trained justice system personnel, including police officers and prosecutors who fail to enforce PPOs.
- Delays in the court proceedings.

A court can forestall dismissals and terminations caused by the lack of information or trust in several ways:*

*See also Section 7.2 on making court proceedings accessible to unrepresented parties.

- Provide clear, written explanations of proceedings.
- Enlist the help of well-trained domestic violence victim advocates or court clerks.
- Take the lead in educating law enforcement agencies and prosecuting attorneys in its community about court procedures.
- Avoid first class mail service of court documents on the parties and witnesses to a PPO proceeding.
- To provide an opportunity for verbal explanation and response to the petitioner's questions, hold hearings on the record for ex parte PPO petitions in cases where there are barriers to a party's ability to understand the proceedings.
- Handle PPO proceedings expeditiously.

2. Belief the Abuse Has Stopped

In some cases, an abused individual abandons a court action due to a belief that the abuse has stopped. Alternatively, an abused individual may abandon legal proceedings against the abuser during a period of reconciliation in the hopes that the abuse will stop. Indeed, for some abused individuals, the mere initiation of a court action may at least temporarily achieve the desired goal of stopping the abuse so that they perceive no further need to proceed in court. Requests for dismissal or termination under these circumstances may be less frustrating to court personnel who understand that a person subject to abuse may need to make many attempts before breaking free from a violent relationship. Court personnel can best serve individuals who have reconciled with their abusers by clearly communicating that the court's door remains open if the violence resumes. Some courts also provide these individuals with information about community domestic abuse prevention services for future reference.

3. Coercion

Abusers employ various forms of coercion to convince their partners to abandon legal proceedings. Some abusers threaten physical harm to their partners who continue with court action or actually injure their partners so that they cannot continue. Other abusers threaten to initiate retaliatory court proceedings — some individuals abandon efforts to obtain court protection in order to prevent their abusers from initiating child custody or neglect proceedings against them.

The Advisory Committee for this chapter of the benchbook suggests that the court remain alert for the following factors that indicate possible coercion:*

*See also the lethality factors listed in Section 1.4(B).

- One attorney appearing in court to act on behalf of both parties to a relationship.
- The respondent's past violent history, if known.
- Serious allegations of violence.
- A criminal case pending against the respondent.
- A short time elapsed between the filing of the petition and the request for dismissal or termination.
- The respondent's appearance with or without the petitioner to file a request for dismissal or termination.
- A lack of credible reasons for the requested dismissal or termination.

If any of these factors is present (or any other suspicious circumstance), the Advisory Committee suggests that the court obtain more information about the parties' situation before dismissing a petition or terminating a PPO. The court might take the following actions:

- Schedule a hearing on a motion to dismiss the petition or terminate the PPO to determine whether it was filed voluntarily.
- If the court is not certain of the reason for the petitioner's failure to appear at a hearing, continue the case and notify the petitioner of the continuation date. To avoid interference with mail service, the notice should be personally served, if possible.
- Notify a respondent appearing in the petitioner's absence that the court will not terminate the PPO or dismiss the petition unless the petitioner comes to court to request it in person.

  Note: MCR 3.704 provides that "[e]xcept as specified in MCR 3.705(A)(5) and (B),* an action for a personal protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order." However, MCR 3.707(A)(1)(b) provides that a respondent may file a motion to modify or terminate the personal protection order and request a hearing.

*MCR 3.705(A)(5) and (B) allow the court to dismiss a petition.

- Modify the PPO instead of terminating it so that the restraints against assaultive behavior are left in place.
- If the motion to dismiss or terminate is granted, advise the petitioner of the right to refile the petition.
- In dangerous circumstances, refuse to dismiss the petition or terminate the PPO. One Chicago judge refuses to vacate protection orders when a child has also been beaten by the respondent.*

*Finn & Colson, *supra*, p 28.

The Advisory Committee for this chapter of the benchbook further suggests that the court *not* respond to a request for dismissal or termination by referring the parties to mediation or otherwise attempting to have them jointly negotiate a settlement regarding the abusive behavior. The Advisory Committee notes that:

- Domestic violence frequently involves criminal behavior, which is never a subject for negotiation or settlement between the victim and perpetrator; and
- Domestic violence by nature involves the abuser's one-sided exercise of control over an intimate partner. Because mediation and negotiated settlement will operate fairly only if there is equal bargaining power between the parties, these dispute resolution devices may not adequately protect the safety of a person who is subject to domestic violence.*

*See Sections 2.4(B) and 10.6 on arbitration and mediation in cases involving domestic violence.

C. Petitioners Who File Repeated Petitions

Courts sometimes find it frustrating when a petitioner who has moved to dismiss a PPO petition or terminate a PPO later returns to court with a new petition. As noted above, this phenomenon can be understood in the context of the complex nature of domestic violence described in Chapter 1. Many abusers are not physically violent on an ongoing basis. After a violent incident, some abusers will seek to win their partners back with a period of affectionate behavior and promises of reform, which are ultimately broken. Accordingly, an individual who files repeat PPO petitions may be doing so after sincere hopes that the violence will stop have proven false. Courts can best serve such individuals by understanding their situation and assuring them that the door to the courthouse remains open to protect them from violence.

If the need for ex parte relief does not appear compelling, some courts deal with repeat petitioners by scheduling the parties for a hearing. In these cases, however, petitioners are told that they can return before the hearing date if there is renewed violence. In other courts, the judge grants the protection order ex parte if it appears warranted on its face and addresses the issue of repeat petitioning at a subsequent noticed hearing. The court might also consider limiting the ex parte relief granted to a restraint on assaultive behavior and holding a hearing as to other types of relief requested in the petition.*

*Finn & Colson, *supra,* p 28-29.

In cases involving repeat petitions, the Advisory Committee for this chapter of the benchbook suggests that the court *not* refer the parties to mediation or otherwise attempt to have them jointly negotiate a settlement regarding the abusive behavior. The Advisory Committee notes that:

- Domestic violence frequently involves criminal behavior, which is never a subject for negotiation or settlement between the victim and perpetrator; and

*See Sections 2.4(B) and 10.6 on arbitration and mediation in cases involving domestic violence.

- Domestic violence by nature involves the abuser's one-sided exercise of control over the victim. Because mediation and negotiated settlement will operate fairly only if there is equal bargaining power between the parties, these dispute resolution devices may not adequately protect the safety of a domestic violence victim.*

D. Parties Who Alter the PPO

Because the form PPO prepared by the State Court Administrative Office lists the relief available in a "check the box" format, some Michigan courts report problems with parties who alter the PPO after issuance by checking additional boxes without court authorization. To manage this problem, the Advisory Committee for this chapter of the benchbook offers the following suggestions:

- On the copies of the form given to the parties, cross out any inapplicable provisions.
- Have the issuing judge initial any handwritten changes on the form.
- Remind the parties that alteration of the court's order is a felony, punishable by imprisonment for not more than 14 years. MCL 750.248.

7.7 PPOs and Access to Children

Because abusers often use the exercise of their parental rights as an opportunity for asserting control over their intimate partners, there is a strong link between safety and the abuser's access to children. This link is recognized in MCR 3.207(A), which states that a circuit court in a domestic relations case may issue both "ex parte and temporary orders with regard to any matter within its jurisdiction" and "[personal protection] orders against domestic violence." This court rule anticipates that child custody (and other) disputes in cases where domestic violence is present can generally be resolved most safely and effectively if the same judge presides over all the proceedings between the same parties. See also MCR 3.703(D)(1)(a), under which a PPO filed in the same court as another action between the parties must be assigned to the same judge who heard the prior action. In *Brandt v Brandt*, 250 Mich App 68, 71-72 (2002), a PPO and subsequent divorce proceeding were assigned to the same judge. The Court of Appeals approved of this procedure, stating that it "allows the judge to be intimately familiar with all the proceedings involving the parties." 250 Mich App at 72. The Court of Appeals also recommended issuing duplicate orders in concurrent domestic relations and PPO proceedings and placing a copy of such orders in each case file. *Id.*

Unfortunately, it is not always possible for one court to meet all the needs of the parties to a violent relationship because persons subject to domestic violence often flee their homes seeking refuge. If such individuals flee after a domestic relations action has been initiated, fear of the abuser may prevent them from seeking relief in the court where the action is pending. If flight occurs before a domestic relations action is initiated, it may be difficult to obtain complete relief from the domestic relations court in the refuge county until the applicable residency requirements are met.* To protect individuals in flight from abuse, MCR 3.703(E)(1) permits petitioners to file PPO actions involving respondents age 18 or over in any county in Michigan. If there is a pending action between the parties or a prior judgment or order entered in another court, MCR 3.703(D)(1)(b) provides that where practicable, the court in the PPO action should not issue an order until it has contacted the prior court to determine any relevant information. If the prior action addressed a child custody or parenting time matter, MCR 3.706(C)(1) requires the court in the PPO action to contact the prior court as provided in MCR 3.205. This rule further directs that where practicable, the judge in the PPO action should not issue an order without first consulting with the prior judge regarding the impact of the PPO on custody or parenting time rights. If a PPO is issued, it takes precedence over any existing custody or parenting time order until it expires, or until the court with jurisdiction over the custody or parenting time order modifies that order to accommodate the conditions of the PPO. MCR 3.706(C)(3).

*In divorce actions, either party must have resided in Michigan for at least 180 days and in the county of filing for at least 10 days before filing. MCL 552.9(1).

Note: MCR 3.205 provides for the exchange of information between courts exercising concurrent jurisdiction in actions affecting minors. With regard to the subsequent court's authority to act, MCR 3.205(A) provides: "If an order or judgment has provided for continuing jurisdiction of a minor and proceedings are commenced in another Michigan court having separate jurisdictional grounds for an action affecting that minor, a waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court." This rule indicates that a domestic relations court's continuing jurisdiction over a minor should not prevent another circuit court from exercising jurisdiction on separate grounds over a subsequent PPO proceeding affecting the minor. See *Krajewski v Krajewski*, 420 Mich 729, 734-735 (1984); *In re Toth*, 227 Mich App 548, 552 (1998); *In re Foster*, 226 Mich App 348, 357 (1997); and *In re DaBaja*, 191 Mich App 281, 289-290 (1991), which permitted probate courts to exercise jurisdiction in abuse/neglect and adoption proceedings involving minors who were also subject to continuing circuit court jurisdiction as a result of prior divorce actions. See, however, MCR 3.205(C)(2), which provides that "[a] subsequent court must give due consideration to prior continuing orders of other courts, and may not enter orders contrary to or inconsistent with such orders, except as provided by law."

Although it provides needed protection for some victims of domestic violence, the concurrence of authority in related proceedings in different courts can be problematic. PPO and domestic relations actions in separate courts can result in conflicting orders issued in each court, which are difficult for police to enforce. Moreover, conflicting orders permit unscrupulous parties to manipulate the court system to the disadvantage or physical peril of others. This section explores the statutory and court rule provisions that may help a court in cases involving concurrent domestic relations and PPO proceedings, along with the policy and practical concerns that can inform its decision-making.

A. Authority to Regulate Access to Children in a PPO

The difficulty in delineating a clear boundary between a PPO and a domestic relations order emanates from the close connection between abusive behavior and the practical issues of support and child custody that must necessarily be addressed in any domestic relations action. Abusers use disputes over custody and support as opportunities to assault, harass, intimidate, and otherwise control their intimate partners. The presence of violence in a domestic relations action thus creates tension between PPO and domestic relations proceedings under the exigent circumstances that often accompany domestic abuse. The expedient issuance and enforcement procedures that promote safety in a PPO action do not offer the best context in which to make the informed factual findings that must accompany a determination of a child's best interest in a custody or parenting time proceeding. Nonetheless, the Court of Appeals has approved of the entry of a PPO affecting a respondent's access to his children pending the filing of a domestic relations action. In *Brandt v Brandt, supra* at 69-70, the Court rejected the respondent's contention that the "best interests of the child" factors contained in the Child Custody Act, MCL 722.21 et seq., must be examined before making any custody or parenting time determination. The Court stated:

> "Respondent is correct that MCL 722.23 enumerates several factors for a court to use to determine the best interests of the children involved in a custody dispute. Nonetheless, we do not believe that these factors were required to be applied in the instant case. The trial court was not making a custody determination, instead, the trial court was simply issuing an emergency order, which was essentially an award of temporary custody of the children to petitioner, while granting respondent parenting time until the divorce proceeding was initiated so that the children might be protected from physical violence or emotional violence or both inflicted on them by respondent."

The tension between a PPO action and a domestic relations proceeding is most acute in situations where a court is requested to issue a PPO that would affect parental rights by excluding the respondent from premises under MCL 600.2950(1)(a), or by limiting access to children's records under MCL 600.2950(1)(h). Such orders will necessarily affect the respondent's access to children; indeed, orders excluding the respondent from premises have a profound impact on parental rights if the respondent is a custodial parent living in the family home. Because a PPO takes precedence over an existing custody or parenting time order under MCR 3.706(C)(3),* an order excluding the respondent from premises or limiting access to records may also affect a noncustodial parent with court-established parental rights. Thus, as a purely practical matter, the statute and court rule give the court in a PPO action concurrent authority with a domestic relations court to limit a parent's access to children. Having granted this power, however, the statute offers scant guidance as to its exercise, leaving the parameters of the PPO proceeding undefined.

*MCR 3.706(C)(3) is quoted in full at Section 6.5(B)(5). See also Section 12.5(B) on the effect of a PPO on the established custodial environment in a proceeding to modify a custody order.

As a starting point for resolving the tension between PPO actions and domestic relations proceedings, it is helpful to recall that these two types of proceedings are designed to meet the needs of parties in distinct situations.* The expedited issuance and enforcement procedures of a PPO action are tailored for situations — often emergencies — in which acts of domestic abuse threaten to interfere with personal liberty or cause a reasonable apprehension of violence. See MCL 600.2950(1)(j). Domestic relations proceedings generally anticipate non-violent situations in which the parties require court assistance to regulate child custody, support, or property matters pending entry of the final judgment in the case. Given these basic differences in purpose, the threshold question in PPO proceedings affecting access to children is whether the situation involves acts imposing upon or interfering with personal liberty, or causing a reasonable apprehension of violence. Absent these circumstances, a PPO is not appropriately used to address the parties' parental rights.

*For comparison of the specific features of PPOs and domestic relations orders under MCR 3.207, see Section 10.7.

If a PPO petition meets the foregoing threshold requirements in requesting an order that would interfere with parental rights, the next (and more difficult) question involves the scope of available relief. The court is clearly empowered to exclude a respondent from premises under MCL 600.2950(1)(a). Having determined that such a measure is necessary to protect the petitioner in a particular case, however, the question remains whether the PPO court may also refine its order by specifying conditions for the respondent's access to children living on the premises. The provisions of the domestic relationship PPO statute that specifically address access to children do not completely resolve this question:

- MCL 600.2950(1)(h) permits restraint on the respondent's "access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."

- MCL 600.2950(1)(f) permits the court to restrain the respondent from "[i]nterfering with petitioner's efforts to remove petitioner's children . . . from premises that are solely owned or leased by the individual to be restrained or enjoined." This provision is designed to prevent abusers from detaining or concealing their partners' children on their solely owned or leased premises.

- MCL 600.2950(1)(d) permits the court to restrain the respondent from "[r]emoving minor children from the individual having legal custody of the children, *except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction*." [Emphasis added.] It is unclear whether the emphasized "except" clause is directed to the respondent or to the court issuing the PPO. If directed to the respondent, the clause would authorize the court to mandate the parties' obedience to a preexisting order without restricting its ability to issue a PPO with inconsistent provisions. If directed to the court, the clause would forbid the issuance of a PPO preventing the respondent from removing children in accordance with a prior order. However construed, this provision does not address abusive behavior other than removal of children from the custodial parent. Moreover, the provision is problematic in its failure to address prior custody or parenting time orders issued by courts that were not cognizant of the parties' violent relationship. It also fails to account for the possibility that the level of violence between the parties may have escalated after the issuance of the prior custody or parenting time order.

The general "catch-all" provision in MCL 600.2950(1)(j) is the only statutory authority that has been construed to address abusive parental behavior other than entering premises or removing children from their custodial parent. This provision permits the court to restrain "[a]ny other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." Although "specific acts" involving the exercise of parental rights are not specifically mentioned, it is not difficult to imagine conduct that would fall within the purview of this provision. In a study of civil protection orders issued in three jurisdictions other than Michigan, the National Center for State Courts reported that petitioners with children frequently reported abusers' threats not to return children after visitation and incidents of physical or verbal abuse occurring during the exchange of children for visitation.*

**Civil Protection Orders: The Benefits & Limitations for Victims of Domestic Violence*, p 51, n 95 (Nat'l Center for State Courts, 1997).

In *Brandt v Brandt, supra* at 69, the trial court entered a PPO prohibiting the respondent from contacting his children. The trial court later modified the PPO to allow the respondent parenting time with his children. The respondent argued on appeal that the trial court did not have the authority to modify a PPO to include parenting time. The respondent asserted that custody and parenting time determinations may only be made in a child custody proceeding after a court has examined the "best interests of the child" factors. The Court of Appeals upheld the trial court's order, indicating that a trial court may restrain individuals from doing certain acts under MCL 600.2950(1). The Court

further stated that MCL 600.2950(1)(j), the "catchall" provision, clearly provides a trial court with the authority to restrain a respondent from any action that "interferes with personal liberty" or might cause "a reasonable apprehension of violence." 250 Mich App at 70. The Court stated:

> "This statutory provision allows the trial court to restrain respondent from 'any other specific act or conduct . . . that causes a reasonable apprehension of violence.' [MCL 600.2950(1)(j)]. There is no question that it would be reasonable for petitioner to fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. Additionally, this interpretation is entirely consistent with the remainder of the statute, which makes it clear that the Legislature recognized that access to the children may need to be restrained to protect the safety of a parent. See MCL 600.2950(1)(d), (f) and (h)." 250 Mich App at 70–71.

The respondent also argued that there was no statutory basis to restrain his contact with his children because the petitioner did not allege that the respondent was violent towards the children. The Court of Appeals disagreed, finding that the petitioner did not need to allege that the respondent was physically violent towards the children. The petitioner's allegations that the respondent was physically violent toward her while in the children's presence and was becoming increasingly more violent provided a sufficient basis for the trial court to enter an order that included prohibiting contact with the children. 250 Mich App at 71.

Many PPOs — particularly those excluding the respondent from premises and restricting access to children's records — affect access to children as a practical matter. Particularly in emergencies where the respondent poses a grave danger to the petitioner, there are reasons for the PPO court to acknowledge the impact of its order on access to children and to incorporate specific provisions governing the exercise of parental rights:

- Because violence often occurs when the parties to an abusive relationship meet to exchange their children, it may be unsafe to enforce court orders for custody or parenting time that require them to do so. There are also serious safety concerns with vague, easily manipulable orders for "reasonable parenting time" or "parenting time to be arranged by the parties."* MCR 3.706(C)(2) authorizes the court to take safety into account in a PPO action initiated after the issuance of a custody or parenting time order. It provides: "If the respondent's custody or parenting time rights will be adversely affected by the [PPO], the issuing court shall determine whether conditions should be specified in the order which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions."

- In emergency situations, it may not be practicable for the parties to a PPO action to participate in a separate domestic relations action to

**Civil Protection Orders*, *supra*. See Section 12.7(B) on the need for specificity in orders for parenting time.

address the respondent's access to children. Such emergencies may include cases where it would endanger the abused individual to return to the county where a prior domestic relations order was issued.

*See Section 10.7 for a comparison of these remedies.

- Violations of domestic relations orders governing access to children do not subject the offender to warrantless arrest, or to the other expedited enforcement procedures for PPOs.*

  Note: Protection order statutes in many other states specifically permit courts to make provision for emergency support and custody within a civil protection order against domestic violence. These orders are entitled to full faith and credit under 18 USC 2265 and 2266(5). See Section 8.13(B)(1).

B. Suggested Procedures for Cases Where a PPO Affects Access to Children

Trial courts can take the following steps to promote safety and prevent manipulation of the system:

*See Section 12.7 on safe terms for parenting time. On screening for domestic violence, see Sections 10.2-10.3 and *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Chapter 2.

- If a custody or parenting time order contains terms that adequately provide for safety in cases involving domestic violence, the court in a subsequent PPO action will be able to incorporate them into its order without making major changes. Accordingly, domestic relations courts should screen for violence in contested cases, so that orders issued will contain provisions that are appropriate for the parties' situation.*

- A court with complete information about the parties will be better able to recognize manipulative behavior. Thus, wherever possible, the courts in PPO and domestic relations proceedings should share information as required by the court rules. Information-sharing can also reduce the incidence of conflicting orders. MCL 600.2950(15)(f) and MCL 600.2950a(12)(f) require the clerk of the court that issues a PPO to provide the following notice immediately upon issuance, without requiring proof of service:

  > "If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify the friend of the court for the county in which the information is located about the existence of the personal protection order."

  See also MCR 3.205 and 3.706(C)(1) for information-sharing requirements.

- A PPO should only address access to children on a temporary basis in emergency situations. Long-term resolution of disputes over access to

children must be sought in a domestic relations proceeding. See MCR 3.706(C)(3) and *Brandt*, *supra* at 70.

- Important due process requirements attach in any case involving limitations on a party's parental rights. To protect these rights, the court in a PPO or a domestic relations proceeding should schedule a prompt post-deprivation hearing after issuing relief on an ex parte basis. See Section 7.5(A) for more discussion of this question.

- If possible and safe, the court issuing a PPO might attempt to accommodate the requirements of a prior custody or parenting time order. For example, if a custody order requires that children have weekly visits with a respondent who may not have contact with the children's custodial parent, the PPO might provide that the weekly visits take place in such a manner that the parents do not have to meet. See MCR 3.706(C)(2), providing that the court issuing a PPO "shall determine whether conditions should be specified . . . which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and minor children would be compromised by such conditions."

Chapter 8: Enforcing Personal Protection Orders

8

8.1 Chapter Overview

*For a discussion of the issuance of PPOs, see Chapters 6 and 7.

This chapter addresses enforcement of personal protection orders issued under the domestic relationship PPO statute (MCL 600.2950) or the non-domestic stalking PPO statute (MCL 600.2950a), and PPOs issued by other states, Indian tribes, or U.S. territories.* The discussion begins with an overview of the enforcement provisions in the PPO statutes and court rules, which provide for contempt sanctions for violation of a PPO. It then explores the following questions that arise in applying these provisions to alleged PPO violations:

- Are civil or criminal contempt sanctions appropriate for a particular PPO violation?
- What due process protections apply in contempt proceedings generally?
- What are the specific procedural requirements for criminal contempt proceedings instituted by warrantless arrest of an alleged adult offender?
- What procedures apply to contempt proceedings against an alleged adult offender that are initiated by an order to show cause?
- What enforcement procedures apply when the alleged offender is under age 18?
- What sentence or disposition may the court impose upon an individual found guilty of contempt?
- What application do constitutional guarantees against double jeopardy have in contempt proceedings regarding behavior that also constitutes a criminal offense?
- What effect do civil protection orders against domestic violence have in other jurisdictions?

8.2 Overview of PPO Enforcement Provisions

A personal protection order without enforcement offers scant protection at best and at worst increases the danger to the petitioner by creating a false sense of security. The Michigan Legislature has provided for enforcement of PPOs by way of the courts' contempt powers. Both the domestic relationship and non-domestic stalking PPO statutes authorize imposition of civil and criminal contempt sanctions upon conviction of a PPO violation — criminal contempt sanctions are most commonly appropriate in cases involving assaultive or threatening behavior.*

*Because PPO violations typically occur outside the court's presence, this chapter assumes that the respondent faces charges of indirect contempt. For a discussion of direct contempt (i.e., contempt committed in the immediate view and presence of a sitting court), see *Contempt of Court Benchbook—Fourth Edition* (MJI, 2008-April 2009), Section 2.4.

Note: Under the Michigan Court Rules, a PPO is defined to include a "foreign protection order" enforceable in Michigan under MCL 600.2950*l*. MCR 3.708(A)(1) and MCR 3.982(A). A "foreign protection order" is:

> "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." MCL 600.2950h(a).

A "foreign protection order" does not include an order issued in another country.

The PPO statutes provide for criminal contempt sanctions as follows:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, shall be imprisoned for not more than 93 days and may be fined not more than $500.00. An individual who is less than 17 years of age and who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in MCL 712A.18. . . . " MCL 600.2950(23) and MCL 600.2950a(20). See also MCR 3.708(H)(5)(a) and MCR 3.988(D).

The PPO statutes also authorize imposition of sanctions under the general contempt provisions of the Revised Judicature Act ("RJA"):

> "A personal protection order issued under this section is also enforceable under [MCL 600.1701 et seq.]." MCL 600.2950(26) and MCL 600.2950a(24).

The general contempt provisions of the RJA authorize the imposition of either criminal or civil contempt sanctions, both of which can involve imprisonment and fines. However, the general penalties for criminal contempt set forth in MCL 600.1715(1) are superseded by the more specific provisions of the PPO statutes. See MCR 3.708(H)(5)(a), MCR 3.988(D), and *Wayne County Prosecutor v Wayne Circuit Judge*, 154 Mich App 216, 221 (1986). If the court determines that civil contempt is the appropriate sanction, it may impose a fine of not more than $7,500.00 and/or a prison term of indeterminate length under MCL 600.1715(2). See also MCR 3.708(H)(5)(b) and MCR 3.988(D)(2)(a).

In both civil and criminal contempt cases, the RJA further authorizes compensation to injured parties for loss or injury resulting from violation of a court's order:

> "If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." MCL 600.1721. See also MCR 3.708(H)(5) and MCR 3.988(D).

In addition to the foregoing statutory penalties, MCR 3.708(H)(5) provides that upon conviction of civil or criminal contempt, "the court may impose other conditions to the personal protection order." MCR 3.988(D)(3) contains a similar provision applicable to PPOs issued against respondents under age 18.

Under the PPO statutes and MCR 3.708, contempt proceedings against an adult age 18 or older may be initiated in one of two ways:

- Criminal contempt proceedings may be initiated by **warrantless arrest** under MCL 764.15b. See also MCL 600.2950(25) and MCL 600.2950a(22).
- If the respondent has not been arrested for the alleged violation, the petitioner may initiate contempt proceedings by way of a **motion to show cause**. MCR 3.708(B).

In cases where a respondent under age 18 has allegedly violated a PPO, enforcement proceedings are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A) and 3.982(B). Court action to enforce a PPO against a respondent under age 18 is initiated by a supplemental petition that may be filed by the original petitioner, a law enforcement officer, a

prosecutor, a probation officer, or a caseworker. MCR 3.983(A). The supplemental petition must contain a specific description of the facts constituting a violation of the PPO. *Id*. Upon receipt of a supplemental petition, the court must either set a date for a preliminary hearing and issue a summons to appear, or issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent. MCR 3.983(B). A law enforcement officer may also apprehend a respondent under age 18 without a court order for violating a PPO. MCL 712A.14(1). In that case, the officer is responsible to ensure that the supplemental petition is prepared and filed with the court. MCR 3.984(B)(4).

At common law, the character and purpose of the punishment determines whether criminal or civil contempt sanctions are appropriate. *In re Contempt of Dougherty*, 429 Mich 81, 92 (1987). The extent to which Michigan's PPO statutes depart from the common law of contempt has not been addressed by the state's appellate courts. Nonetheless, the statutes' authorization of both criminal and civil contempt sanctions requires the court to consult the common law for guidance as to when each type of sanction is appropriate. Accordingly, the sections that follow provide a brief general discussion of the Michigan common law governing contempt.*

*For a more detailed treatment of contempt, see *Contempt of Court Benchbook—Fourth Edition* (MJI, 2008-April 2009).

8.3 Distinguishing Criminal and Civil Contempt

The first analytical step in any contempt proceeding is to determine whether the alleged violation is subject to civil or criminal contempt sanctions. This step is critical because due process requires that a person charged with contempt be informed at the outset whether the proceedings involve civil or criminal contempt.* *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), and *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968). This section explores the substantive differences between civil and criminal contempt.

*See Section 8.4 for other due process requirements.

A. Elements of Criminal Contempt

Criminal contempt sanctions are punitive in nature. A person convicted of criminal contempt is subject to imprisonment and fines, which are imposed to vindicate the authority of the court when the contemnor has done "that which he has been commanded not to do." *In re Contempt of Dougherty*, 429 Mich 81, 93-94 (1987), citing *Gompers v Bucks Stove & Range Co*, 221 US 418, 441-443 (1911). Criminal contempt sanctions are appropriate where all of the following prerequisites are met:

- The contemnor acts with intent, in "wilful disregard or disobedience of the authority or orders of the court." *People v Matish*, 384 Mich 568, 572 (1971), and *People v Kurz*, 35 Mich App 643, 652 (1971).
- The contemnor cannot be coerced to comply with the court's order because the violation has altered the status quo so that it cannot be restored or the relief intended has become impossible. Coercive fines

or imprisonment are likely to be futile in cases where the acts constituting the violation of the court's order were completed prior to the time when the sanctions are imposed. *In re Contempt of Dougherty*, *supra,* 429 Mich at 100, and *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968).

- The court's purpose is to remedy acts constituting an imminent threat to the orderly administration of justice and to vindicate its own authority by punishing the contemnor. *In re Contempt of Rochlin,* 186 Mich App 639, 648 (1990).

The court has no power to impose either criminal or civil contempt sanctions where a party has indicated only that it intends to disobey a court order in the future. *In re Contempt of Dougherty*, *supra,* 429 Mich at 106-107.

The foregoing prerequisites are satisfied in most cases where the alleged PPO violation involves assaultive or threatening behavior against persons, animals, or property. In these cases, the alleged violation is generally not ongoing at the time the court imposes sanctions, so that coercive sanctions will be futile. Where there is no way to coerce the respondent to comply with the PPO, the court can only punish the offending behavior by imposing criminal contempt sanctions.

Note: If assaultive behavior occurs in the court's presence during a court proceeding, direct contempt sanctions are appropriate. See *Contempt of Court Benchbook—Fourth Edition* (MJI, 2008-April 2009), Section 2.4.

B. Elements of Civil Contempt

Civil contempt sanctions are imposed for the benefit of the complainant and have the remedial purpose of restoring the status quo that has been disturbed by a violation of a court order. *Gompers v Bucks Stove & Range Co*, 221 US 418, 441 (1911). Civil contempt sanctions are either coercive or compensatory.

- Coercive sanctions involve imprisonment or fines imposed to compel the contemnor's performance of an act in compliance with a court order. MCL 600.1715(2).

- Compensatory sanctions are imposed to restore an injured party who has suffered actual economic losses as a result of the contemptuous conduct. Compensatory sanctions can be awarded incident to either civil or criminal contempt proceedings. See MCL 600.1721, which is discussed at Section 8.9(C).

Intent to violate the court's order is *not* a required element of civil contempt. *Catsman v City of Flint*, 18 Mich App 641, 646 (1969). See also *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501 (2000) (In

civil contempt proceeding, "the circuit court had to find that respondent was neglectful or violated its duty to obey an order of the court.") Coercive civil contempt sanctions are appropriate in cases where the following prerequisites are met:

- The sanction will restore the status quo by forcing the contemnor to take a desired action or cease ongoing harmful conduct. Coercive sanctions are often appropriate in cases where the acts constituting the violation of the court's order are continuing at the time when the sanctions are imposed. *In re Contempt of Dougherty*, 429 Mich 81, 100 (1987) and *Jaikins v Jaikins*, 12 Mich App 115, 121 (1968).

- The contemnor has the ability to do the act that the court has ordered. Civil contempt sanctions must end when the contemnor complies with the court's order or loses the ability to comply. See MCL 600.1715(2), *Jaikins v Jaikins, supra,* 12 Mich App at 121-122, and *People v McCartney*, 132 Mich App 547, 557 (1984), vacated on other grounds and remanded 141 Mich App 591 (1985).

The court has no power to impose any type of contempt sanction where a party has indicated only that it intends to disobey a court order in the future. *In re Contempt of Dougherty, supra,* 429 Mich at 106-107.

Coercive civil contempt sanctions will generally *not* be appropriate in a PPO action where the respondent is charged with violating a prohibition against assaultive or threatening behavior. In such cases, the essence of the court's order is to *restrain* the respondent from offensive behavior, not to mandate action by the respondent. Moreover, in most cases involving assaults or threats, the alleged violation will not be continuing, so that coercive sanctions will not be effective to bring the respondent into compliance with the court's order or undo any injury the violation has caused. Contemnors in these types of cases can only be punished for their behavior and should be subject to criminal contempt proceedings.

The following discussion sets forth typical factual situations in which courts impose coercive civil contempt sanctions.

1. Failure to Perform an Action Mandated by the Court

Civil contempt sanctions are commonly imposed where an individual is accused of failing or refusing to perform an action within his or her power that has been mandated by a court order. In these cases, civil contempt sanctions are imposed to coerce the contemnor to perform a court-ordered act that will restore the status quo. Cases of this nature include failures to pay spousal support, surrender property, or make a conveyance required by a decree for specific performance. In these types of cases, contemnors are properly subject to coercive fines or imprisonment until they perform or become unable to do so. *In re Contempt of Dougherty, supra,* 429 Mich at 93.

In the context of a PPO action, a respondent's refusal or failure to do an action ordered by the court may take the following forms:

- Failure or refusal to relinquish a firearm or other weapon.
- Failure or refusal to relinquish property to the petitioner.
- Detention of children in violation of a court order.

2. Contemnor in Continuing Violation of a Court Order

Less frequently, courts impose civil contempt sanctions on individuals who have done acts that the court has forbidden. If the contemnor's act violates a court order, civil contempt sanctions are appropriate if the contemnor is in continuing violation of the court's order at the time of imposing sanctions, and if the coercive sanction will bring the contemnor into compliance with the court's order. One example of this type of coercive sanction is a monetary fine imposed for each day a contemnor remains on strike in violation of a court order. *In re Contempt of Dougherty*, *supra,* 429 Mich at 99-100. See also MCL 600.1715(1).

In the context of a PPO action, forbidden behavior that may be subject to civil contempt sanctions might include:

- Possession of a firearm or other weapon.
- Disbursement of family property.
- Interference with the petitioner's efforts to remove children or personal property from premises solely owned or leased by the respondent.

8.4 Due Process in Contempt Proceedings Generally

The Michigan Supreme Court has applied most, but not all, criminal due process protections to contempt proceedings. The Court's due process analysis in contempt cases starts from the assumption that contempt is an anomalous proceeding. On the one hand, the Court has noted that "all contempts may be said to be criminal in nature because they permit imprisoning a contemnor for wilfully failing to comply with an order of the court." *In re Contempt of Dougherty*, 429 Mich 81, 90 (1987). On the other hand, the Court has recognized that contempt is "neither wholly civil nor altogether criminal." *Id.* at 91. Accordingly, the Supreme Court has not focused on the civil or criminal nature of the contempt proceedings in determining what due process requires in a particular case; rather, the Court's due process inquiry poses the question whether the proceedings will result in the deprivation of physical liberty. *Mead v Batchlor*, 435 Mich 480, 498 (1990).

The liberty interests at stake in contempt proceedings have led Michigan's appellate courts to conclude that most criminal due process protections apply regardless of the civil or criminal nature of the contempt. The following criminal due process protections apply to contempt cases:

- If a contempt proceeding is for acts committed outside the immediate view and presence of the court and is initiated by a motion to show cause, the motion must be supported by the affidavit of a person who witnessed or has personal knowledge of the acts charged. In determining whether an affidavit states facts constituting the commission of contemptuous conduct, a trial judge can rely on the stated facts as well as on legitimate inferences drawn therefrom. *Michigan v Powers*, 97 Mich App 166, 168 (1980), and *In re Contempt of Robertson*, 209 Mich App 433, 438-439 (1995).*

- A person charged with contempt must be informed whether the proceedings against him or her involve civil or criminal contempt sanctions. *In re Contempt of Auto Club Insurance Ass'n*, 243 Mich App 697, 716 (2001), *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), and *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968).

- The accused must be advised of the charges, afforded a hearing on the charges, and given a reasonable time in which to prepare a defense. *In re Contempt of Robertson, supra*, 209 Mich App at 438.

- An indigent defendant may not be incarcerated following a civil or criminal contempt proceeding where the assistance of counsel has been denied. *Mead v Batchlor, supra*, 435 Mich at 505-506.

- The rules of evidence apply at the hearing regarding nonsummary civil and criminal contempt charges. MCR 3.708(H)(3), MRE 1101(a), and *In re Contempt of Robertson, supra*, 209 Mich App at 439.

- The Double Jeopardy Clause applies in any proceeding where a punitive sanction is imposed. *People v McCartney (On Remand)*, 141 Mich App 591, 593 (1985), and *People v Artman*, 218 Mich App 236, 246 (1996). See also *United States v Dixon*, 509 US 688 (1993) (double jeopardy applies to nonsummary criminal contempt proceedings). Section 8.12 contains further discussion of double jeopardy.

- In a civil contempt proceeding arising from an individual's failure to pay court-ordered child support, the court may not jail a person unless a stenographic record is made. Moreover, the court should make careful inquiry into the individual's present ability to pay; incarceration is inappropriate in such cases absent findings supported by substantial evidence that the individual has the ability to perform the condition of the proposed order of confinement. *Mead v Batchlor, supra*, 435 Mich at 506.

*PPO enforcement is unique in that the Legislature has made special provisions for initiation of criminal contempt proceedings after warrantless arrest. See Sections 8.5-8.6.

Despite its recognition of the fundamental liberty interests at stake in all contempt proceedings, the Michigan Supreme Court has not extended to them the full panoply of due process protections that apply in ordinary misdemeanor or felony cases. *In re Contempt of Dougherty*, *supra*, 429 Mich at 91. With respect to due process, contempt proceedings differ from criminal proceedings in two ways:

- The reasonable doubt standard is applicable to criminal contempt cases only. MCR 3.708(H)(3), MCR 3.987(F), and *Michigan v Powers*, *supra*, 97 Mich App at 171. In civil contempt cases, the Michigan appellate courts have applied either a preponderance of the evidence standard (*Jaikins v Jaikins*, 12 Mich App 115, 121 (1968)) or a "clear and unequivocal" standard (*People v Matish*, 384 Mich 568, 572 (1971)). In PPO actions involving an adult respondent, MCR 3.708(H)(3) states that the petitioner or prosecuting attorney must prove the respondent's guilt of civil contempt "by clear and convincing evidence." In actions to enforce a PPO against a respondent under age 18, MCR 3.987(F) provides for proof of guilt of civil contempt by a preponderance of the evidence.

- Individuals accused of civil or criminal contempt have no right to a jury trial. See *People v Antkoviak*, 242 Mich App 424, 472 (2000). In *Cross Co v UAW Local No 155*, 377 Mich 202, 211 (1966), the Michigan Supreme Court cited the need "to enforce orders . . . with speed and dispatch" as justification for its holding that a jury trial was not required in a criminal contempt proceeding arising from acts allegedly in violation of an injunction against illegal picketing during a labor dispute.

  Note: The Sixth Amendment to the U.S. Constitution establishes the floor for denying a jury trial in Michigan contempt cases because Michigan law confers no independent right. *People v Antkoviak, supra.* The U.S. Supreme Court has held that petty offenses may be tried without a jury. In deciding whether an offense is "petty," the most relevant criterion is the severity of the penalty authorized; where no maximum penalty is authorized, the Court considers the severity of the penalty actually imposed. *Frank v United States*, 395 US 147, 148-149 (1969). In *Frank*, the Court upheld a three-year sentence of probation that was imposed without a jury trial on an individual convicted of criminal contempt for violating an injunction. The Court reasoned that this sentence was within the limits of the congressional definition of petty offense, so that a jury trial was not required. The Court further held that criminal contempt sentences of up to six months may be constitutionally imposed without a jury trial. *Id.* at 150. Regarding imposition of fines for contempt without a jury trial, see *United Mine Workers v Bagwell*, 512 US 821 (1994) (imposition of "serious" fines of over $64 million constituted criminal contempt, which could only be imposed after a jury trial) and *Muniz v Hoffman*, 422 US 454 (1975) (a $10,000 fine against a

union convicted of criminal contempt was not of such magnitude that the union was entitled to a jury trial).

The statutes and court rules governing PPO enforcement proceedings incorporate the foregoing general due process requirements, making detailed provision for such things as adequate notice of the charges, appointment of counsel, and proof beyond a reasonable doubt in criminal contempt cases. Sections 8.5 through 8.11 outline in detail the procedural steps for PPO enforcement proceedings as set forth in these statutes and court rules.

8.5 Initiating Criminal Contempt Proceedings by Warrantless Arrest

MCL 764.15b authorizes law enforcement officers to arrest an individual named in a PPO without a warrant upon reasonable cause to believe that the individual is violating or has violated the order.* This section sets forth the prerequisites to warrantless arrest under the statute. The discussion assumes an adult respondent and applies to domestic relationship, non-domestic stalking, and foreign PPOs. Enforcement procedures for cases involving respondents under age 18 are addressed in Section 8.11.

*State Police officers may also make warrantless arrests for PPO violations. MCL 28.6(5).

Note: A petitioner who obtains a PPO does not have a constitutionally protected right to have it enforced even when officers have probable cause to believe that a violation has occurred. *Town of Castle Rock v Gonzales*, 545 US ___, ___ (2005).

A. Notice Prerequisites to Warrantless Arrest

A PPO is effective and immediately enforceable upon a judge's signature. An ex parte PPO is effective immediately, without written or oral notice to the respondent, and before entry into the LEIN system. MCL 600.2950(9),(12), (18) and MCL 600.2950a(6), (9), (15). In order for a PPO to be effective in another state, Indian tribal territory, or U.S. territory, a PPO must be served on the respondent. MCL 600.2950(9) and MCL 600.2950a(6).*

*See Section 8.13 for more information on full faith and credit of PPOs.

Once in effect, a PPO is enforceable anywhere in Michigan, by any law enforcement agency that:

- Has received a true copy of the PPO;
- Is shown a copy of the PPO (i.e., by the petitioner); *or*
- Has verified the existence of the PPO on the LEIN network.*

*MCL 600.2950(21) and MCL 600.2950a(18).

A law enforcement officer shall enforce a PPO if *any one* of the foregoing conditions is met. If the officer is shown a copy of the PPO, for example, he

or she must enforce it even if it has not been served on the respondent or entered into the LEIN system.

*The NCIC protection order file is maintained by the FBI. MCL 600.2950h. See Section 8.13 for information on "valid" foreign protection orders.

If a law enforcement officer is shown a copy of a foreign PPO but the officer can not verify the order on LEIN or the National Crime Information Center ("NCIC") protection order file, the officer must still enforce the foreign PPO unless it is apparent that the order is invalid.* MCL 600.2950*l*(4). The law enforcement officer may rely upon the statement of the petitioner that the foreign protection order that has been shown to the officer remains in effect and may rely upon the statement of the petitioner or the respondent that the respondent has received notice of that order. *Id.*

If a law enforcement officer is presented with a copy of a foreign PPO, from any source, the officer may rely upon the copy of the foreign PPO if it appears to contain all of the following:

> "(a) The names of the parties.
>
> "(b) The date the protection order was issued, which is prior to the date when enforcement is sought.
>
> "(c) The terms and conditions against respondent.*
>
> "(d) The name of the issuing court.
>
> "(e) The signature of or on behalf of a judicial officer.
>
> "(f) No obvious indication that the order is invalid, such as an expiration date that is before the date enforcement is sought." MCL 600.2950*l*(3)(a)-(f).

*A foreign protection order must be enforced even though it contains provisions that are unavailable under Michigan's PPO statutes.

If the person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, the law enforcement officer shall attempt to verify the existence of the foreign protection order and all of the following:

> "(a) The names of the parties.
>
> "(b) The date the foreign protection order was issued, which is prior to the date when enforcement is sought.
>
> "(c) Terms and conditions against respondent.
>
> "(d) The name of the issuing court.
>
> "(e) No obvious indication that the foreign protection order is invalid, such as an expiration date that is before the date enforcement is sought." MCL 600.2950*l*(5)(a)-(e).

Verification can be done through LEIN or the NCIC protection order file, administrative messaging, contacting the court that issued the foreign

protection order, contacting the law enforcement agency in the issuing jurisdiction, contacting the issuing jurisdiction's protection order registry, or any other method the law enforcement officer believes to be reliable. MCL 600.2950*l*(5). If the existence of the order and information listed in 600.2950*l*(5)(a)-(e) is verified, the officer may enforce the order. If there is no copy of the order and no verification, the officer should maintain the peace and take appropriate action regarding criminal violations.

If the respondent has not been served with or received notice of a foreign PPO, the law enforcement officer must serve the respondent. MCL 600.2950*l*(9) states:

> "If there is no evidence that the respondent has been served with or received notice of the foreign protection order, the law enforcement officer shall serve the respondent with a copy of the foreign protection order, or advise the respondent about the existence of the foreign protection order, the name of the issuing court, the specific conduct enjoined, the penalties for violating the order in this state, and, if the officer is aware of the penalties in the issuing jurisdiction, the penalties for violating the order in the issuing jurisdiction. The law officer shall enforce the foreign protection order and shall provide the petitioner, or cause the petitioner to be provided, with proof of service or proof of oral notice. . . . If there is no evidence that the respondent has received notice of the foreign protection order, the respondent shall be given an opportunity to comply with the foreign protection order before the officer makes a custodial arrest for violation of the foreign protection order. The failure to comply immediately with the foreign protection order is grounds for an immediate custodial arrest. This subsection does not preclude an arrest under . . . MCL 764.15 and 764.15a, or a proceeding under . . . MCL 712A.14."

When enforcing a foreign PPO, the officer must maintain the peace and take any appropriate action for violation of criminal law. MCL 600.2950*l*(8) provides that "[t]he penalties provided for under [MCL 600.2950] and [MCL 600.2950a] and . . . MCL 712A.1 to 712A.32, may be imposed in addition to a penalty that may be imposed for any criminal offense arising from the same conduct."

Once one of the foregoing conditions is met, MCL 764.15b and the PPO statutes authorize police to arrest without a warrant upon reasonable cause to believe that the respondent is violating or has violated the order, *if* the respondent has been given notice of the PPO. This notice can be given to the respondent in one of the following ways:

- Formal service, as described in Section 6.5(H);

*See Section 6.5(H) for more information about this form of service.

- Service of a true copy of the order or oral advice about the order by a law enforcement officer or court clerk with knowledge of its existence at any time, as described in MCL 600.2950(18) and MCL 600.2950a(15);* or
- Service of a true copy of the order or oral notice from a law enforcement officer responding to a call alleging a violation of the PPO, as described in MCL 600.2950(22) and MCL 600.2950a(19).

If notice cannot be verified on LEIN of NCIC for a foreign PPO, then a law enforcement officer may rely upon a statement from the petitioner indicating that the respondent has received notice of the order. MCL 600.2950*l*.

For domestic or non-domestic stalking PPOs, oral notice given by court clerks or law enforcement officers under the foregoing provisions must inform the respondent of:

- The PPO's existence;
- The specific conduct enjoined;
- The penalties for violating the PPO; and
- The place where the respondent may obtain a copy of the PPO.

If a law enforcement officer provides oral notice of a foreign PPO under the foregoing provisions, the law enforcement officer must inform the respondent of:

- The existence of the foreign PPO;
- The name of the issuing court;
- The specific conduct enjoined;
- The penalties for violating the order in this state; and
- The penalties for violating the order in the issuing jurisdiction, if the officer is aware of such penalities. MCL 600.2950*l*(9).

A proof of service or oral notice must be filed with the clerk of the court that issued the PPO. MCL 600.2950(18), (22), MCL 600.2950a(15), (19), and MCL 600.2950*l*(9). See also MCR 3.706(E). In situations where a law enforcement officer gives notice while responding to a call alleging a PPO violation, the officer must also immediately enter or cause to be entered into the LEIN network that the respondent has actual notice of the PPO. MCL 600.2950(22), MCL 600.2950a(19), and MCL 600.2950*l*(9).

> **Note:** If a law enforcement officer has made oral notice of a foreign protection order, the officer must provide the issuing court with a proof of service or proof of oral notice "if the address of the issuing court is apparent on the face of the foreign protection order

or otherwise is readily available to the officer." MCL 600.2950*l*(9).

B. Making a Warrantless Arrest Where the Notice Requirements Are Fulfilled

Once a respondent has received either service or oral notice of a PPO, MCL 764.15b(1) authorizes a police officer to make a warrantless arrest if the officer has — or receives positive information that another officer has — reasonable cause to believe that *all* of the following conditions exist:

- A PPO has been issued under the non-domestic stalking or domestic relationship PPO statutes, or is a foreign PPO;*
- The individual named in the PPO is violating or has violated the order. An individual is in violation of the order if he or she commits one or more of the acts *specifically prohibited* in the order; and
- If the PPO was issued under non-domestic stalking or domestic relations PPO statutes, the PPO must state on its face that a violation of its terms subjects the individual to immediate arrest and to either of the following:
  - If the individual is 17 years of age or older, to criminal contempt sanctions of imprisonment for not more than 93 days and to a fine of not more than $500.00; or
  - If the individual is less than 17 years of age, to the dispositional alternatives of the Juvenile Code, MCL 712A.18.*

*A "foreign PPO" must either appear valid or be verified as described above. See Section 8.5(A).

*See Section 8.11 on enforcement proceedings for respondents under age 18.

If the respondent first received notice of the PPO from police officers responding to a call alleging a violation of the PPO, the officers must give the respondent an opportunity to comply with the PPO before making an arrest. The failure to immediately comply with the PPO is grounds for an immediate custodial arrest. MCL 600.2950(22) and MCL 600.2950a(19).

In *People v Freeman,* 240 Mich App 235 (2000), the Court of Appeals held that a police officer's reliance on LEIN information provided reasonable cause to believe that a respondent named in a PPO had notice of the PPO and had violated its provision, thereby supporting an immediate arrest. The Court noted that "reasonable cause" means "having enough information to lead an ordinarily careful person to believe that the defendant committed a crime. CJI2d 13.5(4)." 240 Mich App at 236.

MCL 764.9c(3)(b) prohibits issuance of an appearance ticket for persons subject to detainment for violation of a PPO.

Regardless of whether they make an arrest, police officers must write an incident report whenever they investigate or intervene in a domestic violence incident. The peace officer must use a standard domestic violence incident

report form. MCL 764.15c(2) states that the report must contain, but not be limited to, all of the following information:

> "(a) The address, date, and time of the incident being investigated.
>
> "(b) The victim's name, address, home and work telephone numbers, race, sex, and date of birth.
>
> "(c) The suspect's name, address, home and work telephone numbers, race, sex, date of birth, and information describing the suspect and whether an injunction or restraining order covering the suspect exists.
>
> "(d) The name, address, home and work telephone numbers, race, sex, and date of birth of any witness, including a child of the victim or suspect, and the relationship of the witness to the suspect or victim.
>
> "(e) The following information about the incident being investigated:
>
> > (*i*) The name of the person who called the law enforcement agency.
> >
> > (*ii*) The relationship of the victim and suspect.
> >
> > (*iii*) Whether alcohol or controlled substance use was involved in the incident, and by whom it was used.
> >
> > (*iv*) A brief narrative describing the incident and the circumstances that led to it.
> >
> > (*v*) Whether and how many times the suspect physically assaulted the victim and a description of any weapon or object used.
> >
> > (*vi*) A description of all injuries sustained by the victim and an explanation of how the injuries were sustained.
> >
> > (*vii*) If the victim sought medical attention, information concerning where and how the victim was transported, whether the victim was admitted to a hospital or clinic for treatment, and the name and telephone number of the attending physician.
> >
> > (*viii*) A description of any property damage reported by the victim or evident at the scene.
>
> "(f) A description of any previous domestic violence incidents between the victim and the suspect.

> "(g) The date and time of the report and the name, badge number, and signature of the peace officer completing the report."

Furthermore, the officers must provide the victim in the domestic dispute with information about how to obtain this incident report. MCL 764.15c(1).* A "domestic violence incident" includes a violation of a domestic relationship PPO issued under MCL 600.2950. MCL 764.15c(4)(a).

*Additional information must be provided to the victim. For further information see Section 4.2.

MCL 28.243(1) requires law enforcement to fingerprint those arrested for criminal contempt of court for an alleged violation of a non-domestic stalking PPO, a domestic relationship PPO, or a valid foreign PPO.

> **Note:** The warrantless arrest procedures for PPO violations under MCL 764.15b do not preclude officers from making a warrantless arrest on other grounds, e.g., under MCL 764.15 (general authority to arrest) or MCL 764.15a (arrest for domestic assault). See Section 3.4 on the authority to arrest for domestic assault, and for discussion of the reasonable cause standard in the context of MCL 764.15a.

8.6 Pretrial Proceedings After Warrantless Arrest

This section outlines the pretrial procedural requirements that apply after an individual age 18 or older has been arrested without a warrant for an alleged PPO violation.* The discussion applies to domestic relationship, non-domestic stalking, and valid foreign PPOs.

*See Section 8.11 on enforcement of a PPO with a minor respondent.

A. Jurisdiction to Conduct Contempt Proceedings

The family division of circuit court in each county in Michigan has jurisdiction to conduct contempt proceedings for an alleged violation of a PPO issued by the circuit court of any other county in Michigan or a valid foreign* PPO. MCL 764.15b(5). The arraignment must take place in the county where the arrest was made, however:

*For information on "valid foreign PPOs," see Section 8.13(A).

> "If the respondent is arrested for violation of a personal protection order as provided in MCL 764.15b(1), *the court in the county where the arrest is made shall proceed* as provided in MCL 764.15b(2)-(5), except as provided in this rule." MCR 3.708(C)(1). [Emphasis added.]

If the respondent is arrested in a county other than the one in which the PPO was issued, the hearing on the charged PPO violation may take place in either the arraigning or the issuing court. The arraigning court shall notify the issuing court prior to the hearing on the charges, and the issuing court may request that the respondent be returned to its county. If the issuing court requests the respondent's return, its county shall bear the cost of transporting the respondent. If the issuing court does not request the respondent's return,

the arraigning court must proceed to a hearing on the charges. MCL 764.15b(5) and MCR 3.708(C)(1). Where the contempt proceeding is brought in a court other than the issuing court, MCR 3.708(C)(2) further provides:

> "A contempt proceeding brought in a court other than the one that issued the personal protection order shall be entitled 'In the Matter of Contempt of [Respondent].' The clerk shall provide a copy of the contempt proceeding to the court that issued the personal protection order."

The broad jurisdictional provisions of MCL 764.15b(5) and MCR 3.708(C)(1)-(2) protect victims who have fled from their places of residence to escape violence.

B. Time and Place for Arraignment

An individual arrested without a warrant for the alleged violation of a PPO must be arraigned in family division of circuit court. The arraignment must take place in the county where the arrest occurred, regardless of where the PPO was issued. MCR 3.708(C)(1). The individual must be brought before the circuit court for arraignment within 24 hours after arrest. MCL 764.15b(2). If a circuit judge is not available within 24 hours after arrest, the individual must be brought within that time before the district court, which "shall set bond and order the respondent to appear for arraignment before the family division of the circuit court in that county." MCR 3.708(C)(3). See also MCL 764.15b(3).

> **Note:** After-hours arrests are common in domestic violence cases. One study of 435 battered women reported that Saturdays and Sundays were the days of the week on which battering incidents (particularly serious ones) were most likely to occur. The study further reported that the most likely time of day for abusive incidents to occur was from 6 p.m. to 12 midnight.* To promote safety, and to avoid the potential constitutional conflicts that arise from holding persons who are arrested after court business hours, the Advisory Committee for this chapter of the benchbook suggests that courts clearly communicate with law enforcement and jail officials about procedures following after-hours arrests. The Committee also suggests that circuit courts include arraignments under MCL 764.15b in their plans for judicial availability adopted pursuant to MCR 6.104(G). On Fourth Amendment concerns with post-arrest detention, see Section 4.3.

*Walker, The Battered Woman Syndrome, p 25 (Springer, 1984). See also Greenfeld, et al, *Violence by Intimates*, p 11 (Bureau of Justice Statistics, 1998).

MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section."

1. Post-Arrest Proceedings Initiated in District Court

If an individual's first post-arrest court appearance is before the district court, the authority of the magistrate or district judge is limited to ordering the respondent to appear for arraignment in family division of circuit court in that county and setting bond. MCR 3.708(C)(3). See also MCL 764.15b(3). The rules for setting bond are discussed in Section 8.6(C).

The warrantless arrest statute and PPO court rules are silent as to the time for the district court to schedule the arraignment. The Advisory Committee for this chapter of the benchbook suggests that the district court schedule the arraignment in circuit court for the earliest possible time — the delay should not be beyond that reasonably necessary to obtain the arraignment, particularly if the respondent is in custody. The Committee's suggestion is based on the following authorities:

- MCL 764.15b(2)(a), which requires that the family division of circuit court set a hearing on the alleged PPO violation within 72 hours after arrest, unless extended by the court on the motion of the arrested individual or the prosecutor. See also MCR 3.708(F)(1)(a) for a similar provision.

- MCR 6.104(A), which applies to criminal cases cognizable in circuit court and provides: "Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment."

- *Brennan v Northville Twp,* 78 F3d 1152 (CA 6, 1996), and *Williams v Van Buren Twp,* 925 F Supp 1231 (ED Mich, 1996), describing the circumstances under which post-arrest detention under MCL 780.582a and MCL 780.581(3) will violate the arrestee's Fourth Amendment rights. These cases, which are discussed in more detail at Section 4.3, state that the Fourth Amendment requires a prompt determination of probable cause to arrest whenever a suspect is arrested without a warrant. While a judicial probable cause determination within 48 hours of arrest will generally comply with the promptness requirement, a detention for less than 48 hours may still run afoul of the constitution if the arrestee can show that the probable cause determination was delayed unreasonably.

2. Post-Arrest Proceedings Initiated in Circuit Court

If an individual's first post-arrest court appearance is before the circuit court, that court must set a reasonable bond pending a hearing on the alleged violation, unless the court determines that release will not reasonably ensure the safety of the individuals named in the PPO.* MCL 764.15b(2)(b), MCR 3.708(D)(5), and MCR 3.708(F)(1)(a). Additionally, the circuit court must:

*See Section 8.6(C) on setting bond.

- Advise the respondent of the alleged violation. MCR 3.708(D)(1). The notice of violation should advise the respondent of the possible

penalties for criminal and/or civil contempt. See *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), requiring that a person charged with contempt be informed whether the proceedings against him or her involve civil or criminal sanctions.

- Advise the respondent of the right to contest the charge at a contempt hearing. MCR 3.708(D)(2).
- Advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one. MCR 3.708(D)(3).
- If requested and appropriate, appoint a lawyer. MCR 3.708(D)(4).
- Schedule a hearing on the charges or take a guilty plea. MCR 3.708(D)(6).

If the circuit court schedules a hearing on the charged violation, it must make the following notifications:

- Notify the prosecuting attorney of the proceedings. MCR 3.708(F)(2) and MCL 764.15b(2)(c).
- Notify the petitioner and his or her attorney, if any. The court must also direct the party to appear at the hearing and give evidence on the charge of contempt. MCR 3.708(F)(3) and MCL 764.15b(2)(d).

The prosecuting attorney must prosecute the criminal contempt proceedings, unless:

- The petitioner retains his or her own attorney for this purpose. MCR 3.708(G) and MCL 764.15b(7);
- The prosecutor determines that the PPO was not violated. MCL 764.15b(7); or
- The prosecutor decides that it would not be in the interests of justice to prosecute the criminal contempt violation. *Id*.

If the prosecuting attorney prosecutes the criminal contempt proceeding, the court may dismiss it upon the prosecuting attorney's motion for good cause shown. MCL 764.15b(7).

> **Note:** Prosecutors may move for dismissal of contempt proceedings on various substantive and procedural grounds. Actions constituting a PPO violation may also constitute criminal offenses. Michigan law specifically permits concurrent criminal and PPO enforcement proceedings, and both may be necessary to provide safety for the petitioner. See MCL 600.2950(23) and MCL

600.2950a(20). However, the concurrence of proceedings raises double jeopardy and other procedural questions that may influence a prosecutor's exercise of discretion in handling alleged PPO violations. A hearing on an alleged PPO violation may be postponed pending the outcome of criminal proceedings if the alleged violation is the basis for a separate criminal prosecution. See MCR 3.708(F)(1)(c), discussed at Section 8.6(D). On double jeopardy, see Section 8.12.

C. Setting Bond in Circuit or District Court

If the police arrest an individual for an alleged PPO violation, no bond is allowed until a court reviews the case and sets bond. Bond must be set within 24 hours after arrest. MCL 764.15b(2)(b). The family division of circuit court is responsible for setting bond unless no circuit judge is available within 24 hours after arrest; in that case, the district court shall set bond. MCL 764.15b(3) and MCR 3.708(C)(3).

Note: MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section."

Safety is of primary concern in setting bond in cases involving allegations of domestic violence. MCR 3.708(F)(1)(a) provides that "[t]he court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the individuals named in the personal protection order." If the court decides to release the respondent on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) that is necessary to reasonably ensure the safety of the individuals named in the PPO, including continued compliance with the PPO. The release order shall also comply with MCL 765.6b. MCR 3.708(F)(1)(b). This statute provides for LEIN entry of release orders issued for the protection of a named individual, and for warrantless arrest upon reasonable cause to believe that an individual has violated such an order. SCAO Form MC 240* is designed for orders issued under MCL 765.6b.

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms/index.htm (last visited March 9, 2004).

For more discussion of conditional release orders under MCL 765.6b, see Sections 4.4 - 4.9.

Note: Although a conditional release order issued by a district court will continue in effect after the case is transferred to circuit court, the Advisory Committee for this chapter of the benchbook suggests that circuit courts take steps to update the information in the LEIN system after the transfer occurs. Updating the LEIN information can facilitate enforcement by clarifying the status of the case for law enforcement officers who use the system. To update the LEIN information, the circuit court can continue or modify the district court's release order at arraignment and make

it an order of the circuit court. This can be done by completing SCAO Form MC 240 or MC 240a, and contacting the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered into LEIN, Form MC 239 can be used to remove the district court's order from the system. See Section 4.8 for further discussion.

D. Time for Holding a Hearing on the Charged Violation

The time for holding the hearing on an alleged PPO violation is governed by MCR 3.708(F)(1)(a), which provides:

> "Following the respondent's appearance [*at a show cause proceeding*] or arraignment [*after warrantless arrest*], the court shall do the following:*
>
> > "(1) Set a date for the hearing at the earliest practicable time except as required under MCL 764.15b.
> >
> > > (a) The hearing of a respondent being held in custody for an alleged violation of a personal protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. . . ."

*The bracketed text has been added by the Advisory Committee and is its interpretation of the court rule. Show cause proceedings are discussed in Section 8.7.

See also MCL 764.15b(2)(a) for a similar provision.

The Advisory Committee for this chapter of the benchbook believes that the "earliest practicable time" provision in MCR 3.708(F)(1) refers only to show cause proceedings. If the contempt proceeding has been initiated after warrantless arrest, the Committee believes that the court rule incorporates the provisions of MCL 764.15b(2)(a) governing the time for holding a hearing on the alleged violation. This statute requires the circuit court to "[s]et a time certain for a hearing on the alleged violation of the [PPO]. The hearing shall be held within 72 hours after arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney."

The 72-hour period for holding the violation hearing may be extended in three ways:*

*There are no provisions for adjournment or postponement upon motion by an attorney retained by the petitioner.

- On motion by the arrested individual or the prosecutor, under MCL 764.15b(2)(a).
- On motion by the prosecutor, under MCR 3.708(F)(1)(c), which provides: "If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution . . . the court may postpone the hearing for the outcome of that prosecution."

- On motion by the prosecutor who is prosecuting the contempt proceeding, under MCL 764.15b(7), which permits adjournments for "not less than 14 days or a lesser period requested."

  Note: On double jeopardy concerns that may influence a prosecutor's exercise of discretion in handling alleged PPO violations, see Section 8.12.

MCL 764.15b(8) provides that "[a] court shall not rescind a personal protection order, dismiss a contempt proceeding based on a personal protection order, or impose any other sanction for a failure to comply with a time limit prescribed in this section." This provision took effect July 1, 2000, and appears to supersede the Court of Appeals' ruling in *In re Contempt of Tanksley*, 243 Mich App 123 (2000), which considered the effect of a violation of the 72-hour hearing requirement under a previous version of the statute. The Court in that case determined that charges of criminal contempt for violation of a PPO should be dismissed without prejudice where the 72-hour time requirement was violated.

E. Taking a Guilty Plea at Arraignment — Guilty Plea Script

If the respondent offers a guilty plea at arraignment, the circuit court may accept it only if the following requirements of MCR 3.708(E) are met:

> "...Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must
>
> > "(1) advise the respondent that by pleading guilty the respondent is giving up the right to a contested hearing and, if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in [MCR 3.708(D)(3)].
> >
> > "(2) advise the respondent of the maximum possible jail sentence for the violation,
> >
> > "(3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and
> >
> > "(4) establish factual support for a finding that the respondent is guilty of the alleged violation."

The following guilty plea script is based on MCR 3.708(E)(1)-(4), and was prepared by Hon. William J. Caprathe, 18th Circuit Court:

1) What is your name?

2) How old are you?

3) Can you read, write and understand the English language?

4) Can you hear and understand me?

5) Do you understand that you are pleading guilty to violating a PPO?

6) Do you understand that you are giving up a right to a hearing and if not represented, you are giving up your right to lawyer, to either hire one or if you can't afford one to have the court appoint one for you?

7) Do you understand that throughout the hearing, you are presumed innocent until your guilt is proven beyond a reasonable doubt?

8) Do you understand that you have the right to have all witnesses against you appear at the hearing, to ask the witnesses questions, and to have a judge order any witnesses you might have to appear at the hearing?

9) Do you understand that you don't have to testify at the hearing and nobody can say anything about you not testifying or hold it against you? On the other hand, you have the right to testify at the hearing if you want to testify.

10) Do you understand that if the judge accepts your guilty plea, you will not have a contested hearing, and you will be giving up all the rights I have told you about, you will also be giving up any claim that the plea was not your own choice but the result of promises and threats that were not disclosed to the court?

11) Do you understand that any appeal from the conviction and sentence following the guilty plea will be by application for leave to appeal and not by right?

12) Do you understand that if you are on probation or parole, this plea could affect your probation or parole status?

13) Has anyone threatened you?

14) Is it your own choice to plead guilty?

15) How do you plead to violating the PPO? Tell me what happened, when, and where.

The court must state on the record that it finds that the plea was understandingly, voluntarily, and knowingly made.

8.7 Pretrial Procedures Where There Has Been No Arrest for an Alleged PPO Violation

Where there has been no arrest following an alleged PPO violation, the petitioner may seek enforcement by way of a show cause proceeding in family division of circuit court. Where the petitioner initiates the contempt proceedings, the respondent may be sanctioned for either civil or criminal contempt. This section addresses the petitioner's motion to show cause and the respondent's first appearance in court in response to the petitioner's motion. The discussion assumes that the respondent is age 18 or older.*

*See Section 8.11 on enforcement of PPOs with a minor respondent.

A. Place for Filing a Motion for an Order to Show Cause

The PPO statutes and court rules do not specify where a petitioner should initiate show cause proceedings in cases where there has been no arrest for an alleged violation of a PPO. The broad jurisdictional provisions of MCL 764.15b(5), discussed at Section 8.6(A), are limited to situations where there has been a warrantless arrest for the alleged PPO violation.

Because violation of a PPO is an offense against the issuing court, the Advisory Committee for this chapter of the benchbook suggests that as a general rule, show cause proceedings should be initiated in the issuing court. See *Cross Co v UAW Local No 155*, 377 Mich 202, 212 (1966). If, however, there are exigent circumstances that justify bringing the show cause proceeding elsewhere (e.g., the petitioner would be endangered by seeking enforcement in the issuing court), the Committee suggests that the court in the jurisdiction where the alleged violation occurred could entertain the show cause proceeding after consultation with the issuing court. See *Cross Co v UAW Local No 155, supra*, which approved transfer of contempt proceedings in the "sound discretion of the judge handling the original proceeding." Besides safety, other factors the court might consider in exercising the discretion to transfer a contempt proceeding might include whether the issuing judge can fairly preside over the matter, whether the proceedings would be unduly delayed by transfer, or whether a judge is readily available in the issuing court.

Where a contempt proceeding is initiated in a court other than the issuing court after warrantless arrest of the respondent, MCR 3.708(C)(2) provides:

> "A contempt proceeding brought in a court other than the one that issued the personal protection order shall be entitled 'In the Matter of Contempt of [Respondent].' The clerk shall provide a copy of the contempt proceeding to the court that issued the personal protection order."

There is no corresponding provision in MCR 3.708(B), the court rule governing motions to show cause.

B. Filing of Motion and Sufficiency of Affidavit

MCR 3.708(B)(1) governs the filing of a motion to show cause:

> "If the respondent violates the personal protection order, the petitioner may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. . . . "

There is no fee for filing a motion to show cause. *Id*.

In *Michigan v Powers*, 97 Mich App 166, 168 (1980), the Court of Appeals made the following comments about the sufficiency of the supporting affidavit.

> "Contumacious behavior not committed in the presence of the court, to be subject to punishment for contempt, must be brought to the court's attention by petition supported by affidavit(s) of a person or persons who witnessed or have personal knowledge of the acts charged. If an inadequate affidavit is the predicate which underlies the contempt proceeding or if no affidavit at all accompanies the petition, the court lacks jurisdiction over the person of the alleged contemnor. . . . In determining whether an affidavit is sufficient, *i.e*., whether it states facts which constitute the commission of contemptuous conduct, a trial judge can rely on the stated facts as well as legitimate inferences drawn therefrom."

If the petitioner's motion and affidavit establish a basis for a finding of contempt, MCR 3.708(B)(1) provides that the court shall either:

> "(a) order the respondent to appear at a specified time to answer the contempt charge; or
>
> "(b) issue a bench warrant for the arrest of the respondent."

C. Service of a Motion and Order to Show Cause

Service of a motion and order to show cause must be made by personal service to the respondent at least seven days before the show cause hearing. MCR 3.708(B)(2).

D. Proceedings at Respondent's First Appearance; Setting the Matter for Hearing

MCR 3.708(D) governs proceedings at the respondent's first appearance before the court in a show cause proceeding. The court must:

- Advise the respondent of the alleged violation. MCR 3.708(D)(1). This advice should inform the respondent of the possible penalties for

criminal and/or civil contempt. See *In re Contempt of Rochlin*, 186 Mich App 639, 649 (1990), holding that a person charged with contempt has a due process right to be informed at the outset whether the proceedings involve criminal or civil contempt.

- Advise the respondent of the right to contest the charge at a contempt hearing. MCR 3.708(D)(2).

- Advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one. MCR 3.708(D)(3).

- If requested and appropriate, appoint a lawyer. MCR 3.708(D)(4).

- Set a reasonable bond pending a hearing on the alleged violation, unless the court determines that release will not reasonably ensure the safety of the individuals named in the PPO. MCR 3.708(D)(5) and MCR 3.708(F)(1)(a). If the court decides to release the respondent on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) that is necessary to reasonably ensure the safety of the individuals named in the PPO, including continued compliance with the PPO. The release order shall also comply with MCL 765.6b. MCR 3.708(F)(1)(b). This statute provides for LEIN entry of release orders issued for the protection of a named individual, and for warrantless arrest upon reasonable cause to believe that an individual has violated such an order. SCAO Form MC 240* is designed for orders issued under MCL 765.6b. For more discussion of conditional release orders under MCL 765.6b, see Sections 4.4 - 4.9.

- Schedule a hearing on the charges or take a guilty plea. MCR 3.708(D)(6). If the court schedules a hearing on the alleged violation it must be held at the "earliest practicable time" after the respondent's first appearance in the show cause proceeding. MCR 3.708(F)(1). If the respondent offers a guilty plea, the circuit court may accept it only if it comports with MCR 3.708(E). The requirements of MCR 3.708(E) and a guilty plea script appear at Section 8.6(E).

*SCAO forms are available online at www.courts.michigan.gov/scao/courtforms/index.htm (last visited March 9, 2004).

In addition to the foregoing requirements, the court must also notify the prosecuting attorney of the proceedings if the respondent is subject to criminal contempt sanctions. MCL 764.15b(4)(b) and MCR 3.708(F)(2). In both civil and criminal contempt proceedings, the court must notify the petitioner and his or her attorney and direct the party to appear at the hearing and give evidence on the charge of contempt. MCL 764.15b(4)(a) and MCR 3.708(F)(3).

MCL 764.15b(7) requires the prosecutor to prosecute a criminal contempt proceeding initiated by a motion to show cause, unless:

- The petitioner retains his or her own attorney for this purpose;

- The prosecutor determines that the PPO was not violated; or
- The prosecutor decides that it would not be in the interests of justice to prosecute the criminal contempt violation.

If the prosecuting attorney prosecutes the criminal contempt proceeding, the court may dismiss it upon the prosecuting attorney's motion for good cause shown. *Id*.

The time for holding the hearing on an alleged PPO violation is governed by MCR 3.708(F)(1)(a), which provides:

> "Following the respondent's appearance [*at a show cause proceeding*] or arraignment [*after warrantless arrest*], the court shall do the following:*
>
> > "(1) Set a date for the hearing at the earliest practicable time except as required under MCL 764.15b [the statute governing proceedings after warrantless arrest].
> >
> > > (a) The hearing of a respondent being held in custody for an alleged violation of a personal protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. . . ."

*The bracketed text has been added by the Advisory Committee and is its interpretation of the court rule. Proceedings after warrantless arrest are discussed in Section 8.6.

The 72-hour period for holding the violation hearing for a respondent held in custody may be extended as follows:

- On motion by the prosecutor who is prosecuting the contempt proceeding, under MCL 764.15b(7), which permits adjournments for "not less than 14 days or a lesser period requested."*
- On motion by the prosecutor, under MCR 3.708(F)(1)(c), which provides: "If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution . . . the court may postpone the hearing for the outcome of that prosecution."

  Note: On double jeopardy concerns that may influence a prosecutor's exercise of discretion in handling alleged PPO violations, see Section 8.12.

*There is no provision for adjournment or postponement upon motion by an attorney retained by the petitioner.

8.8 Hearing on the Contempt Charges

This section describes the procedures for hearings on alleged PPO violations as set forth in MCR 3.708(H). This rule applies in cases where the respondent is age 18 or older.* Except where specified, this rule applies to both civil and criminal contempt proceedings. For discussion of due process requirements in contempt proceedings generally, see Section 8.4.

*For procedures involving a minor respondent, see Section 8.11.

- "There is no right to a jury trial." MCR 3.708(H)(1).
- "The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses." MCR 3.708(H)(2).
- "The rules of evidence apply to both criminal and civil contempt proceedings." MCR 3.708(H)(3).
- "At the conclusion of the hearing, the court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." MCR 3.708(H)(4).

Regarding the burden of proof, MCR 3.708(H)(3) provides:

> "The petitioner or the prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence."

8.9 Sentencing for Contempt

Because domestic violence can have lethal consequences, safety is of primary concern in imposing sentence upon conviction of a PPO violation. There are many danger signals to look for in making a safety assessment — a list of "lethality factors" appears at Section 1.4(B). One important safety consideration is that domestic violence may escalate when the abused individual seeks outside intervention or attempts to leave the relationship. Such "separation violence" occurs when an abuser perceives a loss of control over an intimate partner and intensifies the violence in order to regain it. Caution is also warranted with individuals who violate a PPO soon and/or often after its issuance. In these cases, the offender's willingness to resort to violence without regard for the court's authority indicates the need for swift, stern action to ensure the petitioner's safety. Criminal intervention and safety planning for the petitioner may also be needed in these cases to supplement the protection offered by a PPO.*

**Civil Protection Orders: The Benefits & Limitations for Victims of Domestic Violence,* p 56-58 (Nat'l Center for State Courts, 1997).

Where an individual age 17 or older has been convicted of a PPO violation, the court can make use of one or more of the following sentencing options, which are the subject of this section:*

*See Section 8.11(I) on dispositional alternatives for respondents under 17. Note that while adult *penalties* are imposed on persons 17 or older, adult *procedures* are not appropriate until a respondent is age 18. See 8.11(A) and (I).

- Criminal contempt sanctions, which involve a mandatory jail term for a fixed period and a fine in the court's discretion;
- Coercive sanctions for civil contempt, which involve an indeterminate jail term and/or fine in the court's discretion;
- Compensation to injured parties for losses resulting from the violation of the court's order; and
- Modification of the PPO.

A. Sentencing for Criminal Contempt

The PPO statutes provide the following criminal contempt penalties for violation of a personal protection order:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, *shall* be imprisoned for not more than 93 days and *may* be fined not more than $500.00 . . . . The criminal penalty provided for under this section may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct." MCL 600.2950(23) and MCL 600.2950a(20). [Emphasis added.] See also MCR 3.708(H)(5)(a) for a similar provision.

Michigan's appellate courts have not yet addressed whether the foregoing statutes require mandatory imprisonment upon conviction of a PPO violation. The Advisory Committee for this chapter of the benchbook believes that under the plain meaning of the words "shall" and "may" in these statutes, imprisonment is mandatory, and a fine is discretionary.

A second unresolved question is whether probationary sentences are authorized upon conviction of criminal contempt under the PPO statutes. To answer this question, a court must determine: 1) whether the probation statutes apply to criminal contempt convictions under the PPO statutes or whether the provisions of the general contempt statute* apply to criminal contempt under the PPO statutes; and 2) whether the mandatory nature of the jail sentence imposed in the PPO statutes forecloses the imposition of a probationary sentence. For the reasons that follow, the Advisory Committee for this chapter of the benchbook suggests that Michigan courts retain discretion to impose probationary sentences upon conviction of a PPO. However, the Committee further suggests that probation should *not* be routinely used as a sentencing option for PPO offenders.

*Effective March 30, 2007, the general contempt statute, MCL 600.1715, expressly authorizes probationary sentences for criminal contempt. 2006 PA 544.

1. Applicability of Probation Statutes to Criminal Contempt Convictions

An individual convicted of criminal contempt may be sentenced to probation according to the provisions in MCL 771.1 to 771.14a. MCL 600.1715(1).* The probation statute in the Code of Criminal Procedure provides as follows:

*Effective March 30, 2007. 2006 PA 544.

> "In all prosecutions for felonies or *misdemeanors* other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and major controlled substance offenses . . . if the defendant has been found guilty upon verdict or plea, and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer." MCL 771.1(1). [Emphasis added.]

See also MCL 771.14(1), which gives courts discretion to order preparation of a presentence investigation report in a case involving "misdemeanor" charges.

The Code of Criminal Procedure defines "misdemeanor" as follows:

> "'Misdemeanor' means a *violation of a penal law* of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine." MCL 761.1(h). [Emphasis added.]

In deciding whether a criminal contempt conviction involves a "violation of a penal law," it is significant to note that under the foregoing definition, "misdemeanors" are not restricted to offenses set forth within the Michigan Penal Code. Indeed, the Legislature has created many criminal offenses outside the Penal Code that are nonetheless considered "penal laws" for purposes of the procedures set forth the Code of Criminal Procedure. The most notable of these are the controlled substance offenses found within the Health Code and traffic offenses found within the Michigan Vehicle Code. Thus, the term "misdemeanor" cannot be defined according to the place where the offense is located within the Michigan Compiled Laws. Instead, a "misdemeanor" must be defined according to the nature of the offense.

The nature of a misdemeanor offense is described as follows in the Michigan Penal Code:

> "When any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor." MCL 750.8.

The Michigan Supreme Court articulated a similar definition of "crime" in *People v Goldman,* 221 Mich 646 (1923). The defendant in this case challenged his sentence to probation for violating a city ordinance, asserting that ordinance violations were not "crimes" for which probation could be imposed. The ordinance violation carried a penalty of up to 90 days in jail and/or a maximum $500.00 fine. The Supreme Court upheld the probationary sentence, characterizing the offense as a "crime" according to the following definition:

> "Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime." 221 Mich at 649.

The Advisory Committee for this chapter of the benchbook suggests that the foregoing Penal Code and Supreme Court definitions of "misdemeanor" and "crime" construe these terms broadly enough to encompass a criminal contempt conviction for violation of a PPO. The statutory penalties for a PPO violation include a jail term and fine, both of which are characteristic of criminal misdemeanor offenses. The Michigan Legislature has also recognized the criminal nature of the sanctions in the PPO statutes in MCL 600.2950(23) and MCL 600.2950a(20), which state: "The *criminal* penalty provided for under this section may be imposed in addition to a penalty that may be imposed for *another* criminal offense arising from the same conduct." [Emphasis added.]*

*See also *U.S. v Dixon,* 509 US 688, 696 (1993), which characterizes criminal contempt as a "crime in the ordinary sense."

2. Effect of Mandatory Sentencing Provisions

If a criminal contempt conviction is a "misdemeanor" to which the probation statutes apply, a probationary sentence will be appropriate for a PPO violation unless the mandatory nature of the statutory penalty forecloses this sentencing option. The Michigan appellate courts have not yet addressed this question. The Advisory Committee for this chapter of the benchbook suggests that the mandatory jail term in the PPO statutes may not be inconsistent with a probationary sentence because MCL 771.3(2)(a) permits the court to impose jail as a condition of probation. This statute provides that the court may, as a condition of probation, require the defendant to "[b]e imprisoned in the county jail for not more than 12 months . . . [or up to] the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months." Thus, a court may impose a probationary sentence on a PPO offender, as long as jail time is one of the conditions of probation.

> **Note:** The jail term imposed upon conviction of criminal contempt under the PPO statutes must be for a definite period of time. Indeterminate sentences are inappropriate. *In re Contempt of Dougherty,* 429 Mich 81, 93-94 (1987).

3. Difficulties With Probationary Sentences for PPO Offenders

Although the Advisory Committee for this chapter of the benchbook believes that arguments could be made for imposing probationary sentences for PPO violations, it nonetheless suggests that courts use probation only in exceptional cases. The Committee discourages the routine imposition of probation for PPO violations due to certain serious practical difficulties that arise with this type of sentence:

- Probation is not a safe sentencing option for offenders who display disregard for court orders or higher levels of violence. By violating a PPO, the offender has already shown disregard for a court's order, so that a jail sentence may be the only way to ensure that the offender no longer has access to the petitioner.

- A jail sentence may be the most effective way of holding the offender accountable for his or her behavior. Most professionals who work with batterers agree that batterers will not change their behavior unless they are held accountable for it. A jail sentence is a highly effective way for society to express its condemnation of violent behavior.

- Many courts do not have the resources to adequately supervise persons who are sentenced to probation. Unsupervised probation may increase the danger in a situation by releasing the offender with the message that violent behavior will not be taken seriously.

For a discussion of participation in batterer intervention services as a condition of probation, see Section 4.14(C).

B. Jail Term and Fine in Civil Contempt Cases

Individuals found guilty of civil contempt are subject to a fine or imprisonment in the court's discretion under the general penalty provisions for contempt in the Revised Judicature Act. MCR 3.708(H)(5)(b). The provisions applicable to civil contempt for violation of a PPO provide:

> "(1) [P]unishment for contempt may be a fine of not more than $7,500.00, or imprisonment . . . or both, in the discretion of the court. . . .
>
> "(2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment and pays the fine, costs, and expenses of the proceedings which shall be specified in the order of commitment." MCL 600.1715.

It is often said that a person imprisoned for civil contempt "has the key to the jailhouse door," which the contemnor can unlock at any time by doing the act that the court has commanded. Where imprisonment for civil contempt is imposed to coerce the performance of a desired action, the sentence may be of indeterminate duration, ending when the contemnor either does the court-ordered action or loses the power to do so.

> **Note:** Because periods of probation may only be imposed for a definite term, probation is not properly ordered where a contemnor is imprisoned for an indefinite term for civil contempt. See MCL 771.2 and *Hill v Hill*, 322 Mich 98, 103 (1948).

C. Compensation for Actual Losses

Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior.

> "If the alleged misconduct has caused an actual loss or injury to any person the court *shall* order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury." MCL 600.1721. [Emphasis added.]

To obtain an order for compensation under MCL 600.1721, the complainant has the burden to prove that the respondent was guilty of contempt, and that the contemptuous conduct caused actual loss or injury. The complainant must also show the amount of the injury. *Montgomery v Muskegon Booming Co*, 104 Mich 411, 413 (1895), and *In re Contempt of Rochlin*, 186 Mich App 639, 651 (1990). Because compensation under MCL 600.1721 is awarded in lieu of a separate action to recover damages, some scholars have suggested that the standard of proof should be by preponderance of the evidence, as it is in a civil action.* But see MCR 3.708(H)(3) (burden of proof of guilt of civil contempt for PPO violation is by clear and convincing evidence).

*Stockmeyer, *Compensatory Contempt,* 74 Mich Bar Journal 296, 297 (1995).

> **Note:** Because MCL 600.1721 makes no distinction between civil and criminal contempt actions, the Advisory Committee for this chapter of the benchbook suggests that compensation to the injured party should be available in both types of proceedings. See *Birkenshaw v Detroit*, 110 Mich App 500, 510-511 (1981), in which the Court of Appeals upheld portions of a compensatory damages award imposed upon a party convicted of criminal contempt. However, MCR 3.708(H)(5)(a)–(b) provides different sanctions for civil and criminal contempt. MCR 3.708(H)(5)(a) applies to criminal contempt and states that the court must sentence the defendant to incarceration for no more than 93 days and may impose a fine of not more than $500.00. MCR

> 3.708(H)(5)(b) applies to civil contempt proceedings and states that the court shall impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721.

MCL 600.1721 allows recovery of damages sufficient to indemnify the injured party for actual losses caused by the respondent's misconduct. Punitive damages are not recoverable, but exemplary damages are appropriate if they are awarded to compensate the complainant for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, wilfully, and wantonly inflicted by the respondent. *Birkenshaw v Detroit, supra*. Examples of injuries that may be compensated in damages in a PPO context include:

- Medical expenses incurred as a result of the PPO violation.
- Property damage.
- Lost wages as a result of the violation.
- Child care expenses incurred as a result of the violation.
- Attorney fees incurred as a result of the other party's contemptuous conduct. *Homestead Development Co v Holly Twp*, 178 Mich App 239, 246 (1989).

D. Reimbursement to Local Authorities

The court may order a person found guilty of criminal contempt for violating a PPO to reimburse the state or a local unit of government for expenses incurred in relation to the PPO violation.* MCL 769.1f(1)(i). PPO's include domestic relations PPOs issued pursuant to MCL 600.2950, non-domestic stalking PPOs issued pursuant to MCL 600.2950a, and foreign PPOs issued by other states, Indian Tribes, or U.S. territories that comply with the conditions for validity provided in MCL 600.2950i. *Id.*

*The foreign PPO must satisfy the conditions for validity provided in MCL 600.2950i. See Section 8.13(A) for more information.

Reimbursable expenses incurred in relation to a PPO violation include but are not limited to the expenses for an emergency response and for prosecution. MCL 769.1f(1). MCL 769.1f(2) states that the "expenses for which reimbursement may be ordered under this section include all of the following:

> "(a) The salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine.
>
> "(b) The salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service

personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose.

"(c) The cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose.

"(d) The salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction.

"(e) The cost of extraditing a person from another state to this state including, but not limited to, all of the following:

(*i*) Transportation costs.

(*ii*) The salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state."

The reimbursement ordered by the court must be paid to the clerk of the court. MCL 769.1f(4). The clerk must transmit the appropriate amount to the unit or units of government named in the reimbursement order. *Id.* The reimbursement ordered shall be made immediately, unless the court provides for payment within a specified period or in specified installments.* *Id*.

*The reimbursement may be ordered as a condition of probation or parole. See MCL 769.1f(5).

E. Amendments to the PPO

In addition to the foregoing sanctions, MCR 3.708(H)(5) provides that "the court may impose other conditions to the personal protection order" upon conviction of civil or criminal contempt. The Advisory Committee for this chapter of the benchbook suggests that the "other conditions" referenced in MCR 3.708(H)(5) be limited to those conditions that the court could have imposed upon issuance of the PPO. Those conditions are set forth at MCL 600.2950(1) and MCL 600.2950a(1), which are discussed at Sections 6.3(B) and 6.4(C).

F. Court Clerk Reporting

MCL 769.16a(1) requires the clerk of the court to report the disposition of criminal contempt charges for violation of a PPO to the Michigan State Police. MCL 769.16a(5) provides that if fingerprints have not already been

taken, the court must order that the fingerprints of the convicted person be taken and forwarded to the Michigan State Police. Additionally, MCL 28.242(1) requires the Michigan State Police to collect and file the conviction and fingerprints with criminal history information. See SCAO Memorandum 2002-01 for information on the forms for the required reports to the Michigan State Police.

If a conviction is vacated or the defendant is otherwise found not guilty after a previous conviction, the Michigan State Police must enter that information into each database maintained for recording criminal convictions and remove all information about the defendant's convictions from each database available to the public. MCL 769.16a(8).

8.10 Appeals From Conviction of Contempt

In cases involving respondents age 18 or older,* MCR 3.709 provides for an appeal of right from conviction of criminal contempt only:

*See Section 8.11(J) on appeals in cases involving a minor respondent.

> "(A) Except as provided by this rule, appeals involving [adult] personal protection order matters must comply with subchapter 7.200.
>
> . . .
>
> "(C) From Finding After Violation Hearing.
>
> (1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.
>
> (2) All other appeals concerning violation proceedings are by application for leave."

8.11 Enforcement Proceedings Involving a Respondent Under Age 18

A. Jurisdiction and Applicable Authorities

MCL 712A.2(h) gives the family division of circuit court jurisdiction over minor respondents in PPO proceedings under the domestic relationship and non-domestic stalking PPO statutes and a proceeding to enforce a valid* foreign protection order. If the court exercises its jurisdiction under this provision, jurisdiction continues until the order expires, even if the respondent reaches adulthood during that time. MCL 712A.2a(3). However, "action regarding the personal protection order after the respondent's eighteenth birthday shall not be subject to [the Juvenile Code]." *Id.* Instead, the court would apply adult PPO laws and procedures to actions regarding the PPO after the respondent's 18th birthday. MCR 3.708(A)(2).

*See Section 8.13(A) for information on "valid" foreign PPOs.

Note: Although they are subject to the enforcement *procedures* for minor respondents, violations committed on or after the respondent's 17th birthday are subject to adult *penalties*. MCL 600.2950(11)(a)(*i*) and MCL 600.2950a(8)(a)(*i*). See Section 8.11(I)(1) for more information.

Proceedings to enforce a PPO against a respondent under age 18 are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A), 3.708(A)(2), and 3.982(B). The rules exclusively applicable to such proceedings are set forth at MCR 3.981–3.989. See MCR 3.901(B)(5). Procedures on appeals related to minor PPOs are governed by MCR 3.709 and 3.993.

B. Referee May Preside at Enforcement Proceedings

The court may assign a nonattorney referee to preside at a preliminary hearing for enforcement of a minor PPO. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor PPO and make recommended findings and conclusions. MCR 3.913(A)(2)(d).

C. Initiation of Proceedings — Overview

If a respondent allegedly violates a minor personal protection order, the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker may submit a written supplemental petition to have the respondent found in contempt. MCR 3.983(A). The supplemental petition must contain a specific description of the facts constituting the violation of the PPO. *Id*. There is no fee for the supplemental petition. *Id*.

D. Original Petitioner Initiates Proceeding by Filing a Supplemental Petition

*See Section 8.7(A) on filing contempt proceedings outside the jurisdiction of the issuing court.

If the original petitioner files the supplemental petition in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).*

Upon receipt of the supplemental petition, MCR 3.983(B)(1)–(2) requires the court to either:

- Set a date for a preliminary hearing on the petition, to be held as soon as practicable, and issue a summons to appear; or
- Issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent.

1. Apprehension of the Respondent

MCL 712A.2c authorizes a court to issue an order for apprehension of a minor who allegedly violates a PPO, as follows:

> "The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is . . . alleged to have violated a personal protection order issued under [MCL 712A.2(h)] or is alleged to have violated a valid* foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

*See Section 8.13(A) for information on "valid" foreign PPOs.

If the court issues an order to apprehend the respondent, MCR 3.983(D)(1)(a)–(b) provides that the order may include authorization to:

- "[E]nter specified premises as required to bring the minor before the court;" and
- "[D]etain the minor pending preliminary hearing if it appears there is a substantial likelihood of retaliation or continued violation."

An officer must immediately take the actions specified in MCR 3.984(B)(1)–(4) when the officer apprehends a minor respondent under any of the following circumstances:

- pursuant to a court order that specifies that the minor is to be brought directly to court, or
- without a court order if the officer has not obtained a written promise from the minor's parent, guardian, or custodian to bring the minor to court, or the officer believes that there is a substantial likelihood of retaliation or violation by the minor.

MCR 3.984(B)(1)–(4) requires the officer to immediately do the following:

- If the whereabouts of the respondent's parent or parents, guardian, or custodian is known, inform them of the respondent's apprehension and of his or her whereabouts, and of the need for them to be present at the preliminary hearing. MCR 3.984(B)(1).
- Take the respondent before the court for a preliminary hearing, or to a place designated by the court pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).

- Prepare a custody statement for submission to the court. The statement must include: a) the grounds for and the time and location of detention; and b) the names of persons notified and the times of notification, or the reason for failure to notify. MCR 3.984(B)(3).

- Ensure that a supplemental petition is prepared and filed with the court. MCR 3.984(B)(4).

The officer is also required to take fingerprints of a juvenile detained for violation of a PPO or foreign PPO. MCL 28.243(1).

While awaiting arrival of the parent or parents, guardian, or custodian, appearance before the court, or otherwise, a minor respondent under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner. MCR 3.984(C).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

> **Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6), the issuing jurisdiction bears this expense.

2. Service of Supplemental Petition and Summons on Respondent

If the court sets a date for a preliminary hearing, the petitioner must serve the supplemental petition and the summons on the respondent and, if the relevant addresses are known or ascertainable upon diligent inquiry, on the respondent's parent or parents, guardian, or custodian. Service must be made as provided in MCR 3.920 at least seven days before the preliminary hearing. MCR 3.983(C).

MCR 3.920(B)(2)(c) provides:

> "In a personal protection order enforcement proceeding involving a minor respondent, a summons must be served on the minor. A summons must also be served on the parent or parents, guardian, or legal custodian, unless their whereabouts remain unknown after a diligent inquiry."

MCR 3.920(B)(4) provides for the manner of service as follows:

> "(a) Except as provided in subrule (B)(4)(b), a summons required under subrule (B)(2) must be served by delivering the summons to the party personally.
>
> "(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.
>
> "(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

The summons must direct the person to whom it is addressed to appear at a time and place specified by the court. MCR 3.920(B)(3). The summons must also:

- Identify the nature of the hearing. MCR 3.920(B)(3)(a).
- Explain the right to an attorney and the right to trial by judge. MCR 3.920(B)(3)(b). (There is no right to a jury trial in contempt proceedings for an alleged PPO violation. MCR 3.987(D).)
- Have a copy of the petition attached. MCR 3.920(B)(3)(d).

E. Proceedings Initiated by Apprehension of Respondent Without a Court Order

MCL 712A.14(1) authorizes apprehension of a minor respondent for an alleged violation of a PPO as follows:

> "Any local police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child . . . for whom there is reasonable cause to believe is violating or has violated a personal protection order issued pursuant to [MCL 712A.2(h)] by the court under [MCL 600.2950 and MCL 600.2950a], or for whom there is reasonable cause to believe is violating or has violated a valid foreign protection order."

MCL 712A.14(1) makes no mention of the PPO statutes' provisions for oral notice at the scene of an alleged PPO violation in situations where a minor respondent has not been served with the PPO or received notice of it. The oral notice provisions in the PPO statutes refer to MCL 712A.14 as if it were a separate proceeding; MCL 600.2950(22) and MCL 600.2950a(19) state that "[t]his subsection does not preclude . . . a proceeding under [MCL 712A.14]."

*See Section 8.5(A) on how the existence of a PPO may be verified.

The Advisory Committee for this chapter of the benchbook suggests that in the absence of alternative specific oral notice procedures for minor respondents, it is consistent with due process to apply the notice provisions of MCL 600.2950(22) and MCL 600.2950a(19) in cases involving minor respondents. The Committee notes that a PPO is immediately enforceable anywhere in Michigan by any law enforcement agency that has verified the existence of the order. MCL 600.2950(21) and MCL 600.2950a(18).* This immediate enforceability applies to PPOs issued against a minor respondent, regardless of whether the respondent or his or her parent, guardian, or custodian has received notice of the PPO. MCL 600.2950(18) and MCL 600.2950a(15). Thus, the oral notice provisions in the PPO statutes are necessary in all cases to give effect to the immediate enforceability of a PPO consistent with due process. On due process concerns with PPOs, see *Kampf v Kampf*, 237 Mich App 377, 383–385 (1999), discussed at Section 7.5(A). See also MCR 3.982(A), which states that "[a] minor personal protection order is enforceable under MCL 600.2950(22), (25), 600.2950a(19), (22), 764.15b, and 600.1701 et seq."

Once a minor respondent has been apprehended without a court order, the apprehending officer may warn and release the minor. MCR 3.984(A). If the minor is taken into custody, MCL 712A.14(1) and MCR 3.984 provide for the following procedures:

- The apprehending officer shall immediately attempt to notify the parent or parents, guardian, or custodian.
- While awaiting the arrival of the parent or parents, guardian, or custodian, a child under the age of 17 years shall not be held in any detention facility unless the child is completely isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner.
- Unless the child requires immediate detention as provided for in the Juvenile Code, the officer shall accept the written promise of the parent or parents, guardian, or custodian to bring the child to the court at a time fixed therein. The child shall then be released to the custody of the parent or parents, guardian, or custodian. In the context of PPO enforcement proceedings, detention is authorized under the Juvenile Code when the respondent has "allegedly violated a personal protection order and . . . it appears there is a substantial likelihood of retaliation or continued violation." MCL 712A.15(2)(f).

The court must designate a judge, referee or other person who may be contacted by the officer taking a minor under age 17 into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the minor pending preliminary hearing. MCR 3.984(D).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending

jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

> **Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6) the issuing jurisdiction bears this expense.

If the supplemental petition is filed in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).

F. Preliminary Hearings

1. Place for Preliminary Hearing

A preliminary hearing (as well as a violation hearing) on an alleged PPO violation may take place in either the issuing jurisdiction or the jurisdiction where a minor respondent was apprehended. MCL 764.15b(6) provides:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued pursuant to [MCL 712A.2(h)], by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state. The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court that issued the personal protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county."

*A similar optional notice provision applies at the time the minor is apprehended. See MCR 3.984(E).

See also MCR 3.985(H), which provides that if a minor respondent is apprehended for an alleged PPO violation in a jurisdiction other than the one in which the PPO was issued, and the apprehending jurisdiction conducts the preliminary hearing, if it has not already done so, the apprehending jurisdiction must immediately notify the issuing jurisdiction that the latter may request that the respondent be returned to the issuing jurisdiction for enforcement proceedings.*

2. Time for Preliminary Hearing

- *Respondent not detained:* If the minor respondent was not taken into court custody or jailed for an alleged PPO violation, "the preliminary hearing must commence as soon as practicable after the apprehension or arrest, or the submission of a supplemental petition by the original petitioner." MCR 3.985(A)(1).

- *Respondent detained:* If the minor respondent was apprehended with or without a court order for an alleged PPO violation and was taken into court custody or jailed, "the preliminary hearing must commence no later than 24 hours after the minor was apprehended or arrested, excluding Sundays and holidays as defined in MCR 8.110(D)(2), or the minor must be released." MCR 3.985(A)(1).

The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or the minor's parent, guardian, or custodian or for other good cause shown. MCR 3.985(A)(2).

3. Required Procedures at Preliminary Hearing

The court shall determine whether the parent, guardian, or custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or custodian if a guardian ad litem or attorney appears with the minor. MCR 3.985(B)(1). A court may appoint a guardian ad litem for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). See MCL 712A.17c(10), which provides:

> "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under [the Juvenile Code]."

See also MCR 3.916(A), which provides that "[t]he court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it." This court rule applies to delinquency and child protective proceedings (MCR 3.901(B)(1)), and appears to apply to PPO enforcement proceedings by virtue of MCR 3.985(B)(1). A guardian ad litem is an officer of the court, not a representative of a party. A guardian ad litem may be called as a witness in the proceeding.

Unless waived by the respondent, the court shall read the allegations in the supplemental petition and ensure that the respondent has received written

notice of the alleged violation. MCR 3.985(B)(2). Immediately after reading the allegations, the court shall advise the respondent on the record in plain language of the following rights listed in MCR 3.985(B)(3):

- The respondent may contest the allegations at a violation hearing.
- The respondent has the right to an attorney at every stage in the proceedings. If the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one.
- The respondent has the right to a non-jury trial.
- A referee may be assigned to hear the case unless demand for a judge is filed in accordance with MCR 3.912.
- The respondent may have witnesses against him or her appear at a violation hearing. The respondent may question the witnesses.
- The respondent may have the court order that any witnesses for his or her defense must appear at the hearing.
- The respondent has the right to remain silent, and to not have his or her silence used against him or her.
- Any statement the respondent makes may be used against him or her.

At the preliminary hearing, the court must decide whether to authorize the filing of the supplemental petition and proceed formally, or to dismiss the supplemental petition. MCR 3.985(B)(4).

> **Note:** MCR 3.985(B)(4) does not mention proceedings on the consent calendar or alternative services under the Juvenile Diversion Act.* Compare MCR 3.935(B), which provides for these options in delinquency proceedings.

*MCL 722.821 et seq.

If the court authorizes filing of the supplemental petition, MCR 3.985(B)(6) requires the following:

- The court must set a date and time for the violation hearing, or, if the court accepts a plea of admission or no contest, either enter a dispositional order, or set the matter for dispositional hearing; and
- The court must either release the respondent subject to conditions or order detention of the respondent pending the violation hearing.*

*See Section 8.11(F)(4)–(5) on release conditions and detention.

At the preliminary hearing, the court must state the reasons for its decision to release or detain the minor, on the record or in a written memorandum. MCR 3.985(G).

*See Section 8.11(F)(6).

The court must allow the respondent the opportunity to deny or otherwise plead to the allegations of the supplemental petition. If the respondent wants to enter a plea of admission or nolo contendere, the court shall follow MCR 3.986.* MCR 3.985(B)(5).

If the respondent denies the allegations in the supplemental petition, the court must make the following notices after the preliminary hearing, as required by MCR 3.985(C):

- Notify the prosecuting attorney of the scheduled violation hearing.
- Notify the respondent, respondent's attorney, if any, and respondent's parents, guardian, or custodian of the scheduled violation hearing, and direct the parties to appear at the hearing and give evidence on the contempt charges.
- Notice of hearing must be given by personal service or ordinary mail at least seven days before the violation hearing, unless the respondent is detained, in which case notice of hearing must be served at least 24 hours before the hearing.

4. Release of Respondent Subject to Conditions Pending Violation Hearing

MCR 3.985(E) governs the conditional release of a respondent to a parent, guardian, or custodian pending the resumption of the preliminary hearing or pending the violation hearing. In setting release conditions, the court must consider available information on the following factors set forth in this court rule:

- Family ties and relationships;
- The respondent's prior juvenile delinquency or minor PPO record, if any;
- The respondent's record of appearance or nonappearance at court proceedings;
- The violent nature of the alleged violation;
- The respondent's prior history of committing acts that resulted in bodily injury to others;
- The respondent's character and mental condition;
- The court's ability to supervise the respondent if placed with a parent or relative;
- The likelihood of retaliation or violation of the PPO by the respondent; and

- Any other factor indicating the respondent's ties to the community, the risk of nonappearance, and the danger to the respondent or the original petitioner if the respondent is released.

Bail procedure is the same as in juvenile delinquency proceedings. See MCR 3.935(F).

See Sections 4.5–4.6 for a general discussion of safety concerns with conditional release in cases involving allegations of domestic violence.

5. Detention Pending Violation Hearing

MCL 712A.15(2) provides as follows:

> "Custody, pending hearing, is limited to the following children:
>
> > "(a) Those whose home conditions make immediate removal necessary.
> >
> > "(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.
> >
> > "(c) Those who have run away from home.
> >
> > "(d) Those who have failed to remain in a detention or nonsecure facility or placement in violation of a court order.
> >
> > "(e) Those whose offenses are so serious that release would endanger public safety.
> >
> > "(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

MCR 3.985(F)(1) prohibits removal of a minor from his or her parent, guardian, or custodian pending a PPO violation hearing or further court order unless the following circumstances exist:

> "(a) probable cause exists to believe the minor violated the minor personal protection order; and
>
> "(b) at the preliminary hearing, the court finds one or more of the following circumstances to be present:
>
> > "(*i*) there is a substantial likelihood of retaliation or continued violation by the minor who allegedly violated the minor personal protection order;

> "(*ii*) there is a substantial likelihood that if the minor is released to the parent, with or without conditions, the minor will fail to appear at the next court proceeding; or
>
> "(*iii*) detention pending violation hearing is otherwise specifically authorized by law."

A minor in custody may waive the probable cause phase of a detention determination only if the minor is represented by an attorney. MCR 3.985(F)(2).

At the preliminary hearing, the respondent may contest the sufficiency of evidence to support detention by cross-examination of witnesses, presentation of defense witnesses, or other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. A finding of probable cause may be based on hearsay evidence that possesses adequate guarantees of trustworthiness. MCR 3.985(F)(3).

A respondent who is detained must be placed in the least restrictive environment that will meet the needs of the respondent and the public, and that conforms to the requirements of MCL 712A.15 and 712A.16. MCR 3.985(F)(4).

Regarding the environment for detention in cases involving alleged PPO violations, MCL 712A.15 provides as follows, in pertinent part:

> "(3) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter [governing status offenses] or subsection (2)(c) [regarding runaways] shall not be detained in any secure facility designed to physically restrict the movements and activities of alleged or adjudicated juvenile offenders unless the court finds that the child willfully violated a court order and the court finds, after a hearing and on the record, that there is not a less restrictive alternative more appropriate to the needs of the child. This subsection does not apply to a child who is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter or a child who is not less than 17 years of age and who is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter.
>
> * * *
>
> "(5) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter or subsection (2)(c) shall not be detained in a cell or other secure area of any secure facility designed to incarcerate adults unless either of the following applies:
>
> > "(a) A child is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter [governing delinquency

> cases] for an offense which, if committed by an adult, would be a felony.
>
> "(b) A child is not less than 17 years of age and is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter [governing minor PPOs]."

MCL 712A.15(5)(b) is consistent with provisions of the PPO statutes that impose adult penalties on persons age 17 and over who violate a PPO. See MCL 600.2950(23) and MCL 600.2950a(20). It is also consistent with provisions governing detention conditions for persons age 17 and over who have been apprehended without a court order for an alleged PPO violation. See Section 8.11(E).

MCL 712A.16 provides as follows:

> "(1) If a juvenile under the age of 17 years is taken into custody or detained, the juvenile shall not be confined in any police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons. However, except as otherwise provided in section 15(3), (4), and (5) of this chapter [subsections 15(3) and (5) are cited above; 15(4) concerns abuse/neglect and delinquency proceedings], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process."*

*See also MCL 764.27a(2) (juveniles confined in a jail or other adult place of detention must be in a room or ward out of sight and sound of adults).

MCL 712A.16(2) provides in pertinent part that the court or court-approved agency may arrange for the boarding of juveniles in any of the following:

- A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court's jurisdiction.
- If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court's jurisdiction.

6. Plea of Admission or No Contest

A minor may offer a plea of admission or no contest to the violation of a minor PPO with the court's consent. The court shall not accept a plea to a violation unless it is satisfied that the plea is accurate, voluntary, and understanding. MCR 3.986(A).*

*See Section 8.6(E) for a guilty plea script developed for adult proceedings.

The court may accept a plea of admission or no contest conditioned on preservation of an issue for appellate review. MCR 3.986(B).

The court shall inquire of the parents, guardian, custodian, or guardian ad litem whether there is any reason the court should not accept the plea tendered by the minor respondent. Agreement or objection by the parent, guardian, custodian, or guardian ad litem to a minor's plea of admission or no contest must be placed on the record if that person is present. MCR 3.986(C).

The court may take a plea of admission or no contest under advisement. Before the court accepts the plea, the minor may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the minor to withdraw the plea. MCR 3.986(D).

7. Respondent Fails to Appear at Preliminary Hearing

If the respondent was notified of the preliminary hearing and fails to appear for it, the court may issue an order to apprehend the respondent. MCR 3.985(D). This order is to be issued in accordance with MCR 3.983(D), which is discussed at Section 8.11(D)(1). MCR 3.985(D) further provides that:

- If the respondent is under age 17, the court may order him or her to be detained pending a hearing on the apprehension order. If the court releases the respondent, it *may* set bond for the respondent's appearance at the violation hearing.
- If the respondent is 17 years old, the court may order him or her to be confined to jail pending a hearing on the apprehension order. If the court releases the respondent, it *must* set bond for the respondent's appearance at the violation hearing.

G. Violation Hearing

1. Time for Hearing

MCR 3.987(A) provides that upon completion of the preliminary hearing, the court shall set a date and time for the violation hearing if the respondent denies the allegations in the supplemental petition. This rule further provides the following limits for holding the violation hearing:

- If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays.
- If the respondent is not detained, the hearing must be held within 21 days.

2. Role of Prosecuting Attorney at Violation Hearing

MCL 764.15b(7) generally provides that the prosecuting attorney shall prosecute the criminal contempt proceeding unless the petitioner retains his or

her own attorney for that purpose, or "the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation." This provision specifically applies to all enforcement proceedings against respondents age 18 and older, whether the proceedings were initiated by warrantless arrest or by motion to show cause. *Id*.

In cases involving a PPO with a respondent under age 18, MCR 3.987(B) provides: "If a criminal contempt proceeding is commenced under MCL 764.15b, the prosecuting attorney shall prosecute the proceeding unless the petitioner retains an attorney to prosecute the criminal contempt proceeding. If the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation, the prosecuting attorney need not prosecute the proceeding." Because proceedings under the statute are "commenced" by way of warrantless arrest, it is not clear whether the prosecutor is required under the court rule to prosecute an action against a minor respondent initiated by filing a supplemental petition. MCL 764.15b(7) requires the prosecutor to prosecute in corresponding adult show cause proceedings; an argument that this provision should apply in cases initiated by supplemental petition could be based on these authorities:

- PPOs with respondents under age 17 are referenced in MCL 764.15b(1)(c), which requires the PPO to state on its face the penalties for violation as a prerequisite to warrantless arrest.

- MCL 712A.2(h) states that the family division of circuit court has jurisdiction over "a proceeding *under* [the PPO statutes, MCL 600.2950 and MCL 600.2950a], in which a minor less than 18 years of age is the respondent." [Emphasis added.] The PPO statutes specifically state that a PPO is enforceable under MCL 764.15b. See MCL 600.2950(25) and MCL 600.2950a(22).

- MCR 3.982(A) states that "[a] minor personal protection order is enforceable under . . . MCL 764.15b."

3. Preliminary Matters

There is no right to a jury trial at PPO violation hearings with a minor respondent. MCR 3.987(D).

The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. MCR 3.987(E).

At the violation hearing, the court must do all of the following:

- Determine whether the appropriate parties have been notified and are present. The respondent has the right to be present at the violation hearing along with parents, guardian, or custodian, and guardian ad litem and attorney. The court may proceed in the absence of a parent

properly noticed to appear, provided the respondent is represented by an attorney. The original petitioner also has the right to be present at the violation hearing. MCR 3.987(C)(1).

- Read the allegations in the supplemental petition, unless waived. MCR 3.987(C)(2).
- Inform the respondent of the right to the assistance of an attorney, unless legal counsel appears with the respondent. MCR 3.987(C)(3).
- Inform the respondent that if the court determines it might sentence the respondent to jail or place him or her in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one. If the respondent requests to proceed without the assistance of an attorney, the court must advise him or her of the dangers and disadvantages of self-representation, and make sure the respondent is literate and competent to conduct the defense. *Id.*

4. Evidence and Burden of Proof

The rules of evidence apply to both criminal and civil contempt proceedings. MCR 3.987(F).

The petitioner or prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt, and the respondent's guilt of civil contempt by a preponderance of the evidence. *Id.*

5. Judicial Findings

At the conclusion of the hearing, the court must make specific findings of fact, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 3.987(G).

H. Dispositional Hearing

1. Time Limitations

MCR 3.988(A) provides the following time intervals between the entry of a judgment finding a violation of a minor PPO and any disposition:

- If the minor is not detained, the time interval may not be more than 35 days.
- If the minor is detained, the time interval may not exceed 14 days, except for good cause.

2. Conduct of Dispositional Hearing

The petitioner has the right to be present at the dispositional hearing. MCR 3.988(B)(2). The respondent may be excused from part of the dispositional hearing for good cause, but must be present when the disposition is announced. MCR 3.988(B)(1).

At the dispositional hearing, the court may receive all relevant and material evidence, including oral and written reports. The court may rely on such evidence to the extent of its probative value, even though it may not be admissible at the violation hearing. MCR 3.988(C)(1).

The respondent or his or her attorney and the petitioner shall be afforded an opportunity to examine and controvert written reports received by the court. In the court's discretion, they may also be allowed to cross-examine individuals making reports when such individuals are reasonably available. MCR 3.988(C)(2).

No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use at the dispositional phase of material prepared pursuant to a court-ordered examination, interview, or course of treatment. MCR 3.988(C)(3).

I. Dispositions

1. Respondent 17 Years of Age or Older

MCL 600.2950(23) provides for criminal contempt sanctions as follows:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, *shall* be imprisoned for not more than 93 days and may be fined not more than $500.00." [Emphasis added.]

MCL 600.2950a(20) contains the same penalties for violation of a non-domestic stalking PPO.

> **Note:** MCR 3.988(D)(1) states that the court "may" impose a 93-day prison sentence. Since the penalty for a PPO violation is arguably not a matter of "practice and procedure," the Advisory Committee for this chapter of the benchbook suggests that the statutory provision should control. See MCR 1.103. On the nature of criminal contempt, see Section 8.3(A). On probation as a dispositional alternative for a PPO violation, see Section 8.9(A). On awards to compensate for a petitioner's actual losses caused by the PPO violation, see Section 8.9(C).

Respondents imprisoned under the foregoing provisions may be committed to a county jail within the adult prisoner population. MCL 712A.18(1)(e).

MCR 3.988(D)(2)(a) provides for civil contempt sanctions as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall
>
> > "(a) impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721, if the respondent is at least 17 years of age."

See Section 8.9(B)–(C) on sanctions under the statutes cross-referenced in MCR 3.988(D)(2)(a).

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

2. Respondent Under Age 17

MCL 600.2950(23) and MCL 600.2950a(20) provide for sanctions against respondents under age 17 who violate a PPO as follows:

> "An individual who is less than 17 years of age who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in [MCL 712A.18]."

MCR 3.988(D) makes no provision for criminal contempt sanctions against a minor respondent under age 17. Consistent with the PPO statutes, however, MCR 3.988(D)(2)(b) subjects such respondents to the dispositional alternatives under the Juvenile Code, as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall . . .
>
> > "(b) subject the respondent to the dispositional alternatives listed in MCL 712A.18, if the respondent is under 17 years of age."

Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

3. Dispositional Alternatives Under the Juvenile Code

In cases involving violation of a PPO, MCL 712A.18 provides the following dispositional alternatives, to be ordered as "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained":

> "(a) Warn the juvenile or the juvenile's parents, guardian, or custodian and, except as provided in subsection (7) [governing restitution], dismiss the petition.
>
> "(b) Place the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. As used in this subdivision, 'related' means being a parent, grandparent, brother, sister, stepparent, stepsister, stepbrother, uncle, or aunt by marriage, blood, or adoption. The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile. The court also shall order, as a condition of probation or supervision, that the juvenile shall pay the minimum state cost prescribed by [MCL 712A.18m].
>
> "(c) If a juvenile is within the court's jurisdiction under section 2(a) of this chapter [governing delinquency cases], or under section 2(h) of this chapter for a supplemental petition [governing PPO violations], place the juvenile in a suitable foster care home subject to the court's supervision. . . .
>
> "(d) Except as otherwise provided in this subdivision, place the juvenile in or commit the juvenile to a private institution or agency approved or licensed by the department of consumer and industry services for the care of juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or agency as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates.
>
> "(e) Except as otherwise provided in this subdivision, commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or facility as the family independence agency or county juvenile agency determines

is most appropriate, subject to any initial level of placement the court designates. If a child is not less than 17 years of age and is in violation of a personal protection order, the court may commit the child to a county jail within the adult prisoner population. In a placement under subdivision (d) or a commitment under this subdivision, except to a state institution or a county juvenile agency institution, the juvenile's religious affiliation shall be protected by placement or commitment to a private child-placing or child-caring agency or institution, if available. Except for commitment to the family independence agency or a county juvenile agency, an order of commitment under this subdivision to a state institution or agency described in the youth rehabilitation services act, [MCL 803.301 to 803.309], or in [MCL 400.201 to 400.214], the court shall name the superintendent of the institution to which the juvenile is committed as a special guardian to receive benefits due the juvenile from the government of the United States. An order of commitment under this subdivision to the family independence agency or a county juvenile agency shall name that agency as a special guardian to receive those benefits. The benefits received by the special guardian shall be used to the extent necessary to pay for the portions of the cost of care in the institution or facility that the parent or parents are found unable to pay.

"(f) Provide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary.

"(g) Order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under this chapter or that obstructs placement or commitment of the juvenile by an order under this section.

"(h) Appoint a guardian under section 5204 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204, in response to a petition filed with the court by a person interested in the juvenile's welfare. If the court appoints a guardian as authorized by this subdivision, it may dismiss the petition under this chapter.

"(i) Order the juvenile to engage in community service.

"(j) If the court finds that a juvenile has violated a municipal ordinance or a state or federal law, order the juvenile to pay a civil fine in the amount of the civil or penal fine provided by the ordinance or law. Money collected from fines levied under this subsection shall be distributed as provided in [MCL 712A.29]."

Three of the dispositional alternatives listed in MCL 712A.18(1)(k)–(m) do not apply to PPO violators. These are: parental participation in treatment, boot camp, and imposition of a sentence that could have been imposed on an adult for the same offense.

4. Orders for Reimbursement to the Court

MCL 712A.18(2) provides that an order of disposition placing a juvenile in or committing a juvenile to care outside of his or her own home and under state or court supervision *shall* contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service. If the court places the juvenile in his or her own home, it *may* order such reimbursement. MCL 712A.18(3). For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003-April 2009), Sections 11.2–11.3.

If the court appoints an attorney to represent a juvenile, parent, guardian, or custodian, the court may require in an order that the juvenile, parent, guardian, or custodian reimburse the court for attorney fees. MCL 712A.18(5).

> **Note:** MCL 712A.18(4) provides for the efficacy of orders directed to a parent or person other than the minor:
>
> > "An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12 and 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."

5. Orders for Restitution

Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior. See MCL 600.1721 discussed at Section 8.9(C).

> **Note:** Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26 which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

Restitution provisions are also found in MCL 712A.18(7) and 712A.30 for "juvenile offense[s]," which are defined as "violation[s] by a juvenile of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a

civil fine." MCL 712A.30(1). The applicability of these provisions in PPO enforcement proceedings is unclear. For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003-April 2009), Section 10.12.

6. Reimbursement of Local Authorities

*For discussion of MCL 769.1f, see Section 8.9(D).

The court may order a person found guilty of criminal contempt for violating a PPO to reimburse the state or a local unit of government for expenses incurred in relation to the PPO violation. MCL 769.1f(1)(i).*

7. Report to the Michigan State Police

MCL 769.16a(1) requires the clerk of the court to report the disposition of criminal contempt charges for violation of a PPO to the Michigan State Police. Additionally, MCL 28.242(1) requires the Michigan State Police to collect and file the conviction with criminal history information.

The Department of State Police created a procedure for reporting a Violation of Personal Protection Order (PPO) to the criminal history record (CHR) system, in the following August 6, 2007, memorandum:

8. Fingerprinting

MCL 769.16a(5) provides that if fingerprints have not already been taken, the court must order that the fingerprints of the juvenile be taken and forwarded to the Michigan State Police. If the juvenile was taken into custody by a law enforcement officer, then the juvenile should have been fingerprinted at the time that he or she was apprehended. MCL 28.243(1).

9. Supplemental Dispositions

MCR 3.989 provides that when a minor placed on probation for violation of a minor PPO has allegedly violated a condition of probation, the court shall follow the procedures for supplemental disposition provided in MCR 3.944, which applies to delinquency proceedings. For more information about such proceedings, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003-April 2009), Chapter 13.

J. Appeals

Appeals related to minor PPOs must comply with both MCR 3.709 and 3.993. MCR 3.709(C) provides:

> "(C) From Finding After Violation Hearing.
>
> > "(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.

> "(2) All other appeals concerning violation proceedings are by application for leave."

MCR 3.993 provides, in pertinent part:

> "(A) The following orders are appealable to the Court of Appeals by right:
>
> > "(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
> >
> > "(2) an order terminating parental rights,
> >
> > "(3) any order required by law to be appealed to the Court of Appeals, and
> >
> > "(4) any final order.
>
> "(B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.
>
> "(C) Except as modified by this rule, chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court. . . ."

8.12 Double Jeopardy and Contempt Proceedings

State and federal constitutional guarantees against double jeopardy are of particular concern in contempt proceedings for alleged PPO violations because the behavior at issue can also provide the basis for separate criminal charges. The guarantee against double jeopardy "prohibits the Government from punishing twice, or attempting a second time to punish criminally for the same offense." *United States v Ursery*, 518 US 267, 273 (1996), citing *Helvering v Mitchell*, 303 US 391, 399 (1938). Consistent with this definition, this section addresses the following issues:

- Do contempt sanctions constitute "punishment" that triggers double jeopardy protections?
- Does double jeopardy apply to contempt proceedings initiated by a private party rather than by the government?
- Once the court has determined that double jeopardy principles apply to a contempt proceeding, when do criminal and contempt proceedings arise from the "same offense" in the context of a PPO enforcement action?

A. Criminal Contempt Proceedings Trigger Double Jeopardy Protections — Civil Contempt Proceedings Do Not

In determining whether a particular sanction constitutes a "punishment" that triggers double jeopardy protections, the U.S. Supreme Court inquires whether the sanction serves a punitive goal. In making this inquiry, the Court considers whether the Legislature that established the sanction has either expressly or impliedly characterized the penalty imposed as "civil" or "criminal."

"Criminal" sanctions trigger double jeopardy protections. Because **criminal contempt** sanctions clearly have a punitive purpose, the U.S. Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. *United States v Dixon*, 509 US 688, 696 (1993). The Michigan appellate courts have not ruled directly on the applicability of double jeopardy to criminal contempt proceedings, but in *People v McCartney (On Remand)*, 141 Mich App 591 (1985), the Court of Appeals applied double jeopardy principles in determining that criminal embezzlement charges could be brought against an individual based on the same conduct that had previously given rise to a conviction of criminal contempt.

Civil contempt sanctions are remedial or coercive and so are not typically subject to double jeopardy protections against punishment. Accordingly, the U.S. Supreme Court has held that an individual may be subjected to both criminal and civil sanctions for the same act, as long as the civil sanctions serve a purpose distinct from punishment. In *Yates v United States*, 355 US 66, 74 (1957), the U.S. Supreme Court upheld the imposition of both civil and criminal contempt sanctions for a single, continuing act of contempt, reasoning that "the civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent."

> **Note:** Although the Legislature's characterization of a penalty as "civil" will typically indicate that double jeopardy protections do not apply, the U.S. Supreme Court has held that it will override the legislative intent in cases where the civil remedy has been "transformed" into a criminal penalty. For more discussion of this question, see *Hudson v United States*, 522 US 93 (1997); *People v Artman*, 218 Mich App 236, 246-247 (1996); and *People v Duranseau*, 221 Mich App 204, 207 (1997).

B. Criminal Contempt Proceedings Initiated by Private Parties May Trigger Double Jeopardy Protections

The U.S. Supreme Court has stated that the prohibition against double jeopardy is a prohibition against punitive action taken by the *government* — "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v Halper*, 490 US 435, 451

(1989), overruled on other grounds, *Hudson v United States*, *supra*. Nonetheless, the Court extended the application of double jeopardy principles to criminal contempt proceedings initiated by a private party in *United States v Dixon*, 509 US 688 (1993). In *Dixon*, a District of Columbia trial court issued a civil protection order restraining a husband from assaulting or threatening his estranged wife. After the order issued, the wife filed three separate motions to have her husband held in contempt for violating it. The wife eventually prosecuted the violations at trial without government participation, and the husband was convicted of criminal contempt. When the U.S. Attorney later obtained an indictment charging the husband with criminal assault and other crimes arising from the conduct that violated the protection order, the husband asserted that the contempt conviction barred the subsequent criminal prosecution. Applying the "same elements" test for double jeopardy articulated in *Blockburger v United States*, 284 US 299, 304 (1932), the Supreme Court concluded that the criminal contempt conviction barred subsequent prosecution of some, but not all, of the criminal charges at issue in the case.

The Supreme Court's decision in *Dixon* did not address the Court's earlier statement in *Halper* that double jeopardy protections are not triggered by litigation between private parties. The criminal nature of the penalties imposed in *Dixon* appears to be the distinguishing factor between these two cases.* The Court noted in *Dixon* that the purpose of the trial court's injunctive order was to restrain an individual from criminal acts — "an historically anomalous use of the contempt power" not permitted at common law. 509 US at 694. Although this novel use of the court's injunctive powers was initiated by a private party, it appears that the injunction's crime-preventive purpose furthered an inherent state interest sufficient to trigger double jeopardy protections.

**Halper* involved civil monetary sanctions sought by the federal government.

C. The "Same Offense" — Michigan and Federal Principles

Once a court has determined that double jeopardy protections apply (i.e., that the contempt proceeding may result in punitive sanctions imposed to vindicate a government interest), it is faced with the question whether the contempt involves the "same offense" as any penal charges arising from the same behavior. This "same offense" inquiry will arise in two different contexts, because US Const, Am V, and Michigan Const 1963, art 1, §15, afford a criminal defendant two different protections against double jeopardy:

- The **protection against successive prosecution** prohibits a second prosecution of the same offense after an acquittal or conviction.
- The **protection against multiple punishments** prevents the court from sentencing a defendant more than once for the same offense, by requiring it to confine its sentence within the limits set by the Legislature. *People v Sturgis*, 427 Mich 392, 399 (1986).

The Michigan Supreme Court has articulated a separate standard for each of the foregoing double jeopardy protections. In *United States v Dixon*, 509 US 688 (1993), however, a majority of the U.S. Supreme Court applied a single standard to each protection. The rest of this section briefly describes these standards and explores how they operate in the context of PPO enforcement actions.

> **Note:** In *United States v Dixon*, *supra*, Justices Blackmun, White, and Souter dissented from the majority's decision to adopt a single-standard double jeopardy test and would have continued to apply separate standards to subsequent prosecution and multiple punishment cases. For this reason, their opinions (particularly Justice Blackmun's and Justice White's) may be helpful in the context of Michigan's two-pronged standard.

1. Michigan's Protection Against Successive Prosecution

People v White, 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*, 469 Mich at 578. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Nutt, supra*, 469 Mich at 575.

In *Nutt*, the defendant pleaded guilty in a Lapeer County Court of one count of second-degree home invasion. *Nutt, supra*, 469 Mich at 569. Later, the defendant was bound over for trial in Oakland County on the charge of receiving and concealing a stolen firearm—the firearm was obtained in the defendant's admitted participation in the Lapeer County theft. *Nutt, supra*, 469 Mich at 570. The defendant moved to dismiss the receiving and concealing charge because *White* required the state "to join at one trial all charges arising from a continuous time sequence that demonstrated a single intent and goal." *Nutt, supra*, 469 Mich at 570.

The Michigan Supreme Court concluded that it had incorrectly construed the meaning of the constitutional phrase "same offense" in its *White* decision because the ratifiers of the 1963 Constitution intended that "same offense" be accorded the meaning given its federal counterpart and that it be interpreted consistently with "state and federal double jeopardy jurisprudence as it then existed." *Nutt, supra*, 469 Mich at 575. The Court stated that the *White* Court "strayed from [the ratifiers'] intent when it adopted the same transaction test" and explained that the remedy for that error required a "return to the same-

elements test, which had been consistently applied in this state until its abrogation . . . in 1973 [footnote omitted]." *Nutt, supra*, 469 Mich at 575.

Michigan's return to the same-elements test signifies a return to "the well-established method of defining the Fifth Amendment term 'same offence'" known as the *Blockburger* test. *Nutt, supra*, 469 Mich at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt, supra*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 US at 304; *Nutt, supra*, 469 Mich at 577-578.

As applied to the *Nutt* case, the Court determined that the defendant could properly be tried for the receiving and concealing charge even though she pleaded guilty to the offense from which the stolen property was obtained. *Nutt, supra*, 469 Mich at 593. Because the elements required to convict her for each offense were not identical, the defendant's protection from double jeopardy was not violated. *Nutt, supra*, 469 Mich at 593. Specifically, the defendant's conviction for second-degree home invasion required proof that (1) the defendant entered a dwelling by breaking or entered without permission, and (2) the defendant entered with the intent to commit a felony or larceny in the dwelling. *Nutt, supra*, 469 Mich at 593. The defendant's conviction for receiving and concealing a stolen firearm required proof that (1) the defendant received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan, (2) a stolen firearm or stolen ammunition, and (3) the defendant knew that the firearm or ammunition was stolen. *Nutt, supra*, 469 Mich at 593. The Court explained:

> "Clearly, there is no identity of elements between these two offenses. Each offense requires proof of elements that the other does not. Because the two offenses are nowise the same offense under either the Fifth Amendment or art 1, § 15, we affirm the result reached by the Court of Appeals majority and hold that defendant is not entitled to the dismissal of the Oakland County charge." *Nutt, supra*, 469 Mich at 593.

2. Michigan's Protection Against Multiple Punishment

The multiple punishment strand of the guarantee against double jeopardy ensures that courts confine their sentences within the limits set by the Legislature. *People v Sturgis, supra,* 427 Mich at 399. Accordingly, the Legislature's intent — as determined from the subject, language, and history of a statute — is determinative in cases involving multiple punishment. *People v Robideau,* 419 Mich 458, 486-488 (1984); *People v Mitchell,* 456 Mich 693 (1998); *People v Walker,* 234 Mich App 299, 308 (1999).

In the case of PPO violations, the Michigan Legislature has clearly indicated its intent that criminal contempt sanctions be imposed in addition to whatever other criminal penalties may apply for a separate criminal offense:

> "The criminal penalty provided for under [the PPO statutes] may be imposed in addition to [any] penalty that may be imposed for [any other] criminal offense arising from the same conduct." MCL 600.2950(23) and MCL 600.2950a(20).

Similarly, MCL 600.1745 provides:

> "Persons proceeded against according to the provisions of this chapter [which governs civil and criminal contempt], shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction shall be had on such indictment shall take into consideration the punishment before inflicted, in imposing sentence."

In *People v Coones,* 216 Mich App 721, 727-728 (1996), the Michigan Court of Appeals held that separate convictions of aggravated stalking and criminal contempt for violation of a temporary restraining order were not multiple punishments in violation of double jeopardy, even though they were based upon the same conduct. The guarantee against double jeopardy does not prevent the Legislature from imposing separate penalties for what would otherwise be a single offense. The determinative inquiry is thus whether the Legislature *intended* to impose cumulative punishment for similar crimes. *People v Robideau, supra*, 419 Mich at 485. With regard to aggravated stalking, the Legislature has clearly expressed its intent to impose multiple punishments for aggravated stalking and criminal contempt. MCL 750.411i(6) states:

> "A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct."*

*The misdemeanor stalking statute contains the same provision, MCL 750.411h(5).

3. *United States v Dixon* — the "Same Offense" in Federal Courts

The double jeopardy analysis by a majority of the U.S. Supreme Court in *United States v Dixon*, 509 US 688 (1993) has limited usefulness under the Michigan Constitution because a majority of the Court rejected the notion that separate standards should apply to subsequent prosecution and multiple punishment cases. Instead, the *Dixon* majority proceeded from the assumption that a single "same elements" test applies in all cases.* Nonetheless, *Dixon's* "same offense" analysis will be discussed here because Michigan courts may be called upon to employ it in the context of a double jeopardy challenge brought under the Fifth Amendment to the U.S. Constitution. See *People v Setzler*, 210 Mich App 138 (1995).

*The *Dixon* majority specifically rejected a two-pronged double jeopardy analysis by overruling *Grady v Corbin*, 495 US 508 (1990), which had articulated a separate standard for each type of case. 509 US at 704.

After his conviction of criminal contempt for violating a civil protection order against domestic violence, one of the two *Dixon* defendants was criminally charged with simple assault (Count I), threatening to injure another (Counts II-IV), and assault with intent to kill (Count V). Counts I and V were based on events for which the defendant had been held in contempt, and Counts II-IV were based on events for which he had been acquitted of contempt. A majority of the U.S. Supreme Court held that the criminal contempt conviction barred prosecution of the simple assault charges only — there was no double jeopardy bar to prosecution of the other four charges, however. The Court reached this conclusion based on the "same elements" test articulated in *Blockburger v United States*, 284 US 299, 304 (1932).

Under the *Blockburger* test, two offenses are not the same for purposes of double jeopardy if each offense contains an element not contained in the other. Applying *Blockburger* to the facts in *Dixon*, the Supreme Court majority found that where a court order restrains an individual from committing a penal offense that is incorporated into the order, "the 'crime' of violating a condition of [the court order] cannot be abstracted from the 'element' of the violated condition." *United States v Dixon, supra*, 509 US at 698. Accordingly, the defendant's subsequent simple assault charge was barred under the *Blockburger* test because the earlier protection order had incorporated the penal provision against simple assault, and the defendant had been convicted of violating it in the contempt proceeding. The underlying simple assault charge in the contempt proceeding was thus "a species of lesser-included offense." *Id.* As to the remaining counts, *Blockburger* was no bar to prosecution because they contained elements separate from the elements of the contempt charges. Counts II-V required more specific threats than those described in the protection order provision. Count V required proof of intent to kill, unlike the anti-assault provision in the protection order.

> **Note:** In *People v Nutt*, 469 Mich 565, 568 (2004), the Michigan Supreme Court readopted the *Blockburger* test, also known as the "same-elements" test, to determine whether the prohibition against double jeopardy is violated when multiple charges are

brought against a defendant for conduct related to a single criminal transaction.

8.13 Full Faith and Credit for Other Jurisdictions' Protection Orders

Every state in the United States and many tribal jurisdictions have enacted statutes authorizing courts to issue civil protection orders against domestic violence. The federal Violence Against Women Act ("VAWA") requires Michigan courts to give full faith and credit to qualified protection orders issued in other states and in tribal jurisdictions (as well as in the District of Columbia, and any commonwealth, territory, or possession of the United States). In general, a protection order issued in accordance with the law of the issuing jurisdiction is entitled to full faith and credit under the VAWA. Enforcement measures upon violation are governed by the law of the enforcing jurisdiction.

This section describes the criteria that a protection order must meet to be entitled to full faith and credit under the VAWA, and provides brief examples of how courts are to enforce qualifying orders issued in other jurisdictions. This section also provides information on Michigan statutes enacted to implement the full faith and credit provisions of VAWA. In reviewing this section, the reader is cautioned that the discussion here is only intended as a starting point for understanding the issues arising under the VAWA full faith and credit provisions; an exhaustive treatment of these concerns is beyond the scope of this benchbook. This is particularly true with respect to questions involving Native Americans and Native American lands. Due to the complexity of the law in this area, the Advisory Committee for this chapter of the benchbook recommends that Michigan judges consult with local tribal judges, magistrates, or court officers in resolving questions regarding Native Americans and Native American lands. For a general discussion of the relationships between state, tribal, and federal laws, see Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 Judicature 118 (1995), and Feldman and Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 Judicature 154 (1995). On tribal criminal jurisdiction, see Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J Pub L 173 (2000).

Finally, the reader should be aware that a violation of another jurisdiction's protection order in Michigan may be subject to federal criminal prosecution. In addition to providing for full faith and credit for protection orders, the VAWA makes it a federal criminal offense to travel in interstate or foreign commerce or enter or leave Indian country with the intent to violate a protection order. 18 USC 2262(a)(1). It is also a federal crime to cause another to travel in interstate or foreign commerce or enter or leave Indian country by force, coercion, duress, or fraud and thereby engage in conduct violating a protection order. 18 USC 2262(a)(2).

Note: For assistance in providing domestic violence service providers and other members of the public with information about VAWA's full faith and credit provisions, see *An Advocate's Guide to Full Faith and Credit for Orders of Protection* (Pennsylvania Coalition Against Domestic Violence, 2001). This brochure is available at the Coalition's web site at www.pcadv.org (under publications) (last visited December 2, 2003).

A. When Is a Protection Order Entitled to Full Faith and Credit?

Under 18 USC 2265, a sister state or tribal protection order must be given full faith and credit if: 1) the issuing court had jurisdiction over the parties and subject matter under its own laws; and 2) the person subject to the order had notice and a reasonable opportunity to be heard regarding issuance of the order. Prior registration in the enforcing jurisdiction and notice of such registration to the restrained individual are not prerequisites to according full faith and credit. 18 USC 2265 provides:

> "(a) Any protection order issued that is consistent with [18 USC 2265(b)] by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.
>
> "(b) A protection order issued by a State or tribal court is consistent with this subsection if —
>
> > "(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
> >
> > "(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.
>
> . . .
>
> "(d) Notification and registration.
>
> > "(1) Notification. A State or Indian tribe according full faith and credit to an order by a court of another State or Indian tribe shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that

> enforcing State or tribal jurisdiction unless requested to do so by the party protected under such order.
>
> "(2) No prior registration or filing as prerequisite for enforcement. Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State or tribal jurisdiction."

Michigan courts must enforce tribal protection orders as provided in 18 USC 2265 rather than under MCR 2.615, which generally provides for enforcement of tribal judgments. The court rule does not apply to judgments or orders that federal law requires be given full faith and credit. MCR 2.615(D).

The Michigan Legislature enacted legislation to incorporate the federal full faith and credit provisions of VAWA. MCL 600.2950j(1) is substantially similar to 18 USC 2265 and provides that a valid foreign protection order must be accorded full faith and credit and is subject to the same enforcement procedures and penalties as if it were issued in Michigan. A foreign protection order is "valid" is all of the following criteria are met:

> "(a) The issuing court had jurisdiction over the parties and subject matter under the laws of the issuing state, tribe, or territory.
>
> "(b) Reasonable notice and opportunity to be heard is given to the respondent sufficient to protect the respondent's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided to the respondent within the time required by state or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." MCL 600.2950i(1).

MCL 600.2950*l*(1) states:

> "(1) Law enforcement officers, prosecutors, and the court must enforce a foreign protection order other than a conditional release order or probation order issued by a court in a criminal proceeding in the same manner that they would enforce a personal protection order issued in this state under [MCL 600.2950] or [MCL 600.2950a] or [MCL 712A.2(h)], unless indicated otherwise in this section."

There are three affirmative defenses to enforcement of a foreign protection order. MCL 600.2950i(2) states:

> "All of the following may be affirmative defenses to any charge or process filed seeking enforcement of a foreign protection order:

> "(a) Lack of jurisdiction by the issuing court over the parties or subject matter.
>
> "(b) Failure to provide notice and opportunity to be heard.
>
> "(c) Lack of filing of a complaint, petition, or motion by or on behalf of a person seeking protection in a civil foreign protection order."

The examples in the following discussion illustrate the application of the jurisdictional and due process criteria of 18 USC 2265 and MCL 600.2950j(1).

1. The Issuing Court "Has Jurisdiction Over the Parties and Matter" Under Its Own Law

A sister state or tribal protection order will be entitled to full faith and credit under the VAWA only if the issuing court had personal and subject matter jurisdiction under the laws of its own jurisdiction.* In Michigan, the question of **personal jurisdiction** has been of particular concern where one of the parties to a protection order is a member of an Indian tribe. The following examples illustrate some of the questions that have arisen in these cases.

*18 USC 2265(b)(1) and MCL 600.2950j(1)(a).

♦ **Example A**

A Native American petitions a Michigan court for a PPO under Michigan law. Michigan courts have jurisdiction to hear such actions because Native Americans are citizens of the United States, and of the states and counties where they reside. US Const, Am XIV; 8 USC 1401(b). Accordingly, Michigan orders protecting Native American petitioners are entitled to full faith and credit if the other requirements of the VAWA are met.

Note: PPO petitions requesting restraints that would affect property on tribal lands raise concerns over the issuing court's subject matter jurisdiction. This issue is discussed below in Example E.

♦ **Example B**

A tribal court issues a protection order restraining a non-Indian respondent from abusive behavior against a tribal member. Tribal jurisdictions may authorize their courts to issue such orders as long as there is no criminal sanction for violation; under current federal law, tribal jurisdictions have no independent criminal jurisdiction over non-Indians. *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) (tribal courts cannot exercise criminal jurisdiction over non-Indians except in a manner acceptable to Congress). To exercise civil jurisdiction over non-Indians, a tribe must show that the non-Indian either: 1) engaged in consensual relations with

the tribe or an individual tribal member; or 2) took an action that had a direct effect on the core integrity of the tribe. See *Nevada v Hicks*, 533 US 353; 150 L Ed 2d 398; 121 S Ct 2304, 2309-2310 (2001) and *Strate v A-1 Contractors*, 520 US 438 (1997) for further discussion of the legal standard governing the exercise of a tribe's civil jurisdiction over non-Indians. See also 18 USC 2265(e), which provides that for purposes of according full faith and credit, "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe." Although some non-Indian respondents have argued that the lack of criminal sanctions makes tribal protection orders unenforceable in Michigan courts, the Advisory Committee for this chapter of the benchbook suggests that a tribal protection order must be given full faith and credit in Michigan courts as long as it is issued in accordance with tribal law. The manner of enforcement is governed by Michigan law under the VAWA, so that a tribe's inability to impose criminal sanctions for violation of its protection orders is irrelevant to the question of eligibility for full faith and credit. See Section 8.13(C) for more discussion of how enforcing states are to give full faith and credit to foreign protection orders.

With respect to **subject matter jurisdiction**, enforcing courts in Michigan have been particularly concerned with whether the restraints or other conditions imposed by the foreign protection order are authorized by laws of the foreign jurisdiction. If so, the foreign order is entitled to full faith and credit, even if the restraints or conditions it imposes would not be authorized in the enforcing jurisdiction.

♦ **Example C**

Pursuant to MCL 600.2950(1), a petitioner obtains a Michigan personal protection order against a respondent with whom she had a dating relationship. She then relocates to another jurisdiction in which the courts may not issue protection orders based on dating relationships. If the respondent follows her to the other jurisdiction and violates the Michigan order there, the court of the other jurisdiction must give the Michigan order full faith and credit, even though it could not have imposed restraints on the respondent itself.

♦ **Example D**

The defendant in *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), was restrained by an order issued in New Jersey under the New Jersey Prevention of Domestic Violence Act. This order was issued principally in favor of the defendant's estranged wife, but also prohibited the defendant from harassing the couple's children. The defendant was arrested and criminally charged in New York for harassing his daughter in that state. In deciding whether it had to give full faith and credit to the New Jersey order with respect to the defendant's daughter, the New York criminal court looked to the New Jersey statute under which the order was issued and to the definition of "protection order" in 18 USC 2266.* The court found that the New Jersey statute specifically authorized the courts

*See Section 8.13(B) for more on the definition of a "protection order" for VAWA purposes.

of that state to issue orders protecting members of the complainant's household. The New York court also determined that the definition of "protection order" in 18 USC 2266 was broad enough to include all persons lawfully included in protection orders under the law of the issuing state.

♦ **Example E**

A Native American initiates a PPO action in a Michigan court under Michigan's PPO statutes. The respondent, her husband, is also a Native American. The petition requests that the respondent be restrained from entering the couple's home. As discussed above, the Michigan court has personal jurisdiction over the Native American petitioner. However, the Michigan court may lack personal jurisdiction over the respondent and subject matter jurisdiction over property located on tribal lands. The Michigan court in this case needs to know whether the couple's home is located on tribal lands. If the home is on tribal lands, the Michigan court lacks subject matter jurisdiction to issue the relief requested. If the home is on Michigan lands, the Michigan court would have jurisdiction to issue the PPO.

Note: The Advisory Committee for this chapter of the benchbook suggests that in complex cases such as this one, Michigan judges should contact local tribal judges, magistrates, or court officers to resolve questions regarding the jurisdiction of each court.

2. The Restrained Party Has Been Given "Reasonable Notice and Opportunity to Be Heard"

The second criterion for full faith and credit is that the party subject to the protection order be given "reasonable notice and opportunity to be heard . . . sufficient to protect that person's right to due process." 18 USC 2265(b)(2) and MCL 600.2950i(1)(b). The statute further provides that where the protection order is issued ex parte, "notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." *Id*.

The VAWA's notice requirement has particular significance for Michigan ex parte PPOs, which are effective and immediately enforceable within Michigan upon a judge's signature without regard to service or notice to the respondent. See MCL 600.2950(9), (12) and MCL 600.2950a(6), (9). Despite their immediate efficacy in this state, Michigan's ex parte PPOs will not be entitled to full faith and credit in other jurisdictions until the respondent has received notice and an opportunity to be heard under Michigan law.*

*See Section 6.5(H) on service of a Michigan PPO.

A case illustrating the need for appropriate notice in interstate protection order proceedings is *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997). In this case, a criminal prosecution was initiated in the Criminal Court of the City of New York to enforce a civil protection order issued in New Jersey. The New York court refused to accord the New Jersey order full faith and credit

because the New Jersey "Return of Service" form was insufficient to establish service. This form stated that the restrained party had been given a copy of the order by personal service but failed to give a date of service. It also lacked a signature and identifying description of the person who made service. Based on these insufficiencies, the New York court granted the defendant's motion to dismiss the criminal proceedings, with leave to the prosecution to submit a superseding information. The prosecution subsequently cured the defect by obtaining an affidavit from a New Jersey court official establishing that the defendant had been afforded due process in New Jersey, and by submitting a superseding information establishing proper service.

B. What Types of Orders Are Entitled to Full Faith and Credit?

The "protection orders" governed by the VAWA full faith and credit provision are defined as follows:

> "'[P]rotection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection." 18 USC 2266(5). See also MCL 600.2950h(a), which contains a substantially similar definition.

The definitions set forth in 18 USC 2266(5) and MCL 600.2950h(a) encompass the following types of orders:

- Protection orders that carry only civil sanctions for violation in the issuing jurisdiction, such as tribal orders issued against non-Indians. 18 USC 2266 and MCL 600.2950h(a) contain no requirement that an order be enforceable by criminal penalties in the issuing jurisdiction. See Section 8.13(A)(1), Example B for an example involving a tribal order issued against a non-Indian.

- Orders protecting persons other than the petitioner if the law of the issuing jurisdiction permits the court to include such persons in its protection orders. See *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), discussed in Section 8.13(A)(1), Example D.

- Michigan PPOs. The definition of "protection order" in 18 USC 2266(5) is broad enough to encompass both domestic relationship and non-domestic stalking PPOs.

A conditional release order or a probation order* issued in a criminal proceeding for the protection of a named individual is not included in the above listing. MCL 600.2950*l*(2) provides:

*See Sections 4.4-4.6 on conditional release orders and Section 4.15 on probation orders.

> "A foreign protection order that is a conditional release order or a probation order issued by a court in a criminal proceeding shall be enforced pursuant to [MCL 600.2950m], [MCL 764.15(1)(g)], the uniform criminal extradition act, . . . MCL 780.1 to 780.31, or the uniform rendition of accused persons act, . . . MCL 780.41 to 780.45."

Violation of a foreign protection order that is a conditional release order or a probation order* issued by a court in a criminal proceeding is a misdemeanor punishable by imprisonment for not more than 93 days or a fine of $500.00, or both. MCL 600.2950m.

*For information regarding probation violations, see Section 4.15.

18 USC 2266(5) and MCL 600.2950h(a) specifically exclude orders for support or child custody issued under state divorce and child custody laws from their full faith and credit provisions. Mutual protection orders are also ineligible for full faith and credit under both the VAWA and MCL 600.2950k(2). The following discussion explains.

1. Orders for Child Custody or Support

The VAWA's definition of "protection order" specifically excludes "a support or child custody order *issued pursuant to State divorce or child custody laws*." [Emphasis added.] This exclusion does *not* apply to support and custody provisions issued under state protection order statutes; the emphasized language was added to the statute in 2000 to clarify that child custody and support provisions within valid protection orders are to be given full faith and credit under the VAWA. See Pub L No 106-386, Div B, Title I, §1107(d), 114 Stat 1464. MCL 600.2950j(2) also provides that a child custody or support provision contained in a valid foreign protection order must be accorded full faith and credit. Although Michigan's PPO statutes do not specifically authorize courts to make provisions for child custody or support in PPOs,* protection order statutes in 44 other states and the District of Columbia specifically permit courts to make provision for emergency support and custody within their civil protection orders. See, e.g., Ala Code §30-5-7(c)(4); Ky Rev Stat Ann §403.750(1)(e), (4); NM Stat Ann §40-13-5(A)(2).

*See Section 7.7 on this issue.

Although custody and support provisions in protection orders are entitled to full faith and credit under the VAWA, an unsettled question remains as to whether such provisions must additionally meet the requirements of other federal and state statutes that govern full faith and credit. Regarding child custody, the Parental Kidnapping Prevention Act, 28 USC 1738A, requires states to accord full faith and credit to sister state custody orders that meet certain jurisdictional and notice criteria.* Under 28 USC 1738A(b)(3), the description of custody orders entitled to full faith and credit is broad enough to include custody provisions contained within civil protection orders. The statute defines "custody determination" as "a judgment, decree, or other order

*See Sections 13.12-13.14 for more discussion of the PKPA.

of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications."

28 USC 1738B requires states to accord full faith and credit to sister state and tribal support orders made consistently with its provisions. This statute's definition of "child support order" is broad enough to include support provisions contained within a protection order. 28 USC 1738B(b) states that "child support order" means:

> "(A) . . . a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and
>
> "(B) includes —
>
> (*i*) a permanent or temporary order; and
>
> (*ii*) an initial order or a modification of an order."

*See Sections 13.2-13.11 for more discussion of the UCCJEA.

Effective April 1, 2002, Michigan adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),* MCL 722.1101 et seq. The UCCJEA requires Michigan courts to recognize and enforce other states' custody determinations. MCL 722.1303. See also MCL 722.1312. A "child-custody determination" is defined as follows:

*Child support orders may be enforced across state lines pursuant to the UIFSA, MCL 552.1101, et seq.

> "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support* or other monetary obligation of an individual." MCL 722.1102(c).

See *Jamil v Jahan*, ___ Mich App ___, ___ (2008), where the Court held that Virginia's registration to enforce Mississippi's custody decree and Mississippi's waiver of jurisdiction did not constitute a child-custody determination for purposes of MCL 722.1101(d) or MCL 722.1102(c), because merely registering to enforce another state's child-custody determination is different from actually making the child-custody determination.

See also *Nash v Salter*, ___ Mich App ___, ___ (2008), where the Court held that the temporary restraining orders the Texas court entered were not child-custody determinations because the orders merely mandated that the parties appear at later hearings to determine whether temporary custody provisions should be made, but the orders failed to provide for any legal or physical custody or parenting time at the time they were entered.

The UCCJEA also provides that a court of this state may take temporary emergency jurisdiction if the child is present in this state and it is necessary in an emergency to protect the child because the child, a sibling of the child, or

the child's parent is subjected to or threatened with mistreatment or abuse. MCL 722.1204.

> **Note**: An order issued under "temporary emergency" jurisdiction is entitled to interstate enforcement and nonmodification under the UCCJEA only when the notice and hearing requirements of the UCCJEA are fulfilled. See the Model UCCJEA, Section 204, Comment.

The Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq. also requires Michigan courts to recognize valid child support orders issued by other states and Indian tribes. A "support order" under the UIFSA could include a support provision contained within another state's protection order. The Act defines "support order" as "a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, spouse, or former spouse that provides for monetary support, health care, arrearages, or reimbursement and may include related costs and fees, interest, income withholding, attorney fees, and other relief." MCL 552.1104(i).*

*For more on interstate enforcement of support orders, see Goelman, et al, Interstate Family Practice Guide: A Primer for Judges, §§307, 409-410, and Michigan Family Law Benchbook, §§5.49-5.60 (Inst for Continuing Legal Education, 1999).

2. Mutual Orders

Limitations on the VAWA's full faith and credit requirement arise where a court issues a mutual protection order against both parties, and the respondent was the petitioner's spouse or intimate partner. 18 USC 2265(c) provides:

> "(c) Cross or counter petition. A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if —
>
> > "(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
> >
> > "(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order."

See MCL 600.2950k(2) for similar provisions. The portion of a mutual order restraining the respondent is entitled to full faith and credit regardless of whether the restraint on the petitioner meets the foregoing criteria.

"Spouse or intimate partner" is defined in 18 USC 2266(7) as follows:

> "The term "spouse or intimate partner" includes--
>
> > "(A) for purposes of--

*18 USC 2261A governs interstate stalking.

> "(*i*) sections other than 2261A,* a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; and . . .
>
> "(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides."

MCL 600.2950k(3) defines "spouse or intimate partner" for the purposes of a foreign protection order, as any of the following:

- a spouse or former spouse,
- an individual with whom the petitioner has had a child in common,
- an individual residing or having resided in the same household as the petitioner, or
- an individual with whom the petitioner has or has had a dating relationship.*

*See Section 6.3(A) for the definition of "dating relationship."

Michigan law prohibits mutual personal protection orders but allows for separate correlative orders that meet the federal criteria. See Section 7.4(E).

C. How Does the Enforcing Court Give Full Faith and Credit to a Sister State or Tribal Order?

If a tribal or sister state protection order meets the jurisdictional and notice requirements of the VAWA's full faith and credit provision, the order must be enforced "as if it were the order of the enforcing State or tribe." 18 USC 2265(a). This means that a Michigan court enforcing a foreign jurisdiction's protection order should impose on the respondent the same sanctions for violation that are available for PPO violations under Michigan law. These sanctions may differ from those that would have been imposed in the issuing jurisdiction. The following examples illustrate.

♦ **Example A**

The defendant in *People v Hadley*, 172 Misc 2d 697; 658 NYS2d 814 (1997), was restrained by an order issued in New Jersey under the New Jersey Prevention of Domestic Violence Act. The order expressly provided that violation may constitute criminal contempt under New Jersey law. After violating the order in the state of New York, the defendant was arrested and charged in a New York proceeding with criminal contempt in the second degree, a misdemeanor under New York law. He requested dismissal of the charges, asserting that the order could only be criminally enforced in a New Jersey court. The New York court

disagreed, finding that it was obligated to enforce the order by imposing New York penal sanctions for the violation.

♦ **Example B**

A Michigan circuit court issues a PPO against a non-Indian respondent who lives in a Michigan city. The PPO protects a non-Indian petitioner residing in the same Michigan city and prohibits the respondent from beating, molesting, or wounding the petitioner. The respondent follows the petitioner to a casino located on tribal land lying wholly within the exterior limits of the State of Michigan and physically assaults the petitioner in the casino parking lot.

The respondent may be arrested by a tribal police officer who is acting in accordance with his or her authority under tribal law. See *Duro v Reina*, 495 US 676, 697 (1990) (a tribal officer may restrain persons disturbing the public order on tribal land). The tribal court may then assert its civil jurisdiction over the respondent in this case under the full faith and credit provisions of the VAWA. 18 USC 2265(e) provides that for purposes of according full faith and credit, "a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe."

Under current federal law, the tribal court may not impose criminal penalties on the respondent. See *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978), and Section 8.13(A)(1), Example B. Criminal offenses between non-Indians that are committed on tribal land are also subject to prosecution by state and/or federal governments, depending upon the offense. *State v Schmuck*, 850 P 2d 1332, 1335 (Wash, 1993). However, a tribal officer has the power to arrest and transport an offender to federal or state authorities in this situation. See *Duro v Reina*, *supra,* and *State v Schmuck*, *supra,* 850 P2d at 1339. In this case, a federal criminal prosecution may occur under 18 USC 2262(a)(1), which prohibits traveling in interstate or foreign commerce or entering or leaving Indian country with the intent to violate a protection order. State jurisdiction over crimes between non-Indians in Indian country lies in the state within which the reservation is situated. See *United States v McBratney*, 104 US 621 (1882) and OAG 1979-1980, No 5714, p 800, n 3 (May 29, 1980).

Note: In a case such as this one, it is important to recognize that there may be an established cross-jurisdictional protocol or agreement between tribal, state, and federal authorities.

♦ **Example C**

A member of a federally-recognized Indian tribe obtains a protection order from her tribal court. This order restrains her intimate partner, a non-Indian, from stalking her. The order further states that penalties for violation include exclusion from tribal lands and civil fines; no criminal penalties are listed. The order is issued in compliance with tribal law and served on the respondent. The tribal law governing protection orders

allows the respondent an opportunity to be heard sufficient to protect his due process rights under federal law. After obtaining her order, the petitioner takes up residence on the tribal trust lands of a second federally recognized Indian tribe. She continues to work on the lands of her own tribe, however, and drives between her work and residence five days a week, crossing over land in the state of Michigan as she does so (without leaving the exterior boundaries of Michigan). The respondent continues his stalking behavior after issuance of the tribal protection order. Over a two-week period, he puts threatening notes on the petitioner's car as it is parked at her home and at her work locations. He also follows closely behind her in his car whenever she drives between her home and work. After he runs her car off the road on a highway in a Michigan county, the petitioner files a motion for an order to show cause in the Michigan circuit court for the county where the highway is located, seeking enforcement of her tribal protection order.

*See Section 8.13(A) on these questions.

The Advisory Committee for this chapter of the benchbook suggests that Michigan criminal contempt sanctions would apply to enforce the tribal protection order in this case. The order is entitled to full faith and credit in the Michigan court because it was issued in accordance with tribal law and with the due process requirements of 18 USC 2265.* Although some would argue that the lack of criminal sanctions makes tribal protection orders unenforceable in Michigan courts, the Advisory Committee suggests that the tribe's inability to impose criminal sanctions for violation is not relevant because the manner of enforcement is governed by Michigan law, not by tribal law. See Section 8.13(A)(1), Example B on the tribe's authority to issue this order.

18 USC 2265 does not provide for the enforcing court to modify a foreign jurisdiction's protection order. Lutz and Bonomolo, *How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection*, 16 Pace L Rev 9, 19 (1995).

In 1997, the FBI established a National Crime Information Center ("NCIC") database for protection orders, enabling law enforcement officers and courts to receive accurate, timely information about active protection orders issued in participating jurisdictions. As of the publication of this benchbook, NCIC serves criminal justice agencies in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Canada. In Michigan, access to NCIC files must be made through the Law Enforcement Information Network ("LEIN"). Although all 50 states are served by NCIC, the only sure way for a court to ascertain the continuing validity of an order issued in another jurisdiction is to contact the issuing court. Such communication is also a matter of courtesy that may facilitate protection of the victim in both the issuing and enforcing jurisdictions.

D. Immunity From Liability for an Action Arising From the Enforcement of a Foreign PPO

MCL 600.2950*l*(10) states:

"A law enforcement officer, prosecutor, or court personnel acting in good faith are immune from civil and criminal liability in any action arising from the enforcement of a foreign protection order. This immunity does not in any manner limit or imply an absence of immunity in other circumstances."

E. Facilitating Enforcement of Michigan PPOs in Other Jurisdictions

In light of the federal requirements for full faith and credit described above, Michigan courts can facilitate enforcement of Michigan PPOs in other jurisdictions by taking the following steps:*

*Many of these suggestions are found in *Full Faith & Credit: A Judge's Bench Card* (National Council of Juvenile & Family Court Judges, 2000)

- Help the parties to better understand the scope of the order by informing them orally and in writing that the order is enforceable in all U.S. states and territories, and on tribal lands.
- Issue orders that are explicit, specific, unambiguous, comprehensive, and legible. Avoid vague, unenforceable terms such as "reasonable."
- Clearly cite the statutory authority under which the order is issued. This citation — coupled with a recitation of the relevant jurisdictional facts — will assist the enforcing court in its assessment of the order under the VAWA jurisdictional criteria.
- Specify whether the respondent had notice and an opportunity to be heard.
- To eliminate questions about full faith and credit, ensure that PPOs affecting parental rights conform to the federal Parental Kidnapping Prevention Act, 28 USC 1738A and the Uniform Child Custody Jurisdiction and Enforcement Act, MCL 722.1101 et seq., as well as to the requirements of the VAWA.*

*See Section 7.7 on PPOs affecting parental rights. On the PKPA and UCCJEA, see Chapter 13.

- Provide the court's contact information for verification purposes, including the judge's name and the court's phone number and address.
- Make specific findings of abuse and include specific prohibitions against abuse.
- Specify the duration of the order and its expiration date.
- Specify that the order is entitled to full faith and credit under the VAWA.
- Specify relevant federal laws in the PPO (e.g., that federal prosecution may result from interstate travel to violate the order, or possession of a firearm while subject to the order).
- Provide the parties with a certified copy of the order.

- At the request of the enforcing court, consult with that court to clear up ambiguities, verify validity, establish the status of service, etc.
- Enter orders as soon as possible into LIEN.

Chapter 9: Statutory Firearms Restrictions in Domestic Violence Cases

9

9.1 Chapter Overview

Under Const 1963, art 1, §6, "[e]very person has a right to keep and bear arms for the defense of himself and the state." However, the state may impose valid restrictions on the right to purchase or possess a firearm. See *People v Smelter*, 175 Mich App 153, 155 (1989) ("The right to regulate weapons extends not only to the establishment of conditions under which weapons may be possessed, but allows the state to prohibit weapons whose customary employment by individuals is to violate the law.") and *Kampf v Kampf*, 237 Mich App 377, 383 (1999) ("[T]he Michigan Constitution does not protect the right to bear arms in the context of sport or recreation.").

Note: The Second Amendment to the U.S. Constitution does not apply to the states. *People v Swint*, 225 Mich App 353, 359-360 (1997), citing *Miller v Texas*, 153 US 535, 538 (1894). Moreover, federal cases interpreting the Second Amendment offer little guidance in construing Const 1963, art 1, §6, because of the textual differences between the Second Amendment and the corresponding Michigan provision. (The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.") On the authority of the U.S. Congress to regulate firearms, see *United States v Napier*, 233 F3d 394, 403 (CA 6, 2000) and *United States v Warin*, 530 F2d 103, 107 (CA 6, 1976), holding that the Second Amendment creates no individual right, and that legislative restrictions on the use of firearms do not impinge on any constitutionally protected liberties.

This chapter addresses federal and state statutory firearms restrictions that apply to individuals who are subject to the following criminal proceedings or court orders:

- Indictment on felony or misdemeanor charges.
- Conviction of a felony.
- Conviction of a misdemeanor.
- Pretrial conditional release orders and probation orders issued in criminal cases for the protection of a named person.
- Personal protection orders.*

*This chapter focuses on the circumstances that are likely to arise in cases involving domestic violence. Firearms disabilities may also arise from other circumstances beyond the scope of this discussion, such as mental illness, controlled substance addiction, or dishonorable discharge from the armed services.

Additionally, this chapter addresses Michigan firearms restrictions that apply to individuals who are otherwise deemed dangerous to themselves or others.

Under federal and Michigan statutes, individuals subject to the foregoing proceedings or orders may face four types of restrictions on access to firearms:

- **Prohibition from purchasing or possessing any firearms.** Federal law prohibitions arise upon conviction of any felony or a misdemeanor domestic violence crime, and upon entry of certain orders for conditional pretrial release, probation, or personal protection. State law prohibitions arise upon conviction of certain felonies.
- **Prohibition from obtaining a license to purchase, carry, or transport a pistol (hereinafter a "pistol license").** This prohibition arises under state law only. It applies to individuals who are subject to: a felony indictment; a felony conviction; a pretrial conditional release order issued for the protection of a named person; or a personal protection order. It may also apply to persons deemed a threat to themselves or others.

- **Prohibition from obtaining a license to carry a concealed pistol (hereinafter a "concealed pistol license").** This prohibition arises under state law only. It applies to individuals who are subject to: a felony indictment; a felony or misdemeanor conviction; a pretrial conditional release order issued for the protection of a named person; or a personal protection order. It may also apply to persons deemed dangerous to themselves or others.

- **Suspension or revocation of an existing concealed pistol license.** A concealed pistol license may be suspended under state law if its holder is charged with a felony or misdemeanor. A concealed pistol license may be revoked if its holder becomes ineligible to obtain a license.

The rest of this chapter will describe the foregoing restrictions in more detail. The reader will also find a brief review of Michigan statutory provisions governing the seizure and forfeiture of firearms used in violation of the law.

9.2 Definitions

For purposes of this chapter, the federal and state definitions of "firearms" should be noted. For purposes of the federal provisions discussed in this chapter, a "firearm" is:

> "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.* Such term does not include an antique firearm." 18 USC 921(a)(3).

*The term "destructive device" includes such things as bombs, grenades, or mines. See 18 USC 921(a)(4).

The Michigan statutes define a "firearm" as:

> "a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber." MCL 28.421(b) and MCL 750.222(d).

A weapon need not be operable or reasonably or readily operable in order to constitute a "firearm" under MCL 750.222(d). *People v Peals*, ___ Mich ___, ___ (2006). Rather, the statutory definition "requires only that the weapon be of a type that is designed or intended to propel a dangerous projectile." *Id* at ___. It is "the design and construction of the weapon, rather than its state of operability" that are relevant in determining whether a weapon is a "firearm." *Id*. at ___.

The Michigan statutes also define a "pistol" as:

> "a loaded or unloaded firearm that is 30 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals it as a firearm." MCL 28.421(e). See also MCL 750.222(e).

9.3 Effect of Federal Firearms Provisions on State Law

The federal firearms statutes do not preempt Michigan law governing firearms to the extent that Michigan law is consistent with the federal statutes. 18 USC 927 provides:

> "No provision of [18 USC 921 et seq., governing firearms restrictions] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."

For a case construing this statute, see *United States v Friday*, 404 F Supp 1343, 1345 (ED Mich, 1975) ("If the congressional scheme conflicts with certain provisions of a state system, Congress has deemed the conflicting state provision pro tanto inadequate by providing that the federal law controls.") For a general discussion of the federal preemption doctrine, see *People v Hegedus*, 432 Mich 598 (1989).

9.4 Michigan Restrictions That Apply Upon Indictment on Felony or Misdemeanor Charges

A. Restrictions Applicable to License Applicants Upon Felony Indictment

An indictment on a felony charge or a criminal charge listed in MCL 28.425b gives rise to two firearms restrictions under Michigan law:

- The person under indictment may not obtain a license to purchase, carry, or transport a pistol (a "pistol license"). MCL 28.422(3)(d).
- The person under indictment may not obtain a license to carry a concealed pistol (a "concealed pistol license"). MCL 28.425b(7)(f).

B. Restrictions Applicable to Concealed Pistol License Holders Upon Felony or Misdemeanor Indictment

1. Notice to Concealed Weapon Licensing Board

MCL 28.425m requires the prosecuting attorney to promptly notify the issuing county concealed weapon licensing board of a criminal charge against a license holder "for a felony or specified criminal offense as defined in this act." The prosecuting attorney must also promptly notify the issuing board of the disposition of the criminal charge. If the license holder was convicted of a crime, this notice must indicate if the crime involved "the brandishing or use of a pistol, if the pistol was carried by the license holder during the commission of the crime, or if no pistol was carried by the license holder during the commission of the crime." *Id.*

The applicable definitions provided in MCL 28.421 do not include the term "specified criminal offense" as used in MCL 28.425m. See Section 9.6(B) for the definition of "misdemeanor." Any misdemeanor conviction in Michigan or elsewhere will disqualify an applicant from obtaining a concealed pistol license if it occurred in the three years immediately preceding the date of application. MCL 28.425b(7)(i). Additionally, certain misdemeanors listed in MCL 28.425b(7)(h) will disqualify an applicant from obtaining a concealed pistol license if the conviction occurred in the eight years immediately preceding the date of application. For more information about these provisions, see Section 9.6(B).

2. Suspension of License

MCL 28.428(3) provides for the immediate suspension of a concealed pistol license held by a person charged with a felony or misdemeanor crime, as follows:

> "If the concealed weapon licensing board is notified by a law enforcement agency or prosecuting official that an individual licensed to carry a concealed pistol is charged with a felony or misdemeanor as defined in this act, the concealed weapon licensing board shall immediately suspend the individual's license until there is a final disposition of the charge for that offense and send notice of that suspension to the individual's last known address as indicated in the records of the concealed weapon licensing board. The notice shall inform the individual that he or she is entitled to a prompt hearing on the suspension, and the concealed weapon licensing board shall conduct a prompt hearing if requested in writing by the individual."

It is not clear whether criminal contempt charges for a PPO violation are encompassed by this provision. See Section 9.6(B) for the definition of "misdemeanor" under MCL 28.428(3), and Section 8.9(A) for a general discussion of whether criminal contempt constitutes a "misdemeanor."

The concealed weapon licensing board may revoke a license if it determines that an individual is ineligible to receive a license. See MCL 28.428(1) and (4). MCL 28.428 further provides for LEIN entry of an order suspending or revoking a license, as follows:

> "If the concealed weapon licensing board orders a license suspended or revoked under this section or amends a suspension or revocation order, the concealed weapon licensing board shall immediately notify a law enforcement agency having jurisdiction in the county in which the concealed weapon licensing board is located to enter the order or amended order into the law enforcement information network. A law enforcement agency that receives notice of an order or amended order under this subsection from a concealed weapon licensing board shall immediately enter the order or amended order into the law enforcement information network as requested by that concealed weapon licensing board." MCL 28.428(5).

C. Exemptions from Licensing Restrictions

*The person indicted may be subject to other restrictions imposed by his or her employer, however.

The foregoing licensing restrictions do not apply to certain government employees acting in the course of their employment:*

- Pursuant to MCL 28.432, the pistol licensing statute does not apply to any of the following:

> "(a) A police or correctional agency of the United States or of this state or any subdivision of this state.
>
> "(b) The United States army, air force, navy, or marine corps.
>
> "(c) An organization authorized by law to purchase or receive weapons from the United States or from this state.
>
> "(d) The national guard, armed forces reserves, or other duly authorized military organization.
>
> "(e) A member of an entity or organization described in subdivisions (a) through (d) for a pistol while engaged in the course of his or her duties with that entity or while going to or returning from those duties.
>
> "(f) A United States citizen holding a license to carry a pistol concealed upon his or her person issued by another state.

"(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms or a licensed dealer."

"(h)* Purchasing, owning, carrying, possessing, using, or transporting an antique firearm. As used in this subdivision, 'antique firearm' means that term as defined in section 231a of the Michigan penal code, 1931 PA 328, MCL 750.231a.

*MCL 28.432(1)(h) was added by 2004 PA 99, effective May 13, 2004.

"(i) An individual carrying, possessing, using, or transporting a pistol belonging to another individual, if the other individual's pistol is properly licensed and inspected under this act and the individual carrying, possessing, using, or transporting the pistol has obtained a license under section 5b to carry a concealed pistol."

♦ Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

"(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.

"(b) A constable* who is trained and certified under the commission on law enforcement standards act, . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.

*The concealed pistol statute is applicable to township constables.

"(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.

"(d) A person regularly employed as a local corrections officer* by a county sheriff, who is trained in the use of force and is authorized in writing by the county sheriff to carry a concealed pistol during the performance of his or her duties.

*"'[L]ocal corrections officer' means that term as defined in . . . MCL 791.532." MCL 28.432a(2).

"(e) A person regularly employed in a city jail or lockup who has custody of persons detained or incarcerated in the jail or lockup, is trained in the use of force, and is authorized in writing by the chief of police or the county sheriff to carry a concealed pistol during the performance of his or her duties."

"(f A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.

"(g) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.

"(h) A resident of another state who is licensed by that state to carry a concealed pistol.

"(i) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

"(j) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.

"(k) A peace officer or law enforcement officer from Canada."

D. Criminal Liability for Violation of Licensing Restrictions

An order suspending or revoking a concealed pistol license (or an amended order) is immediately effective. However, an individual is not criminally liable for violating the order or amended order unless he or she has received notice of it. MCL 28.428(6). If an individual is carrying a pistol in violation of a suspension or revocation order, but has not previously received notice of it, the individual shall be informed of the order and be given an opportunity to properly store the pistol or otherwise comply with the order before an arrest is made for a violation. MCL 28.428(7). A law enforcement officer who notifies an individual of a suspension or revocation order in this situation shall enter a statement into the LEIN network that the individual has received notice of the order. MCL 28.428(8).

Obtaining a pistol in violation of the pistol licensing statute is a misdemeanor punishable by 90 days in jail and/or a maximum $100.00 fine. MCL 750.232a(1). Carrying a concealed pistol without a license is a felony punishable by a maximum five years' imprisonment and/or a maximum $2,500.00 fine. MCL 750.227(3). See also MCL 750.223(3)(a), which makes

it a felony to sell a firearm or ammunition to a person under indictment for a felony punishable by imprisonment for four years or more.

Federal criminal penalties are also imposed on those who sell firearms or ammunition to persons under indictment for crimes punishable by more than one year's imprisonment. See 18 USC 922(d)(1) and 18 USC 924(a)(2) (imposing a fine and/or a maximum ten-year prison term for violations). Crimes punishable by more than a year's imprisonment do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

9.5 Restrictions Arising from Conviction of a Felony

Both federal and Michigan law restrict the purchase or possession of firearms by individuals convicted of felony offenses. Additionally, licensing restrictions arise under Michigan law.

A. Federal Restrictions on the Purchase or Possession of Firearms or Ammunition by Convicted Felons

Persons convicted of a crime punishable by imprisonment for a term exceeding one year may not purchase or possess firearms or ammunition under the federal firearm statutes. 18 USC 922(g)(1) provides:

> "(g) It shall be unlawful for any person —
>
> > "(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 USC 921(a)(20) contains the definitions for the terms used in the above provision. It provides that a "crime punishable by imprisonment for a term exceeding one year" does not include a state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less. The statute also excludes antitrust or similar offenses related to the regulation of business practices.

What constitutes a "conviction" for purposes of 18 USC 922(g)(1) is to be determined in accordance with the law of the jurisdiction where the conviction was entered. Additionally, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this

chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 USC 921(a)(20). Any restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. *Beecham v United States*, 511 US 368, 371 (1994).

> **Note:** In Michigan, convictions are set aside under MCL 780.621. For purposes of the federal prohibition on firearms possession, a convicted felon's civil rights are restored in Michigan upon completion of sentence. *Hampton v United States*, 191 F3d 695 (CA 6, 1999) (petitioner charged with violating 18 USC 922(g)(1) had no felony "conviction" as defined in 18 USC 921(a)(20) because his civil rights were restored upon completion of his sentence for the predicate offense). However, a convicted felon's right to purchase or possess firearms is also restricted by MCL 750.224f, which is discussed at Section 9.5(B). In *Hampton v United States*, *supra*, this statute did not restrict the convicted felon's ability to possess a firearm because its restriction period had expired. However, in *United States v Williams*, 134 F Supp 2d 851 (ED Mich, 2001), a convicted felon who failed to comply with the restrictions imposed by MCL 750.224f was subject to the federal prosecution for firearms possession, even though he had completed his sentence and his civil rights were otherwise restored under Michigan law. See Section 9.5(C) for more information on what constitutes a "conviction" under Michigan law.

The penalty for violating 18 USC 922(g)(1) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

Exemptions from the foregoing restrictions are available for government personnel under 18 USC 925(a)(1):

> "The provisions of this chapter . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."

Relief from disabilities imposed under 18 USC 922(g)(1) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 USC 925(c).

In addition to the forgoing restrictions, federal law forbids the sale of firearms or ammunition to a person who has been convicted of a crime punishable by more than one year in prison.* See 18 USC 922(d)(1) and 18 USC 924(a)(2) (imposing a fine and/or a maximum ten-year prison term for violations).

*Crimes punishable by more than one year in prison do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons

If a felony conviction was for an offense punishable by imprisonment for four years or more, the person convicted may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute firearms in Michigan until certain conditions are fulfilled. MCL 750.224f(1) and (5). Violation of this statute is a felony punishable by a maximum five years' imprisonment and/or a maximum $5,000.00 fine. MCL 750.224f(3).

MCL 750.224f(1)–(2) provides for expiration of the foregoing restrictions at a given time after all of the following conditions are met:

- Payment of all fines resulting from the violation;
- Completion of all imprisonment imposed for the violation; and
- Successful completion of all conditions of probation or parole imposed for the violation.

For all but certain "specified felonies" covered by the statute, the firearms prohibition expires three years after the foregoing conditions are met. MCL 750.224f(1). For "specified felonies," however, the prohibition expires five years after these conditions are met. MCL 750.224f(2). Additionally, a person convicted of a "specified felony" must make application to the concealed weapon licensing board under MCL 28.424. "Specified felonies" are felonies in which one or more of the following circumstances exist:

> "(*i*) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> "(*ii*) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> "(*iii*) An element of that felony is the unlawful possession or distribution of a firearm.
>
> "(*iv*) An element of that felony is the unlawful use of an explosive.
>
> "(*v*) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson." MCL 750.224f(6).

In *People v Perkins*, ___ Mich App ___, ___ (2004), the Court of Appeals held that larceny from a person, MCL 750.357, constitutes a "specified felony" for the purposes of MCL 750.224f. The Court stated:

> "Because a person whose property is stolen from his presence may take steps to retain possession, and the offender may react violently, we conclude that the offense of larceny from a person, '*by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*.' MCL 750.224f(6)(i). We therefore hold that larceny from a person is a specified felony within the meaning of MCL 720.224f."

The Michigan Supreme Court affirmed the Court of Appeals' holding. *People v Perkins*, ___ Mich ___, ___ (2005).

In *Tuggle v Michigan Dep't of State Police*, ___ Mich App ___, ___ (2006), the Court of Appeals held that attempted breaking and entering of an unoccupied dwelling, MCL 750.110, constitutes a "specified felony" for the purposes of MCL 750.224f. The Court stated:

> "On balance, we decline to negate the 'physical force against the person *or property* of another' portion of the definition of specified felony. [MCL 750.224f(6)(i)]." *Tuggle, supra at* ___.

Government employees (e.g., law enforcement officers) are *not* exempt from the restrictions imposed on convicted felons under MCL 750.224f. See MCL 750.231.

A person selling a firearm or ammunition to anyone who may not purchase or possess a firearm under MCL 750.224f is subject to felony sanctions of ten years' imprisonment and/or a $5,000.00 fine. MCL 750.223(3)–(4).

The Michigan Court of Appeals has rejected an ex post facto challenge to MCL 750.224f, which makes it a crime for a convicted felon to possess a firearm. See *People v Tice*, 220 Mich App 47 (1996).

The Michigan Court of Appeals has also rejected a claim that MCL 750.224f, which makes it a crime for a convicted felon to possess a firearm, is unconstitutionally vague. See *People v Pierce*, ___ Mich App ___ (2006).

In *Pierce*, the defendant was convicted of breaking and entering a building. The defendant subsequently was charged with, and convicted of, being a felon in possession of a firearm pursuant to MCL 750.224f. *Pierce*, *supra* at ___. On appeal defendant argued that it was unclear whether breaking and entering a building was a "specified felony" for purposes of MCL 750.224f, and therefore argued that the statute was unconstitutionally vague. The Court of Appeals disagreed:

> ". . . the ordinary and plain language of MCL 750.224f(6) provides, in clear and understandable terms, that a person who commits a felony involving 'the use, attempted use or threatened use of force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used,' is subject to the more stringent requirement for restoration firearms rights set forth in MCL 750.224f(2). Breaking and entering is a crime that clearly fits within the language. Therefore the statute provides adequate notice to persons of ordinary intelligence as to the conduct proscribed." *Pierce, supra* at ___ [citation omitted].

Accordingly, the Court found that MCL 750.224(f) is not unconstitutionally vague. The Court, however, remanded the case to the trial court on another issue.

> **Note:** MCL 750.224f does not apply to "a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm." MCL 750.224f(4). Michigan convictions may be set aside under MCL 780.621.*

*For discussion of this statute, see *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Section 3.2.

C. Michigan Licensing Restrictions for Convicted Felons

Conviction of a felony in Michigan or elsewhere disqualifies an individual from obtaining a license to carry a concealed pistol. MCL 28.425b(7)(f). Additionally, felons subject to the restrictions on purchasing or possessing a firearm imposed by MCL 750.224f* may not obtain a license to purchase, carry, or transport a pistol, MCL 28.422(3)(e). Felons subject to MCL 750.224f are additionally prohibited from obtaining a concealed pistol license under MCL 28.425b(7)(e).

*MCL 750.224f is discussed in Section 9.5(B).

MCL 28.425b(19)(a) defines "conviction" as "a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation that if committed by an adult would be a crime."

MCL 333.7411 provides that when a person who has not previously been convicted of a controlled substance offense, or who has one prior conviction for possession of an imitation controlled substance, pleads guilty to or is convicted of an enumerated controlled substance offense, the trial court may defer further proceedings and place that individual on probation. If the individual fulfills the terms of probation, the court must discharge the individual and dismiss the proceedings. In *Carr v Midland County Concealed Weapons Licensing Board*, 259 Mich App 428, 438 (2003), the Court held that once an individual has been successfully discharged from a felony drug charge pursuant to MCL 333.7411, that individual has not been convicted of a felony for the purposes of the Concealed Pistol Licensing Act.

MCL 780.621 provides the court with the ability to set aside a conviction for certain criminal offenses, provided the individual meets the requirements contained in the statute. In OAG, 2003, No 7133 (May 2, 2003), the Attorney General stated:

> "[A] person convicted of a felony whose conviction has been set aside by order of a Michigan court in accordance with [MCL 780.621], if otherwise qualified, may not be denied a concealed pistol license under [MCL 28.425b(7)(f)]. A person convicted of one of the offenses described under [MCL 28.425b(8)], whose conviction has been set aside, may nevertheless be denied a concealed pistol license on the basis of information concerning that conviction if the concealed weapon licensing board determines that denial is warranted under [MCL 28.425b(7)(o)*(which provides an exception to granting the license if it would be detrimental to the individual or public)].

*MCL 28.425b was amended by 2002 PA 719, which redesignated MCL 28.425b(7)(o) as 28.425b(7)(n). See Section 9.9 for more information on MCL 28.425(b)(7)(n).

MCL 28.425b(19)(b) defines "felony" with reference to MCL 761.1, or as "a violation of a law of the United States or another state that is designated as a felony or that is punishable by death or by imprisonment for more than 1 year." MCL 761.1 defines a "felony" as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."

The foregoing restrictions do not apply to certain government employees acting in the course of their employment:*

*The employee may be subject to other restrictions imposed by his or her employer, however.

- Pursuant to MCL 28.432, the pistol licensing statute does not apply to any of the following:

  > "(a) A police or correctional agency of the United States or of this state or any subdivision of this state.
  >
  > "(b) The United States army, air force, navy, or marine corps.
  >
  > "(c) An organization authorized by law to purchase or receive weapons from the United States or from this state.
  >
  > "(d) The national guard, armed forces reserves, or other duly authorized military organization.
  >
  > "(e) A member of an entity or organization described in subdivisions (a) to (d) for a pistol while engaged in the course of his or her duties with that entity or while going to or returning from those duties.

"(f) A United States citizen holding a license to carry a pistol concealed upon his or her person issued by another state.

"(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms or a licensed dealer."

- Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

"(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.

"(b) A constable* who is trained and certified under . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.

*The concealed pistol statute is applicable to township constables.

"(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.

"(d) A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.

"(e) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.

"(f) A resident of another state who is licensed by that state to carry a concealed pistol.

"(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

"(h) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol

> unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.
>
> "(i) A peace officer or law enforcement officer from Canada."

Obtaining a pistol in violation of the pistol licensing statute is a misdemeanor punishable by 90 days in jail and/or a maximum $100.00 fine. MCL 750.232a(1). Carrying a concealed pistol without a license is a felony punishable by a maximum five years' imprisonment and/or a maximum $2,500.00 fine. MCL 750.227(3).

See Section 9.4 regarding license suspension and revocation for concealed pistol license holders who are charged with a felony.

Upon entry of a conviction of a felony resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the conviction into the LEIN. MCL 28.425b(8).

9.6 Restrictions Upon Conviction of a Misdemeanor

A. Federal Restrictions for Domestic Violence Misdemeanors

Effective September 30, 1996, the federal Omnibus Consolidated Appropriations Act of 1997 imposes firearms restrictions on anyone who has been convicted of a misdemeanor domestic violence crime. 18 USC 922(g)(9) prohibits such persons from purchasing or possessing a firearm, as follows:

> "(g) It shall be unlawful for any person--
>
> . . .
>
> "(9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

The penalty for violating this statute is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

The foregoing restrictions result from all domestic violence misdemeanor convictions, even those that occurred prior to the September 30, 1996 effective date of the federal statute. The restrictions apply to both handguns and long guns. **There are no exemptions from these restrictions for government (e.g., law enforcement) personnel.** See 18 USC 925(a)(1).*

*A federal appeals court has rejected constitutional challenges to the exemptions in 18 USC 925 based on the equal protection provisions of the Fifth Amendment. *Fraternal Order of Police v United States*, 335 US App DC 359; 173 F3d 898 (1999).

18 USC 921(a)(33) defines a "misdemeanor crime of domestic violence" as follows:

> "(A) . . . [T]he term 'misdemeanor crime of domestic violence' means an offense that —
>
> > "(*i*) is a misdemeanor under Federal or State law; and
> >
> > "(*ii*) 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.
>
> "(B)
>
> > (*i*) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USC 921 et seq.] unless —
> >
> > > "(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
> > >
> > > "(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
> > >
> > > "(aa) the case was tried by a jury, or
> > >
> > > "(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
> >
> > "(*ii*) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an

> offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

For purposes of 18 USC 921(a)(33)(B)(*ii*), restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. See *Beecham v United States*, 511 US 368, 371 (1994).

Applying Michigan principles governing the restoration of civil rights, the U.S. District Court for the Western District of Michigan has held that "Michigan law excludes persons who commit misdemeanor crimes of domestic violence from prosecution under [18 USC 922(g)(9)]." *United States v Wegrzyn*, 106 F Supp 2d 959, 960 (WD Mich, 2000). The district court reasoned that a misdemeanant convicted of domestic violence loses the right to vote upon conviction, pursuant to MCL 168.758b. This statute takes away a misdemeanant's right to vote "while confined"; however, upon release from custody, this civil right is automatically restored. Thus, upon release from custody, a Michigan domestic violence misdemeanant has "had civil rights restored" as provided in 18 USC 921(a)(33)(B)(*ii*), and cannot be considered to be "convicted" for purposes of prosecution under 18 USC 922(g)(9). 106 F Supp 2d at 961-962, citing *Hampton v United States*, 191 F3d 695, 702-703 (CA 6, 1999). The court in *Wegrzyn* extended this reasoning to a domestic violence misdemeanant who had not been sentenced to time in jail, holding that "under such circumstances the requirement . . . that civil rights be lost and restored is satisfied." 106 F Supp 2d at 964. This decision in *Wegrzyn, supra* was appealed to the United States Court of Appeals for the Sixth Circuit. In *United States v Wegrzyn*, 305 F3d 593 (CA 6, 2002), the Court of Appeals affirmed the district court's decision, indicating the decision was "far from 'absurd' because, besides being mandated by applicable law, it also gives effect to the Congressional intent to allow states to have input in the definition of the parameters of the crime, and gives effect to the expressed intent of the Michigan legislature." *Id.* at 600.

Michigan convictions may be set aside under MCL 780.621.*

*For discussion of this statute, see *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), Section 3.2.

18 USC 922(g)(9) has withstood constitutional challenge on various grounds, as the following cases illustrate:

- *United States v Lewis*, 236 F3d 948 (CA 8, 2001) (Rejecting challenges based on the Commerce Clause, the equal protection provisions of the Fifth Amendment, and the Second and Eighth Amendments).

- *United States v Beavers*, 206 F3d 706 (CA 6, 2000), cert den 529 US 1121 (2000) (The statute does not violate Fifth Amendment due process rights by failing to require the government to prove as an

element of the offense the defendant's knowledge that possession of firearms was illegal).

- *Fraternal Order of Police v United States,* 335 US App DC 359; 173 F3d 898 (1999) (Rejecting challenges based on the Commerce Clause, and the Second and Tenth Amendments).

- *United States v Meade,* 175 F3d 215 (CA 1, 1999) (Rejecting challenges based on the Tenth Amendment and the Due Process Clause).

- *United States v Smith,* 171 F3d 617 (CA 8, 1999) (Rejecting assertions that the statute was unconstitutionally vague, and that it violated the Second Amendment and the equal protection provisions of the Fifth Amendment).

- *United States v Thomson*, 134 F Supp 2d 1227 (D Utah, 2001) (Rejecting challenges based on the Ex Post Facto Clause and vagueness).

- *National Ass'n of Government Employees v Barrett,* 968 F Supp 1564 (ND Ga, 1997) (Rejecting assertions that the statute violated the federal Commerce Clause, the Equal Protection Clause, the Due Process Clause, the Ex Post Facto Clause, the Bill of Attainder Clause, and the Tenth Amendment).

Several federal courts have held that the predicate "domestic violence misdemeanor" giving rise to the prohibitions of 18 USC 922(g)(9) need not have as an element the existence of a domestic relationship between the perpetrator and victim. *United States v Smith, supra,* 171 F3d at 620; *United States v Meade, supra,* 175 F3d at 219; *United States v Thomson, supra,* 134 F Supp 2d at 1230.

Relief from the restrictions imposed under 18 USC 922(g)(9) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 USC 925(c).

In addition to the foregoing restrictions, federal law forbids the sale or other disposal of firearms or ammunition to a person with knowledge or reasonable cause to believe that the person has been convicted of a domestic violence misdemeanor crime. See 18 USC 922(d)(9) and 18 USC 924(a)(2)(imposing a fine and/or a maximum ten-year prison term for violation of this prohibition).

B. Michigan Restrictions Following a Misdemeanor Conviction

MCL 28.425b(7)(i) disqualifies applicants who have been convicted of an enumerated misdemeanor in Michigan or elsewhere in the three years immediately preceding the date of application. MCL 28.425b(7)(i) disqualifies applicants who have been "convicted of a misdemeanor violation of any of the following in the 3 years immediately preceding the date of application":

- Operating under the influence, MCL 257.625.
- Refusal of commercial vehicle operator to submit to chemical test, MCL 257.625a.
- Ignition interlock device reporting violation, MCL 257.625k.
- Circumventing an ignition interlocking device, MCL 257.625*l*.
- Operating a commercial vehicle with an alcohol content, MCL 257.625(3).
- Operating aircraft under the influence, MCL 259.185.
- Operating an ORV under the influence, MCL 324.81134.
- Illegal sale of a self-defense spray or foam device, MCL 750.224d.
- Operating a snowmobile under the influence, MCL 324.82127.
- Controlled substance violations pursuant to MCL 333.7401 to 333.7461.
- Operating a locomotive under the influence, MCL 462.353(3).
- Disorderly person, MCL 750.167.
- Embezzlement, MCL 750.174.
- False pretenses with intent to defraud, MCL 750.218.
- Larceny, MCL 750.356.
- Second-degree retail fraud, MCL 750.356d.
- Larceny of a vacant building, MCL 750.359.
- Larceny by conversion, MCL 750.362.
- Larceny—defrauding a lessor, MCL 750.362a.
- Malicious destruction of property, MCL 750.377a.
- Malicious destruction of real property, MCL 750.380.

- Receiving stolen property, MCL 750.535.
- Malicious use of telephones, MCL 750.540e.
- A violation of a law of the United States, another state, or a local unit of government of this state or another state substantially corresponding to a violation described above.

An applicant is also ineligible to obtain a concealed pistol license if he or she has been convicted of certain specified misdemeanors in the eight years immediately preceding the date of application. These misdemeanors include domestic assault, aggravated domestic assault, stalking, and various firearms offenses; they are listed in MCL 28.425b(7)(h) as follows:

- Failing to stop when involved in a personal injury accident, MCL657.617a.
- Operating while intoxicated, second offense, MCL 257.625(9)(b).
- Operating a commercial vehicle with alcohol content, second offense, MCL 257.625m.
- Reckless driving, MCL 257.626.
- Operating while license suspended or revoked, second or subsequent offense, MCL 257.904.
- Operating aircraft while under the influence of intoxicating liquor or a controlled substance with prior conviction, MCL 259.185.
- Hindering or obstructing certain persons performing official weights and measures duties, MCL 290.629.
- Hindering, obstructing, assaulting, or committing bodily injury upon director or authorized representative under the motor fuels quality act, MCL 290.650.
- Operating an ORV under the influence of intoxicating liquor or a controlled substance, second or subsequent offense, MCL 324.81134(5) or (6).
- Operating a snowmobile under the influence of intoxicating liquor or a controlled substance, punishable as a second or subsequent offense, MCL 324.82128(1)(b) or (c).
- Operating a vessel under the influence of intoxicating liquor or a controlled substance, second or subsequent offense, MCL 324.80177(1)(b).
- Knowingly or intentionally possessing a controlled substance, MCL333.7403.

- Operating a locomotive while under the influence of intoxicating liquor or a controlled substance, or while visibly impaired, MCL462.353(4).
- Displaying sexually explicit matter to minors, MCL 722.677.
- Assault or domestic assault, MCL 750.81.
- Aggravated assault or aggravated domestic assault, MCL 750.81a.
- Breaking and entering or entering without breaking, MCL 750.115.
- Fourth-degree child abuse, MCL 750.136b.
- Accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a.
- Vulnerable adult abuse, MCL 750.145n.
- Solicitation to commit a felony, MCL 750.157b(3)(b).
- Impersonating a peace officer or medical examiner, MCL 750.215.
- Illegal sale of a firearm or ammunition, MCL 750.223.
- Illegal use or sale of a self-defense spray or foam device, MCL 750.224d.
- Sale or possession of a switchblade, MCL 750.226a.
- Improper transportation of a loaded firearm, MCL 750.227c.
- Failure to have a pistol inspected, MCL 750.228.
- Accepting a pistol in pawn, MCL 750.229.
- Failure to register the purchase of a firearm or a firearm component, MCL 750.232.
- Improperly obtaining a pistol, making a false statement on an application to purchase a pistol, or using false identification to purchase a pistol, MCL 750.232a.
- Intentionally aiming a firearm without malice, MCL 750.233.
- Intentionally discharging a firearm aimed without malice, MCL 750.234.
- Possessing a firearm on prohibited premises, MCL 750.234d.
- Brandishing a firearm in public, MCL 750.234e.
- Possession of a firearm by an individual less than 18 years of age, MCL 750.234f.

- Intentionally discharging a firearm aimed without malice causing injury, MCL 750.235.
- Parent of a minor who possessed a firearm in a weapon free school zone, MCL 750.235a.
- Setting a spring gun or other device, MCL 750.236.
- Possessing a firearm while under the influence of intoxicating liquor or a drug, MCL 750.237.
- Weapon free school zone violation, MCL 750.237a.
- Indecent exposure, MCL 750.335a.
- Stalking, MCL 750.411h.
- Fourth-degree criminal sexual conduct, MCL 750.520e.
- Reckless, careless, or negligent use of a firearm resulting in injury or death, MCL 752.861.
- Careless, reckless, or negligent use of a firearm resulting in property damage, MCL 752.862.
- Reckless discharge of a firearm, MCL 752.863a.
- A violation of a law of the United States, another state, or a local unit of government of this state or another state substantially corresponding to a violation described above.

MCL 28.425b(19)(a) defines "conviction" as "a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation that if committed by an adult would be a crime."

MCL 333.7411 provides that when a person who has not previously been convicted of a controlled substance offense, or who has one prior conviction for possession of an imitation controlled substance, pleads guilty to or is convicted of an enumerated controlled substance offense, the trial court may defer further proceedings and place that individual on probation. If the individual fulfills the terms of probation, the court must discharge the individual and dismiss the proceedings. In *Carr v Midland County Concealed Weapons Licensing Board*, 259 Mich App 428, 439 (2003), the Court held that once an individual has been successfully discharged from a drug charge pursuant to MCL 333.7411, that individual has not been convicted for the purposes of the Concealed Pistol Licensing Act.

MCL 28.425b(19)(d) defines "misdemeanor" as "a violation of a penal law of this state or violation of a local ordinance substantially corresponding to a violation of a penal law of this state that is not a felony or a violation of an

order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine, or both." It is not clear whether a criminal contempt conviction for a PPO violation is encompassed by this provision. See Section 8.9(A) for a general discussion of whether criminal contempt constitutes a "misdemeanor."

Upon entry of a conviction of a misdemeanor resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the conviction into the LEIN. MCL 28.425b(8).

See Section 9.4(B) regarding license suspension and revocation for concealed pistol license holders who are charged with a misdemeanor.

Pursuant to MCL 28.432a, the requirements for obtaining a license to carry a concealed pistol do not apply to any of the following:

> "(a) A peace officer of a duly authorized police agency of the United States or of this state or a political subdivision of this state, who is regularly employed and paid by the United States or this state or a subdivision of this state, except a township constable.
>
> "(b) A constable who is trained and certified under . . . MCL 28.601 to 28.616, while engaged in his or her official duties or going to or coming from his or her official duties, and who is regularly employed and paid by a political subdivision of this state.*
>
> "(c) A person regularly employed by the department of corrections and authorized in writing by the director of the department of corrections to carry a concealed pistol during the performance of his or her duties or while going to or returning from his or her duties.
>
> "(d) A member of the United States army, air force, navy, or marine corps while carrying a concealed pistol in the line of duty.
>
> "(e) A member of the national guard, armed forces reserves, or other duly authorized military organization while on duty or drill or while going to or returning from his or her place of assembly or practice or while carrying a concealed pistol for purposes of that military organization.
>
> "(f) A resident of another state who is licensed by that state to carry a concealed pistol.
>
> "(g) The regular and ordinary transportation of a pistol as merchandise by an authorized agent of a person licensed to manufacture firearms.

*The concealed pistol statute is applicable to township constables.

"(h) A person while carrying a pistol unloaded in a wrapper or container in the trunk of his or her vehicle or, if the vehicle does not have a trunk, from transporting that pistol unloaded in a locked compartment or container that is separated from the ammunition for that pistol from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business, or in moving goods from 1 place of abode or business to another place of abode or business.

"(i) A peace officer or law enforcement officer from Canada."

9.7 Restrictions Arising from Entry of a Court Order

A personal protection order, pretrial conditional release order, or probation order may by its terms prohibit an individual from purchasing or possessing a firearm or ammunition. In addition to such court-ordered prohibitions, certain statutory restrictions arise from the entry of such orders. If a PPO, conditional release order, or probation order restrains an individual from abusing his or her intimate partner, a federal statute prohibits the individual from purchasing or possessing firearms or ammunition, even if the court order is silent on this issue. Under Michigan law, PPOs and conditional release orders protecting a named person give rise to licensing restrictions.

Note: The discussion in this section does not apply to government employees who must carry a firearm as a condition of employment, such as law enforcement or corrections officers. Court orders restraining these individuals from purchasing or possessing firearms are the subject of Section 9.8.

A. Federal Restrictions on Purchase or Possession of Firearms or Ammunition After Entry of a Court Order

Under 18 USC 922(g)(8), persons who are subject to court orders restraining them from abusing an intimate partner may not purchase or possess firearms or ammunition. The statute provides:

"It shall be unlawful for any person--

. . .

"(8) who is subject to a court order that —

*For a case where the defendant agreed to an order but no hearing was held, see *United States v Spruill*, 292 F3d 207 (CA 5, 2002).

> "(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;*
>
> "(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> "(C)
>
> "(*i*) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> "(*ii*) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
>
> "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

The penalty for violating this statute is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

18 USC 921(a)(32) defines "intimate partner" as follows:

> "The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person."

18 USC 922(g)(8) has been subject to constitutional challenge on various grounds. The following cases illustrate:

- *United States v Napier*, 233 F3d 394 (CA 6, 2000) (Rejected due process challenges to the statute based on assertions that it does not require notice of its prohibitions. This case also rejected challenges based on the Commerce Clause and the Second Amendment).

- *United States v Kafka*, 222 F3d 1129 (CA 9, 2000) (Conviction under the statute did not violate due process rights, even though the defendant did not know that his possession of a firearm violated the statute).

- *United States v Baker*, 197 F3d 211 (CA 6, 1999) (Rejected assertions that the statute violates the Commerce Clause and the equal protection guarantees of the Fifth Amendment. This case also held that the statute does not violate due process because it lacks a requirement that a defendant receive direct notice of the statutory firearms disability after issuance of the protection order. Finally, the case held that prosecution under the statute does not constitute cruel and unusual punishment under the Eighth Amendment).

- *United States v Emerson*, 270 F3d 203 (CA 5, 2001) (Rejecting arguments that the statute violates the Second Amendment and the Fifth Amendment's due process guarantees. The court found that defendant needed the knowledge that he possessed the weapon in order to violate the statute, but that he did not need to know that the possession violated federal law. *Id.* at 215-216.).

Michigan PPOs and conditional pretrial release orders for protection of a named person under MCL 765.6b are likely to meet the criteria set forth in 18 USC 922(g)(8). The federal statute may also apply to probation orders issued under MCL 771.3(2)(o), which authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." For discussion of the standard for issuing a domestic relationship PPO, see Section 6.3(C). For discussion of conditional release orders issued for protection of a named individual in a criminal proceeding, see Sections 4.4 and 4.6. Probation orders are discussed in Section 4.14(B).

Under the Michigan statutes governing PPOs, conditional release orders, and probation orders, a court has broad discretion with respect to firearms. A court may or may not impose firearms restrictions as it sees fit, or it may tailor firearms restrictions to specific circumstances. For example, a court might prohibit an individual from possessing a pistol in his or her residence but still permit the individual to possess a hunting rifle at another separate location. It is not clear whether a Michigan order that allows access to firearms under its own terms would nonetheless result in a prohibition against the purchase or possession of all firearms under 18 USC 922(g)(8). On its face, the federal statute forbids the purchase or possession of firearms or ammunition in interstate or foreign commerce by persons "who are subject to a court order," without any deference to the court order's provisions in this regard. See *New Jersey v S.A.*, 675 A2d 678 (NJ Super, 1996), holding that 18 USC 922(g)(8) prohibited return of confiscated firearms to a person subject to a state domestic violence restraining order. Among the issues to consider in resolving this question are: 1) whether the court order was issued after a hearing, and whether the restrained party had notice and an opportunity to participate as provided in 18 USC 922(g)(8)(A); 2) whether the purchase or possession of firearms or ammunition is "in interstate or foreign commerce";

and, if so, 3) whether the federal statute is preemptive of state law that would permit possession of a firearm under certain circumstances. Federal preemption questions are governed by 18 USC 927, which is quoted at Section 9.3.

Relief from disabilities imposed under 18 USC 922(g)(8) is available upon application to the U.S. Attorney General. The U.S. Attorney General may grant relief "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 USC 925(c).

In addition to the forgoing restrictions, federal law forbids the sale or other disposal of firearms or ammunition to a person with knowledge or reasonable cause to believe that the person is subject to a court order restraining the person from abusing his or her intimate partner. See 18 USC 922(d)(8) and 18 USC 924(a)(2)(imposing a fine and/or a maximum ten-year prison term for violation of this prohibition).

B. Michigan Licensing Restrictions After Entry of a Court Order

The issuance of a Michigan personal protection order or an order for conditional pretrial release under MCL 765.6b can result in restrictions on obtaining a license to purchase, carry, or transport a pistol (a "pistol license"), and to carry a concealed pistol (a "concealed pistol license"). These state restrictions do not apply to long guns.

1. Restrictions on Obtaining a License to Purchase, Carry, or Transport a Pistol

Under MCL 28.422(3)(a), the following persons are disqualified from obtaining a license to purchase, carry, or transport a pistol:

- Persons subject to domestic relationship or non-domestic stalking PPOs issued under MCL 600.2950 and MCL 600.2950a. This restriction applies regardless of whether the parties to the PPO are involved in an intimate relationship. MCL 28.422(3)(a)(*iii*) and (*iv*).

- Persons subject to conditional pretrial release orders issued for the protection of a named person under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.422(3)(a)(*vi*).

Note: For purposes of pistol licensing, MCL 28.422(3)(a) appears to make a distinction between PPOs and conditional release orders. The express language of the pistol licensing statute provides for a disability after issuance of a PPO without regard to whether the PPO explicitly addresses firearms. A conditional pretrial release order, on the other hand, must specifically prohibit access to firearms before the licensing disability applies.*

*See Sections 4.6(A), 6.3(B), and 6.4(C) on court orders with firearms restrictions.

The foregoing orders will not result in the inability to obtain a pistol license unless the restrained individual received notice and an opportunity for a hearing in the court proceeding in which the PPO or conditional release order was issued. MCL 28.422(3)(a). Moreover, the pistol license disability will not apply unless the PPO or conditional release order was entered into the LEIN network. MCL 28.422(3)(a). Accordingly, LEIN entry of an ex parte PPO entered without notice to the respondent will not result in a pistol license disability until the respondent has received notice and an opportunity for a hearing.*

*Compare the concealed pistol licensing restrictions below, which apply even if the restrained party had no notice in the proceeding where the order issued.

Purchasing, possessing, or transporting a pistol without a license is a misdemeanor punishable by 90 days in jail and/or a maximum $100.00 fine. MCL 750.232a.

2. Restrictions on Obtaining a License to Carry a Concealed Pistol

Under MCL 28.425b(7)(d), the following persons are disqualified from receiving a license to carry a concealed pistol:

- Persons subject to domestic relationship and non-domestic stalking PPOs issued under MCL 600.2950 and MCL 600.2950a. This restriction applies regardless of whether the parties to the PPO are involved in an intimate relationship. MCL 28.425b(7)(d)(*iii*).

- Persons subject to conditional pretrial release orders issued under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.425b(7)(d)(*iv*).

  Note: MCL 28.425b(7)(d) appears to make a distinction between PPOs and conditional release orders. The express language of the statute provides for a disability after issuance of a PPO without regard to whether the PPO explicitly addresses firearms. A conditional pretrial release order, on the other hand, must specifically prohibit access to firearms before the licensing disability applies.*

*See Sections 4.6(A), 6.3(B), and 6.4(C) on court orders with firearms restrictions.

*Compare the pistol licensing restrictions, which apply only if there was notice and opportunity to be heard when the order issued.

The concealed pistol restrictions in MCL 28.425b(7)(d) take effect without regard to whether the person subject to the order received notice and an opportunity to be heard in the proceeding at which the order issued. Thus, an ex parte PPO issued without notice to the respondent can result in a concealed pistol disability.*

Carrying a concealed pistol without a license is a felony punishable by up to five years in prison and/or a maximum $2,500.00 fine. MCL 750.227(3).

3. LEIN Entry; Notice Requirements for Persons Subject to Disqualifying Court Orders

Upon entry of a court order resulting in a prohibition against using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under MCL 28.425b, the Department of State Police shall immediately enter the order into LEIN. MCL 28.425b(8).

Persons who are subject to a court order that disqualifies them from obtaining a pistol license must receive notice of their disqualification from the Department of State Police upon entry of the order into the LEIN network. MCL 28.422b(1). The notice shall be sent by first class mail to the last known address of the person, and shall include at least all of the following:

- The name of the person disqualified.
- The date of the disqualifying order's entry into LEIN.
- A statement that the person cannot obtain a license to purchase a pistol or obtain a concealed pistol license until the order or disposition is removed from the LEIN network.
- A statement that the person may request the State Police to correct or expunge* inaccurate information from the LEIN network. MCL 28.422b(1)(a)–(d).

*Proceedings for correction or expungement are set forth in MCL 28.422b(2)–(5).

9.8 Court Orders Prohibiting Law Enforcement Officers from Purchasing or Possessing Firearms

The effect of a PPO or conditional release order on a law enforcement officer's ability to possess a firearm will depend upon whether the order specifically addresses this issue:

- **If the order specifically prohibits the officer from possessing a firearm, the officer is bound by its provisions.**

  The statutes governing PPOs and conditional release orders specifically state that a court may prohibit the restrained party from purchasing or possessing firearms or ammunition. These statutes contain no exemptions for law enforcement officers in this regard. See MCL 600.2950(1)(e), MCL 600.2950a(23), and MCL 765.6b(3). Although the statute governing

conditions in probation orders does not specifically reference firearms restrictions, MCL 771.3(4) provides that "[t]he court may impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper." Such conditions could include firearms restrictions; as is the case with PPOs and pretrial release orders, the probation statute provides no exemption from firearms restrictions for law enforcement officers.

Accordingly, courts have discretion under the PPO, conditional release, and probation statutes to restrict an officer's access to all firearms, under all circumstances, or to impose tailored restrictions (e.g., the officer may only possess a firearm while on duty in his or her jurisdiction). The officer must abide by whatever restrictions the court imposes.

Although a law enforcement officer may be prohibited from possessing a firearm by court order, relief from the court's restrictions is available. Relief from a PPO may be sought by filing a motion to modify or rescind it within 14 days of service. This motion must be heard within five days of filing the motion. MCL 600.2950(14) and MCL 600.2950a(11). Relief from a conditional release order may be sought by a motion to modify it under MCR 6.106(H)(2) (felony cases) or MCL 780.65(1) (misdemeanor cases). See Section 6.7 on motions to modify a PPO, and Section 4.9 on modification of a conditional release order.

- **If a PPO or conditional release order restraining a law enforcement officer does not address the purchase or possession of firearms, the officer will be permitted to carry a firearm in the line of duty.**

Law enforcement officers acting in the line of duty are exempt from both federal and Michigan firearms restrictions imposed after entry of a court order. Thus, where the court's order is silent regarding firearms, no statutory disabilities apply with respect to service weapons. With respect to other weapons, however, the restrictions imposed on the general public apply.*

*See Section 9.7 for discussion of these restrictions.

The exemption from the federal restrictions imposed by 18 USC 922(g)(8) provides:

> "The provisions of this chapter [18 USC 921 et seq.], . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." 18 USC 925(a)(1).

For the exemptions from the Michigan pistol and concealed pistol licensing requirements, see MCL 28.432 and MCL 28.432a. These statutes provide exemptions for employees of police, corrections, or military agencies, with respect to weapons used for the purposes of the agency.

9.9 Michigan Restrictions on Concealed Weapons Applicable to Dangerous Individuals

The Michigan pistol licensing and concealed pistol licensing statutes each contain provisions that permit disqualification from licensure for individuals who are deemed dangerous to themselves or others.

The pistol licensing statute, MCL 28.422(3), provides in pertinent part:

> "The commissioner or chief of police of a city, township, or village police department that issues licenses to purchase, carry, or transport pistols, or his or her duly authorized deputy, or the sheriff or his or her duly authorized deputy, in the parts of a county not included within a city, township, or village having an organized police department, in discharging the duty to issue licenses shall with due speed and diligence issue licenses to purchase, carry, or transport pistols to qualified applicants residing within the city, village, township, or county, as applicable *unless he or she has probable cause to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an offense with the pistol that would violate a law of this or another state or of the United States*. An applicant is qualified if all of [the circumstances listed in the statute] exist." [Emphasis added.]

The Michigan appellate courts have not decided whether this section's "probable cause" requirement is in addition to the qualifying circumstances listed in the statute, or whether the qualifying circumstances serve as an exclusive list of factors to consider in determining whether an applicant poses a threat.

MCL 28.425b(7)(n) provides for disqualification of an applicant for a concealed pistol license if it is determined that issuing the license is "detrimental to the safety of the applicant or to any other individual." A determination under this provision shall be based on "clear and convincing evidence of repeated violations of this act, crimes, personal protection orders or injunctions, or police reports or other clear and convincing evidence of the actions of, or statements of, the applicant that bear directly on the applicant's ability to carry a concealed pistol." *Id.*

Suspension of a concealed pistol license is also possible in appropriate circumstances. MCL 28.428(4) provides:

> "If the concealed weapon licensing board determines by clear and convincing evidence based on specific articulable facts that the applicant poses a danger to the applicant or to any other person, the concealed weapon licensing board shall immediately suspend the individual's license pending a revocation hearing under this section. The concealed weapon licensing board shall send notice of the suspension to the individual's last known address as

> indicated in the records of the concealed weapon licensing board. The notice shall inform the individual that he or she is entitled to a prompt hearing on the suspension, and the concealed weapon licensing board shall conduct a prompt hearing if requested in writing by the individual."

Revocation of a concealed pistol license is mandatory

> "if the [concealed licensing] board determines that the individual is not eligible under this act to receive a license to carry a concealed pistol. The concealed weapon licensing board shall immediately send notice of the fact of and the reason for the revocation under this subsection by first-class mail to the individual's last known address as indicated on the records of the concealed weapon licensing board. The requirements of [MCL 28.428(2)] do not apply to this subsection." MCL 28.428(4).
>
> **Note:** MCL 28.428(2) requires that the individual receive notice of a hearing and have the opportunity to be heard before the board may revoke the individual's license. Notice must be by personal service or certified mail.

9.10 Seizure and Forfeiture of Firearms Under Michigan Law

Firearms involved in violations of the Michigan statutes discussed in this section may be seized and forfeited to the state. Regarding seizure of weapons after violation of the pistol or concealed pistol licensing statutes, MCL 28.433 provides:

> "When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that any pistol or other weapon or device mentioned in this act [MCL 28.421 et seq.] is unlawfully possessed or carried by any person, such magistrate shall, if he be satisfied that there is reasonable cause to believe the matters in said complaint be true, issue his warrant directed to any peace officer, commanding him to search the person or place described in such complaint, and if such pistol, weapon or device be there found, to seize and hold the same as evidence of a violation of this act [MCL 28.421 et seq.]."

MCL 750.238 contains a substantially similar provision addressing violations of the restrictions on the purchase or possession of firearms by convicted felons found in MCL 750.224f.

With regard to forfeiture of weapons after violation of the pistol or concealed pistol licensing statutes, see MCL 28.425g, which provides:

> "A pistol carried in violation of this act [MCL 28.421 et seq.] is subject to seizure and forfeiture in the same manner that property is subject to seizure and forfeiture under . . . MCL 600.4701 to 600.4709."

See also MCL 28.434(1), providing that:

> ". . . all pistols, weapons or devices carried or possessed contrary to this act [MCL 28.421 et seq.] are declared forfeited to the state, and shall be turned over to the director of the department of state police or his or her designated representative, for disposal under this section."

Provisions for disposal (including notice requirements) are found at MCL 28.434(2)–(3).

MCL 750.239 contains a similar provision addressing violations of the restrictions on the purchase or possession of firearms by convicted felons found in MCL 750.224f.

> **Note:** Firearms used in violation of 19 USC 921 et seq. are subject to seizure and forfeiture under 18 USC 924(d).

9.11 Chart: Summary of Federal and Michigan Statutory Firearms Restrictions*

*Law enforcement officers acting in the line of duty are exempt from the restrictions on this chart, except where otherwise indicated.

Event triggering restriction	Federal restrictions	Michigan restrictions
Felony indictment (Section 9.4)	Person indicted is not disqualified from purchasing or possessing firearms or ammunition, but it is illegal to sell these items to person indicted.	1.Disqualified from obtaining pistol license. 2. Disqualified from obtaining concealed pistol license. Existing C.P. license subject to suspension.
Misdemeanor indictment (Section 9.4)	No federal restrictions.	Existing concealed pistol license subject to suspension. (Note: Applicability of restriction to person charged with criminal contempt is unclear.)

Event triggering restriction	Federal restrictions	Michigan restrictions
Felony conviction (Section 9.5) (Note: For purposes of the federal statutes, a conviction that was expunged or set aside, or for which a person has had civil rights restored shall not be considered a conviction unless it expressly provides for a firearms restriction.)	Person convicted may not purchase or possess firearms or ammunition.	1. If convicted of felony offense punishable by 4 or more years imprisonment, disqualified from purchasing or possessing firearms until statutory conditions met and disqualification period expires. (No exemption for law enforcement officer.) 2. If subject to above restrictions on purchasing or possessing, may not obtain pistol license. 3. May not obtain concealed pistol license; existing license subject to suspension, revocation.
Misdemeanor conviction (Section 9.6) (Note: For purposes of the federal statutes, a conviction that was expunged or set aside, or for which a person has had civil rights restored shall not be considered a conviction unless it expressly provides for a firearms restriction.)	If domestic violence misdemeanor, person convicted may not purchase or possess firearms or ammunition. (No exemption for law enforcement officer.)	Existing concealed pistol license subject to suspension, revocation. May not obtain a new c.p. license if specified conviction within 3 years of application, or if specified conviction within 8 years of application. (Note: Applicability of restriction to criminal contempt conviction is unclear.)
Entry of court order against person other than law enforcement officer (PPO or conditional release order for protection of named person under MCL 765.6b) (Section 9.7) Law enforcement officer is exempt from both Michigan and federal restrictions, but bound by any specific firearms restrictions imposed in the court's order (Section 9.8)	Person subject to the order may not purchase or possess firearms or ammunition.	1. Disqualified from obtaining pistol license if order is issued after notice to restrained party and entered into LEIN. A conditional release order must also specify a firearms limitation for disqualification to apply. 2. Disqualified from obtaining concealed pistol license. A conditional release order must also specify a firearms limitation for disqualification to apply.
Dangerous Individuals (Section 9.9)	No federal provision.	Possible disqualification from obtaining pistol license. Disqualification from obtaining concealed pistol license. C.P. license may be suspended or revoked.

Chapter 10: Case Management for Safety in Domestic Relations Cases

10

10.1 Chapter Overview

The presence of violence has serious safety implications for domestic relations proceedings* in the family division of the circuit court:

- Because domestic violence typically occurs in the home, the intimate partners and their children may be the only sources of information about its existence. This circumstance can impede the court's fact-finding ability regarding matters affecting the safety of the parties and their children. Although many parties to domestic relations cases disclose the presence of violence to the court soon after proceedings

*In this chapter, "domestic relations proceedings" refer to proceedings listed in MCR 3.201.

begin, others may not disclose it at all, or may do so only after the case is well underway. Fear, uncertainty, embarrassment, denial, and lack of financial resources may be obstacles to abused individuals as they contemplate whether to disclose information about domestic violence to a court.

*See Section 1.4(B) on lethality factors.

- Domestic violence involves a pattern of abusive behavior perpetrated to control an intimate partner. Therefore, the separation of the parties may cause the violence to escalate rather than to cease, as the abusive party attempts to reassert the position of power in the relationship. Indeed, separation of the parties is one of several important "lethality factors" for a court to consider when assessing the danger presented by a case involving domestic violence.*

*See Section 1.5 on abusive tactics, and Section 1.7 on domestic abuse and children.

- Domestic violence often involves far more than physical assault on an intimate partner. Abusive tactics can also include sexual, emotional, and/or financial abuse. Abuse can be directed at an intimate partner's friends, family members, associates, animals, or property. Children are often involved in abusive tactics, either as tools, or as victims themselves. Consistent with the foregoing tactics, abusers may manipulate court proceedings regarding support, child custody, or parenting time as vehicles for continued assertion of control.*

This chapter briefly addresses some of the case management strategies that courts can use to address the foregoing concerns. The discussion covers:

- Identifying cases where domestic violence is present.
- Limiting access to records that would reveal the whereabouts of an abused party who is in hiding to escape violence.
- Determining whether alternative dispute resolution can be safely used in a case involving allegations of domestic violence.
- Using personal protection orders appropriately in domestic relations cases.

10.2 Why Is It Important to Know Whether Domestic Violence Is Present in a Case?

No court can adequately respond to domestic violence of which it is unaware. In order to make just, workable decisions in domestic relations cases, judges and referees rely on Friend of the Court caseworkers, conciliators, and investigators to provide information and make recommendations concerning the parties and their circumstances. To carry out their duties, these court staff members must gather information about various physical and mental health issues that may be present in the family relationships before the court, including domestic violence. There are many reasons why it is important that

the presence of domestic violence be identified as soon as possible after a domestic relations case is filed.

- Domestic violence, regardless of whether directed against or witnessed by a child, is a factor that the court must consider in determining the "best interests" of a child under the Child Custody Act, MCL 722.23(k).

- "The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time" is a factor for the court to consider in determining the frequency, duration, and type of parenting time to be granted under MCL 722.27a(6)(d).

- Under the federal Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, courts must cooperate with federal and state child support agencies to safeguard against the disclosure of confidential information about persons subjected to domestic abuse. See, e.g., MCR 3.218(A)(3)(h) and 42 USC 654(26)(B)–(C).

- Identifying domestic violence early in a case allows for taking precautions to promote the safety of the parties, their children, and court personnel. For this reason, inquiry into the presence of domestic violence should also include inquiry into the presence of any "lethality factors," discussed in Section 1.4(B).

- Identifying domestic violence early in a case allows for a complete investigation about the parties' circumstances, providing a sound factual basis for judges and referees who must issue orders governing the parties' interactions as the case progresses through the court system.

Few court staff members are experts on domestic violence, just as few are experts in other health problems affecting the family, such as mental illness or substance abuse. As with other serious family health problems, intervention with domestic violence requires referral to professionals with specialized knowledge. Nonetheless, domestic violence is a critical factor to consider in domestic relations cases, and court staff will be better able to perform their duties if they have basic information about it. Many of the referral resources discussed in Sections 2.1 - 2.3 can assist courts with providing information about domestic violence to court staff.*

*For a domestic violence reference manual for Friend of the Court personnel, see *Friend of the Court Domestic Violence Resource Book* (MJI, 2008).

10.3 Strategies for Identifying Whether Domestic Violence Is at Issue

*See Section 1.6(C) for more on the effects of domestic violence on a party's interaction with the court system.

For the reasons set forth in Section 10.2, it is important to promptly identify cases in which domestic violence is at issue. Unfortunately, the parties to such cases are often reluctant to volunteer information about the violence in their lives. Abused parties may hesitate to disclose information about domestic violence because they are concerned about the court's response to it. This concern may be fueled by an abuser's threats of physical violence or retaliatory litigation, by misinformation about court processes, or by lack of access to legal counsel. Abusers often control their partners' access to community resources; with respect to court proceedings, they may deliberately provide misinformation or prevent a partner from receiving notices sent from the court. Abusers often control the finances in a household so that their partners will not have access to the funds to pay for legal counsel in domestic relations proceedings. In one case reported by a domestic violence advocate, an abuser deliberately retained all of the domestic relations attorneys in the family's community so that his wife would not have access to them.*

The following discussion explores three strategies for overcoming barriers to communication about domestic violence:

- Courts can provide the parties with clear, consistent, ongoing information about court practices and procedures.
- Courts can promote the parties' physical safety by taking steps to minimize the opportunities for contact between them as the proceedings progress.
- Courts can obtain information about domestic violence by consistently using effective screening methods early in the case and continuing screening as the case progresses.

A. Providing Information

To overcome the fear and uncertainty that many abused individuals experience when dealing with the court system, courts can provide the parties with clear, consistent, ongoing information about court practices and procedures. Such information may make abused individuals feel safer about disclosing domestic violence. Information is also vital to their safety; in fact, safety planning is only possible if an abused individual understands the nature and timing of the court's actions.

To effectively communicate with the parties in cases involving domestic violence, a court might take the following steps:

- Provide complete information about court proceedings, including information about the timing and duration of the proceedings.

- From the earliest stages of the case, the parties need to understand what information the court may and may not keep confidential. If a party wishes non-confidential information, such as an address, to remain confidential, it is important to provide information as to how that might be accomplished, i.e., by a court order.*

*More about confidentiality in domestic relations proceedings is found at Section 10.4.

- Explain fully the factors the court will consider in making its decisions about support, child custody, or parenting time.

- Communicate to both parties that the court takes allegations of domestic violence seriously.

- Communicate to both parties that the court may order the payment of attorney fees for a willful failure to comply with an order. MCR 3.206(C).*

*See also Section 13.11 for assessing costs under the UCCJEA.

- Inquire about the circumstances where a party does not appear for a scheduled court proceeding.

- Provide information about community service provider agencies or pro bono legal service agencies.*

*See Sections 2.1-2.3 for information about referral resources.

- Provide educational materials on the nature and dynamics of domestic violence. Such information may help individuals overcome their embarrassment about domestic violence or may aid those who suffer abuse but do not recognize that domestic violence is a factor in their lives. Educational materials may be made available at various locations in the courthouse, or in orientation packets or programs provided for litigants or their children.

- In providing information, consider cultural concerns, literacy, and language barriers.*

*See Section 2.5 on cross-cultural communication.

- Courts might consider using electronic media (such as the Internet) to convey information about proceedings. Appropriate warnings should be provided about the limitations on confidential access to such information.

It is important to understand that measures like those described above may not completely alleviate an individual's fear or uncertainty about the court's response to domestic violence. Domestic violence is a factor the court must consider in determining the best interests of the child and in setting terms for parenting time under the Child Custody Act. See MCL 722.23(k), 722.27a(6)(d). Thus, if allegations of domestic violence surface, they must be fully and fairly investigated in accordance with due process principles. There may be great tension between the abused party's need for safety and the court's duty to provide due process to both parties. In some cases, the court's efforts to create a safe environment may diminish a party's fears about safety. In other cases, however, a party may remain uncertain about disclosing information about domestic violence because he or she fears the loss of access to children. In light of the court's duty to consider the best interests of the children, this apprehension may be justified.

*More discussion of the statutory best interest factors appears in Section 12.2.

Domestic violence is only one of several factors the court must consider in determining the best interests of the children.* The abused party may be concerned about the weight the court will give to other factors, including:

- The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. MCL 722.23(j). Some abused individuals fear that they will appear to be uncooperative or "unfriendly" if they raise the issue of domestic violence. This fear will be particularly significant for abused individuals who fear that the court will not believe the allegations of abuse.

- The capacity to provide for the child's physical and emotional needs. MCL 722.23(b), (c), (g). In some cases, domestic violence may have seriously impaired a party's ability to function as a parent. In other cases, the perpetrator may be a new partner who is not a parent to the children involved in a child custody or parenting time proceeding.

Courts will not change their obligation to provide due process to all parties to litigation; neither will they change the fact that custody and parenting time determinations must be made with the best interests of the children in mind. In some cases, the most helpful thing the court might do is to provide a referral to a domestic violence service agency that can provide safety planning and advocacy services. These agencies may be able to empower abused persons so that they are better able to function as parents or to extricate themselves from relationships with violent partners.

B. Minimizing Contact Between the Parties

Threats of physical violence may be a reason why abused individuals maintain secrecy in some relationships. Moreover, opportunities for continued domestic abuse may arise during court proceedings that require the presence of both parties. Courts can address these concerns by taking steps to minimize the contact between the parties:

- Honor any no-contact provisions in court orders, such as personal protection orders, probation orders, or conditional release orders issued in criminal proceedings.

- Arrange for separate waiting areas in the courthouse.

- Allow abused individuals to leave the courthouse first, and keep abusers in the courthouse until the abused individual has had the opportunity to leave without being followed.

In interstate cases, statutory provisions exist that decrease the risk of violence by permitting the taking of evidence while the parties are separated. The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq., contains the following procedures for gathering evidence from another state:

- In addition to other procedures available to a party, testimony of witnesses may be taken by deposition or other means allowable in this state for testimony taken in another state. MCL 722.1111(1).

- One court may request another to assist with evidence-gathering in a variety of ways: holding hearings to receive evidence; ordering a party to produce or give evidence; and having custody evaluations made regarding a child. The assisting court may then forward certified copies of hearing transcripts, evidence, or social studies prepared in compliance with the request. MCL 722.1112(1). See Section 13.10 for further discussion.

Similar provisions appear in the Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq., which provides that a petitioner's presence in Michigan is not required for the establishment, enforcement, or modification of a support order or for the rendering of a judgment determining parentage. MCL 552.1328(1). See Section 11.3(D) for more information on the evidence-gathering provisions of this Act.

C. Information-Gathering Strategies

Many commentators suggest that contested custody cases be screened as early as possible, using consistent written protocols. These commentators further recommend that screening continue as the case progresses. Based on a survey of courts nationwide, the National Center for State Courts reported the following methods for screening cases:*

- Reviewing pleadings upon case filing.

- Reviewing motion papers upon filing of motions for pretrial hearings or conferences.

- Requiring attorneys or litigants to complete and attach a screening form to the pleadings.

- Incorporating a screening component into the petition.

- Requiring all litigants who appear for a contested hearing to complete a questionnaire.

- Requiring all litigants referred to mediation, a custody evaluation, or other service to complete a screening questionnaire.

- Interviewing all litigants whose questionnaire responses indicate domestic violence between the parties. See Section 11.3(C) for some interviewing strategies.

- Searching for related proceedings involving domestic violence in other divisions or units of the court system (e.g., protection order, abuse/neglect, juvenile delinquency, or criminal proceedings).

*See Keilitz, et al., *Domestic Violence & Child Custody Disputes: A Resource Handbook for Judges & Court Managers*, p 9-11, 23 (Nat'l Center for State Courts, 1997). A discussion of domestic violence screening also appears in *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Sections 2.5-2.12. See Section 10.6 on alternative dispute resolution.

Once the presence of domestic violence has been discovered, the court should make an ongoing assessment of the risk posed by the abusive party. A list of lethality factors appears at Section 1.4(B).

> **Note:** Domestic violence experts have developed many screening and lethality assessment tools. The Advisory Committee for this chapter of the benchbook suggests that a court can most effectively avail itself of the resources in its community if it develops its own screening and lethality assessment criteria in cooperation with local attorneys, social workers, or other service providers with expertise in domestic violence treatment and prevention. See Section 10.6 and Appendix D for information about a Model Protocol for Domestic Violence and Child Abuse Screening in the context of domestic relations mediation.

After a court has identified a case in which domestic violence is present and assessed the potential for danger, it is better able to take appropriate steps to promote safety and fairness. These steps might include:

*Keilitz, et al, *supra*, p 9.

- Coordinating case processing with other units of the court that are handling related cases,* such as protection order, abuse/neglect, juvenile delinquency, or criminal proceedings. Communication between courts handling separate cases involving domestic violence is critical to promote safety and prevent manipulation by the parties. For a discussion of the relationship between personal protection orders and domestic relations proceedings, see Sections 7.7, 10.7, and 12.5(B).

**Id.,* p 15-17. See Sections 2.1-2.3 on referral resources.

- Collaborating with agencies outside the courts to provide appropriate services to the parties.*

- Using caution in ordering mediation and arbitration in cases involving allegations of domestic violence. For discussion of this issue, see Section 10.6.

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 19-20 (1990).

- Using caution in awarding joint custody or unsupervised parenting time. The propensity for continued violence remains after divorce or separation, and violence frequently recurs during unsupervised parenting time or the exercise of joint custody.* For more discussion, see Sections 12.4 and 12.7.

- Requiring careful judicial review of the parties' custody and financial agreements to ensure that they are not the products of coercion or duress.

10.4 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

Courts can promote safety in cases involving domestic violence by developing consistent procedures for safeguarding confidential information. Because many abused individuals seek to keep abusers from discovering their whereabouts, identifying information is of particular concern in cases involving domestic violence. Identifying information includes:

- A child's or party's residence address.
- A party's workplace or job training address.
- A party's occupation.
- A child's or party's school or place of education.
- Telephone numbers for the above entities.
- Records of name changes.

This section explores the Michigan rules governing confidentiality of identifying information in court and other records.

A. Confidentiality in Friend of the Court Records Generally

MCR 8.119(E)(1) provides that "[u]nless access to a file, a document, or information contained in a file or document is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(F)], any person may inspect pleadings and other papers in the clerk's office and may obtain copies as provided in [MCR 8.119(E)(2)–(3)]."*

*MCR 8.119 applies to "all actions in every trial court," with exceptions not relevant here. MCR 8.119(A).

MCR 8.119(F) sets forth the following procedures to obtain an order restricting access to court records:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

"(2) In determining whether good cause has been shown, the court must consider the interests of the public as well as of the parties.

> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public."

"(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.

"(4) For purposes of this rule, 'court records' includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) [governing protective orders against discovery].

"(5) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

"(6) Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D) [regarding limitation on public access to court proceedings or records of the proceedings].

"(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office."

> **Note**: When a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.* MCR 8.119(F) also governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c).

In domestic relations cases, MCR 3.218 specifically governs access to Friend of the Court records. It provides that "[a] party, third-party custodian, guardian, guardian ad litem or counsel for a minor, lawyer-guardian ad litem, and an attorney of record must be given access to friend of the court records related to the case, other than confidential information." MCR 3.218(B).*

*Additionally, citizen advisory committees under the Friend of the Court Act and named government entities may access records related to their functions. See MCR 3.218(C)–(F).

Regarding professional reports, MCR 3.219 provides:

> "If there is a dispute involving custody, visitation, or change of domicile, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the friend of the court and to the attorneys of record for the parties, or the parties if they are not represented by counsel. The attorneys for the parties, or the parties if they are not represented by counsel, may file objections to the report before a decision is made."

"Confidential information" is defined in MCR 3.218(A)(3) to mean:

> "(a) staff notes from investigations, mediation sessions, and settlement conferences;
>
> "(b) Family Independence Agency protective services reports;
>
> "(c) formal mediation records;
>
> "(d) communications from minors;
>
> "(e) friend of the court grievances filed by the opposing party and the responses;
>
> "(f) a party's address or any other information if release is prohibited by a court order;
>
> "(g) except as provided in MCR 3.219 [cited above, governing dissemination of a professional report], any information for which a privilege could be claimed, or that was provided by a governmental agency subject to the express written condition that it remain confidential; and
>
> "(h) all information classified as confidential by the laws and regulations of title IV, part D of the Social Security Act, 42 USC 651 *et seq*."*

*See Sections 10.5, 11.4, and 12.11 on the Social Security Act.

Under MCR 3.218(A)(3)(f), "a party's address or any other information" in Friend of the Court records can be protected from disclosure by a court order. However, this rule does not specify the procedures for obtaining such an order. If a "family violence indicator" is set in Michigan's automated child support enforcement system for an individual, that individual's address shall

*See Section 11.4 for further discussion of "family violence indicators."

be confidential under MCR 3.218(A)(3)(f). AO 2003-3, 466 Mich xxiv (2002).*

MCR 3.218(H) authorizes courts to adopt administrative orders under MCR 8.112(B) that contain "reasonable regulations necessary to protect friend of the court records and to prevent excessive and unreasonable interference with the discharge of friend of the court functions."

The above authorities do not specify whether a court order issued pursuant to MCR 3.218(A)(3)(f) must be issued in accordance with the procedures set forth in MCR 8.119(F). MCR 8.119(E)(1) contemplates various sources of authority for restricting access to documents "by statute, court rule, or an order entered pursuant to [MCR 8.119(F)]." Moreover, the procedures for sealing records in MCR 8.119(F)(1) apply "[e]xcept as otherwise provided by statute or court rule." In cases where a court rule — such as MCR 3.218(A)(3)(f) — authorizes courts to order restrictions on access without providing procedures for issuing such orders, the procedures in MCR 8.119(F) seem to apply.

> **Note:** The requirement in MCR 8.119(F)(3) that the court provide "any interested person the opportunity to be heard concerning the sealing of the records" may be problematic in cases involving domestic violence. Abusers may use this "opportunity" as a tool for harassing the person seeking confidentiality. Furthermore, the motion process itself may be dangerous for an abused individual. Advance notice of a hearing on a motion may itself alert the abuser to the abused individual's whereabouts, particularly if the abused individual must appear in court for a hearing, or if the abused individual's address must appear on the motion papers. (Under MCR 2.113(C), the caption of a motion must contain the name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party's name, address, and telephone number.*) It would be helpful to permit parties to file ex parte motions to seal court records, affording an "opportunity to be heard" within a reasonable time after entry of the order under MCR 8.119(F)(6). See Section 7.5(A) on due process concerns with ex parte orders.

*Unless the court has ordered that this information can be excluded. See MCR 3.203(F).

If a person is denied access to a Friend of the Court record, that person can file a motion to gain access to the file. MCR 3.218(G) states:

> "Any person who is denied access to friend of the court records or confidential information may file a motion for an order of access with the judge assigned to the case or, if none, the chief judge."

Other authorities in addition to MCR 3.218 address the confidentiality of specific types of information of relevance in domestic relations cases. The rest of this section discusses these authorities, which govern:

- Complaints and verified statements.
- Responsive pleadings, motions, and court orders or judgments.
- Address information.
- Documents that support recommendations.
- Children's records.
- Records in interstate cases.
- Records of name changes.

For information about federal confidentiality requirements under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, see Sections 10.5, 11.4, and 12.11.

B. Complaint and Verified Statement

Disclosure and protection of information in the complaint and verified statement in a domestic relations case is governed by MCR 3.206.

1. Information That Must Be Disclosed

MCR 3.206(A)(1) provides that a domestic relations complaint must state the complete names of all parties, the complete names and dates of birth of any minors involved in the action, and the residence information required by statute. Under this rule, the complaint does not have to contain a specific address, so that a party's state or county of residence may be sufficient. See MCL 552.9, regarding a complaint for divorce.

The court rule requires more detailed information if the action involves a minor, or if child or spousal support is requested, however. MCR 3.206(B)(1) requires the party seeking relief to attach a verified statement to the copies of papers served on the other party and provided to the Friend of the Court. This verified statement must include:

> "(a) the last known telephone number, post office address, residence address, and business address of each party;
>
> "(b) the social security number and occupation of each party;
>
> "(c) the name and address of each party's employer;
>
> "(d) the estimated weekly gross income of each party;
>
> "(e) the driver's license number and physical description of each party . . . ;
>
> "(f) any other names by which the parties are or have been known;

> "(g) the name, age, birth date, social security number, and residence address of each minor involved in the action, as well as of any other minor child of either party;
>
> "(h) the name and address of any person, other than the parties, who may have custody of a minor during the pendency of the action;
>
> "(i) the kind of public assistance, if any, that has been applied for or is being received by either party or on behalf of a minor, and the AFDC and recipient identification numbers . . . ;
>
> "(j) the health care coverage, if any, that is available for each minor child; the name of the policyholder; the name of the insurance company, health care organization, or health maintenance organization; and the policy, certificate, or contract number."

In cases where the support of a child is being sought pursuant to the Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1318(1) states, in part:

> "[T]he petition or accompanying documents shall provide, so far as known, the obligor's and obligee's name, residential addresses, and social security numbers, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought."

However, the UIFSA provides an exception as follows:

> "Upon a finding, which may be made ex parte, that a party's or a child's health, safety, or liberty would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the party's or child's address or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this act."

In cases where the custody of a minor is to be determined, additional information required by MCL 722.1209 of the Uniform Child-Custody Jurisdiction and Enforcement Act must be provided, either in the complaint or a verified statement. MCR 3.206(A)(3). MCL 722.1209 provides, in part:

> "[E]ach party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period."

However, MCL 722.1209(5) provides as follows:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."*

*See SCAO Form MC 416.

2. Confidentiality of Information in the Verified Statement

Confidentiality of the information in the verified statement is governed by MCR 3.206(B)(2), which states:

> "The information in the verified statement is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement that is served on the other party."

Under the foregoing subrule, a party seeking to protect his or her identifying information from the other party must show "good cause" to do so. This "good cause" exception applies only to addresses of a party and minors. It does not protect information about a party's occupation, employment address, or insurance coverage, from which an abuser could also gain access to a victim. However, some relief regarding these items may be available under MCR 3.206(B)(3), which provides:

> "If any of the information required to be in the verified statement is omitted, the party seeking relief must explain the omission in a sworn affidavit, to be filed with the court."

While MCR 3.206(B)(3) permits a party to explain omissions in the verified statement, it does not instruct the court as to how such omissions should be handled. See Section 10.4(A) for discussion of procedures for sealed court records under MCR 8.119(F).

> **Note:** It may be helpful to ask each party on intake of a case whether there are safety concerns with disclosing identifying information to the other party. Where domestic violence is present, some courts will allow a party living in a shelter to give a post office box as an address; otherwise, a court order is needed to protect an address.

C. Confidentiality of Information Disclosed in Responsive Pleadings, Motions, and Court Judgments or Orders

The Michigan Court Rules require disclosure of parties' addresses on responsive pleadings, motion papers, and court judgments and orders

awarding child or spousal support. There are no express exceptions to these requirements for cases in which disclosure of a party's address presents a danger to that party.

*See MCR 3.201(C) on the applicability of this rule in domestic relations proceedings.

- The contents of **responsive pleadings and motion papers** are governed by MCR 2.113(C).* Under this rule, the caption of a pleading or motion must contain the name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party's name, address, and telephone number. MCR 2.113(c)(1)(e)–(f).

- MCR 3.211(D)(1) requires all orders for child support or spousal support be prepared and submitted on the standard Uniform Support Order form. MCR 3.211(F) requires the use of a "Judgment Information Form," which includes sensitive personal information regarding parties and their families. The Staff Comment to the amended rule indicates that MCR 3.211(F) "allows personal information concerning a party to be provided to the friend of the court in a document separate from the court order, which is a public document."

The foregoing authorities contain no express provisions for requesting a protective order prohibiting disclosure to the other party. See Section 10.4(A) on protective orders that may be issued based on MCR 8.119(F).

D. Address Information

The parties to domestic relations actions and their sources of income must provide the Friend of the Court office with information about changes of address during the time such actions are pending, and after the court has entered judgments or orders in them:

- MCR 3.211(C)(2) provides that a judgment or order awarding custody of a minor must require the person awarded custody to promptly notify the Friend of the Court in writing when the minor is moved to another address.

- A child support order entered or modified by the court shall provide that each party shall keep the Friend of the Court informed of the name and address of his or her current source of income, and of the health care coverage available to him or her, including the name and contract number of the insurer. MCL 552.605a.

- A party's employer who is a source of income must promptly notify the Friend of the Court when the payer's employment is terminated or interrupted for more than 14 consecutive days, and shall provide the payer's last known address and the name and address of the payer's new employer, if known. MCL 552.614(2).

The foregoing authorities make no express provision for requesting a protective order prohibiting disclosure to the other party. See Section 10.4(A) for discussion of procedures for sealed court records under MCR 8.119(F).

Where domestic violence is present, some courts address the need for confidentiality by allowing a party living in a shelter to give a post office box as an address.

> **Note:** MCR 3.703(B)(6) governs the confidentiality of a petitioner's address in a personal protection action. This rule provides: "The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address." The omission of a petitioner's residence address on a petition and order in a personal protection action should alert the court to potential danger in disclosing the address on documents generated in the domestic relations action. Note also that some PPOs specifically protect identifying information; if so, the domestic relations court must abide by the terms of the PPO. See Section 10.4(F) for more information.

E. Documents That Support Recommendations

MCL 552.507(4) provides for access to information gathered by Friend of the Court employees, as follows:

> "A copy of each report, recommendation, transcript, and any supporting documents *or a summary of supporting documents* prepared or used by the friend of the court or an employee of the office shall be made available to the attorney for each party and to each of the parties before the court takes any action on a recommendation made under [sections 5 or 7 of the Friend of the Court Act, MCL 552.505, 552.507]."* [Emphasis added.]

*These sections permit referees and Friend of the Court personnel to make reports and recommendations on custody, parenting time, or child support.

Although broad, the foregoing disclosure requirements permit Friend of the Court personnel to maintain the confidentiality of identifying information in appropriate cases. Under the cited statute, a *summary* of a supporting document may be provided to a party in a case rather than an original document. If Friend of the Court staff know that release of identifying information in a document will put a party in danger, they can summarize any documents that support recommendations to the court, omitting the identifying information.

F. Access to Children's Records

MCL 722.30 states that non-custodial parents must have access to information in children's records in the absence of a protective order issued by a court:

> "Notwithstanding any other provision of law, a parent shall not be denied access to records or information concerning his or her child because the parent is not the child's custodial parent, unless the parent is prohibited from having access to the records or information by a protective order. As used in this section 'records or information' includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education."

*See Section 6.3 for a description of a domestic relationship PPO.

A domestic relationship PPO can prohibit a person from obtaining access to identifying information in children's records.* MCL 600.2950(1)(h) provides that the court may restrain a respondent from:

> "Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."

See also MCL 380.1137a, which prohibits a school from releasing the foregoing information protected by a PPO to a parent who is subject to a personal protection order.

Restrictions on a parent's access to children's records in a PPO can alert the domestic relations court to potential danger. If a PPO protects a child's identifying information, the court must abide by the terms of the PPO.

See Section 10.4(A) for discussion of restricted access to information in court records in cases where a PPO has not been issued and a party desires to limit a noncustodial parent's access to information regarding a child.

G. Confidentiality Requirements for Interstate Actions

Upon separation from an abuser, relocation to a new state may allow the abused party to find family support or economic opportunity in a safe location. Indeed, relocation to a new state may be necessary to escape continued violence or harassment. In cases where the abused party has relocated to a new state, the courts of that state may be called upon to enforce domestic relations orders entered in another state.

*For a full list of proceedings covered by this Act, see MCL 552.1301(2).

The Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq., governs interstate proceedings to determine parentage or to enforce, establish, or modify support.* MCL 552.1320 contains the following confidentiality provision that is broader than the provisions governing enforcement of support orders entered in Michigan:

> "Upon a finding, which may be made ex parte, that a party's or a child's health, safety, or liberty would be unreasonably put at risk by the disclosure of identifying information, or if an existing order

> so provides, a tribunal shall order that the party's or child's address or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this act."

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq., is designed to resolve jurisdictional conflicts in interstate child custody disputes. MCL 722.1209(1) contains the following disclosure requirement:

> "(1) Subject to the law of this state providing for confidentiality of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or sworn statement must state all of the following:
>
> > (a) Whether the party has participated, as a party or witness or in another capacity, in another child-custody proceeding with the child and, if so, identify the court, the case number of the child-custody proceeding, and the date of the child-custody determination, if any.
> >
> > (b) Whether the party knows of a proceeding that could affect the current child-custody proceeding, including a proceeding for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, identify the court, the case number, and the nature of the proceeding.
> >
> > (c) The name and address of each person that the party knows who is not a party to the child-custody proceeding and who has physical custody of the child or claims rights of legal custody or physical custody of, or parenting time with, the child."

If a party's or a child's health, safety, or liberty are threatened, the UCCJEA provides an exception from disclosure of identifying information. MCL 722.1209(5) states:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and

> liberty and determines that the disclosure is in the interest of justice."

H. Name Changes

In a proceeding for a name change under MCL 711.1, the court may order for "good cause" that no publication of the proceeding take place and that the proceeding be confidential. "Good cause" includes evidence that publication or availability of a record could place the person seeking a name change or another person in physical danger, such as evidence that these persons have been the victim of stalking or an assaultive crime. MCL 711.3(1).

It is a misdemeanor for a court officer, employee, or agent to divulge, use, or publish, beyond the scope of his or her duties with the court, information from a record made confidential under MCL 711.3(3). Disclosures under a court order are permissible, however. *Id*.

If the court orders that the record of a name change is confidential and that no publication will take place pursuant to MCL 711.1, then the court must maintain the record in a sealed envelope and place it in a private file. MCR 3.613(E) states:

> "(E) Confidential Records. In cases where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file. Except as otherwise ordered by the court, only the original petitioner may gain access to confidential files, and no information relating to a confidential record, including whether the record exists, shall be accessible to the general public."

10.5 Federal Information-Sharing Requirements

In addition to the Michigan authorities described in Section 10.4, certain federal statutes contain confidentiality provisions that are of interest in domestic relations cases involving domestic violence. Federal restrictions on access to information in cases involving domestic violence appear in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). This legislation, at 42 USC 653(a)(2)-(3), expanded the use of the Federal Parent Locator Service ("FPLS") for the following purposes:

- Establishing parentage.
- Establishing, setting the amount of, modifying, or enforcing child support obligations.
- Enforcing any federal or state law regarding the unlawful taking or restraint of a child.

- Making or enforcing a child custody or visitation determination.

The FPLS is operated by the federal Office of Child Support Enforcement in the U.S. Department of Health and Human Services. The FPLS includes a National Directory of New Hires and a Federal Case Registry of Child Support Orders. These federal databases are linked to state Directories of New Hires, and State Case Registries of Child Support Orders.

States must periodically forward data from the state databases to the corresponding databases within the FPLS. The information in the FPLS is accessible to "authorized individuals," who are defined separately in the federal statutes for purposes of custody and support matters. However, states must provide safeguards protecting the privacy rights of persons who may be in hiding from a family violence perpetrator. 42 USC 654(26)(B)–(D) requires states to:

- Prohibit the release of information on the whereabouts of a party or a child to another party against whom a protective order with respect to the former party or child has been entered, 42 USC 654(26)(B);

- Prohibit the release of information on the whereabouts of a party or a child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child, 42 USC 654(26)(C); and

- Notify the Secretary of Health and Human Services that the state has reasonable evidence of domestic violence or child abuse and the disclosure could be harmful to the custodial parent or child of the custodial parent. This notification (called a "Family Violence Indicator") is required in cases where the prohibitions in 42 USC 654(26)(B) and (C) apply. 42 USC 654(26)(D).

42 USC 653(b)(2) prohibits disclosure of FPLS information if the state has notified the Secretary of Health and Human Services that it has reasonable evidence of domestic violence or child abuse and the disclosure could be harmful to the custodial parent or child of the custodial parent. Persons seeking disclosure of information restricted by a Family Violence Indicator must seek a one-time override of the restriction from a court. The court shall determine whether disclosure or information to another person could be harmful to a party or child and, if the court determines that disclosure to another person could be harmful, the court and its agents shall not make any disclosure. See Sections 11.4 and 12.11 for more information about this process.

10.6 Alternative Dispute Resolution in Cases Involving Domestic Violence

A. General Concerns with Alternative Dispute Resolution

In Michigan, "alternative dispute resolution" ("ADR") is defined under MCR 2.410(A)(2) as:

> "any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties."

*For general information on ADR, see 1 Michigan Family Law, ch 8 (5th ed, Inst for Continuing Legal Ed, 1998), and 79 Mich Bar J 480 et seq., (May, 2000).

As the court rule indicates, ADR encompasses many different dispute resolution methods, including negotiation and settlement, mediation, and arbitration.* In distinguishing the various ADR methods, it is useful to consider the degree to which the disputants rely on assistance from a neutral third party to resolve the case:

- In **negotiation and settlement**, the parties typically meet face-to-face to try to reach an agreement resolving their dispute. Although there is no neutral third party to facilitate the discussion, the parties frequently engage attorneys to represent their interests. Negotiation and settlement will not result in a resolution of the parties' dispute if they are not able to reach agreement.

*Some courts use "conciliation" to facilitate the parties' agreement to temporary provisions for support or access to children soon after case filing. Conciliation is similar to mediation in many respects.

- In **mediation**, a neutral third party assists the parties as they work together to reach agreement.* The parties frequently have attorneys to represent them during the mediation, although this is not required. The neutral third party does not impose a solution on the parties, so that mediation will not result in a resolution of the dispute if the parties cannot agree. See MCL 552.502(*l*) ("'Domestic relations mediation' means a process by which the parties are assisted by a domestic relations mediator in voluntarily formulating an agreement to resolve a dispute concerning child custody or parenting time that arises from a domestic relations matter.") For a more detailed discussion of the types of mediation in Michigan domestic relations cases, see *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Section 6.2.

- The parties to **arbitration** enter into an agreement, in which they select a neutral third party (or third-party panel) to hear their dispute and reach a decision that will be binding on them under contract principles. The parties to arbitration are typically represented by counsel, although this is not required. Because the neutral third party makes a decision for the parties, arbitration always results in a determination of the parties' rights and responsibilities. See MCL 600.5001 et seq., and MCR 3.602 on arbitration procedure.

The parties to domestic relations cases may use any of the above methods to resolve disputes. See MCR 3.216(A)(4) (parties may agree to use mediation and other settlement procedures), and MCL 600.5070-600.5075 (discussed at Section 10.6(C), governing binding arbitration in domestic relations cases).

In cases involving domestic violence and/or child abuse, concerns about safety, fairness, and abuser accountability arise for all of the foregoing alternative dispute resolution methods because they rely to some extent on the parties' ability to reach agreement. Reaching agreement is problematic in cases involving domestic violence for the following reasons:*

*More discussion of mediation appears in *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Sections 6.3 - 6.4.

- Alternative dispute resolution methods cannot produce a fair resolution without an equal balance of power between the parties. Moreover, the parties must be empowered to express their needs and concerns without fear of reprisal or intimidation. Where domestic violence is at issue, the balance of power is so weighted toward the abuser that the possibility of coercion may be unavoidable. See Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies*, p 61 (Nat'l Inst of Justice, 1986), cited in Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, p 131 (Family Violence Prevention Fund, 1995).

- Assault of any kind is a serious crime that should be treated as such by the court. A process in which violence is the subject of agreement implies, and allows the abuser to believe, that the abused individual is somehow responsible for the abuse. Accordingly, violence should not be a subject for negotiation or compromise. Herrell and Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 20-21 (1990).

With respect to mediation, some commentators have asserted that it can be a route to empowerment and responsibility in some situations involving domestic violence if there is adequate screening and appropriate safeguards are in place. See Corcoran and Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 Mediation Quarterly 303, 314 (1990). Michigan statutes and court rules governing mediation and arbitration accommodate this point of view in that they do not provide for a blanket exclusion from these dispute resolution methods for cases where domestic violence is present. Instead, most Michigan authorities acknowledge that mediation and arbitration are problematic where domestic violence is present but provide options for parties to use them in particular cases where safeguards are present. The rest of this section describes these authorities.

B. Authorities Governing Mediation in Cases Involving Domestic Violence

1. Statutory Mediation Provisions for Child Custody and Parenting Time Disputes

Friend of the Court offices are required under MCL 552.513(1) to provide mediation to the parties in domestic relations matters. This statute has limited applicability to mediation of child custody or parenting time disputes. The Friend of the Court office is not required to provide mediation for support, property division, or other issues. Mediation under the statute is strictly voluntary; the court may not require the parties to meet with a mediator.

The statute creates no express limitations on the availability of mediation for cases with special circumstances, such as cases involving domestic violence or child abuse.

2. Court Rule Mediation Provisions

MCR 3.216 is a permissive rule authorizing a court to order parties to attempt mediation. Courts that wish to exercise this authority must first submit a local ADR plan to the State Court Administrator. MCR 3.216(C)(1) contains the following features that differentiate court rule mediation from mediation under MCL 552.513(1):

- The court rule has no limitation as to subject matter — it applies to mediation of "*any* contested issue in a domestic relations case, including post-judgment matters." [Emphasis added.]
- Mediation under the court rule may be voluntary *or* court-ordered — the court may order mediation "[o]n written stipulation of the parties, on written motion of a party, or on the court's initiative."

Unlike the domestic relations mediation statute, MCR 3.216 provides for exemptions from mediation in special cases. For example, "[p]arties who are subject to a personal protection order or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate." MCR 3.216(C)(3). Additionally, parties may object to mediation on the basis of the following circumstances listed in MCR 3.216(D)(3):

> "(a) child abuse or neglect;
>
> "(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;
>
> "(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;

> "(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or
>
> "(e) for other good cause shown."

An objecting party must file a written motion (and a notice of hearing) with the court and the attorneys of record within 14 days of receiving notice of the order assigning the case to mediation. MCR 3.216(D)(1). A hearing must be set within 14 days after the motion is filed, unless otherwise ordered by the court or by agreement of counsel to adjourn. *Id.*

3. Model Protocol for Domestic Violence and Child Abuse Screening

In collaboration with other agencies, the Michigan Domestic Violence Prevention and Treatment Board has developed a Model Court Protocol for Domestic Violence and Child Abuse Screening in Matters Referred to Domestic Relations Mediation (June 29, 2001). This Model Protocol is available from the Office of Dispute Resolution of the Michigan State Court Administrative Office. (The Protocol may also be found online at www.courts.michigan.gov/scao/dispute/odr.htm. Last visited December 16, 2003.) The Protocol succinctly states the major concerns with mediation in cases involving domestic violence, as follows:

> "Mediation presumes that participants can maintain a balance of power with the help of a mediator in order to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous and unfair if the imbalance of power is great or if the imbalance is unrecognized.
>
> "When domestic violence is present among parties in a dispute, the abuser's desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the victim from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the victim, the children, and the mediator to a risk of violence.
>
> "Mediator neutrality may support the abuser's belief that the abuse is acceptable. The future-orientation of mediation may discourage discussion of past abuse, which in turn invalidates the victim's concerns and excuses the abuser. This may result in agreements that are inherently unsafe.
>
> "Mandatory referral to mediation by the court may communicate to the abuser and the abused that the violence is not serious enough to compromise the parties' ability to negotiate as relative equals. This message also may invalidate the seriousness of the abuse, dilute abuser accountability, and result in unsafe agreements.

"*When domestic violence is present, the case should be presumed inappropriate for mediation*.

"The decision whether to order, initiate or continue mediation should be made on a case-by-case basis.

"Parties should be fully and regularly informed that continuation of mediation is a voluntary process and that they may withdraw for any reason." [Emphasis added.]

The full text of the Model Court Protocol and supporting documents (including court forms) appears at Appendix D.

4. Model State Code on Domestic and Family Violence

Section 408(A) of the Model State Code on Domestic and Family Violence approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges* suggests that courts be prohibited from ordering or referring the parties to attempt mediation in the following circumstances:

*The Model is available online at www.azcadv.org/PDFs/model%20code.pdf. (Last visited on December 16, 2003.)

"1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.

"2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:

"(a) Mediation is requested by the victim of the alleged domestic or family violence;

"(b) 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

"(c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

The commentary to this model rule notes that courts should refrain from non-mandatory referrals to mediation because "[j]udicial referrals are compelling and often viewed by litigants as the dispute resolution method preferred by the court."

Section 407(2) of the Model Code also stresses that mediation should not occur unless the abused individual desires it. This provision requires mediators to refrain from mediating court-ordered or referral cases unless the abused individual wishes to proceed:

"A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:

> "(a) Mediation is requested by the victim of the alleged domestic or family violence;
>
> "(b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
>
> "(c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

C. Provisions Addressing Domestic Violence in Domestic Relations Arbitration Statutes

Effective March 28, 2001, domestic relations arbitration is subject to the provisions of MCL 600.5070 - 600.5075.* These statutes provide for arbitration as follows:

*See 2000 PA 419.

"Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to 1 or more of the following issues:

> "(a) Real and personal property.
>
> "(b) Child custody.
>
> "(c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
>
> "(d) Parenting time.
>
> "(e) Spousal support.
>
> "(f) Costs, expenses, and attorney fees.
>
> "(g) Enforceability of prenuptial and postnuptial agreements.
>
> "(h) Allocation of the parties' responsibility for debt as between the parties.

"(i) Other contested domestic relations matters." MCL 600.5071.

*The domestic relations arbitration statutes contain no definition of "domestic violence." See Section 1.2 for definitions that apply in other contexts.

In MCL 600.5072(1)(c), the Legislature has acknowledged that ***"arbitration is not recommended for cases involving domestic violence."*** [Emphasis added.]* This acknowledgment appears in a provision prohibiting a court from ordering a party to participate in arbitration unless each party acknowledges in writing or on the record that he or she has been informed in plain language of the following:

"(a) Arbitration is voluntary.

"(b) Arbitration is binding and the right of appeal is limited.

"(c) Arbitration is not recommended for cases involving domestic violence.

"(d) Arbitration may not be appropriate in all cases.

"(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

"(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

"(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

"(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

"(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration." [Emphasis added.]

If either party is subject to a PPO involving domestic violence, or if there are allegations of domestic violence or child abuse in the pending domestic relations matter, the court is prohibited from referring the case to arbitration unless each party waives this exclusion. The exclusion cannot be waived unless the party is represented by an attorney throughout the action (including the arbitration process). The party must also be informed on the record concerning the arbitration process, the suspension of the formal rules of

evidence, and the binding nature of arbitration. MCL 600.5072(2). If a party decides to waive the exclusion from arbitration in accordance with the foregoing requirements, "the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record." MCL 600.5072(3).

An arbitration award will not be set aside merely because a party testified during the arbitration proceedings that domestic violence existed, when the application to set aside the arbitration award was not timely filed,* and there was nothing in the pleadings or prearbitration court filings indicating that either party was subject to a personal protection order or alleging domestic violence or child abuse. *Valentine v Valentine*, 277 Mich App 37, 38-39 (2007).

*Unless the award is based on corruption, fraud, or other undue means, MCR 3.602(J)(2) requires a party to file an application to set aside an arbitration award within 21 days after he/she receives a copy of the arbitration award.

The validity of a party's voluntary submission to binding arbitration requires record evidence that the prearbitration disclosures mandated by MCL 600.5072(1) were satisfied. *Johnson v Johnson*, ___ Mich App ___ (2007). In *Johnson,* the Court of Appeals held that the lower court erroneously entered a default judgment against plaintiff based on plaintiff's failure to participate in arbitration when plaintiff was not advised of the limited availability of appellate review, it was unclear whether the agreement to arbitrate included determining spousal support or alimony, it was unclear whether the agreement to arbitrate was voluntarily made, and the parties were not advised that the arbitration fee was unnecessary if they chose to continue with trial.

A child abuse or neglect matter is specifically excluded from arbitration. MCL 600.5072(4).

An arbitrator must be an attorney in good standing with the State Bar of Michigan who has practiced for not less than five years prior to the appointment as an arbitrator and demonstrated an expertise in the area of domestic relations law. Arbitrators must also have received training in the dynamics of domestic violence and in handling domestic relations matters that have a history of domestic violence. MCL 600.5073(2).

10.7 Comparing Personal Protection Orders with Domestic Relations Orders Under MCR 3.207

*Under the provisions cited, issuance of a domestic relations order, divorce judgment, order for separate maintenance, or decree of annulment should not preclude the court from also issuing a PPO. See Section 7.4(A).

The personal protection order is as entangled with domestic relations proceedings in Michigan as domestic violence is with the breakdown of many marriage relationships. MCR 3.207(A) states that the court "may issue ex parte and temporary orders with regard to any matter within its jurisdiction *and* may issue protective orders against domestic violence as provided in subchapter 3.700 [governing PPOs]." [Emphasis added.] See also MCL 552.14(1), which provides that on the motion of a party, the court may issue a PPO before or at the time of a divorce judgment, order for separate maintenance, or decree of annulment, regardless of whether a PPO was previously entered during the pendency of the action.*

This section compares the domestic relationship PPO under MCL 600.2950 with the domestic relations order under MCR 3.207 to assist the court in determining which type of order is most appropriate in a particular case. In general, a PPO is intended for situations where physical assault or other injury is anticipated due to one party's acts of domestic abuse. Domestic relations orders under MCR 3.207 are best suited for non-violent situations in which the parties require court assistance to regulate child custody, support, or property matters pending entry of the final judgment in the case.

> **Note:** A PPO takes precedence over any existing custody or parenting time order until the PPO expires, or until the court with jurisdiction over the custody or parenting time order modifies that order to accommodate the conditions of the PPO. MCR 3.706(C)(3). See Sections 7.7 and 12.5(B) for more discussion of PPOs and access to children.

A. Persons Subject to the Court's Order

Ex parte or temporary orders issued under MCR 3.207 and domestic relationship personal protection orders issued under MCL 600.2950 apply to overlapping categories of persons. Ex parte or temporary orders are appropriately used in the domestic relations proceedings set forth in MCR 3.201(A):

- Actions for divorce, separate maintenance, or annulment of marriage;
- Actions for affirmation of marriage;
- Paternity actions;
- Actions for family support under MCL 552.451 et seq.;
- Actions regarding the custody of minors under MCL 722.21 et seq.;
- Actions regarding parenting time with minors under MCL 722.27b; and

- Proceedings that are ancillary or subsequent to the foregoing actions, relating to the custody of minors, parenting time with minors, and support of minors and spouses or former spouses.

The parties to the above domestic relations actions will generally overlap with the parties to PPO actions because they typically fall into one of the following categories of persons who may be restrained under the domestic relationship PPO statute, MCL 600.2950:

- The petitioner's spouse or former spouse;
- A person with whom the petitioner has had a child in common;
- A person who resides *or* who has resided in the same household as the petitioner; or
- A person with whom the petitioner has *or* has had a dating relationship.

Note: Because a domestic relationship PPO is usually appropriate in cases where the PPO is sought concurrently with a domestic relations proceeding, this section will not refer to non-domestic stalking PPOs under MCL 600.2950a. See Sections 6.3(A) and 6.4(A) for a comparison of these two types of PPOs.

B. Conduct Subject to Regulation

MCR 3.207(A) authorizes the court to issue "ex parte and temporary orders with regard to any matter within its jurisdiction" and "protective orders against domestic violence as provided in subchapter 3.700 [governing PPOs]." Although no Michigan appellate court has construed this language, it appears to direct the court to address "domestic violence" by way of a PPO — typically under MCL 600.2950 — and other domestic relations issues by way of an order under MCR 3.207.

In deciding whether a case involves domestic violence that should be restrained by a PPO, it is helpful to keep two ideas in mind. First, "domestic violence" is generally more than an isolated instance of physical abuse within an intimate relationship — it involves a *pattern* of behaviors perpetrated with the intent and effect of exercising control over an intimate partner. This pattern may involve physical, sexual, emotional, and/or financial abuse. It may also include non-criminal acts, which are nonetheless dangerous if committed in the context of other behavior that leads to a violent crime.* Second, the purpose of a PPO is to prevent domestic violence crimes. See *United States v Dixon*, 509 US 688, 694 (1993), in which the U.S. Supreme Court characterized civil protection order proceedings as "an historically anomalous use of the contempt power" to restrain criminal behavior.

*See Sections 1.2-1.5 on the nature of domestic violence, and Section 1.4(B) on assessing lethality in cases involving domestic violence.

The statutes governing domestic relations orders and domestic relationship PPOs illustrate the type of conduct that is regulated under each type of order. MCL 552.15(1) provides as follows:

> "After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the friend of the court, or on the court's own motion, the court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as prescribed in . . . MCL 552.605, and as the court considers proper and necessary. Subject to . . . MCL 552.605b, the court may also order support as provided in this subsection for the parties' children who are not minor children. "

A domestic relationship PPO under MCL 600.2950 is designed to restrain behavior that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence. Under MCL 600.2950(1)(a)-(j), the court may enjoin one or more of the following acts:

- Entering onto premises.
- Assaulting, attacking, beating, molesting, or wounding a named person.
- Threatening to kill or physically injure a named person.
- Removing minor children from the person having legal custody of them, except as otherwise authorized by a custody or parenting time order.
- Interfering with the petitioner's efforts to remove the petitioner's children or personal property from premises solely owned or leased by the respondent.
- Purchasing or possessing a firearm.
- Interfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationships or environment.
- Having access to information in records concerning a minor child of both petitioner and respondent that will inform the respondent about the address and telephone number of the petitioner and the petitioner's minor child or about the petitioner's employment address.
- Stalking, as defined in the criminal stalking statutes.*
- Doing any other specific act that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

*See Sections 3.7-3.12 on stalking.

C. Issuance of Order

Because PPOs are intended to protect petitioners from violent behavior, the procedures for issuing them differ significantly from the procedures for issuing domestic relations orders under MCR 3.207. These differences are as follows:

- To protect petitioners who have fled from their places of residence to escape violence, a PPO may be issued in any county in Michigan regardless of the parties' residency. MCR 3.703(E)(1).* Orders issued under MCR 3.207 are subject to the residency restrictions of the underlying domestic relations action. See, e.g., MCL 552.9, regarding divorce actions.

*Venue is more restricted if the respondent is under age 18. See MCR 3.703(E)(2), discussed at Section 6.5(B)(1).

- There is no filing fee for a PPO petition, and no summons is issued. Moreover, since PPO petitions are filed as independent actions, no motion fees are allowed. See MCR 3.703(A), discussed in Section 6.5(B). Motions in domestic relations actions are subject to a $20.00 motion fee. MCL 600.2529(1)(e). See also MCR 2.119(G). Motion fees in domestic relations actions can be waived under MCR 2.002.

- Under MCL 600.2950b, standardized PPO forms are available for use by pro se parties. Upon request, the court may provide assistance (but not legal assistance) to a party in completing the forms and may instruct the party regarding proper service of the order. There is no similar provision for assistance to pro se parties applicable to proceedings under MCR 3.207.

- A PPO is filed as a separate action from any accompanying domestic relations action, so that it will not be inadvertently terminated upon conclusion of the domestic relations action. MCR 3.703(A). Temporary domestic relations orders are vacated by entry of final judgment unless specifically continued or preserved. MCR 3.207(C)(6).

- The court must rule on a petition for an ex parte PPO within 24 hours of its filing. MCR 3.705(A)(1). There is no such restriction for orders issued under MCR 3.207.

- An ex parte PPO must be issued for a period of no less than 182 days. The restrained party may move to modify or rescind the PPO and request a hearing within 14 days of service or actual notice, unless good cause is shown for filing the motion after the 14 days have elapsed. MCL 600.2950(13) - (14). An ex parte order issued under MCR 3.207(B)(4) "remains in effect until modified or superseded by a temporary or final order." The adverse party has 14 days from service of the order to file written objections; if no objection is filed, the ex parte order automatically becomes a temporary order. MCR 3.207(B)(6).

- An ex parte PPO is effective when signed by a judge and is immediately enforceable, without written or oral notice to the restrained party. MCL 600.2950(11)(b), (12). An order issued under MCR 3.207(B)(3) is "effective upon entry and enforceable upon service."

D. Enforcement Proceedings

A comparison of the enforcement mechanisms for PPOs and domestic relations orders under MCR 3.207 further reveals the differences between these two types of proceedings. Violation of a PPO subjects the adult offender to warrantless arrest and criminal or civil contempt sanctions. Offenders age 17 and older found guilty of criminal contempt shall be imprisoned for not more than 93 days and may be fined not more than $500.00. MCL 600.2950(23).* These penalties reflect the Legislature's recognition that domestic violence is criminal behavior. On the other hand, the enforcement mechanisms for domestic relations orders under MCR 3.207 reflect the essentially civil nature of these proceedings. Although arrest and contempt proceedings are available to enforce a domestic relations order, the governing statutes also provide alternative, less coercive methods of enforcement, which allow for more flexibility in resolving disputes arising from these orders.

*Offenders under age 17 are subject to the dispositional alternatives under the Juvenile Code. See Section 8.11(I)(2)-(3).

The different natures of the PPO and the domestic relations order are illustrated by the following enforcement features:

- A PPO is entered into the LEIN system. MCL 600.2950(17). There is no provision for LEIN entry of domestic relations orders issued under MCR 3.207.

- A party who is in violation of a PPO is subject to warrantless arrest pursuant to MCL 764.15b. In cases where the party in violation has not received notice of the PPO, MCL 600.2950(22) authorizes law enforcement officers to give the party verbal notice and an opportunity to comply with the PPO — failure to immediately comply is grounds for immediate custodial arrest. There is no provision authorizing warrantless arrest for violation of an order issued under MCR 3.207. However, the Friend of the Court may petition for an order of arrest at any time if immediate action is necessary to enforce a domestic relations order or judgment concerning support, parenting time, or custody. MCR 3.208(B)(6).

- Violation of a PPO is punishable by criminal or civil contempt sanctions. MCL 600.2950(23), (26). The prosecuting attorney is responsible to prosecute criminal contempt proceedings against the respondent, whether brought after warrantless arrest, or by a motion to show cause filed by the petitioner. MCL 764.15b(7). For orders issued under MCR 3.207, the Friend of the Court is responsible to initiate enforcement proceedings. MCR 3.208(B). The Friend of the Court may petition for an order to show cause why a party should not be held

in contempt, but contempt sanctions are not the only remedy. See, e.g., MCL 552.511, which sets forth alternative remedies for custody or parenting time violations, and MCL 552.607, regarding arrearages on orders of support.

If a dispute arises over a PPO issued in the context of a domestic relations case, some commentators suggest that the court handle resolution of the dispute with the criminal nature of the PPO in mind. Typically, domestic relations proceedings of a civil nature call for negotiated settlements of private disputes involving property distribution or child custody. To the extent that PPO proceedings address criminal conduct, however, they should not be a subject for negotiation or settlement between the victim and the perpetrator. Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, p 4 (National Institute of Justice, 1990). See also Section 10.6 on the use of mediation and arbitration in cases involving domestic violence.

Chapter 11: Support

11

11.1 The Significance of Support in Cases Involving Domestic Violence

The significance of child or spousal support to an abused individual can be best understood by keeping in mind that domestic violence perpetrators use a variety of abusive tactics in order to exercise control over their intimate partners. Such tactics often include control over financial matters, such as:*

*See Section 1.5 on abusive tactics.

- Preventing the abused party from working or developing job skills.
- Controlling the abused party's paycheck.
- Limiting the abused party's access to money.
- Interfering with the abused party at the workplace.
- Damaging the abused party's credit rating.
- Failing to meet court-ordered support obligations.

For many abused individuals, the abuser's economic control is a key obstacle to leaving the relationship.* It is difficult to establish economic independence from an abuser, especially for individuals who have been isolated from supportive friends or relatives or prevented from acquiring work skills. It is thus critical that courts establish and facilitate enforcement of adequate spousal and child support awards to assist abused individuals in attaining economic self-sufficiency. Without such support, abused persons may be unable to provide homes for themselves or their children.

*Menard & Turetsky, *Child Support Enforcement & Domestic Violence,* 50 Juvenile & Family Court J 27, 30 (Spring, 1999).

In one study, conducted in ten cities across the United States, the U.S. Department of Justice reported that 22% of homeless parents (mainly mothers) left their homes because of intimate partner violence. See Rennison and Welchans, *Intimate Partner Violence*, p 8 (Bureau of Justice Statistics Special Report, May, 2000), citing *Homes for the Homeless. Ten Cities 1997–1998: A Snapshot of Family Homelessness Across America* (Institute for Children and Poverty). As a result of this homelessness (and being physically and economically abused), abused persons may also lose custody of their children or return to their abusive partners.

Abused individuals need child and spousal support because domestic violence frequently inflicts extra financial burdens on the family. These may include:*

*Erickson, *Child Support Manual for Attorneys & Advocates,* p 72 (Nat'l Center on Women & Family Law, Inc, 1992).

- Extra shelter costs.
- Broken or stolen belongings.
- Extra medical expenses.
- Counseling expenses.
- Litigation expenses.

Some commentators point out that abused individuals may be hesitant to seek the spousal or child support they need for fear that the financial benefits may not outweigh the potential risks. Such individuals may fear that paternity or child support actions have the potential to renew violence by alerting the abuser to their location, precipitating physical contact with the abuser in the courthouse, or stimulating desires for custody or parenting time that could lead to regular, dangerous contact. Aggressive child support enforcement also may pose a risk of violent retaliation by the abuser. Nonetheless, because financial independence is so important to establishing a violence-free household, it is not surprising to find research confirming that most victims of domestic violence want child support if they can obtain it safely.* Moreover, enforcement of abusers' support obligations makes sense from a policy perspective because it sends them a message that abusive tactics will not be effective to free them from their financial responsibilities.

*Pearson, et al, *Child Support & Domestic Violence: The Victims Speak Out,* in Violence Against Women 427–429, 441, 444 (Sage Periodicals Press, April 1999).

The rest of this chapter contains information about state and federal laws that address the foregoing concerns of abused individuals in proceedings to establish and enforce support. The chapter also provides suggestions for case management practices that promote safety.

Note: A general discussion of court procedures for establishing and enforcing spousal and child support orders is beyond the scope of this benchbook. See *Michigan Family Law Benchbook*, ch 5-6 (Institute of Continuing Legal Education, 1999) for general information about these subjects. For a brief discussion of criminal sanctions for desertion and non-support, see Section 3.14(B)(4).

11.2 The Effect of Abusive Conduct on Property Division, Spousal Support, and Child Support

Although a trial court may not consider the element of fault in its decision to enter a divorce judgment,* the Michigan Supreme Court has held that the parties' conduct is still a factor in adjudicating property questions in divorce cases. In *Sparks v Sparks*, 440 Mich 141, 157–158 (1992), the Court examined the 1971 "no-fault" amendments to the divorce act and concluded that the Legislature's failure to amend the property section to remove the concept of fault "evidenced an intent to retain the traditional factors when fashioning a property settlement." The Court then listed these factors — including fault — and instructed the state's trial courts to consider them in dividing marital property, without assigning disproportionate weight to any one factor.

*See MCL 552.6(3) on the grounds for entering a divorce judgment.

This section explores how the Michigan appellate courts have applied the principles in *Sparks* to questions of property division and spousal support in divorce cases. It also addresses the question of the role of a party's conduct in decisions regarding child support.

Note: The Friend of the Court is generally required to open a case for domestic relations matters. MCL 552.505a(1). The parties to a domestic relations matter may file a motion to opt out of having a Friend of the Court case opened. The motion must be filed with the party's initial pleadings. See MCL 552.505a(2). However, the court must allow the parties to opt out unless the court finds that "[t]here exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child." MCL 552.505a(2)(d).

A. The Parties' Conduct as a Factor in Property Division

Marital misconduct is one of several factors to consider in reaching an equitable division of marital assets upon divorce. In *Sparks v Sparks, supra*, 440 Mich at 157, 159–160, the Michigan Supreme Court reviewed a trial court's property distribution made solely on the basis of one party's extramarital sexual relationship. The Supreme Court found that the trial court had erroneously assigned disproportionate weight to this party's conduct and remanded the case for additional findings of fact. The Supreme Court then

instructed Michigan trial courts to consider the following factors whenever they are relevant to the circumstances of a particular case:

- Duration of the marriage.
- Contributions of the parties to the marital estate.
- Age of the parties.
- Health of the parties.
- Life status of the parties.
- Necessities and circumstances of the parties.
- Earning abilities of the parties.
- Past relations and conduct of the parties.
- General principles of equity.
- Any additional factors relevant to a particular case, such as the interruption of a party's career or education.

In weighing the foregoing factors, a trial court must make specific findings regarding any that are relevant to the case. A court must not assign disproportionate weight to any one factor. 440 Mich at 158. The Supreme Court expressed the following guidelines:

> "It is not desirable, or feasible, for us to establish a rigid framework for applying the relevant factors. The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations. . . . But . . . while the division need not be equal, it must be equitable. . . . Just as the final division may not be equal, the factors to be considered will not always be equal. Indeed, there will be many cases where some, or even most, of the factors will be irrelevant. But where any of the factors delineated . . . are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors." 440 Mich at 158–159.

In weighing a party's conduct, the trial court's purpose is to reach an equitable division of the marital property, not to punish the party found at fault for the breakdown of the marriage. In *McDougal v McDougal*, 451 Mich 80 (1996), the circuit court found the husband in an eight-year marriage at fault for the parties' divorce, based on acts that included an assault on the wife. On this basis, it awarded the wife a large proportion of the marital property. The Supreme Court acknowledged that the wife was entitled to a substantial award but found the circuit court's disproportionate award to her inequitable. It remanded the case, instructing the circuit court to consider other factors such as the duration of the marriage, both parties' significant contributions to the marital estate, the 22-year difference in the parties' ages, the husband's

terminal illness, the wife's employment, and the husband's retirement. The Supreme Court stated: "[F]ault is an element in the search for an equitable division — it is not a punitive basis for an inequitable division. We cannot agree that the element of fault in this case supports the extreme financial penalties imposed by the circuit court." 451 Mich at 90. See also *Sands v Sands*, 442 Mich 30, 36–37 (1993), in which the Supreme Court overruled a Court of Appeals decision that would have created an automatic rule of forfeiture for cases involving concealment of assets, stating "a judge's role is to achieve equity, not to 'punish' one of the parties."

Spooner v Spooner, 175 Mich App 169 (1989), is another case illustrating how fault should be weighed in reaching a fair and equitable property settlement between the parties to a divorce. The parties to this case were divorced after the husband assaulted his wife. In granting the divorce, the trial court found that the husband was at fault for the breakdown of the marriage on the basis of the assault and other acts. The court also found that: the marriage was of short (two years) duration; the husband brought far greater assets into the marriage than the wife; and each party had the ability to earn a living. Based on these findings, the court awarded each party the assets brought into the marriage. Additionally, based on the husband's fault, the court awarded the wife $35,000.00 from his stock account. The Court of Appeals upheld the trial court's property settlement. With respect to the $35,000.00 distribution to the wife, the panel stated: "The award was based on [the husband's] fault in causing the divorce and because a legitimate inference could be made based on [the wife's] use of her money for household expenses which freed . . . [the husband] to use his own funds to strengthen those accounts." 175 Mich App at 173.

In *Welling v Welling*, 233 Mich App 708 (1999), the Court of Appeals reviewed the trial court's determination of fault in a case where a party's misconduct resulted from his use of alcohol. The party asserted that the trial court erred in considering his alcoholism when determining marital fault. The Court of Appeals disagreed, finding that the trial court correctly considered the party's *behavior* while drinking, not his status as an alcoholic. This behavior included passing out on a daily basis and verbal abuse. 233 Mich App at 710–711. The Court of Appeals further found "inapposite" the party's contention that his conduct while intoxicated was not intentional or wrongful:

> "In determining 'fault' as one of the factors to be considered when fashioning property settlements, courts are to examine 'the conduct of the parties during the marriage.' [*Sparks v Sparks*, *supra*, 440 Mich at 157.] The question here is whether one of the parties to the marriage is more at fault, in the sense that one of the parties' conduct presented more of a reason for the breakdown of the marital relationship than did the conduct of the other. Clearly, defendant's conduct in this case . . . did present a greater reason for the breakdown of the relationship. This is the obvious conclusion even if we assume that the defendant's behavior was not 'intentional' or 'wrongful.' The effect of the conduct on plaintiff

and the marital relationship was highly detrimental, regardless of the reasons behind it." 233 Mich App at 711–712.

In determining who is at fault for purposes of making a property division, the focus must be on the conduct of the parties leading to the separation. *Zecchin v Zecchin*, 149 Mich App 723, 728 (1986) (husband's voluntary departure from the family home at the wife's request did not justify the trial court in ascribing fault for the breakup to the wife where facts showed that marital breakdown had occurred prior to this incident).

B. The Parties' Conduct as a Factor in Awarding Spousal Support

The trial court has discretion to order spousal support to be paid "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1). The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either one. *Magee v Magee*, 218 Mich App 158, 162 (1996), citing *Hanaway v Hanaway*, 208 Mich App 278, 295 (1995) and *Ianitelli v Ianitelli*, 199 Mich App 641, 642–643 (1993).

In exercising discretion to award spousal support, the court may consider a number of different factors, including a party's fault in causing the divorce. *Thames v Thames*, 191 Mich App 299, 308 (1991). In addition to fault, other factors set forth in *Thames* are:

- The past relations and conduct of the parties.
- The length of the marriage.
- The abilities of the parties to work.
- The source and amount of property awarded to the parties.
- The parties' ages.
- The abilities of the parties to pay spousal support.
- The present situation of the parties.
- The needs of the parties.
- The parties' health.
- The prior standard of living of the parties and whether either is responsible for the support of others.
- Contributions of the parties to the joint estate.
- General principles of equity.

The Court of Appeals has weighed the foregoing factors using the same principles that apply in cases involving divisions of marital property.* In *Cloyd v Cloyd*, 165 Mich App 755 (1988), the trial court awarded the plaintiff wife custody of the parties' three children under age 18, with defendant to pay child support on a sliding scale, as well as medical expenses and insurance for the children. The court also awarded the wife the marital home and $300.00 towards her attorney fees. The court did not, however, award spousal support to either party. In reaching its decision, the trial court found the husband more at fault than the wife for the breakdown of the parties' 19-year marriage, based in part on testimony regarding incidents of physical violence prior to the parties' separation. The trial court also found that the wife had limited prospects for future employment because she lacked education beyond high school, had not been working in the years just prior to the divorce, and suffered from a disability. On appeal, the Court of Appeals reviewed all of the trial court's findings and held that the failure to award spousal support to the wife was erroneous. The panel found that "virtually every factor weighs in plaintiff's favor." With respect to the husband's abusive behavior, the panel noted that "the past conduct of the parties factor weighs in plaintiff's favor in light of the testimony regarding defendant's violent behavior." 165 Mich App at 761.

*See *Sparks v Sparks*, 440 Mich 141 (1992), discussed above.

For a Supreme Court case in which abusive conduct was a factor in the court's award of spousal support, see *Johnson v Johnson*, 346 Mich 418, 429–430 (1956) ("The plaintiff . . . was forced into court by the defendant's cruelty, and under such circumstances . . . plaintiff should not lose her marital right to support to which she would have been entitled had the marriage continued and which she was compelled to forego because of the defendant's conduct.").

C. The Parties' Conduct as a Factor in Awarding Child Support

The trial court must consider the child's needs and actual resources of each parent in determining the amount of child support. See MCL 552.519(3)(a)(*vi*) and *Thames v Thames*, 191 Mich App 299, 306 (1991). Trial courts must order support in an amount determined by application of the Child Support Formula developed by the state Friend of the Court Bureau under MCL 552.519(3). Orders deviating from the formula may be entered only if the court determines that application of the formula would be unjust or inappropriate. MCL 552.605(2). In making a determination to deviate from the formula, the court must set forth in writing or on the record all of the following as required by MCL 552.605(2):

- The child support amount determined by application of the Child Support Formula.
- How the child support order deviates from the formula.
- The value of property or other support awarded instead of the payment of child support, if applicable.

- The reasons why application of the Child Support Formula would be unjust or inappropriate in the case.

The court may enter a child support order agreed to by the parties that deviates from the Child Support Formula if the foregoing statutory requirements are met. MCL 552.605(3).

The Child Support Formula does not address domestic violence as a factor in determining the amount of support. Likewise, no Michigan statute or appellate case has connected domestic violence with a child's need for support as of the publication date of this benchbook. It is conceivable, however, that domestic violence could result in particular needs justifying an order for child support that deviates from the child support formula. For example, a child may need additional support to pay for medical or mental health care costs resulting from a party's violent conduct. In such cases, the child's increased needs may render application of the support formula unjust or inappropriate.

See also *Burba v Burba (After Remand)*, 461 Mich 637, 650 (2000), in which the Michigan Supreme Court held that if the Friend of the Court determines that the facts of the case render application of the Child Support Formula unjust or inappropriate, the Friend of the Court must prepare a written report including:

- The amount of support, based on actual income earned by the parties, determined by application of the Child Support Formula and all factual assumptions upon which that support amount is based.
- An alternative support recommendation and all factual assumptions upon which the alternative support recommendation is based.
- How the alternative support recommendation deviates from the Child Support Formula.
- The reasons for the alternative support recommendation.
- All evidence known to the Friend of the Court that the individual is or is not able to earn the income imputed to him or her.

The Court in *Burba* also held that as a matter of law, income disparity between the parties is *not* an appropriate reason for deviating from the Formula because income disparity is already factored into it. 461 Mich at 649.

11.3 Promoting Safe Enforcement of Support Obligations

Under MCR 3.208(B), the Friend of the Court is responsible for initiating proceedings to enforce an order or judgment for support. This section explores four things a court can do to promote safety in support proceedings where domestic violence is a factor: gather information, provide information,

safeguard confidential information, and minimize contact between the parties. A general discussion of court procedures for enforcing spousal and child support orders is beyond the scope of this benchbook; however, a brief discussion of criminal sanctions for desertion and non-support appears at Section 3.14(B)(4). See *Michigan Family Law Benchbook*, ch 5-6 (Inst of Continuing Legal Ed, 1999) for general information about enforcement of child and spousal support.

A. Gathering Information

Information-gathering is key to promoting safety in the establishment and enforcement of support obligations. To respond adequately to domestic violence in support proceedings, court personnel need to know about the following:

- The nature and dynamics of domestic violence generally. A basic understanding of domestic violence enables court employees to identify it as a factor and appropriately take it into account in the cases before them. Chapter 1 contains more information about the nature and dynamics of domestic violence.

- Whether domestic violence is a factor in a particular case. The more information a court has about the presence of domestic violence in a case, the better equipped it will be to tailor its safety precautions, recommendations, orders, and enforcement measures to the needs of parties. To gather the appropriate information, employees must learn techniques to safely screen for domestic violence at all stages of a case. A discussion of case screening appears in Section 10.3 and in *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Chapter 2.

B. Providing Information

Information is critical to abused individuals. It empowers them to escape abuse and is critical to their safety planning. Abused individuals need information about the following:

- The workings of all agencies within the support system, including those outside the court system. Accurate information about the support system is critical if individuals are to gain access to it. Knowledge about the system is particularly important in cases involving domestic violence, where an abuser may deliberately provide false information as a means of maintaining control in the relationship. Information about the system might be offered at each point where assistance is requested.

- How government support agencies will use information about domestic violence. The rules protecting confidential information (*and*

the limits of these protections) should be clearly explained so that abused individuals can account for them when planning for safety.

- Each action taken in a case. If an individual knows that a court or other agency is about to take action to enforce a support obligation, the individual can take adequate safety precautions.

- Community referral resources. Because court personnel do not have the training to address all the needs of an abused individual, they need to make appropriate referrals to other community resources that can offer other types of assistance. Information about referral resources appears in Chapter 2.

C. Safeguarding Confidentiality

Because domestic violence victims sometimes go into hiding to escape their abusers, it is critical to their safety that addresses and other identifying information remain confidential. It may be necessary to remove such information from court papers that the abuser may see. Other strategies for safeguarding confidentiality are:

- Provide for privacy in interview areas so that the parties feel safe about sharing information.

- Do not bring up domestic violence issues with the alleged perpetrator present.

- Take care about discussing domestic violence issues when children, friends, or other family members are present, as the abused party may not believe they are aware of the domestic violence and/or may not want them to have specific information about it.

*See Section 2.5 on cross-cultural communication.

- Use caution before allowing a friend or family member to act as an interpreter for a person who does not speak English. The abused individual may not discuss domestic violence when these persons are present for fear that they may disclose the conversation to the abuser or for fear that the information presented may endanger the interpreter. In some cases, the interpreter might not want the violence to be disclosed, and may not accurately convey the abused individual's statements to the interviewer.*

For more discussion of the rules regarding confidential information, see Sections 10.4 and 10.5.

D. Minimizing Contact Between the Parties

Opportunities for violence arise when abusers and their intimate partners come into contact during court proceedings. To minimize contact between the parties, courts can adopt the following strategies:

- Do not require the abused individual to come to court for proceedings unless it is absolutely necessary.*

*See Menard & Turetsky, *Child Support Enforcement & Domestic Violence,* 50 Juvenile & Family Court J 27, 33 (Spring, 1999).

- If both parties must come to the courthouse, provide separate waiting areas for them. Never leave the parties alone together in a waiting area.

- Meet with the parties separately to prevent coercion or intimidation of the abused individual.

- If both parties must come to the courthouse, stagger arrival and departure times. Safety concerns may require keeping the abusive party in the courthouse longer after the court proceeding has ended so that the abused individual may leave without being followed.

- Refrain from linking parenting time to support payments. In cases involving domestic violence, abusers frequently use contacts for parenting time as opportunities to harass, threaten, or assault a former partner.* Under these circumstances, a linkage between parenting time and support payments encourages the abuser's efforts to control the other parent and, in some cases, may endanger the other parent.

*See Section 1.5 on the use of parenting time as a control tactic.

Because domestic violence typically involves psychological abuse as well as physical assault, opportunities for abuse arise any time the parties interact, even if the interaction does not involve physical contact. To prevent abusers from using the mail or other forms of communication to threaten or otherwise harass their victims, courts might consider the following strategies:

- If an abusive payer has income that can be withheld for support, order income withholding. Income withholding is required by federal law (see 42 USC 666(a)(1), (b)) and is the most reliable way to ensure that an abused payee receives support without being harassed or threatened by communications sent in the mail with support checks.*

*Sager, *Managing Your Divorce: A Guide for Battered Women,* p 50 (Nat'l Council of Juvenile & Family Court Judges, 1998).

- In some cases involving domestic violence, the payee may not take the initiative to enforce the support obligation of an abusive former partner. The payee in these cases may be concerned about revealing his or her whereabouts or may fear reprisal from the abusive party. It is thus important to remember that the responsibility for initiating enforcement proceedings is with the office of the Friend of the Court, not with the abused party; the payee's participation is not needed to enforce the court's order for support. See, e.g., MCR 3.208(B) and MCL 552.511(1). Communicating this fact to the abusive party may promote safety; some abusers may not engage in coercive behavior if they realize that the payee is not in a position to control efforts to enforce support obligations.

In interstate cases, the Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq., provides that a petitioner's presence in Michigan is not required for the establishment, enforcement, or modification of a support order or for the rendering of a judgment determining parentage. MCL 552.1328(1). This statute also contains a number of evidence-gathering

provisions that permit fact-finding without requiring the presence of witnesses in a Michigan court, as follows:

> "(2) A verified petition, affidavit, document substantially complying with federally mandated forms, or document incorporated by reference in any of them that would not be excluded as hearsay if given in person is admissible in evidence if given under oath by a party or witness residing in another state.
>
> "(3) A copy of a record of child support payments certified as a true copy of the original by the record's custodian may be forwarded to a responding tribunal. The copy is evidence of the facts asserted in it and is admissible to show whether payments were made.
>
> "(4) If furnished to the adverse party at least 10 days before trial, a copy of a bill for testing for parentage, or for the mother's or child's prenatal or postnatal health care, is admissible in evidence to prove the amount billed and that the amount is reasonable, necessary, and customary.
>
> "(5) Documentary evidence transmitted from another state to this state's tribunal by telephone, telecopier, or other means that does not provide an original writing shall not be excluded from evidence on an objection based on the means of transmission.
>
> "(6) In a proceeding under this act, this state's tribunal may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. This state's tribunal shall cooperate with other states' tribunals in designating an appropriate location for the deposition or testimony."

MCL 552.1332 further provides that a Michigan tribunal may request a tribunal in another state to assist in obtaining discovery. Moreover, a Michigan tribunal may, upon request, compel a person under its jurisdiction to respond to a discovery order issued in another state.

11.4 Federal Information-Sharing Requirements

*42 USC 653(h)–(i).

The Federal Parent Locator Service ("FPLS") is key to efforts to improve child support enforcement under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). The FPLS is operated by the federal Office of Child Support Enforcement ("OCSE") in the U.S. Department of Health and Human Services. It includes a Federal Case Registry of Child Support Orders and a National Directory of New Hires.* 42 USC 653(a)(2)–(3) authorize the following uses for information in the FPLS:

- Establishing parentage.

- Establishing, setting the amount of, modifying, or enforcing child support obligations.
- Enforcing any federal or state law regarding the unlawful taking or restraint of a child.
- Making or enforcing a child custody or visitation determination.

In child support cases, the FPLS can be used to obtain and transmit information about the location, income, and assets or debts of persons who owe child support, are owed child support, or who have or may have parental rights regarding a child.

The National Directory of New Hires and the Federal Case Registry of Child Support Orders are linked to each other and to corresponding state databases that states must create and maintain. 42 USC 653a (State Directory of New Hires) and 42 USC 654a(e) (State Case Registry). See also MCL 400.233(h) (the Office of Child Support shall develop a statewide information system to facilitate establishment and enforcement of child support obligations). State case registries must include a single automated case registry of all IV-D cases and all child support orders (whether IV-D or not) established or modified in the state after October 1, 1998. 42 USC 654a(e). In 2003, Michigan implemented the state databases required under the federal statutes.

42 USC 654a(e) provides that the State Case Registry must include the following information:

> "(1) Contents. The automated system required by this section shall include a registry (which shall be known as the 'State case registry') that contains records with respect to--
>
> > "(A) each case in which services are being provided by the State agency under the State plan approved under this part [42 USC 651 et seq.]; and
> >
> > "(B) each support order established or modified in the State on or after October 1, 1998.
>
> "(2) Linking of local registries. The State case registry may be established by linking local case registries of support orders through an automated information network, subject to this section.
>
> "(3) Use of standardized data elements. Such records shall use standardized data elements for both parents (such as names, social security numbers and other uniform identification numbers, dates of birth, and case identification numbers), and contain such other information (such as on case status) as the Secretary may require.
>
> "(4) Payment records. Each case record in the State case registry with respect to which services are being provided under the State

plan approved under this part [42 USC 651 et seq.]; and with respect to which a support order has been established shall include a record of--

> "(A) the amount of monthly (or other periodic) support owed under the order, and other amounts (including arrearages, interest or late payment penalties, and fees) due or overdue under the order;
>
> "(B) any amount described in subparagraph (A) that has been collected;
>
> "(C) the distribution of such collected amounts;
>
> "(D) the birth date and, beginning not later than October 1, 1999, the social security number, of any child for whom the order requires the provision of support; and
>
> "(E) the amount of any lien imposed with respect to the order pursuant to section 466(a)(4) [42 USC 666(a)(4)].

"(5) Updating and monitoring. The State agency operating the automated system required by this section shall promptly establish and update, maintain, and regularly monitor, case records in the State case registry with respect to which services are being provided under the State plan approved under this part [42 USC 651 et seq.], on the basis of--

> "(A) information on administrative actions and administrative and judicial proceedings and orders relating to paternity and support;
>
> "(B) information obtained from comparison with Federal, State, or local sources of information;
>
> "(C) information on support collections and distributions; and
>
> "(D) any other relevant information."

States must periodically forward the foregoing data to the Federal Case Registry within the Federal Parent Locator Service. 42 USC 654a(f)(1). Information in the FPLS is accessible to "authorized persons." For child support purposes, "authorized persons" are listed in 42 USC 653(c) as follows:*

> "(1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amount owed as child and spousal support (including, when authorized under the State plan, any official of a political subdivision);
>
> "(2) the court which has authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for the support and maintenance of a child, or any agent of such court;
>
> "(3) the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving [public assistance]) without regard to the existence of a court order against a noncustodial parent who has a duty to support and maintain any such child; and
>
> "(4) a State agency that is administering a program operated under a State plan."

*Note that "authorized persons" are defined differently for purposes of cases involving parental kidnapping or access to children. See 42 USC 663(d)(2) and Section 12.11.

Although the data-collection and information-sharing requirements under PRWORA facilitate enforcement of child support and custody orders, they pose a potential danger to abused individuals who are in hiding from a domestic violence perpetrator. To address this concern, the Act contains a number of provisions that prevent domestic violence perpetrators from using the state and federal databases to locate victims in hiding. (These security provisions also apply when information is sought in parental kidnapping or custody enforcement cases. 42 USC 663(c).)

42 USC 654(26) prohibits the state from disclosing information to potentially dangerous individuals as follows:

> "A state plan for child and spousal support must --
>
> . . .
>
> "(26) have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including --
>
> . . .
>
> "(B) prohibitions against the release of information on the whereabouts of 1 party or the child to

> another party against whom a protective order with respect to the former party or the child has been entered;
>
> "(C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child."

Additionally, 42 USC 653(b)(2) prohibits the OCSE from disclosing FPLS information to any person "if the State has notified the Secretary [of Health and Human Services] that the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the custodial parent or the child of such parent." Under 42 USC 654(26)(D), the state child support agency is required to send such a notice to the Secretary if:

- A protective order with respect to the parent or child has been entered; *and*
- The state has reason to believe that the release of the information may result in physical or emotional harm to the party or the child. 42 USC 654(26)(B)–(C).

After receiving this notice (also referred to as a "Family Violence Indicator") from the state child support agency, the OCSE will not disclose FPLS data when requested by an "authorized person." Instead, the FPLS will notify the "authorized person" that: 1) the state has given notice of reasonable evidence of domestic violence or child abuse; and 2) information can only be disclosed to a court or an agent of a court with authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for child support. 42 USC 653(b)(2), (c). The "authorized person" can then petition a court with proper jurisdiction to order a one-time override of the family violence indicator.

If a case is "flagged" with a Family Violence Indicator, 42 USC 653(b)(2)(A)–(B) requires judicial review of requests for disclosure. If the court determines that disclosure could be harmful, it may not disclose the information to anyone. If the court decides that the FPLS information would not cause the parent or child harm, the information may be released. See also 42 USC 654(26)(E), which provides:

> "A State plan for child and spousal support must --
>
> . . .
>
> "(26) have in effect safeguards, applicable to all confidential information handled by the State agency, that

> are designed to protect the privacy rights of the parties, including --
>
> . . .
>
> > "(E) procedures providing that when the Secretary [of Health and Human Services] discloses information about a parent or child to a State court or an agent of a State court . . . and advises that court or agent that the Secretary has been notified that there is reasonable evidence of domestic violence or child abuse pursuant to section 653(b)(2) of this title, the court shall determine whether disclosure to any other person of information received from the Secretary could be harmful to the parent or child and, if the court determines that disclosure to any other person could be harmful, the court and its agents shall not make any such disclosure."

Additional information about the circumstances of a case in which a Family Violence Indicator is present may be available, but only through the state IV-D agency, the court that imposed the Indicator, or through the individuals involved.

Effective September 1, 2002,* the Michigan Supreme Court adopted Administrative Order 2002-03 to implement the provisions of 42 USC 654(26). Administrative Order 2002-03 provides:

*AO 2002-3 was adopted on an interim basis in May 2002. The order was later adopted permanently. See AO 2002-7.

> "The friends of the court shall adhere to the following rules in managing their files and records:
>
> > "(1) When the Family Violence Indicator is set in the statewide automated child support enforcement system for an individual in an action, that individual's address shall be considered confidential under MCR 3.218(A)(3)(f).
> >
> > "(2) Friend of the court offices shall cause a Family Violence Indicator to be set in the statewide automated child support enforcement system on all the files and records in an action involving an individual when:
> >
> > > (a) a personal protection order has been entered protecting that individual,
> > >
> > > (b) the friend of the court becomes aware of an order of any Michigan court that provides for confidentiality of the individual's address, or denies access to the individual's address,

(c) an individual files a sworn statement with the office setting forth specific incidents or threats of domestic violence or child abuse, or

(d) the friend of the court becomes aware that a determination has been made in another state that a disclosure risk comparable to any of the above risk indicators exists for the individual.

"(3) When the Family Violence Indicator has been set for an individual in any action, the Family Violence Indicator shall be set in all other actions within the statewide automated child support enforcement system concerning that same individual.

"(4) When the Family Violence Indicator has been set for a custodial parent in any action, the Family Violence Indicator shall also be set for all minors for which the individual is a custodial parent. When the Family Violence Indicator has been set for any minor in an action, the Family Violence Indicator shall also be set for the minor's custodian.

"(5) The friend of the court office shall cause the Family Violence Indicator to be removed:

(a) by order of the circuit court,

(b) at the request of the protected party, when the protected party files a sworn statement with the office that the threats of violence or child abuse no longer exist, unless a protective order or other order of any Michigan court is in effect providing for confidentiality of an individual's address, or

(c) at the request of a state that had previously determined that a disclosure risk comparable to the risks in paragraph two existed for the individual.

"(6) When the Family Violence Indicator has been removed for an individual in any action, the Family Violence Indicator that was set automatically for other persons and cases associated with that individual shall also be removed."

11.5 Public Assistance and Domestic Violence

Studies show that a significant percentage of welfare recipients are victims of domestic violence. See Raphael and Haennicke, *Keeping Battered Women*

Safe Through the Welfare-to-Work Journey: How Are We Doing? p 4 (Taylor Institute, 1999) (estimating 20%–30%) and Pearson, et al, *Child Support and Domestic Violence: The Victims Speak Out*, p 443, in Violence Against Women (Sage Periodicals Press, April 1999) (disclosure of current or past abuse by public assistance applicants ranged from 28% to 49% at four office sites surveyed). These results are not surprising in light of the fact that domestic violence perpetrators often use economic means to exercise control — they often limit their partners' access to money or prevent their partners from working or developing job skills. An individual so deprived of economic independence may find it extremely difficult to return to the work force after leaving an abuser, either because of the inability to develop a work history or skills during the relationship, or because the abuser has thwarted efforts to get or keep a job the relationship has ended.

The 1996 federal Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") replaced the Aid to Families with Dependent Children ("AFDC") program with a Temporary Assistance to Needy Families ("TANF") program. This section explores two features of the TANF program that are of particular concern to individuals who have been subjected to domestic violence.

A. Eligibility Limits

The 1996 federal legislation imposed a lifetime eligibility limit of 60 months on families receiving TANF assistance. 42 USC 608(a)(7). Many commentators have expressed concerns that the federal 60-month limitation is not reasonable for abused individuals, who may take longer to develop full economic independence due to interference from their abusers. For example, in one study of public assistance applicants at four sites, 44% of applicants disclosing domestic violence reported that their abusive former partners had prevented them from working. Fifty-eight percent reported that they or their children were isolated.* To address these concerns, the federal legislation provides a "Family Violence Option," which exempts TANF recipients from the 60-month limitation. At its discretion, a state may elect to adopt the Family Violence Option, which applies "by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty." 42 USC 608(a)(7)(C)(*i*).

*Pearson, et al, *supra*, p 439.

"Battered or subject to extreme cruelty" is defined in 42 USC 608(a)(7)(C)(*iii*) as follows:

> "[A]n individual has been battered or subjected to extreme cruelty if the individual has been subjected to --
>
> > "(I) physical acts that resulted in, or threatened to result in, physical injury to the individual;
> >
> > "(II) sexual abuse;

"(III) sexual activity involving a dependent child;

"(IV) being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities;

"(V) threats of, or attempts at, physical or sexual abuse;

"(VI) mental abuse; or

"(VII) neglect or deprivation or medical care."

Regulations promulgated by the Office of Family Assistance further provide that exemptions under the Family Violence Option are granted in cases "where compliance would make it more difficult for . . . individuals to escape domestic violence or unfairly penalize those who are or have been victimized by such violence or who are at risk of further domestic violence." 45 CFR 260.52(c).

*TANF State Plan, p 2, (Family Independence Agency, Oct 1, 2000-Sept 30, 2002).

Michigan has not adopted the federal Family Violence Option. The state has no time limit on its Family Independence Program; it does not seek federal financial participation if the family includes an adult who has received assistance payments for more than 60 months. Families in need of assistance beyond the 60-month limit are state-funded as long as they continue to meet program requirements.*

*Family Independence Agency, *Program Eligibility Manual 230A*, p 13–14 (Aug 1, 2001).

Michigan residents receiving TANF assistance must participate in the state's "Work First" employment and training program, unless they receive a deferral from participation. Domestic violence victims may obtain a three-month exemption from work activities, which is renewable indefinitely with the approval of the Family Independence Manager. FIA workers use clients' statements as documentation of domestic violence unless they have sufficient reason to question the statements. If they question their clients' statements, they may request further documentation, which may include court records (among other types of records).* Once a client is deferred, the caseworker assists the client to develop a plan intended to resolve domestic violence as a barrier to self-sufficiency.

Courts can be helpful to individuals who seek a waiver from the TANF time limitations by documenting domestic violence in court orders and other written court papers.

B. Cooperation with State Child Support Agency in Locating Non-Custodial Parents

Under the TANF program, states use child support payments collected on behalf of those receiving assistance to reimburse the state for the assistance payments. Thus, TANF recipients must assign their support rights to the state as a condition of assistance and must cooperate with the state child support agency in locating non-custodial parents who owe support. 42 USC

608(a)(2)–(3) allows reduction or elimination of public assistance for noncooperation in establishing paternity or obtaining child support. However, states may adopt a "good cause" exception to the federal cooperation requirement. 42 USC 654(29).

In Michigan, failure to cooperate results in disqualification from the program for a minimum of one month; if an individual remains disqualified for four consecutive months for failure to cooperate in obtaining support, the entire case is closed. It must remain closed for a minimum of one month and cannot be reopened until the noncooperative person cooperates with the action to establish paternity or obtain support. 1997 MR 8, R 400.3125.

In situations involving domestic violence, a TANF recipient may be placed in danger by divulging the required information. Thus, a "good cause" exception exists in Michigan for appropriate cases. 1997 MR 8, R 400.3124 provides:

> "(1) A client shall take all action required by [MCL 400.1 et seq] to establish paternity and obtain support.
>
> "(2) A client may claim good cause for not taking the action specified in subrule (1) of this rule. Good cause includes any of the following reasons:
>
> > (a) The child entitled to support was conceived due to incest or forcible rape.
> >
> > (b) Legal proceedings for the adoption of the child entitled to support are pending before a court.
> >
> > (c) A client is currently receiving counseling from a public or licensed private social agency to decide if the child should be released for adoption and the counseling has not continued for more than 3 months.
> >
> > (d) Serious physical harm to the child entitled to support.
> >
> > (e) Serious physical harm to the client.
> >
> > (f) Serious emotional harm to the child entitled to support that actually harms the child's ability to function in everyday life.
> >
> > (g) Serious emotional harm to the client that actually harms the client's capacity to adequately care for the child entitled to support.
>
> "(3) A client's cooperation in establishing paternity and obtaining support is not required if good cause exists, but a support action

may proceed if the FIA determines that the action would not endanger the child or client.

"(4) Once a client is informed of the right to claim good cause and decides to make the claim, the client shall do all of the following:

(a) Specify the type of good cause.

(b) Specify the persons covered by the claim of good cause.

(c) Provide written evidence to support the claim within 20 calendar days of filing the claim.

"(5) A good cause determination shall be made within 45 calendar days of the client's written claim, unless the client was granted an additional 25-calendar-day extension to the original 20-calendar-day limit and more information is needed that cannot be obtained within the 45-calendar-day limit.

"(6) A good cause determination shall make 1 of the following findings:

(a) Good cause does not exist and the client must cooperate.

(b) Good cause does exist and the client's cooperation in obtaining support is not required.

(c) Good cause does exist, but a support action can proceed without the client and without endangering the client or child."

See also 1997 MR 8, R 400.3126–400.3128, which contain a similar cooperation requirement and good cause exception regarding identification of third-party resources (defined in 1997 MR 8, R 400.3101(1)(*ii*) as persons, entities, or programs that are, or might be, liable to pay all or part of a recipient's medical expenses).

Lack of proper documentation is a key obstacle to individuals seeking to establish a "good cause" exception to the TANF cooperation requirements. One study of four social service sites in Colorado found that 59% of the "good cause" applications denied either lacked documentary evidence or lacked sufficient evidence. Successful applicants provided an average of two types of documents. A significant percentage (32%) of persons polled in this study stated that they were not interested in applying for a "good cause" exception because they lacked documents to prove harm. Pearson, et al, *supra*, p 441–443. In Michigan, 1997 MR 8, R 400.3124(4)(c) requires "written evidence" supporting a "good cause" claim to be submitted within 20 calendar days of

filing the claim. Courts can be helpful to individuals who seek a "good cause" exception by documenting domestic violence in court orders and other written court papers.

11.6 Recovery of Litigation Expenses

Domestic violence victims are sometimes at an economic disadvantage as compared to their partners, especially where the abuser exercised financial control over the household or prevented the victim from earning income from work outside the home. This economic disparity may put them at a disadvantage in court proceedings by impeding their access to legal assistance. MCL 552.13(1) ameliorates this circumstance in the context of an action for divorce or separation:

> "In every action brought, either for a divorce or for a separation, the court may require either party to . . . pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency."

A request for legal fees may be made at any time during the pendency of the action under MCR 3.206(C):

> "(1) A party may, *at any time,* request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> "(2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> > "(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
> >
> > "(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply." [Emphasis added.]

Reasonable legal fees in a divorce action are not recoverable as of right, but are awarded in the trial court's discretion as necessary to enable a party to carry on or defend a suit. In awarding such fees, the trial court should make specific findings regarding the necessity of the award. Counsel who petition for fees should prepare proposed findings and call to the trial court's attention the need for such findings. *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446 (1992); *Spooner v Spooner*, 175 Mich App 169, 174 (1989).

Guidance for exercising discretion under MCL 552.13(1) is found in the following cases decided by the Michigan Court of Appeals:

*See Section 3.15 on tort remedies for stalking. On the interplay between divorce and torts arising from domestic violence, see Chiamp & Argi-

- An award of legal fees has been upheld where a party was forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Stackhouse v Stackhouse*, *supra*. See also *Milligan v Milligan*, 197 Mich App 665, 671 (1992) ("An award of attorney fees in an action designed to prevent future litigation is not an abuse of discretion.") and *Mauro v Mauro*, 196 Mich App 1, 3 (1992) (noncompliance with a court order justified award against offending party).

- The court should not require a party to invade his or her assets to satisfy attorney fees when he or she must rely on the same assets for support. *Maake v Maake*, 200 Mich App 184, 189 (1993); *Hanaway v Hanaway*, 208 Mich App 278, 299 (1995).

- An award of legal fees was not appropriate where the person requesting them had access to pro bono counsel. *Hawkins v Murphy*, 222 Mich App 664, 669-670 (1997).

- An award of legal and accountant's fees was appropriate where the party requesting them had lesser income and earning ability than the other party. *Ianitelli v Ianitelli*, 199 Mich App 641, 645 (1993).

- An award of legal fees was not appropriate where the party from whom they were requested had assumed a greater amount of marital debt than the party making the request. *Heike v Heike*, 198 Mich App 289, 294 (1993).

- The court in a divorce proceeding has no authority to award a party the costs of defending a separate criminal action in which the complainant is the other party to the divorce. In *Westrate v Westrate*, 50 Mich App 673, 676 (1973), a wife was criminally charged with assault with intent to commit murder after shooting her husband in their home. When the parties divorced, the wife requested the trial court to award her the attorney fees incurred in defense of the criminal charges, asserting that the expenses incurred in the criminal proceeding were also necessary to defend her right to custody of the children and to part of the marital estate in the divorce action. The Court of Appeals upheld the trial court's determination that it had no jurisdiction to either consider or award the wife the requested attorney fees.

11.7 Effect of Divorce Judgment on Subsequent Tort Remedies for Domestic Violence

Alleged acts of domestic violence give rise to various tort claims by both parties in abusive relationships. Physically assaultive conduct directed against a victim's person or property can be the basis for claims against the abuser based on wrongful death, assault and battery, and trespass. Redress for emotional abuse may be available by way of civil actions for invasion of privacy, stalking, or intentional infliction of emotional distress. Alleged abusers may respond to the accusations against them by filing tort claims. In *Gramer v Gramer*, 207 Mich App 123 (1994), for example, a husband

arrested for alleged spousal abuse responded by filing claims against his wife for false arrest, false imprisonment, malicious prosecution, and abuse of process. Although this benchbook cannot fully address the tort remedies applicable in the context of domestic violence, the discussion in this section will explore some of the issues that have arisen where the parties to a divorce action are also involved in separate tort litigation arising from alleged acts of domestic violence.*

A. Res Judicata and Collateral Estoppel

Defendants have asserted the doctrines of res judicata and collateral estoppel in response to their ex-spouses' tort claims filed subsequent to a judgment of divorce. These related doctrines are distinguished as follows:

- **Res judicata** bars further litigation of a controversy when: 1) the prior action was decided on the merits; 2) the matter in the second case was or could have been resolved in the first; and 3) both actions involved the same parties or their privies. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575 (2001). Under this doctrine, the initial judgment extinguishes all claims that could have been raised in the suit as well as those claims that were actually litigated. *Bhama v Bhama*, 169 Mich App 73, 82 (1988); *Goldman v Wexler,* 122 Mich App 744, 747 (1983), citing Restatement, Judgments, §68, pp 293-294.

- **Collateral estoppel** bars re-litigation of factual issues that already have been decided. For this doctrine to apply, there must be a question of fact essential to the judgment that was actually litigated and determined by a valid and final judgment. The parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33 (2000). For a detailed discussion of the doctrines of collateral estoppel and mutuality of estoppel, and the interplay between them, see *Keywell v Bithell*, 254 Mich App 300 (2002). Collateral estoppel operates where the subsequent action is based upon a different cause of action from that upon which the prior action was based. The prior judgment is conclusive between the parties to it as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. *McCoy v Cooke*,165 Mich App 662, 667 (1988).

Except in cases involving fraudulent inducement to marry, the Court of Appeals has held that res judicata and collateral estoppel do not preclude a party from seeking tort damages from an ex-spouse following entry of a divorce judgment. In fact, the doctrine of collateral estoppel may bind the defendant in a subsequent tort suit to a prior judicial determination that a battery occurred. The following cases illustrate the application of these doctrines:

- *Goldman v Wexler,* 122 Mich App 744 (1983):

After the dissolution of her marriage in October 1978, the plaintiff filed separate tort suit against her former husband for a battery committed in 1977. The trial court found that the prior divorce judgment barred plaintiff's tort claim and dismissed her action. Plaintiff appealed to the Court of Appeals. On appeal, the defendant asserted that res judicata precluded plaintiff's tort suit because the property settlement that was incorporated into the prior divorce judgment took into account the fault of the parties. Furthermore, the defendant maintained that the plaintiff had received at least partial compensation for the injuries suffered as a result of the alleged battery. The Court of Appeals disagreed with the defendant and reversed the trial court's decision. As to res judicata, the Court held:

> "The present [tort] action is for a battery which is alleged to have occurred during the course of the marriage. Although we agree that fault continues to be a consideration in property division disputes in a divorce action . . . we cannot agree . . . that both claims constituted but a single cause of action. Consequently, this [tort] claim is neither barred by nor merged into the divorce judgment." 122 Mich App at 748.

As to collateral estoppel, the Court noted that the property division incorporated into the divorce judgment was the result of a negotiated settlement agreed to by the parties, and that consent judgments are not entitled to collateral estoppel effect. *Id*.

With respect to damages, the panel noted that the defendant could raise an affirmative defense to the extent that the consideration given plaintiff in the property settlement constituted payment for the injury suffered as a result of the battery. 122 Mich App at 749.

- *McCoy v Cooke*, 165 Mich App 662, 667 (1988):

  Plaintiff's complaint against her former husband alleged that he beat her during their marriage and intentionally inflicted emotional distress on her. Based on the doctrine of collateral estoppel, the trial court granted the defendant summary disposition. The trial court found that the issue of defendant's abuse had been fully litigated during prior divorce proceedings, in the context of fault. The Court of Appeals reversed, finding that the trial court's application of collateral estoppel was in error. Citing *Goldman v Wexler, supra*, the panel held:

  > "Rather than precluding plaintiff's tort claim, collateral estoppel prevents relitigation of the issue whether a battery occurred. Since the trial judge in the divorce proceeding expressly resolved this issue by finding that defendant repeatedly battered plaintiff, collateral estoppel works against the defendant."

- *Bhama v Bhama*, 169 Mich App 73, 81-83 (1988):

The parties to this action were divorced in 1977. In 1985, a custody dispute arose between them that was ultimately resolved in November 1986. In September 1986, the plaintiff filed suit against her ex-husband for intentional infliction of emotional distress. This suit complained of intentional outrageous conduct that alienated plaintiff from her children. The trial court entered summary judgment for the defendant, finding that the plaintiff had failed to state a claim on which relief could be granted, and that her claim was precluded by res judicata. On appeal, the Court of Appeals reversed the trial court's decision. It held that the plaintiff had stated an actionable claim to which res judicata was no obstacle.* The panel noted three prerequisites to the proper invocation of res judicata: 1) the former action was decided on the merits; 2) the matter contested in the second action was decided in the first; and 3) the two actions were between the same parties or privies. If these prerequisites are met, "all claims that could have been raised in the first action are barred as well as those claims that were actually litigated." 169 Mich App at 81-82. With respect to the second of the three prerequisites, the panel stated:

*See Section 3.15(B) on intentional infliction of emotional distress.

> "[I]f it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other." *Id.*, citing 30A Am Jur, Judgments, §365, p 407-408.

Applying the foregoing criteria, the Court of Appeals found that the custody and tort proceedings constituted different causes of action, so that res judicata could not be appropriately applied to preclude the plaintiff's tort claims. The Court determined that plaintiff's tort claim could not be sustained by the same facts or proofs that were required for the 1985 custody proceeding. The custody proceeding was litigated under the Child Custody Act, which set forth an 11-factor test for determining the best interests of the children. MCL 722.23. Although the issue of defendant's "brainwashing" the children arose with respect to one of these factors, the court's "best interest" determination in the custody proceeding did not require it to hear proof of the elements of intentional infliction of emotional distress, namely, outrageousness, intent, causation, and emotional distress to the plaintiff. Moreover, plaintiff's tort suit sought monetary damages, which were not at issue in the prior custody proceeding.

♦ *Gubin v Lodisev*, 197 Mich App 84 (1992):

Defendant appealed from two judgments: 1) an October 1988 divorce judgment; and 2) a separate July 1988 judgment awarding plaintiff damages for fraud. The fraud claim alleged that defendant induced

plaintiff to marry him by promising to be a faithful husband if she would take the actions necessary to allow him to immigrate to the U.S. The Court of Appeals reversed the fraud judgment, holding that plaintiff's action for fraud was so intimately bound with the existence and breakdown of the marriage relationship that a separate tort action was inappropriate. 197 Mich App 88-89. The panel distinguished *McCoy v Cooke* and *Goldman v Wexler, supra*, noting that these cases "involved torts that are not bound so intimately with the breakdown of the marriage itself." *Id.* at 88.

Note: The *Gubin* panel's distinction of *McCoy* and *Goldman* may be based on an erroneous reading of the facts in those cases. The *Gubin* panel characterized the claims in these cases as "tort action[s] for an alleged battery and intentional infliction of emotional distress *committed after the divorce judgment had been entered*." 197 Mich App at 88. [Emphasis added.] In *McCoy*, however, the plaintiff's complaint alleged that her former husband had beaten her "during their marriage." 165 Mich App at 664. In *Goldman*, the alleged battery occurred during the parties' marriage, a year before the judgment of divorce was entered. 122 Mich App at 746.

With regard to fraud, see also *Courtney v Feldstein*, 147 Mich App 70 (1985). The plaintiff in this case sued her ex-husband following entry of a divorce judgment, alleging that he had fraudulently concealed the value of his assets during the divorce proceedings. The Court of Appeals held that res judicata was no bar to the plaintiff's claim, noting that "[a]s a general proposition, the principles of res judicata may not be invoked to sustain fraud." 147 Mich App at 74.

B. Effect of Release Agreement in Property Settlement

Although the doctrines of res judicata and collateral estoppel may not preclude tort claims brought subsequent to entry of a divorce judgment, the parties themselves may agree to relinquish such claims in a property settlement incorporated into the judgment. In *Gramer v Gramer*, 207 Mich App 123 (1994), the plaintiff filed claims against his ex-wife alleging false arrest, false imprisonment, malicious prosecution, and abuse of process, following his arrest on criminal charges lodged during the pendency of the parties' divorce action. The trial court dismissed these claims based upon a release in the parties' property settlement agreement, which was incorporated into the divorce judgment. The release provided:

"WHEREAS, the parties are desirous of definitely and for all times settling and determining all matters of property, and all other claims or rights between them which may have arisen or might arise out of the marriage relationship between them and as a result of the action for divorce. . . . " 207 Mich App at 124.

On appeal, the plaintiff argued that the parties did not intend to include his tort claims in their property settlement agreement because these claims did not constitute marital property. The Court of Appeals disagreed and affirmed the trial court's dismissal of the plaintiff's claims. In reaching its conclusion, the panel reasoned that absent factors such as fraud or duress, trial courts should enforce a release contained in a property settlement agreement. As with other agreements in the nature of a contract, the scope of a release should be determined by the intent of the parties as expressed in its language. In this case, the panel determined that there was no claim of fraud or duress, and that the release language clearly expressed an intent to settle all claims arising out of the parties' marriage and divorce. It further found that plaintiff's tort claims arose out of the parties' marriage relationship, and were therefore subject to the parties' agreement,* regardless of whether or not they could be characterized as marital property: "A property agreement that purports to settle all claims arising from the marriage and divorce bars future or existing tort claims brought by one spouse against another." 207 Mich App at 126.

*Although it was not essential to the holding, the panel also found that the plaintiff's tort claims were property subject to property division, and were properly included in the property settlement agreement.

Chapter 12: Domestic Violence and Access to Children

12

12.1 Chapter Overview

MCL 722.25(1) provides that the "best interests" of the child control in proceedings under the Child Custody Act of 1970. In implementing this legislative policy, the Child Custody Act assumes that cooperation between the parties to a child access dispute tends to foster the child's best interests. Thus, one of the "best interest" factors under the Act is a party's "willingness and ability . . . to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent . . . . " MCL 722.23(j). Moreover, the Act encourages cooperation between the parties by requiring courts to implement the parties' agreements unless there is a showing by clear

and convincing evidence that an agreement is not in the child's best interests. See MCL 722.26a(2) (agreements for joint custody), and MCL 722.27a(2) (agreements to parenting time terms).

*See Section 1.4(B) on separation violence and Section 1.7 on the effects of violence on children.

Studies show that cooperation between the parties to child access disputes can reduce the negative impact of divorce on children. In cases involving domestic violence, however, cooperation may not be possible. Indeed, the abused individual's separation from the relationship may intensify the abuse and increase the risk of physical violence as the abusive party seeks to regain lost control. In such cases, efforts to promote cooperation can have dangerous and inequitable effects on both the abused party and the children involved.* As one commentary puts it:

> "The abuser's access to the children endangers rather than nourishes them; the imbalance of power between abuser and victim transforms alternative dispute resolution into yet another weapon in the abuser's arsenal; and striving for family preservation confronts the victim with the . . . choice of remaining in a potentially lethal setting in order to continue living with her children or abandoning them and her home." Dunford-Jackson, et al, *Unified Family Courts: How Will They Serve Victims of Domestic Violence?* 32 Family Law Quarterly 131, 132 (1998).

**Id.* at 133, and Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement,* p 4 (Nat'l Inst of Justice, 1990). See Section 10.6 for concerns about alternative dispute resolution in cases involving domestic violence.

The presence of domestic violence in a custody or parenting time dispute requires a shift in focus to accommodate unique safety and equitable concerns that are not present in other domestic relations actions. For example, the court may find it necessary to separate the parties and shield the abused party rather than to issue orders that promote conciliation and cooperation. Moreover, the court may be compelled to hold the abusive party accountable for compliance with court orders by imposing constraints, sanctions, and restitution. Finally, the criminal nature of domestic violence may make it inappropriate to encourage negotiated settlement of custody or parenting time disputes, particularly where the abused party is not represented by counsel.*

With the foregoing concerns in mind, this chapter and Chapter 13 explore how a court can prevent custody or parenting time arrangements from providing abusers with opportunities for continuing harassment, threats, or violence. The discussion covers both Michigan custody and parenting time proceedings (Chapter 12) and proceedings involving multiple jurisdictions (Chapter 13).

This chapter assumes the reader's basic familiarity with Michigan domestic relations procedures. It will not address third-party custody or visitation issues or child protective proceedings. For discussion of basic child custody and parenting time proceedings and the law governing third-party custody and visitation, see *Michigan Family Law Benchbook*, ch 3 - 4 (Institute for Continuing Legal Education, 2009). Child protective proceedings are the subject of *Child Protective Proceedings Benchbook—Third Edition* (MJI, 2006-April 2009).

For discussion of general safety and case management concerns in domestic relations proceedings where violence is at issue, see Chapter 10. Property matters in divorce proceedings are the subject of Chapter 11. A discussion of personal protection orders and access to children appears at Section 7.7. Criminal sanctions for parental kidnapping are addressed in Sections 3.5 - 3.6.

12.2 Determining a Child's Best Interests in Custody Cases Involving Allegations of Domestic Violence

A. Statutory Provisions

The principal authority for resolving child custody disputes in Michigan is the Child Custody Act of 1970.* This Act directs that in establishing parental rights and duties as to custody of minor children, the "best interests" of the child control. MCL 722.25(1).

*MCL 722.21 et seq.

MCL 722.23 lists the following twelve best interest factors for Michigan trial courts to weigh in making child custody determinations:

> "As used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> > "(a) The love, affection, and other emotional ties existing between the parties involved and the child.
> >
> > "(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
> >
> > "(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
> >
> > "(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
> >
> > "(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
> >
> > "(f) The moral fitness of the parties involved.
> >
> > "(g) The mental and physical health of the parties involved.

> "(h) The home, school, and community record of the child.
>
> "(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> "(j) *The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.*
>
> "(k) *Domestic violence, regardless of whether the violence was directed against or witnessed by the child.**
>
> "(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute." [Emphasis added.]

*This factor was added by a 1993 amendment to the statute.

Domestic violence is specifically listed in subsection (k) of the foregoing statute as a best interest factor for a trial court to weigh in a proceeding under the Child Custody Act. Additionally, domestic violence is relevant to subsection (j) because it directly affects each party's willingness or ability to encourage the other's relationship with the child.

The Child Custody Act contains no definition of "domestic violence." For definitions that apply in other contexts, see Section 1.2.

In its *Michigan Custody Evaluation Model*, p 37 (October 1998), the State Court Administrative Office comments as follows:

> "The evaluator must consider any violence that has been directed against the child, witnessed by the child, and/or caused the child to suffer any emotional trauma. One of the most common forms of domestic violence is the emotional abuse inflicted upon a child while residing in an environment where violent acts occur or where there is a threat that a violent act may occur. The emotional abuse is a result of the fear that a child endures while awaiting the next abusive episode."

The *Michigan Custody Evaluation Model* has been superseded by the *Custody and Parenting Time Investigation Manual* (SCAO, 2002) (available online at www.courts.michigan.gov/scao/resources/publications/manuals/index.htm, last visited January 12, 2004). Although the text quoted above does not appear in the *Custody and Parenting Time Investigation Manual*, it is still relevant and may be helpful in making a custody determination.

B. Principles for Weighing the Best Interest Factors

Michigan courts have great discretion in applying the statutory best interest factors. MCL 722.23 contains no direction for courts in weighing each factor

in relation to the others, other than to state that a child's "best interests" consist of the "sum total" of the listed factors. The Michigan appellate courts have likewise declined to adopt a bright-line, mathematical formula for making "best interest" determinations. See *Lustig v Lustig*, 99 Mich App 716, 731 (1980). In reviewing trial courts' best interest determinations, the Court of Appeals has held that:

- The statutory best interest factors need not be given equal weight. In *McCain v McCain*, 229 Mich App 123 (1998), the Court reviewed a custody award that was based on findings in favor of one party on three out of four factors on which the parties were not equivalent. The party who was awarded custody prevailed on factors (b), (c), and (h), while the appellant prevailed on factor (j), the "friendly parent" factor. With respect to factor (j), the Court of Appeals found that the party who was awarded custody would "go out of his way to try to destroy" the appellant's relationship with the children. The appeals panel upheld the trial court's custody award, however, concluding that it could not find support for the proposition that "a finding on one factor must completely countervail all the other findings." 229 Mich App at 131. Despite this holding, the panel nonetheless acknowledged that the statutory best interest factors need *not* be given equal weight:

  > "Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." 229 Mich App at 131.

  See also *Streicher v Streicher*, 128 Mich App 5 (1983),* in which the Court of Appeals overturned the trial court's custody award, holding that the trial court had not properly weighed the abusive behavior of the party to whom custody had been awarded. The trial court had found the parties to be equal with respect to a majority of the best interest factors, including mental health. In reversing the trial court's custody award, the Court of Appeals held that the trial court's finding of equality with respect to mental health was against the great weight of evidence. The panel noted that "deciding what is in the best interests of the child . . . is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game." 128 Mich App at 14.

**Streicher* was decided before the 1993 addition of domestic violence to the list of best interest factors in MCL 722.23.

- When a party's behavior is relevant to more than one statutory factor, the trial court may consider it wherever necessary to make an accurate best interest assessment. In *Fletcher v Fletcher*, 229 Mich App 19 (1998), the defendant asserted that the trial court erroneously considered evidence of her negative influence on the children's relationship with their father under two best interest factors. The Court of Appeals found no error:

  > "[T]he factors have some natural overlap . . . . We conclude that, in order to accurately assess under factor (a) the emotional ties between the parties and the children, the

> trial court was free to consider defendant's influence on plaintiff's relationship with the children even though that evidence was also relevant under factor (j). We likewise find no merit in defendant's assertion that the trial court placed undue emphasis on this evidence." 229 Mich App at 25-26.

The trial court's findings on the best interest factors must be placed on the record so that they might be reviewed on appeal. In *Foskett v Foskett*, 247 Mich App 1, 9 (2001), the trial court concluded that "it appears that domestic violence plagues mother's home environment," based on information gained in in camera interviews with the children. This information was not placed on the record. The Court of Appeals reversed and remanded for further proceedings, stating that "[i]f a trial court relies significantly on information obtained through the in camera interview to resolve factual conflicts relative to any of the . . . best interest factors and fails to place that information on the record, then the trial court effectively deprives this Court of a complete factual record on which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination regarding custody." 247 Mich App at 10.

*Effective May 1, 2004. Administrative Order 2002-13.

When weighing the best interest factors, the court may also interview the child to determine if the child has a preference regarding custody. MCR 3.210(C)(5)* states:

> "(5) The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor."

C. Applying Factor (k) — Domestic Violence

As MCL 722.23(k) recognizes, domestic violence is clearly relevant to the child's best interest in a proceeding under the Child Custody Act. As noted in Section 1.7, children are affected by adult domestic violence in several ways that subject them to devastating physical, emotional, cognitive, and behavioral effects that may be carried into their adult lives: 1) they witness it; 2) they are used by the abuser to control the victim; and 3) they suffer physical consequences incident to the adult violence. The physical consequences of domestic violence for children may involve accidental injury, homelessness, dislocation, or somatic complaints (e.g., frequent illness, sleep disorders, bedwetting). Additionally, children suffer an increased risk of physical abuse at the hands of domestic violence perpetrators. For a case involving spousal abuse in which the court considered the accompanying risk of child abuse in reaching a determination regarding access to children, see *Walsh v Walsh*, 221 F3d 204, 220 (CA 1, 2000). This case is discussed in detail in Section 13.18(C).

Note: Factor (k) makes no distinction between domestic violence occurring between a child's biological parents and domestic violence occurring between a child's biological parent and the parent's new partner.

In 1994, the Board of Trustees of the National Council of Juvenile and Family Court Judges approved a Model State Code on Domestic and Family Violence* that can offer some guidance with respect to domestic violence as a factor in determining custody and parenting time (referred to as "visitation" in the Code). Section 402 of the Model Code provides as follows:

*The Model State Code is available online at www.ncjfcj.org/dept/fvd/publications (last visited January 17, 2004).

> "1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence:
>
> > "(a) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.
> >
> > "(b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.
>
> "2. If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation."

The foregoing provisions focus on three areas:

- **Safety**

  The Commentary to Section 402 explains that paragraph 1(a) "contemplates that no custodial or visitation award may properly issue that jeopardizes the safety and well-being of adult and child victims."

- **The history and patterns of abuse**

  The Model Code drafters recognize that domestic violence is a *pattern* of controlling behavior rather than any single action, and that abusers may direct their violent acts against persons other than the victim (e.g., children, friends, relatives) in order to exercise control over the victim.* Accordingly courts are urged to take the history and context of acts of abuse into account when making custody and parenting time determinations. Regarding paragraph 1(b), the Commentary states:

  *See Sections 1.2–1.5 for a discussion of the nature of domestic violence.

  > "Paragraph (b) compels courts to consider the history, both the acts and patterns, of physical abuse inflicted by the abuser on other persons, including but not limited to the

> child and the abused parent, as well as the fear of physical harm reasonably engendered by this conduct. It recognizes that discreet [sic] acts of abuse do not accurately convey the risk of continuing violence, the likely severity of future abuse, or the magnitude of fear precipitated by the composite picture of violent conduct."

♦ **Victim flight**

*More discussion about parental flight appears at Section 12.10.

The Commentary to Section 402 of the Model Code addresses the issue of parental flight from abuse as follows:*

> "Subsection 2 recognizes that sometimes abused adults flee the family home in order to preserve or protect their lives and sometimes do not take dependent children with them because of the emergency circumstances of flight, because the lack resources to provide for the children outside the family home, or because they conclude that the abuser will hurt the children, the abused parent, or third parties if the children are removed prior to court intervention. This provision prevents the abuser from benefiting from the violent or coercive conduct precipitating the relocation of the battered parent and affords the abused parent an affirmative defense to the allegation of child abandonment."

Regarding flight from abuse, MCL 722.27a(6)(h) provides that "[a] custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent." For further discussion of this statute, see Section 12.7(B).

D. Applying Factor (j) — The "Friendly Parent" Factor

The "friendly parent" factor, i.e., the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent," gives an advantage to the parent who appears most likely to promote continuing contact. This factor is based on the general assumption that having limited contact with one or both parents can result in a child experiencing adjustment difficulties after the parents separate. *Michigan Custody Evaluation Model, supra,* p 36.

When applying factor (j) in a case involving domestic violence, however, the assumption on which the factor is based must be carefully examined. Although contact with both parents can help children from non-violent families better adjust to a divorce, such contact may be more harmful than helpful in situations involving domestic violence. Research has shown that where severe conflict is present, the post-separation adjustment of children is facilitated by awarding sole custody to a non-abusive parent who offers a warm relationship, provides a predictable routine, imposes consistent,

moderate discipline, and buffers the child against parental conflict and abuse. Appendix III to the Model Code on Domestic and Family Violence (National Council of Juvenile and Family Court Judges, 1994), citing Kelly, *Parental Conflict: Taking the Higher Road*, in Family Advocate (Winter, 1992), Furstenberg and Cherlin, *Divided Families: What Happens to Children When Parents Part* (Harvard University Press, 1991), and Wallerstein and Blakeslee, *Second Chances: Men, Women, and Children a Decade After Divorce* (Tichnor and Fields, 1990).

Moreover, domestic violence experts note with concern that when applied without regard to the presence of domestic violence in a relationship, "friendly parent" provisions such as factor (j) may impose an impossible situation upon a victim who opposes shared custody arrangements out of fear of further victimization, ultimately rewarding the abuser:

> "[F]ew courts even ask a mother why she may be discouraging the father's access to the children . . . . Every abused mother walks a tightrope. On the one hand, she must protect her children at the risk of the state's removing them or her being criminally prosecuted if she fails to protect them. On the other hand, she risks losing custody to her abuser if she protects her children by restricting the abuser's access to them. Friendly parent provisions punish her and the children if she even raises concerns about his fitness or parenting ability (or . . . if she opposes joint custody) because her very concern can be used as a weapon against her to deny her custody. Friendly parent provisions actually encourage abusers to continue to use the children as pawns in custody fights because even false allegations that a father was denied access to the children frequently result in the abuser's winning custody. Thus, friendly parent provisions, rather than being the benevolent facilitator of better parenting, actually have the likely effect of rewarding the less fit parent with sole custody.
>
> "[W]ell-intentioned efforts to promote better parenting through the use of friendly parent provisions and court orders providing that neither parent should disparage the other parent in front of the children have the unintentional results of keeping the abuse secret, reinforcing the abuser's right to perpetuate the violence, not holding the abuser responsible for his abuse (the first necessary step before he can recover), further victimizing the abused parent and greatly increasing the chance that the children will be permanently psychologically abused and become abusers as adults." Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other,* 29 Clearinghouse Review, 1113, 1122–1123 (April 1996).

As of the publication date of this benchbook, the Michigan appellate courts have not extensively discussed factor (j) in a context involving domestic violence. In *Bowers v Bowers*, 198 Mich App 320 (1993), the testimony in a

proceeding to modify a custody order showed that the father threatened, berated, and insulted the mother in front of the children. Based partly on this testimony, the Court of Appeals found that factor (j) favored the mother, overturning the trial court's finding of equality on this factor as "against the great weight of the evidence." 198 Mich App at 332–333.

> **Note:** The Michigan Court of Appeals has held that a finding against a parent under factor (j) does not necessarily outweigh findings in favor of that parent on other factors. See *McCain v McCain*, 229 Mich App 123 (1998), discussed in Section 12.2(B).

12.3 Criminal Sexual Conduct Precluding an Award of Custody

If one of the parties to a custody dispute has been convicted of criminal sexual conduct, the Child Custody Act may preclude that party from obtaining custody of a child conceived during or victimized by the abuse.

*These offenses are defined in MCL 750.520a to 750.520e and 750.520g.

MCL 722.25(2) provides that if a child is conceived as the result of acts for which one of the child's biological parents is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* the court shall not award custody of the child to the convicted biological parent. This absolute prohibition does not apply if:

- The conviction was for consensual sexual penetration (third-degree criminal sexual conduct) under MCL 750.520d(1)(a), involving a victim at least 13 years of age and under 16 years of age; or
- After the date of the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

*The relevant offenses are defined in MCL 750.520a to 750.520e and 750.520g.

MCL 722.25(3) provides that if one of the parties to a child custody dispute is convicted of criminal sexual conduct against his or her own child,* the court shall not award that party custody of the child or a sibling of the child without obtaining the consent of:

- The child's other parent; and
- The child or sibling if the court considers the child or sibling to be of sufficient age to express his or her desires.

*See Section 12.8(A) for information on denying parenting time.

Provisions substantially similar to those in the foregoing statute appear in the parenting time provisions of MCL 722.27a(5).* In *Devormer v Devormer*, 240 Mich App 601 (2000), the Court of Appeals held that MCL 722.27a(5) did not apply to preclude the defendant father from parenting time with his son after the father was convicted of criminal sexual conduct against his stepdaughter, who was the plaintiff mother's daughter and the son's half-sister. The Court held that the victim of the defendant's crime (i.e., the

stepdaughter) was not his "child" for purposes of the statute. The Court reversed the trial court's decision to deny parenting time to the defendant based on the statute and remanded the case for a determination whether parenting time would be in the son's best interests.

12.4 Joint Custody

Under MCL 722.26a(7), "joint custody" refers to court orders specifying:

> "(a) That the child shall reside alternately for specific periods with each of the parents [and/or]
>
> "(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child."

This section describes the standard for the court's joint custody determination under MCL 722.26a and addresses concerns with this standard that arise in cases involving allegations of domestic violence.

A. Standard for Joint Custody Determinations

In cases where the statutory prohibitions on custody awards to persons convicted of criminal sexual conduct do not apply,* MCL 722.26a sets forth the following standard for issuing an order for joint custody:

*These prohibitions are discussed in Section 12.3.

> "(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request.* In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> > (a) The [best interest] factors enumerated in [MCL 722.23].
> >
> > (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.
>
> "(2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child."

*When a parent requests joint custody, the court must apply the statutory best interest factors and state the reasons for denying the request on the record. *Mixon v Mixon*, 237 Mich App 159, 163 (1999).

MCL 722.26a creates no presumption in favor of joint custody. *Wellman v Wellman,* 203 Mich App 277, 286 (1994). However, the statute encourages joint custody awards by requiring courts to notify the parties of this option,

and by requiring "clear and convincing evidence" to overcome the parties' agreement on joint custody.

In cases where domestic violence is present, joint custody awards raise serious concerns for the safety of the victim and the welfare of the parties' children. The Model State Code on Domestic and Family Violence approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges provides the following presumptions concerning custody in cases involving domestic violence:

- **Rebuttable presumption against joint custody or sole custody to the abusive parent:**

  "In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence." Model Code, Section 401.

- **Rebuttable presumption in favor of residence with the non-abusive parent:**

  "In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent's choice, within or outside the state." Model Code, Section 403.

Although Michigan has not adopted the presumptions contained in the foregoing Model Code provisions, it can address the concerns that form the basis for these presumptions within the context of the joint custody statute (MCL 722.26a). The joint custody statute requires the court to consider:

- The best interest factors of MCL 722.23, and
- The parties' ability to "cooperate and generally agree concerning important decisions affecting the welfare of the child."

B. The Best Interests of the Child in Joint Custody Determinations

In deciding whether joint custody is appropriate, MCL 722.26a(1)(a) requires a trial court to consider the best interest factors in MCL 722.23. In cases involving allegations of domestic violence, factors (j) ("the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship") and (k) (domestic violence) are particularly relevant.*

*For a general discussion of how these best interest factors are weighed, see Section 12.2.

With respect to best interest factor (j), some researchers who study the effects of divorce on children have found that joint custody is appropriate for parents who are: 1) committed to making it work out of love for their children; 2) willing and able to negotiate differences; and 3) able to separate their spousal roles from their parental roles. Because relationships where domestic violence is present rarely exhibit such characteristics, these researchers generally advise against joint custody arrangements for them.*

*Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse,*39 Social Work 51, 56 (1994).

Best interest factor (k) requires the court to consider whether an award of joint custody will result in a child's continued exposure to domestic violence. The deleterious effects of adult domestic violence on children who are exposed to it are well-documented by researchers and addressed in Section 1.7. Indeed, some commentators caution that continued aggression and violence between divorced spouses with joint custody has the most adverse consequences for children of any custody option. It can result in the short term in emotional and physical problems leading to poor school performance, running away, and delinquency. In the long term, it can result in the children themselves becoming caught in the cycle of violence.*

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 19-20 (1990).

Some researchers have concluded that "high conflict" parents should be allowed to develop separate parenting relationships with their children, noting that frequent visits and joint custody schedules offer increased opportunity for verbal and physical abuse. More frequent transitions between "high conflict" parents were related to more emotional and behavioral problems for the children. See Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations,* (August 1998) at www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_custody.php (last visited January 7, 2004). If joint custody results in difficulties for the children of "high conflict" parents, it is likely to be especially problematic in custody cases involving domestic violence. Indeed, domestic violence continues — and may escalate — after separation and divorce as the abusive party seeks to reassert control in the relationship. *Id*. See also Section 1.4(B) on separation violence and lethality. In cases where domestic violence is present, the parental interactions required for joint custody arrangements may endanger parents and children by creating opportunities for continued abuse.

> **Note:** An order for joint custody in Michigan may make it more cumbersome for an abused parent to move to a location that is safe from the threat of domestic violence. MCL 722.31 imposes restrictions on changes in a parent's legal residence after issuance of a court order governing custody. These restrictions do not apply if the order grants sole legal custody to one of the parents. This statute is discussed in more detail in Section 12.6.

If the court decides that joint custody is not appropriate due to parental conflict, it will have to determine which parent should be awarded sole custody. Social science research indicates that men who batter should rarely have sole or joint custody of their children. Saunders, *Child Custody and*

Visitation Decisions in Domestic Violence Cases, supra. In practice, however, commentators have pointed out that abused parents who oppose joint custody may risk being labelled "unwilling . . . to facilitate a close and continuing parent-child relationship" under best interest factor (j), and thus may risk being placed at a disadvantage with respect to the court's determination as to sole custody. This risk of being characterized as an "unfriendly parent" may lead some parties to acquiesce to unsafe joint custody arrangements. Hardcastle, *Joint Custody: A Family Court Judge's Perspective,* 32 Family Law Quarterly 201, 214-218 (1998). Best interest factor (j) is only one of 12 factors for the court to consider in making its custody determinations, however. If a party's opposition to joint custody is motivated by fear of abuse at the hands of the other party, Michigan courts have enough discretion in weighing the best interest factors to reach a safe, equitable outcome. See Section 12.2 on weighing the best interest factors.

C. Parental Cooperation

In addition to the best interest factors discussed in Section 12.4(B), the joint custody statute requires the trial court to consider the parties' ability to "cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b). There is no Michigan statutory or appellate case authority addressing the issue of parental cooperation in the context of domestic violence. Researchers studying the dynamics of domestic violence have concluded that cooperation is not a characteristic of relationships where it is present. See Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases, supra*, citing a study showing that "highly conflictual parents" had a poor prognosis for becoming cooperative parents.*

*The cited study was Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families & Principles for Custody Decision Making*, 33 Family & Conciliation Courts Review 415-425 (1995).

In cases where cooperation is not possible, requiring the parties to do so can have dangerous and inequitable effects on both the abused party and the children involved. It is not unusual to find the following dangerous situations arising in domestic relations cases where both violence and access to children are at issue:

- An abusive party uses protracted litigation over access to children as a means to continue asserting power and control over a former partner.
- An abusive party uses the contact required for the exchange of children as an opportunity for further mental or physical abuse.
- An abusive party uses children as instruments of abuse, e.g., by conveying threats through children, or by interrogating children about a former partner's activities.
- An abusive party abuses or abducts children as a means of asserting power and control over a former partner.
- An abused party who does not feel safe may flee with children to escape an abuser.

As noted in Section 12.4(B), workable joint custody arrangements require parents who are willing and able to cooperatively negotiate their differences. The failure of cooperation that characterizes many violent relationships makes them poor candidates for joint custody awards.

D. Joint Custody Agreements

Joint custody agreements are encouraged under the Child Custody Act. The Act provides that the court may only refuse to issue an order in accordance with the parties' agreement to joint custody if it determines in light of clear and convincing evidence on the record that the terms are not in the best interests of the child. MCL 722.26a(2). This statute does not mean that a trial court must uphold the parties' stipulations without making an independent determination as to the best interests of their children, however. In *Phillips v Jordan*, 241 Mich App 17, 21 (2000), the Court of Appeals stated:

> "While trial courts try to encourage parents to work together to come to an agreement regarding custody matters . . . [t]he trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child."

See also *Koron v Melendy*, 207 Mich App 188, 191 (1994) ("Implicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest.") and *Napora v Napora*, 159 Mich App 241, 246 (1986) ("Although stipulations are favored by the judicial system and are generally upheld, a parent may not bargain away a child's right by agreement with a former spouse.")

The Michigan Supreme Court, in *Harvey v Harvey*, ___ Mich ___, ___ (2004), clarified the responsibilities of the trial court in making a custody determination under the Child Custody Act, MCL 722.21 et. seq. The Court held that under the Child Custody Act, the circuit court is *required* to determined the best interests of the children before entering an order resolving the custody dispute. The Court clarified that this does not require the trial court to conduct a hearing or otherwise engage in fact-finding when the parties agree to custody. The Court stated:

> "However, the deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount. MCL 722.25(1). Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated 'best interests' factors from the court's deliberations once a custody dispute reaches the court."

It is particularly important that courts make an independent determination of the child's best interests in cases involving allegations of domestic violence. As discussed in Section 1.7, domestic violence has a profound impact upon

*See Herrell & Hofford, *supra*, p 20.

children. Moreover, stipulations between abused and abusive individuals may not contain mutually-agreed terms. In many relationships where domestic violence is present, there is an unequal balance of power or bargaining capability between the parties. In some cases, the imbalance may be so great that the abused individual's agreement to joint custody will be the product of coercion or fearful acquiescence. The abused individual may agree to an unsafe joint custody arrangement under threat of physical violence, or out of fear of losing access to children in a trial over sole custody.*

> **Note:** The extent to which a court must make independent best interest findings in cases involving stipulations appears to depend on whether the stipulation is part of the original judgment of divorce or part of a post-judgment modification. On post-judgment agreements to modify custody, a trial court must independently reexamine and make findings on each "best interest" factor. On original judgments of divorce, the trial court need not expressly articulate each of the best interest factors. *Koron v Melendy, supra,* 207 Mich App at 192.

12.5 Modifying Michigan Custody Determinations

A. Standard for Modification

MCL 722.27(1)(c) governs modification of Michigan custody determinations as follows:

> "(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
>
> . . .
>
> "(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b,* until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency

*The referenced statute addresses post-majority child support.

> of the relationship shall also be considered. If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. Upon a parent's return from active military duty, the court shall reinstate the custody order in effect immediately preceding that period of active military duty. If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in the best interest of the child determination."

Note: Effective December 28, 2005, 2005 PA 327 amended MCL 722.22 to define "active military duty" to be "when a reserve unit member or national guard unit member is called into active military duty." MCL 722.22(a).

Under the foregoing statute, the moving party must make a threshold showing of proper cause or change of circumstances. Once a party has made this showing, the court will determine whether an established custodial environment exists. If no established custodial environment exists, the court will consider whether a preponderance of the evidence indicates that a change of custody would be in the child's best interests. If an established custodial environment exists, the court will consider whether clear and convincing evidence shows that a change would be in the child's best interests.* *Hayes v Hayes*, 209 Mich App 385, 387 (1995); *Rossow v Aranda*, 206 Mich App 456, 458 (1994).

*See Section 12.5(B) for discussion of the effect of PPOs and other court orders on the established custodial environment.

1. "Proper Cause" or "Change of Circumstances"

In *Vodvarka v Grasmeyer*, 259 Mich App 499, 512 (2003), the Court of Appeals provided the following guidance to trial courts in determining when "proper cause" exists:

> "In summary, to establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors,* and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors."

*See Section 12.2(A) for a listing of the "best interest" factors.

The Court also stated that in order to establish a "change of circumstances," the petitioner must prove "that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a

significant effect on the child's well-being, have materially changed." *Id.* at 513. In contrast, in order to determine whether "proper cause" exists, a trial court may on rare occasions be required to take testimony of events occurring prior to the prior court order. The Court stated:

> "[P]roper cause is geared more towards the significance of the facts or events or, as stated earlier, the appropriateness of the grounds offered. However, we believe a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before the entry of the order is thereafter significant enough to constitute proper cause to revisit the order. However, there can be such situations." *Id.* at 515.

As of the publication date of this benchbook, no Michigan statute or appellate decision directly addresses the relevancy of domestic violence to a party's threshold showing of "proper cause" or "change of circumstances" under MCL 722.27(1)(c). However, a showing that a party entered into a stipulation regarding custody as a result of duress or coercion may suffice to establish proper cause for a change of custody. See *Rossow v Aranda, supra,* 206 Mich App at 457.

Under the Model Code on Domestic and Family Violence, approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges, a finding of domestic violence occurring since a prior custody determination constitutes a change of circumstances:

> "In every proceeding in which there is at issue the modification of an order for custody or visitation of a child, the finding that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstances." Model Code, Section 404.

2. Best Interests of the Child

*See Section 12.2 for more discussion of weighing the "best interest" factors.

Since 1993, domestic violence has been listed as a best interest factor under MCL 722.23(k), so that the court must consider it once the party seeking modification makes the threshold showing of "proper cause" or "change of circumstances."* The following Court of Appeals cases consider violence as a best interest factor in the context of requests for changes in custody. These cases were decided before domestic violence was added to the list of best interest factors in 1993, however.

- *Harper v Harper*, 199 Mich App 409, 417–419 (1993):

  The Court of Appeals in this case upheld the trial court's decision awarding physical custody of the parties' two sons to the plaintiff father. According to the evidence presented, the defendant mother struck and shoved the plaintiff many times in the presence of their children. She once

forced her way into his truck and reached through the truck window to slap him. A social worker testified that these incidents of aggression "contributed to the children's inability at self-control." 199 Mich App at 419. Another witness, the plaintiff's 13-year-old daughter, testified that the defendant pressured her to stay with the defendant and became histrionic when the witness would not do so. This witness further testified that the defendant followed her to her room after a confrontation and threatened to slash her wrists with a razor blade if the witness would not say she loved her. Certain expert testimony showed that the defendant suffered from a borderline personality disorder. *Id.* There was also evidence of the defendant's neglect of the children, which the Court of Appeals characterized as "serious lapses of judgment." 199 Mich App at 417. Based on the evidence presented, the Court of Appeals upheld the trial court's analysis of the mother's behavior under factor (g) (the mental and physical health of the parties), in which the trial court found that the defendant's mental health was inferior to the plaintiff's.

- *Troxler v Troxler*, 87 Mich App 520, 524 (1978):

  A divorce judgment awarded custody of the parties' three children to their mother. The trial court subsequently granted a motion by the children's father for a change in custody to him. On appeal, a majority of the Court of Appeals found that the evidence supported the trial court's decision to grant custody to the father. The trial court found in favor of the father on stability of environment, permanence of the home as a family unit, and moral fitness. It also found that the children were doing well in school and receiving proper care in their father's home. The trial court was further influenced by the mother's testimony that her new husband had struck her and "pretty near knocked her teeth out." She also testified that the children's father had sent her a blank check while she was cohabiting with her new husband prior to their marriage, so that she could move out with the children into a place of their own.

Equality on the best interest factors does not preclude the moving party from meeting the clear and convincing burden of proof required to support a change from an established custodial environment. In *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594-596 (1995), the original divorce judgment awarded joint legal custody of a child to both parents, with sole physical custody to the mother. Following allegations of child abuse, temporary physical custody of the child was granted to the father, with supervised visitation by the mother. The child remained in the father's temporary physical custody from June 1990 to April 1992, during which time the mother severed her relationship with a boyfriend who was suspected of the abuse. In April 1992, the circuit court determined that both parties should have joint legal and physical custody. The court found that the statutory best interest factors did not significantly favor either party, but that the mother had met her burden to prove by clear and convincing evidence that a change in custody was justified. The circuit court stated:

> "[T]he Court [is] convinced that [the mother] is capable of giving love and care to the child and that the good of the child would be

> better served if both parents had the realization that they were both the legal and physical custodians of the child." 209 Mich App at 593.

Disapproving *Arndt v Kasem*, 135 Mich App 252 (1984), the Court of Appeals affirmed the circuit court's decision. The panel held that a finding of mathematical equality or near equality on the best interest factors set forth in MCL 722.23 does not necessarily amount to an evidentiary standoff that precludes a party from satisfying the clear and convincing standard of proof required to change an established custodial environment under MCL 722.27(1)(c). 209 Mich App at 596.

B. PPOs and the Established Custodial Environment

Because a PPO may affect the parties' access to children — particularly if it excludes a parent from premises — it may as a practical matter grant custody to one parent. This reality is likely to have significant implications for any future domestic relations proceedings between the parties because it creates a situation that could potentially ripen into an established custodial environment. See *Blaskowski v Blaskowski*, 115 Mich App 1, 7 (1982).

*See Section 6.3(B) for a detailed discussion of the *Brandt* case.

Generally, once an established custodial environment exists, a court may not modify an existing custody or parenting time order to change it unless the party seeking the change shows clear and convincing evidence that it is in the child's best interests. MCL 722.27(1)(c). The Michigan Supreme Court has held that this restriction serves a legislative policy "to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an established custodial environment, except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 577 (1981). However, a court may change custody or parenting time in the provisions of a PPO, without considering the best interest factors contained in MCL 722.27(1)(c). *Brandt v Brandt*, 250 Mich App 68 (2002).* In *Brandt*, the trial court entered a PPO prohibiting the respondent from contacting his children. 250 Mich App at 69. The trial court later modified the PPO to allow the respondent parenting time with his children. The respondent argued on appeal that the trial court did not have the authority to modify a PPO to include parenting time. The respondent asserted that custody and parenting time determinations may only be made in a child custody proceeding after a court has examined the "best interests of the child" factors. The Court of Appeals upheld the trial court's order, indicating that a trial court may restrain individuals from doing certain acts under MCL 600.2950(1). The Court further stated that MCL 600.2950(1)(j), the "catchall" provision, clearly provides a trial court with the authority to restrain a respondent from any action that "interferes with personal liberty" or might cause "a reasonable apprehension of violence." 250 Mich App at 70. The Court stated:

> "This statutory provision allows the trial court to restrain respondent from 'any other specific act or conduct . . . that causes a reasonable apprehension of violence.' [MCL 600.2950(1)(j)].

> There is no question that it would be reasonable for petitioner to fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. Additionally, this interpretation is entirely consistent with the remainder, of the statute, which makes it clear that the Legislature recognized that access to the children may need to be restrained to protect the safety of a parent. See MCL 600.2950(1)(d), (f) and (h)." 250 Mich App at 70–71.

A PPO's potential effect on access to children makes it tempting for some parties to use it to gain an advantage in domestic relations proceedings. To avoid such manipulations, a court should carefully consider petitions that would interfere with the respondent's parental rights, keeping in mind that domestic relations proceedings are better suited for resolving disputes over access to children.* If the PPO court finds that interference with the respondent's parental rights is necessary to protect the petitioner, however, a domestic relations court may subsequently find itself deciding the effect of the PPO on the child's custodial environment in a proceeding to modify custody.

*See Section 10.7 for a comparison of domestic relations orders and PPOs.

The question whether an established custodial environment exists is one of fact for the trial court to resolve based on the statutory criteria. *Hayes v Hayes,* 209 Mich App 385, 387-388 (1995). The statutory criteria do not allow a court to consider how the custodial environment came into being; rather, the focus is on the circumstances surrounding the care of the children in the time preceding the court's determination in a particular case. 209 Mich App at 388. In *Blaskowski v Blaskowski, supra,* 115 Mich App at 6, the Court of Appeals explained:

> "If the trial court determines that an established custodial environment in fact exists, it makes no difference whether that environment was created by a court order, whether temporary or permanent, or without a court order, or in violation of a court order, or by a court order which was subsequently reversed."

Application of the foregoing principles is illustrated by *Baker v Baker, supra.* In this case, the Michigan Supreme Court held that two temporary custody orders did not, of themselves, create an established custodial environment. Instead, such an environment depended upon:

> "a custodial relationship of a significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." 411 Mich at 579-580.

Applying this standard, the Court concluded that a child's established custodial environment had been destroyed in a case where he experienced

repeated custodial changes and geographical moves after the breakup of his parents' marriage. Long-term community contacts in the father's location were not sufficient to preserve his father's home as an established custodial environment where there was "no 'appreciable time [during which] the child naturally look[ed]' to his father *alone* 'for guidance, discipline, the necessities of life and parental comfort' in a stable, settled atmosphere . . . ." 411 Mich at 582. [Emphasis in original.]

See also *Pluta v Pluta*, 165 Mich App 55, 60 (1987) ("[A]n order for temporary custody does not, by itself, establish a custodial environment. The trial court must look at the total custodial relationship.") and *Hayes v Hayes, supra*, 209 Mich App at 388 ("Where there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded."). For further cases addressing the effect of prior custody orders on the established custodial environment, see *Michigan Family Law Benchbook*, §3.3 (Institute for Continuing Legal Education, 1999).

12.6 Change of Legal Residence

MCL 722.31 imposes restrictions on changes in a parent's legal residence after issuance of a court order governing custody. The statute provides:

> "A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." MCL 722.31(1).

The statute does not apply in the following circumstances:

- The custody order grants sole legal custody to one of the parents. MCL 722.31(2).
- The child's two residences were more than 100 miles apart at the time of the commencement of the action in which the custody order is issued. MCL 722.31(3).
- The change of legal residence will result in the child's two legal residences being closer together than they were before the change. *Id.*
- Orders determining or modifying child custody or parenting time shall include a provision stating the parents' agreement as to how a change in either of the child's legal residences will be handled. MCL 722.31(5). If a residence change is done in compliance with this agreement, the statutory restrictions do not apply. *Id.*

The 100-mile limitation in MCL 722.31(1) refers to radial miles rather than road miles. See *Bowers v Vandermeulen-Bowers*, ___ Mich App ___, ___ (2008), where the trial court properly permitted the use of a map and ruler to measure the distance between the parties' two residences.

In circumstances where the statute applies, a parent's change of residence may be excused from the 100-mile restrictions if the other parent consents to the change of residence. MCL 722.31(2). Otherwise, a court order is needed to permit the residence change. *Id*.

In deciding whether to permit a residence change, the court must make the child the primary focus in its deliberations. MCL 722.31(4). This provision further sets forth the following factors for the court to consider before permitting a legal residence change:*

> "(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> "(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> "(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> "(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> "(e) *Domestic violence, regardless of whether the violence was directed against or witnessed by the child.*" [Emphasis added.]

*See *Mogle v Scriver*, 241 Mich App 192, 202-203 (2000), for a case applying similar factors before the effective date of the statute.

If the statutory restrictions apply to a change of a child's legal residence and the parent seeking the change needs to find a safe location from the threat of domestic violence, the parent may move to the safe location with the child until the court makes a determination under the statute. MCL 722.31(6).

If the parents cannot reach agreement as to how a change in the child's legal residences will be handled, a custody order regarding the child shall include a provision stating: "A parent whose custody or parenting time of a child is governed by this order shall not change the legal residence of the child except

in compliance with section 11 of the 'Child Custody Act of 1970', 1970 PA 91, MCL 722.31." MCL 722.31(5).

12.7 Parenting Time

Parenting time in cases involving domestic violence is governed by MCL 722.27a, which contains the following provisions of particular interest:

- Parenting time is to be granted "in accordance with the best interests of the child." A strong relationship with both parents is presumed to be in a child's best interest, so that absent clear and convincing evidence of danger to the child's physical, mental, or emotional health, a child has a right to parenting time with a parent. MCL 722.27a(1), (3). See also *Rozek v Rozek*, 203 Mich App 193 (1993).
- In ordering terms for parenting time, the court may consider whether the exercise of parenting time presents a reasonable likelihood of abuse or neglect of the child, or abuse of a parent. MCL 722.27a(6)(c)–(d).
- Persons convicted of criminal sexual conduct may in some cases be denied parenting time with children conceived during or victimized by the offense. MCL 722.27a(4)–(5).

Under the foregoing provisions, the presence of domestic violence will not preclude a court from ordering parenting time unless:

- There is clear and convincing evidence of danger to the child's physical, mental, or emotional health, MCL 722.27a(3), or
- The parenting time would be with a parent convicted of criminal sexual conduct, under the circumstances set forth in MCL 722.27a(4)–(5).

*See Section 12.8 on such cases.

This section will address cases in which there are no facts present that would preclude a court from ordering parenting time under MCL 722.27a(3)–(5).* The topics covered include domestic violence as a best interest factor and parenting time terms that promote safety, fairness, and accountability. This section also includes a sample parenting time questionnaire for the parties and sample parenting time provisions.

A. Domestic Violence as a Factor in Granting Parenting Time

Domestic violence, "regardless of whether . . . directed against or witnessed by the child," is clearly relevant to a child's well-being and is listed in MCL 722.23(k) as one of 12 factors to be considered in the court's "best interest" determination. In weighing the 12 best interest factors, no single factor raises any presumption with respect to the court's determination; all relevant factors are to be considered together to reach a "sum total." For more discussion of

how courts are to weigh and apply the statutory "best interest" factors, see Section 12.2.

In addition to the "best interest" factors in MCL 722.23, the parenting time statute contains a basic general presumption that it is in the best interests of a child to have "a strong relationship with both of his or her parents." MCL 722.27a(1). The statute further provides that "[a] child has a right to parenting time with a parent." MCL 722.27a(3). Therefore, unless a statutory exception applies (for cases involving danger to the child or criminal sexual conduct), the court must grant parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The parenting time statute allows the court flexibility to tailor the terms of its order to address the needs of the parties and the child.

As of the publication date of this benchbook, no Michigan appellate court decisions directly address the role of domestic violence as a "best interest" factor in granting parenting time. Some commentators have noted that court orders for parenting time in cases involving domestic violence are subject to the same concerns that arise with regard to orders for joint custody, namely:*

*Lemon, *Domestic Violence & Children: Resolving Custody & Visitation Disputes*, p 57–59 (Family Violence Prevention Fund, 1995). See Section 12.4 on joint custody, and 1.5 on abusive tactics.

- An abuser's exercise of parenting time can pose potential danger to a child or former intimate partner. Abusers may use parenting time as a tool for emotional abuse. They may, for example, institute disputes over parenting time as a means to harass a former partner, or they may use parenting time as an opportunity to recruit the children to collect information about the former partner. Furthermore, parenting time can give abusers physical access to children and former partners, which creates opportunities for physical abuse.

- Continued aggression and violence between divorced spouses has adverse consequences for children. It can result in the short term in emotional and physical problems leading to poor school performance, running away, and delinquency. In the long term, it can result in the children themselves becoming caught in a cycle of violence.

In response to the foregoing concerns, the Board of Trustees of the National Council of Juvenile and Family Court Judges approved the following provision, which appears in the Model Code on Domestic and Family Violence (1994):

> "A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made." Model Code, Section 405(1).

The commentary to this provision states:

> "The Model Code posits that where protective interventions are not accessible in a community, a court should not endanger a child or adult victim of domestic violence in order to accommodate visitation by a perpetrator of domestic or family violence. The risk of domestic violence directed both towards the child and the battered parent is frequently greater after separation than during cohabitation; this elevated risk often continues after legal interventions."

The following discussion addresses how courts can craft parenting time orders that promote safety, fairness, and accountability.

B. Terms for Parenting Time

The parenting time statute gives the court great flexibility to order parenting time terms. If carefully and specifically drafted in accordance with the statute, a parenting time order can promote safety as it encourages a child's relationship with both parents.

MCL 722.27a(6) lists nine factors for the court to consider in determining the frequency, duration, and type of parenting time to be granted. Three of these factors require the court to determine the reasonable likelihood of abuse against a child or a parent resulting from the exercise of parenting time. The nine factors are:

> "(a) The existence of any special circumstances or needs of the child.
>
> "(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> "(c) *The reasonable likelihood of abuse or neglect of the child during parenting time.*
>
> "(d) *The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.*
>
> "(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> "(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> "(g) Whether a parent has frequently failed to exercise reasonable parenting time.

"(h) *The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.**

"(i) Any other relevant factors." [Emphasis added.]

*See Sections 3.5-3.6 and 12.10 on parental kidnapping.

For a case illustrating the application of these factors, see *Booth v Booth*, 194 Mich App 284, 292–293 (1992). At a bench trial in this divorce action, the plaintiff wife testified that the defendant had physically abused their son when he was an infant and emotionally abused her. She also testified that the defendant had been jailed for physically abusing her. Defendant denied the physical abuse of his wife although he admitted hitting his son at age five as a disciplinary measure. The trial court awarded the parties joint legal custody of the parties' two children, with sole physical custody to plaintiff. Defendant was granted supervised visitation with the children. Among other issues raised on appeal, defendant asserted that the trial court erroneously ordered supervised visitation. The Court of Appeals upheld the order for visitation, noting that the trial court properly considered the likelihood of abuse or neglect under the applicable statute in determining the frequency, duration, and type of visitation.

In drafting an order for parenting time in cases where domestic violence is present, the court can promote safety by making its order highly specific. Clear, precise parenting time terms are more readily enforced by law enforcement officers and are more difficult for the parties to manipulate. The court may issue precise orders under MCL 722.27a(7)–(8), which permit either party to request at any time that parenting time be granted in specific terms and authorize the court to order "any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent . . . ." When a party requests specific parenting time provisions, the trial court errs by not considering the request. *Pickering v Pickering*, ___ Mich App ___, ___ (2005). Under MCL 722.27a(8), specific terms for parenting time may include one or more of the following:

"(a) Division of the responsibility to transport the child.

"(b) Division of the cost of transporting the child.

"(c) Restrictions on the presence of third persons during parenting time.

"(d) Requirements that the child be ready for parenting time at a specific time.

"(e) Requirements that the parent arrive for parenting time and return the child from parenting time at specific times.

"(f) Requirements that parenting time occur in the presence of a third person or agency.

"(g) Requirements that a party post a bond to assure compliance with a parenting time order.

"(h) Requirements of reasonable notice when parenting time will not occur.

"(i) Any other reasonable condition determined to be appropriate in the particular case."

Consistent with MCL 722.27a(8), the court might consider the following terms to enhance safe enforcement of its orders for parenting time in cases involving domestic violence:*

*Many of these suggestions are from Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, & Enforcement*, p. 43 (Nat'l Inst of Justice, 1990), and Family Violence: A Model State Code, Section 405 (Nat'l Council of Juvenile & Family Court Judges, 1994).

- Avoid non-specific provisions such as "reasonable parenting time," "parenting time as agreed by the parties," or "parenting time to be arranged later." The terms of a parenting time order should be stated unambiguously, with pick-up and drop-off locations, times, and days of the week clearly specified.
- Provide for supervised parenting time, with the supervising third-parties clearly identified. Establish conditions that clearly specify the responsibilities and authority of the supervisor during supervised parenting time. Order the abusive party to pay a fee to defray the costs. See *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Section 4.8, for more discussion of supervised parenting time.
- Provide safe, neutral locations for parenting time, whether supervised or unsupervised.
- Specify how the parties may communicate with each other to make arrangements for parenting time (e.g., whether the parties or their attorneys may communicate by telephone, or whether written or electronic communication is permitted).
- Arrange parenting time so that the parties will not meet. Drop-off and pick-up times could be different for each party, so that one will have left the drop-off site before the other arrives.
- If the parties must meet to transfer children, require that the transfer take place in the presence of a third party and in a protected setting, such as a police station or public place.
- Start with short, daytime visits in a public place, and increase length only if things are going well. Place limits on overnight visits.
- Prohibit the noncustodial party from drinking or using drugs before or during parenting time.
- Require a bond to assure compliance with the court's order.

- Limit the abusive party's access to firearms. For a discussion of firearms restrictions in cases involving domestic violence, see Chapter 9.
- Permit refusal of parenting time upon violation of any condition the court imposes.
- Permit cancellation of parenting time if the noncustodial party is more than a specified number of minutes late.
- Specify the consequences of violating the court's order, and the steps that the aggrieved party should take in the event of a violation.
- Specify how disputes between the parties will be resolved.
- Assess whether one of the parties is at risk for abducting or fleeing with the children, and take steps to deter such behavior. For more information, see Section 12.10.
- Order the abusive party to successfully complete a batterer intervention program as a condition of parenting time. See Sections 2.3 - 2.4 for more information about such programs.
- If the abused parent is in hiding from the abuser, keep the address of the abused parent and other identifying information confidential. See Sections 10.4 and 12.11 for more information about this subject.
- Build in automatic return dates for the court to review how its order is working.

In cases involving a personal protection order, the State Court Administrative Office's *Michigan Parenting Time Guideline* (2000) states (at p 26):

> "If the parties have a Personal Protection Order, parenting time exchanges shall occur (if permitted by the order) in a manner which ensures the order is not violated. In order to provide appropriate safety when a PPO is in place or when a documented history of abuse exists, all exchanges should occur in a public place, at a designated neutral exchange site, by a third party, or at a supervised parenting time facility."*

*See Section 7.7 for more on PPOs and access to children.

Section 405(4) of the Model Code on Domestic and Family Violence states that the court may refer, but shall not order, an abused parent to attend counseling relating to the abuse, either individually or with the abuser, as a condition of custody or parenting time. This provision recognizes that joint counseling with the perpetrator of domestic violence can be dangerous for the victim.* The commentary to Section 405(4) notes that this provision does not preclude the court from ordering other types of counseling, such as substance abuse counseling or educational classes.

*Joint counseling is contra-indicated in cases involving domestic violence. See Section 2.4(B).

To expedite the issuance of parenting time orders, some commentators suggest providing the abused party with a short form questionnaire on which

*Finn & Colson, *supra,* at 44.

to record preferred arrangements.* For sample questions, see Section 12.7(C). Examples of specifically-worded parenting time terms appear at Section 12.7(D).

*See Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse, 39 Abuse,* 39 Social Work 51, 56 (1994), and Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court J 20 (1990).

If the parties agree to parenting time terms, the court may only refuse to issue an order in accordance with their agreement if it determines in light of clear and convincing evidence on the record that the terms are not in the best interests of the child. MCL 722.27a(2). When applying this subsection to a case involving domestic violence, the court can promote safety and the best interests of the children by making careful inquiry into whether the parties have truly reached an agreement. When domestic violence is present, there is often an unequal balance of power or bargaining capability between the parties; in some cases, the imbalance may be so great that the victim's agreement to parenting time terms will be the product of coercion.* Michigan appellate cases addressing the trial court's obligation to review the parties' stipulations are discussed at Section 12.4(D).

C. Sample Parenting Time Questionnaire

The following questions are taken from Finn and Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement,* p 45 (Nat'l Inst of Justice, 1990). Although these questions are suggested in the context of civil protection order proceedings, they are also relevant to the issuance of parenting time orders.

To assist the court in issuing its order for parenting time, please answer the following questions:

- Do you believe that it may be dangerous for your child(ren) if your former spouse/partner is allowed to visit with them? If so, why may it be dangerous?
- Is there a safe place for your former spouse/partner to pick up the children?
  - Your home?
  - Your parents' home?
  - Church, synagogue, or other place of worship?
  - Police station?
  - Other? (fill in)_____
- Do you want someone else to be present when your former spouse/partner is with the children, such as grandparents or a clergy person? If so, who?
- When do you want your former spouse/partner to be able to visit with the children?

- What day(s) of the week?
- What time of day? From___ to____
- How many times each month?

♦ Does your former spouse/partner have a drinking or drug problem? If so, do you want the order to provide that your former spouse/partner cannot visit with the children after drinking or taking drugs?

♦ Does your former spouse/partner carry or have access to weapons? If so, do you want the order to provide that your former spouse/partner cannot carry a weapon while visiting the children, or that visits with the children take place in a location where your former spouse/partner will have no access to weapons?

D. Examples of Specifically-Worded Parenting Time Terms

The following terms are adapted from Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes*, Appendix J (Family Violence Prevention Fund, 1995). The examples are drafted with the assumption that the abused individual is the plaintiff, the abuser is the defendant, and Mary Smith is a neutral third party.

1) Parenting time shall take place every first and third Saturday from 10 a.m. to 3 p.m., at the home of and in the presence of Mary Smith, plaintiff's aunt, at 123 Main Street, City. The plaintiff is responsible for dropping off the child by 9:45 a.m. and picking up the child at 3:15 p.m. If parenting time cannot take place, notice must be given by telephoning Mary Smith at (000) 123–4567 by 8:30 a.m., and parenting time shall then take place the following Saturday with the same provisions.

2) If defendant wishes to exercise parenting time rights, he must call Mary Smith at (000) 123–4567 by 10 a.m. the day before a scheduled visit. Mary Smith shall then call the plaintiff.

3) Defendant shall consume no alcohol or illegal drugs during the 12 hours prior to and during parenting time. If he appears to have violated this provision, Mary Smith is authorized to deny him parenting time that week.

4) Parenting time may be denied if the defendant is more than 30 minutes late and does not call by 8:30 a.m. to alert Mary Smith to this. *(This term prevents a custodial parent and child from waiting for the other parent.)*

5) Plaintiff must arrive at the drop-off location 20 minutes before defendant, and then leave before defendant arrives. At the end of parenting time defendant must remain at the location for 20 minutes while plaintiff leaves with the children. *(This term*

prevents defendant from following plaintiff to harass her or ascertain the location of her new residence.)

6) *(If there is no third party available, even for exchanging the children):* Drop-off and pick-up of the children shall occur at the local police department, in the lobby. Defendant shall leave with the children immediately; plaintiff may request a police escort to her car or to public transportation. At the end of parenting time, defendant shall wait in the lobby at least 20 minutes while plaintiff leaves with the children. *(This term prevents defendant from following plaintiff to harass her or ascertain the location of her new residence.)*

For an example of a parenting time order with provisions designed to prevent abduction to a foreign nation, see *Farrell v Farrell,* 133 Mich App 502, 513, n 3 (1984).

12.8 Grounds for Denying Parenting Time

A. Criminal Sexual Conduct by a Parent

*These offenses are defined in MCL 750.520b to 750.520e and 750.520g.

MCL 722.27a(4) provides that if a child is conceived as the result of acts for which one of the child's biological parents is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* the court shall not grant parenting time with the child to the convicted biological parent. This absolute prohibition does not apply if:

- The conviction was for consensual sexual penetration (third-degree criminal sexual conduct) under MCL 750.520d(1)(a), involving a victim at least 13 years of age and under 16 years of age; or
- After the date of the conviction, the biological parents cohabit and establish a mutual custodial environment for the child.

*These offenses are the same as those set forth in MCL 722.27a(4).

MCL 722.27a(5) provides that if an individual is convicted of first-, second-, third-, or fourth-degree criminal sexual conduct or assault with intent to commit criminal sexual conduct,* and the victim is the individual's child, the court shall not grant parenting time with that child or a sibling of that child without obtaining the consent of:

- The child's other parent; and
- The child or sibling if the court considers the child or sibling to be of sufficient age to express his or her desires.

In *Devormer v Devormer,* 240 Mich App 601 (2000), the Court of Appeals held that MCL 722.27a(5) did not apply to preclude the defendant father from parenting time with his son after the father was convicted of criminal sexual

conduct against his stepdaughter, who was the plaintiff mother's daughter and the son's half-sister. The Court held that the victim of the defendant's crime (i.e., the stepdaughter) was not his "child" for purposes of the statute. The Court reversed the trial court's decision to deny parenting time to the defendant based on the statute and remanded the case for a determination whether parenting time would be in the son's best interest.

B. Danger to the Child's Physical, Mental, or Emotional Health

MCL 722.27a(3) provides that a child has a right to parenting time, "unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health."* As of the publication date of this benchbook, no Michigan appellate decisions have directly considered the issue of denying parenting time based upon this statutory provision.

*See Section 1.7 on the effects of domestic violence on children.

In *Rozek v Rozek*, 203 Mich App 193, 194–195 (1993), the Court of Appeals considered MCL 722.27a(3) on the issue of the standard of proof needed to show an endangerment of a child's physical, mental, or emotional health. After concluding the trial court improperly used a "preponderance of the evidence" standard rather than the required "clear and convincing evidence" standard, the Court remanded the matter to the trial court for a new hearing. The Court would not express an opinion on whether the record would have supported the trial court's termination of the father's parenting time under the proper standard of proof. It did, however, note that the statute permits a court to order parenting time with a multitude of terms and conditions to best protect and serve the interests of the child.

12.9 Civil Remedies to Enforce Michigan Parenting Time Orders

Under MCR 3.208(B), the Friend of the Court is responsible to initiate proceedings to enforce orders or judgments for custody or parenting time. Civil remedies to enforce parenting time orders are available under the Friend of the Court Act, MCL 552.501, et seq., and the Support and Parenting Time Enforcement Act, MCL 552.601 et seq.*

*On criminal sanctions for parental kidnapping, see Sections 3.5-3.6.

Under the Friend of the Court Act, the Friend of the Court office must initiate enforcement proceedings upon receipt of a written complaint stating specific facts that constitute a violation of a parenting time order. MCL 552.511b(1). A "parenting time violation" is defined as "an individual's act or failure to act that interferes with a parent's right to interact with his or her child in the time, place, and manner established in the order that governs . . . parenting time between the parent and the child and to which the individual accused of interfering is subject." MCL 552.602(e). If a parent has the right to interact with his or her child pursuant to a custody or parenting time order and requests

assistance, the Friend of the Court must assist that parent in preparing a complaint. MCL 552.511b(1).

Within 14 days of the receipt of the complaint, the Friend of the Court must send a copy of the complaint to the individual accused of interfering with the order and to each party to the parenting time order. MCL 552.511b(2).

MCL 552.511b(3) provides:

> "If, in the opinion of the office, the facts as stated in the complaint allege a . . . parenting time order violation that can be addressed by taking an action authorized under section 41 of the support and parenting time enforcement act, MCL 552.641, the office shall proceed under section 41 of the support and parenting time enforcement act, MCL 552.641."

*See MCL 552.602(m) for the definition of "friend of the court case."

The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case,"* to take one or more of the following actions in response to an alleged parenting time order violation:

- Apply a makeup parenting time policy under MCL 552.642.
- Commence civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and, except for good cause shown on the record, shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).
- File a motion pursuant to MCL 552.517d for a modification of the existing parenting time provisions to ensure parenting time, unless it would be contrary to the best interests of the child.
- Schedule mediation pursuant to MCL 552.13.
- Schedule a joint meeting under MCL 552.542a.

Note: The Friend of the Court is generally required to open a case for domestic relations matters. MCL 552.505a(1). The case is referred to as a "friend of the court case." The parties to a domestic relations matter may opt out of having a Friend of the Court case opened by filing a motion with their initial pleadings. See MCL 552.505a(2). The court must allow the parties to opt out unless the court finds that "[t]here exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child." MCL 552.505a(2)(d).

MCL 552.641(2) permits the Friend of the Court to decline to take one of the foregoing actions if any of the following circumstances apply:

> "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because the complaint was found to be unwarranted, and the party has not paid those costs.
>
> "(b) The alleged . . . parenting time order violation occurred more than 56 days before the complaint is submitted.
>
> "(c) The . . . parenting time order does not include an enforceable provision that is relevant to the . . . parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a parenting time order without good cause,* the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2)(a)–(h) provide that once the court finds a parent in contempt, it may do one or more of the following:

*"Good cause" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order. MCL 552.644(3).

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.
>
> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.
>
> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.
>
> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The court must state on the record the reason it is not ordering a sanction listed in MCL 522.644(2)(a)–(h). MCL 552.644(3).

*See Section 2.1(A) for information on the Domestic Violence Prevention and Treatment Board.

MCL 552.641(3) requires courts to enforce parenting time violations in compliance with the guidelines developed by the Friend of the Court in cooperation with Domestic Violence Prevention and Treatment Board ("DVPTB")* as required in MCL 552.519. The Friend of the Court and DVPTB guidelines ("Guidelines") are found in SCAO Administrative Memorandum 2002-11. The Guidelines provide the following guidance in the selection of an enforcement remedy for a violation of a parenting time order:

*See Chapters 6-8 for information on PPOs.

> "Selection of an enforcement remedy should also be influenced by the safety concerns that arise when one party has committed a crime against a child or the other party, or has violated another court order (such as a personal protection order*) in exercising or asserting custody or parenting time rights. Cases in which parties are unable to adequately represent their own interests require special consideration to ensure fairness. The parties' ability to represent their own interests may be impeded by factors such as undue influence, substance abuse, mental illness, and domestic violence. In cases involving domestic violence, safety concerns arise in addition to questions of fairness. Efforts to promote safety in these cases will be most effective if they focus on the protection of the abused individual and children, and on intervention in the abusive parent's manipulation and control tactics. This focus will help the court to address the underlying basis for the problems caused by domestic violence in the case, rather than on the parenting time symptoms that arise from the violence. Other ways to promote safety include:
>
> - Minimize physical or other contact between the parties, and thus opportunities for threats, harassment, or physical violence.
>
> - Adhere to any prior court orders restricting contact between the parties. Such orders may have been issued in criminal or civil cases in Michigan or another jurisdiction (Michigan courts must extend full faith and credit to protection orders issued in civil and criminal cases in other U.S. jurisdictions. See MCL 600.2950h, 600.2950j).*
>
> - Communicate clearly with the parties about court processes, particularly with regard to the limits of confidentiality. Abused individuals need to know what use will be made of their disclosures of domestic violence in order to take safety precautions against potential retaliatory violence, which is often precipitated by such disclosures.

*See Chapter 13 for a discussion of providing full faith and credit to orders issued in both other U.S. jurisdictions and foreign jurisdictions.

- Refer abused individuals to domestic violence service agencies that can assist with safety planning."* [Footnotes omitted.]

*See Appendix A for a listing of domestic violence service agencies.

If the court finds that a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6) and MCL 552.644(8). The first time a party acts in bad faith the sanction may not exceed $250.00. The second time a party acts in bad faith the sanction may not exceed $500.00. Sanctions for any third or subsequent finding that a party has acted in bad faith may not exceed $1,000.00. MCL 552.644(6).

Courts can take the following steps in response to concerns about domestic violence in proceedings to enforce parenting time orders under the Friend of the Court Act and the SPTEA:

- Conduct ongoing screening for domestic violence in contested custody cases.

- In cases where domestic violence is present, deter disputes over parenting time by drafting specific orders that adequately address the abuse. Avoid provisions for "reasonable parenting time" or "parenting time as arranged by the parties," which are easily manipulated and thus likely to become vehicles for further abuse. See Section 12.7(B) on safe terms for parenting time.

- Do not require the parties to negotiate, arbitrate, or mediate their dispute, and carefully scrutinize any agreements resulting from these dispute resolution methods. The use of alternative dispute resolution in cases involving domestic violence raises serious safety and equitable concerns. To succeed, alternative dispute resolution methods require cooperation between parties with equal bargaining power; they cannot operate fairly in relationships that are characterized by an abusive party's one-sided exercise of power and control. Indeed, alternative dispute resolution may provide the abusive party with opportunities for further physical abuse, intimidation, or harassment. Moreover, domestic violence involves criminal behavior which as a matter of policy should not be the subject for negotiation between the perpetrator and victim. See Section 10.6 for more discussion of alternative dispute resolution.

- Communicate to the abusive party that enforcement of the court's order is the responsibility of the Friend of the Court, not the abused individual. Doing this may promote safety; some abusers may not engage in coercive behavior if they realize that the abused individual is not in a position to control efforts to enforce a custody or parenting time order.

- Refrain from changing an existing custody or parenting time order until investigation of the case is complete. The National Council of Juvenile and Family Court Judges suggests that noncompliance to avoid abuse should not be grounds for modification of custody in favor of an abusive party, particularly when the abused party is not available to explain the circumstances surrounding the noncompliance.*

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court J 20 (1990).

A complete discussion of procedures for enforcing custody and parenting time orders is beyond the scope of this benchbook. For more discussion, see State Court Administrative Office, *Michigan Parenting Time Guideline,* p 29–31 (2000), *Custody and Parenting Time Investigation Manual* (SCAO 2002), and *Michigan Family Law Benchbook,* §§4.10–4.19 (Institute for Continuing Legal Education, 1999).

12.10 Preventing Parental Abduction or Flight

In cases where domestic violence is present, both the abuser and the victim may be at risk for taking physical control over children in violation of a court order for custody or parenting time:

- An abusive parent whose parental rights have been limited may abduct a child as a means of punishing or controlling the abused parent.
- An abused parent may feel unsafe with court-ordered terms for custody or parenting time and flee with a child to avoid contact with the abuser.

Courts can discourage abduction or flight if it identifies cases where children are at risk and takes preventive measures. Assessing and reducing the risk of parental abduction or flight is important because the children affected can suffer serious emotional and physical harm. Uprooted from family and friends, these children may be told that they are leaving their homes because a parent is dead or because a parent no longer loves them. They may be given new names and told not to reveal their true identities to anyone. In order to remain in hiding, a parent may fail to enroll a child in school or to seek necessary medical attention. In some cases, a parent's abduction or flight may entail a threat of physical violence to a child.

The court's best response to the problem of parental abduction or flight is to prevent the problem from arising in the first place — parents will not be so likely to take control over their children in violation of a custody or parenting time order if the order contains appropriate provisions for the safe exercise of parental rights.* Such orders can be issued only if the court has full information about the parties' situation. Accordingly, the prevention of parental abduction or flight can start with a court's efforts to screen contested custody cases to identify disputes in which children are at risk. See Section

*See Sections 12.2-12.8, and Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 20 (1990).

10.3 on screening. Awareness of such cases enables the court to include preventive measures in its orders for custody or parenting time.

> **Note:** If a parent abducts or flees with a child, the same criminal statutes apply regardless of the parent's motivation. See Sections 3.5 - 3.6 on Michigan's criminal penalties for parental kidnapping. Civil remedies to enforce Michigan parenting time orders are the subject of Section 12.9. Civil enforcement of other jurisdictions' custody orders is discussed in Chapter 13.

A. Risk Factors for Parental Abduction or Flight

When screening cases to assess the risk of parental abduction or flight, a number of factors can alert the court to potential danger. The presence of domestic violence between the parties to a child custody dispute is one factor that increases the risk of parental abduction or flight. As noted above, an abuser may abduct children as a means of asserting power in a relationship, and a victim may flee with children to find refuge from abuse. Other risk factors are as follows:

- A parent has previously abducted or threatened to abduct a child or has a history of hiding the child.
- A parent has no strong ties to the child's home jurisdiction.
- A parent has a strong support network, especially if it includes friends or family living in another jurisdiction.
- A parent has few financial ties to the geographical area where the child is living.
- A parent is engaged in planning activities, such as quitting a job, selling a home, terminating a lease, closing a bank account, making a maximum draw on a credit card, liquidating assets, hiding or destroying documents, applying for a passport, or undergoing plastic surgery.
- The parties' marriage has a history of instability.
- A parent shows disdain for the court's authority.
- A parent denies or dismisses the value of the other parent to the child. This parent may believe that he or she knows what is best for the child and cannot see how or why it is necessary to share parenting with the other parent.
- The child is very young. Young children are easier to transport and conceal, and they cannot tell others of their plight.
- A parent believes that the other parent has abused, neglected, or molested the child. This factor is particularly significant where the

parent feels that authorities have dismissed the allegations as unsubstantiated and have taken no action to protect the child.

- A parent is mentally ill and suffers from irrational or psychotic delusions that the other parent will harm him or her and/or the child.

- A parent feels disenfranchised by the judicial system. Such parents may not have access to legal assistance due to lack of knowledge or financial need. Others may not have confidence in the ability of the judicial system to address their concerns.

- A parent has citizenship or ties to a nation that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. (Recovery of children from non-member nations is extremely difficult.) For a list of member nations and more information about this Convention, see Sections 13.17-13.19.

Note: Some of the foregoing factors are also indicative of a risk for engaging in lethal violence. See Section 1.4(B) for a list of lethality factors to consider in conjunction with the foregoing factors.

B. Preventive Measures

Once it has screened a contested custody case for the foregoing risk factors, a court can further assess the need for preventive measures by considering the likelihood of harm to the child and the chances of recovering the child. Depending upon the circumstances of the case, the court can take a number of preventive steps to deter violation:*

*The suggestions are taken from Rigler, *supra,* and Goelman, et al, *supra,* §§201, 208. See also *Farrell v Farrell*, 133 Mich App 502, 513, n 3 (1984) for an example of a parenting time order with provisions designed to prevent abduction to a foreign nation.

- Draft custody or parenting time orders that adequately address the violence between the parties. Such orders should be specific — orders for "reasonable parenting time" or "parenting time as arranged by the parties" are easily manipulable and so are likely to become vehicles for further abuse. See Section 12.7(B) on safe terms for parenting time.

- State the possible penalties for violating the court's order.

- Avoid orders for joint custody when there is hostility between the parents, especially if they live in different jurisdictions. See Section 12.4 on joint custody.

- Provide for supervised parenting time, with supervision by a neutral third party rather than by a party's family member. See *Friend of the Court Domestic Violence Resource Book* (MJI, 2008), Section 4.8 on this subject.

- Prevent a party from removing a child from the child's home jurisdiction without the written consent of the other party or the court. See Section 12.6 on statutory restrictions on a parent's relocation.

- Require the visiting parent to give the custodial parent notice of where the children will be taken during parenting time.
- Order a parent who poses a flight risk to post a bond that would be forfeited to the other parent upon flight. The amount of the bond should be sufficient to cover enforcement and recovery costs.
- Order a parent who is visiting from a distant location to deposit plane tickets with the custodial parent prior to exercising parenting time.
- Give a copy of the custody order to school authorities, day care providers, and medical personnel with explicit instructions not to release the child or any of the child's records to the noncustodial parent.
- Provide culturally-sensitive services. See Section 2.5 for more information about this subject.
- Ensure that a thorough investigation of allegations of child or spousal abuse takes place.
- Appoint a guardian ad litem for the child.
- Teach older children how to find help if they are abducted.
- If possible, instruct relatives and others who might support a parent in hiding a child that they are criminally liable if they aid and abet a crime. If there is a risk that the child will be taken from the U.S. to another nation, inform potential support persons that their assistance in hiding the child abroad might result in their exclusion from entering the U.S.
- Order the at-risk parent to surrender the child's passport to the other parent prior to parenting time or have the child's and the at-risk parent's passports held by a neutral third party.
- Give copies of court orders to agencies that issue passports, with the request that the custodial parent be notified if the other parent attempts to obtain a passport without the certified written authorization of both parents or the court. The child's passport can be marked with a requirement that travel is not permitted without the same authorization. (This option may be inadequate for children with dual citizenship, as foreign embassies and consulates are not obligated to honor passport restrictions if the request is made by an ex-spouse who is a non-national. In these cases, require the person at risk for abducting the child to request and obtain assurances of passport control from his or her own embassy before being granted unsupervised visitation with the child.)
- If there is a risk that the child will be taken from the U.S. to another nation, have the parties enter into a stipulation that neither of them will request travel documents for the child, with the understanding that a

copy of the stipulation, properly sealed, will be delivered to all the appropriate offices of the other nation in the U.S., Canada, and Mexico, with a cover letter stating that both parties wish that the stipulation be followed.

- Where there is a risk of abduction to a foreign nation, suggest that the parties petition a court in the foreign nation for an order that parallels the provisions of the U.S. court order and that can be enforced in the foreign nation.

Another way for the court to limit the harmful effects of parental abduction or flight is to include provisions in its custody or parenting time orders that facilitate enforcement by courts in other jurisdictions. Such provisions should comply with the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq., and the Parental Kidnapping Prevention Act ("PKPA"), 28 USC 1738A. In general, provisions that facilitate enforcement support the issuing court's authority to act in the case and include:*

*Goelman, et al, *supra*, §208. The UCCJEA and the PKPA are discussed in Sections 13.2-13.16.

*For sample provisions, see Goelman, et al, *supra*, §208.

- Clear statements of the statutory basis for the court's exercise of jurisdiction over the proceeding. These statements should refer to specific provisions of the UCCJEA and the PKPA.* See MCL 722.1201-722.1204 and 28 USC 1738A(c) for jurisdictional bases under these statutes. See also Sections 13.5 and 13.12.

- Proper identification of the parties to the order.

- Description of the circumstances surrounding service on and notice to the parties. See MCL 722.1106-722.1108 and 28 USC 1738A(e) regarding service and notice requirements under the UCCJEA and the PKPA.

- Identification of the parties present at the hearing and whether the parties were represented by counsel.

12.11 Resources for Locating Missing Children

The Federal Parent Locator Service ("FPLS") may be used to obtain and transmit information for the purposes of: 1) enforcing any federal or state law regarding the unlawful taking or restraint of a child; or 2) making or enforcing a child custody or visitation determination. 42 USC 653(a)(2)–(3).* For these purposes, 42 USC 663(c) specifies that FPLS information is accessible to "authorized persons," who are defined in 42 USC 663(d)(2) as:

*The FPLS is also used for purposes of establishing parentage and child support enforcement. See Section 11.4.

- Agents or attorneys of any state having the duty or authority to enforce a child custody or visitation determination.

- Any court with jurisdiction to make or enforce a child custody or visitation determination, or any agent of such court.

- Any agent or attorney of the United States or a state who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.

Information as to the most recent address and place of employment of a parent or child may be disclosed to authorized persons under 42 USC 663(c). For purposes of parental kidnapping or custody enforcement, this information is not accessible to parents of a child.*

*However, parents have access to FPLS information for purposes of support enforcement. See Section 11.4.

Because release of information from the FPLS is potentially dangerous for individuals who are in hiding from a domestic abuse or child abuse perpetrator, states are required to take measures to safeguard the confidentiality of identifying information in cases where: 1) a protective order with respect to a parent or child has been entered; or 2) the state has reason to believe that the release of the information may result in physical or emotional harm to the parent or the child. The same safeguards apply regardless of whether the information in the FPLS is sought for purposes of parental kidnapping or custody enforcement or for purposes child support enforcement. 42 USC 663(c). For more information about these safeguards, see Section 11.4.

Michigan law enforcement officers are required to report missing children to the Law Enforcement Information Network, the National Crime Information Center, and the missing children information clearinghouse in the Department of State Police. MCL 28.258–28.259.

Chapter 13: Custody Proceedings Involving Multiple Jurisdictions

13

13.1 Chapter Overview

The parties to relationships involving domestic violence frequently cross jurisdictional lines in their efforts to perpetrate or escape abuse. Difficult enforcement questions arise when these parties turn to the courts of multiple jurisdictions for assistance with their disputes over access to children. This chapter addresses domestic violence as a factor in resolving these questions. The discussion covers the following governing authorities:

- The Uniform Child-Custody Jurisdiction and Enforcement Act, MCL 722.1102 et seq.
- The federal Parental Kidnapping Prevention Act, 28 USC 1738A.
- The Hague Convention on the Civil Aspects of International Child Abduction, and its enabling legislation, 42 USC 11601-11611.

Criminal penalties for parental kidnapping are discussed in Sections 3.5 - 3.6. Full faith and credit for sister state and tribal civil protection orders is discussed in Section 8.13. See Section 10.4 for a discussion of confidentiality requirements.

13.2 Interstate Custody Proceedings — The Governing Law

Interstate enforcement of child-custody orders issued by U.S. courts has historically* been a source of difficulty due to uncertainty about the application of the Full Faith and Credit Clause of the U.S. Constitution, US Const, art IV, §1. Uncertainty has existed because custody decrees are generally subject to modification; accordingly, courts felt free to modify prior custody orders issued in other jurisdictions. As a result, parents who were dissatisfied by custody orders issued in one jurisdiction were frequently

*This historical discussion is taken, in part, from *In re Clausen*, 442 Mich 648, 661-665, 669 (1993).

motivated to transport their children to another jurisdiction in an effort to achieve a more favorable result in a different court.

To combat the problems caused by parental "forum shopping," the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Child Custody Jurisdiction Act ("UCCJA") in 1968. The UCCJA provided standards for determining whether a state could take jurisdiction of a child-custody dispute. It also determined when courts would enforce sister state custody decrees and set forth the circumstances under which modification of sister state decrees was permitted.

Because all states did not adopt identical versions or interpretations of the UCCJA, its enactment did not completely do away with uncertainties about interstate enforcement of domestic custody orders. In response to this continuing uncertainty, the U.S. Congress enacted the Parental Kidnapping Prevention Act ("PKPA"), 28 USC 1738A, in 1980. The PKPA requires each state to give full faith and credit to the child custody and visitation determinations of its sister states if these determinations are consistent with the Act's jurisdictional standards and notice requirements. *Thompson v Thompson*, 484 US 174, 182 (1998) (holding that the PKPA is addressed to state courts; it does not provide a private cause of action in federal court to determine the validity of conflicting custody decrees.)

The PKPA was intended to function with the UCCJA in a correlative and complementary fashion.* However, there were significant differences between the PKPA and the UCCJA. Although the PKPA jurisdictional standards are derived from the UCCJA, the PKPA differs from the UCCJA in that it prohibits concurrent jurisdiction and protects the exclusive jurisdiction of a state that issues a decree consistent with its provisions. Once a state exercises jurisdiction consistent with the PKPA, no other state may exercise concurrent jurisdiction over the custody dispute, even if the other state would have been empowered to take jurisdiction in the first instance. Furthermore, all states must accord full faith and credit to the first state's decree. *Thompson v Thompson, supra*, 484 US at 177.

*Blakesley, *Child Custody—Jurisdiction & Procedure*, 35 Emory L J 291, 339 (1986). See also Goelman, et al, Interstate Family Practice Guide: A Primer for Judges, §§202, 302 (ABA Center on Children & the Law, 1997).

The different standards in the UCCJA and PKPA resulted in cases where a court would have jurisdiction to decide a custody or visitation dispute under the UCCJA, but not under the PKPA. The UCCJA was widely criticized for its potential to create concurrent jurisdiction in multiple courts. To address this issue, the NCCUSL developed the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). Effective April 1, 2002, the Michigan Legislature repealed the UCCJA and adopted the UCCJEA. MCL 722.1406. The UCCJEA ameliorates the problem of concurrent jurisdiction by giving priority to a child's home state. This is consistent with the PKPA. In addition, the UCCJEA provides for exclusive continuing jurisdiction in the state that issued a custody determination in substantial conformity with the UCCJEA. Custody determinations that are consistent with the UCCJEA and PKPA are entitled to full faith and credit by other states.

The UCCJEA governs procedures for "child-custody proceedings" when one or both of a child's parents reside outside of Michigan. It also provides for enforcement and modification of out-of-state custody decrees, judgments, or orders. The UCCJEA contains provisions for filing and registering other states' custody decrees, judgments, and orders; communication between the courts of different states; petition requirements; notice and service of process; and gathering evidence safely from the parties.

13.3 Purposes of the UCCJEA

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted the model Uniform Child-Custody Jurisdiction and Enforcement Act in 1997 ("Model Act").* The Model Act contains a useful "Prefatory Note" and comments on each section. Although the comments are not binding upon courts, they may assist courts in interpreting and applying the UCCJEA. When a court takes action pursuant to the UCCJEA, the purposes of the UCCJEA should be kept in mind. The comment to Section 101 of the Model Act states that the UCCJEA should be interpreted according to its purposes, which are to:

> "(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> "(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> "(3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> "(4) Deter abductions of children;
>
> "(5) Avoid relitigation of custody decisions of other States in this State;
>
> "(6) Facilitate the enforcement of custody decrees of other States . . . ."

Michigan's UCCJEA echoes the Comment's emphasis on achieving uniformity among states that have enacted it. MCL 722.1401 states: "In applying and construing this uniform act, the court shall give consideration to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

*For a copy of the Model Act, see http://www.law.upenn.edu/bll/ulc/uccjea/final1997act.htm (last visited February 24, 2004).

13.4 Full Faith and Credit Under the UCCJEA

The UCCJEA requires Michigan courts to give full faith and credit to orders issued in other states if the orders are consistent with the UCCJEA's jurisdictional standards and notice requirements. MCL 722.1312 states:

> "A court of this state shall accord full faith and credit to an order issued by another state and consistent with this act that enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under article 2 [governing jurisdiction, MCL 722.1201, et seq.]."

The UCCJEA requires Michigan courts to give full faith and credit to the child-custody orders of foreign nations in the same manner as they are required to give full faith and credit to the orders of other states. MCL 722.1105 states:

> "(1) A court of this state shall treat a foreign country as a state of the United States for the purposes of applying articles 1 [miscellaneous provisions, MCL 722.1101, et seq.] and 2 [governing jurisdiction, MCL 722.1201, et seq.].
>
> "(2) Except as otherwise provided in subsection (3), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under article 3 [governing enforcement, MCL 722.1301 et seq.].
>
> "(3) A court of this state need not apply this act if the child-custody law of a foreign country violates fundamental principles of human rights."

Similarly, the UCCJEA requires Michigan courts to give full faith and credit to the child-custody orders of tribal courts. An interstate proceeding involving an Indian child is governed by the Indian Child Welfare Act.* However, Indian tribes of other states are treated as states for purposes of the UCCJEA. MCL 722.1104(1)–(2). An Indian tribe's custody determination must be recognized and enforced under the UCCJEA if it was made in substantial conformity with the UCCJEA. MCL 722.1104(3).

*For more information on the Indian Child Welfare Act, see *Child Protective Proceedings Benchbook — Third Edition* (MJI, 2006-April 2009), Chapter 20.

13.5 Jurisdiction Under the UCCJEA

In response to a petition in a child-custody or visitation dispute involving another jurisdiction, a Michigan court must first inquire whether it has jurisdiction under one of the bases provided in the UCCJEA. Upon request of a party, a question regarding the existence or exercise of jurisdiction under the

UCCJEA must be given priority by a court and handled expeditiously. MCL 722.1107.

The UCCJEA governs procedures in "child-custody proceedings" when one or both of a child's parents reside outside of Michigan. The UCCJEA defines "child-custody proceedings" as follows:

> "'Child-custody proceeding' means a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [MCL 722.1301 et seq.]."

The UCCJEA defines "child custody determination" as follows:

> "'Child-custody determination' means a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual." MCL 722.1102(c).

The second inquiry a Michigan court must make is whether a proceeding has been commenced in another state. A proceeding is "commenced" when the first pleading is filed. MCL 722.1102(e). Michigan must not exercise jurisdiction if a proceeding has been commenced in another state. MCL 722.1206(1)-(2) provide:

*See Section 13.5(E)(1) for information on determining the most convenient forum.

> "(1) Except as otherwise provided in [MCL 722.1204, governing emergency jurisdiction], a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court of another state having jurisdiction substantially in conformity with this act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum* under [MCL 722.1207].

*See Section 13.7 for a discussion of communication pursuant to the UCCJEA.

> "(2) Except as otherwise provided in [MCL 722.1204], before hearing a child-custody proceeding, a court of this state shall examine the court documents and other information supplied by the parties as required by [MCL 722.1209]. If the court determines that, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this act,

> the court of this state shall stay its proceeding and communicate with the court of the other state.* If the court of the state having jurisdiction substantially in accordance with this act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the child-custody proceeding."

Filing a child support complaint under the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 et seq., does not constitute initiation of a "child custody proceeding" under the UCCJEA. *Fisher v Belcher*, ___ Mich App ___, ___ (2005). In *Fisher*, the Court noted that the definition of "child custody proceeding" in MCL 722.1101(d) does not include support actions, and that the definition of "child custody determination" in MCL 722.1101(c) specifically precludes "order[s] relating to child support . . . ." Thus, because the support action filed in Michigan was not a "child custody proceeding," and because a paternity action and request for custody was filed in Missouri, the Michigan court properly dismissed the petition for jurisdiction under the UCCJEA pursuant to MCL 722.1206(2). *Fisher, supra*, at ___.

A. Pleading Requirements

MCL 722.1206(2) requires a Michigan court to examine the information supplied by the parties pursuant to MCL 722.1209 in order to determine if a child-custody proceeding has been commenced in a court of another state. MCL 722.1209(1) provides the pleading requirements as follows:

> "(1) Subject to the law of this state providing for confidentiality* of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or sworn statement must state all of the following:
>
> > (a) Whether the party has participated, as a party or witness or in another capacity, in another child-custody proceeding with the child and, if so, identify the court, the case number of the child-custody proceeding, and the date of the child-custody determination, if any.
> >
> > (b) Whether the party knows of a proceeding that could affect the current child-custody proceeding, including a proceeding for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, identify the court, the case number, and the nature of the proceeding.

*See Section 10.4 regarding confidentiality. See also MCL 722.1209(5), discussed below.

> (c) The name and address of each person that the party knows who is not a party to the child-custody proceeding and who has physical custody of the child or claims rights of legal custody or physical custody of, or parenting time with, the child."

If the information required by MCL 722.1209(1) is not provided, the court on its own motion or on the motion of a party, may stay the proceeding until the information is provided. MCL 722.1209(2).

If the pleading indicates that the party has participated in a child-custody proceeding involving the same child or the existence of another child-custody proceeding involving the same child, the court may require the petitioner to give additional information under oath. The court may also examine the parties under oath regarding the details of the information provided and any other matter pertinent to the court's jurisdiction or disposition. MCL 722.1209(3).

The parties have a continuing duty to keep the court informed of any proceedings in this or another state that could affect the current child-custody proceeding. MCL 722.1209(4).

If the health, safety, or liberty of a party or the child would be put at risk from the disclosure of identifying information, then the court may seal the information pursuant to MCL 722.1209(5), which states:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."

The UCCJEA provides that a Michigan court has jurisdiction to make an *initial* child-custody determination and jurisdiction to modify *existing* child-custody determination in certain circumstances.

B. Initial Orders

A Michigan court may exercise its jurisdiction to make an initial child-custody determination if it has one of the following:

- "home state" jurisdiction;
- "significant connection" jurisdiction (if no other state has "home state" jurisdiction, or if the child's "home state" has declined jurisdiction);

- "last resort" jurisdiction (if no other state has "home state" or "significant connection" jurisdiction, or if all courts having jurisdiction have declined jurisdiction); or
- "temporary emergency" jurisdiction.

These are the exclusive jurisdictional basis for a Michigan court to make a child-custody determination under the UCCJEA. MCL 722.1201(2)-(3). In addition, persons entitled must receive notice and an opportunity to be heard.*

*See Section 13.6.

1. "Home State" Jurisdiction

The UCCJEA gives priority to "home state" jurisdiction. If Michigan has "home state" jurisdiction under the UCCJEA, it may make an *initial* child-custody determination.* MCL 722.1201(1)(a) states:

*For information on jurisdiction for modification of existing orders, see Section 13.5(D).

> "(1) Except as otherwise provided in [MCL 722.1204, governing "temporary emergency" jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> > (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state."

MCL 722.1102(g) defines "home state" as follows:

> "(g) 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of a parent or person acting as a parent is included as part of the period."

"Person acting as a parent" means a person who meets both of the following criteria:

> "(*i*) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.
>
> "(*ii*) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state." MCL 722.1102(m)(*i*)–(*ii*).

2. "Significant Connection" Jurisdiction

*See Section 13.5(E)(1) for a discussion of "inconvenient forum."

If another state does not have "home state" jurisdiction, or if another state does have "home state" jurisdiction but declines to exercise that jurisdiction because Michigan is a more convenient forum,* Michigan may exercise jurisdiction to make an initial child custody determination under certain circumstances. MCL 722.1201(1)(b) states:

> "(1) Except as otherwise provided in [MCL 722.1204, governing "temporary emergency" jurisdiction], a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:
>
> . . .
>
> (b) A court of another state does not have jurisdiction under subdivision (a) ["home state" jurisdiction], or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under [MCL 722.1207 or MCL 722.1208], and the court finds both of the following:
>
> (*i*) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
>
> (*ii*) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships."

Jurisdiction based on a party's "significant connection" to a specific state cannot be had unless the court first establishes that "(1) there is no 'home state' as that term is used in MCL 722.1201(1)(a); or (2) 'a court of the home state of the child has declined to exercise jurisdiction . . . .' MCL 722.1201(1)(b)." *Nash v Salter*, ___ Mich App ___, ___ (2008). In *Nash*, Michigan did not have a significant connection to the matter for purposes of jurisdiction because the child's home state was Texas, and Texas had not declined jurisdiction. *Nash*, *supra* at ___.

The phrase "significant connection" is not defined in the UCCJEA. In deciding whether to exercise "significant connection" jurisdiction under the former UCCJA, Michigan courts looked to factors such as duration of the child's stay in a state, extended family members living in a state, school enrollment, and location of health care providers. See, e.g., *Farrell v Farrell*, 133 Mich App 502, 509 (1984), and *Dean v Dean*, 133 Mich App 220, 226 (1984).

For a detailed interpretation of "significant connection" by the Michigan Court of Appeals, see *White v Harrison-White*, ___ Mich App ___ (2008). In *White*, the Court concluded:

> "[T]he significant connection that permits exercise of exclusive, continuing jurisdiction under MCL 722.1202(1)(a) exists where one parent resides in the state, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in the state. Our interpretation of the phrase 'significant connection' comports with that of a majority of jurisdictions, the plain and ordinary meaning of the phrase, and the overarching purpose of the UCCJEA to prevent jurisdictional disputes by granting exclusive, continuing jurisdiction to the state that entered the initial custody decree, so long as the relationship between the child and the parent residing in the state does not become so attenuated that the requisite significant connection no longer exists." *White*, *supra* at ___.

3. "Last Resort" Jurisdiction

If all courts having either "home state" or "significant connection" jurisdiction of a proceeding have declined jurisdiction because Michigan is a more convenient forum, or if no other state has jurisdiction, a Michigan court may exercise its jurisdiction to make an initial child-custody determination. MCL 722.1201(c)–(d). Communication between the courts involved in a child-custody dispute is critical to making informed decisions about assuming "last resort" jurisdiction. See Section 13.7 for a discussion of the UCCJEA's communication requirements.

4. "Temporary Emergency" Jurisdiction

In applying the UCCJEA in cases where domestic violence is an issue, the provisions for emergency jurisdiction are of particular significance. A Michigan court may take "temporary emergency" jurisdiction even though it may not take "home state" or "significant connection" jurisdiction. Moreover, Michigan's duty to recognize and enforce the custody determination of another state does not take precedence over Michigan's authority to enter temporary emergency orders. See MCL 722.1206(1) and Model Act, Section 204, Comment. Michigan may obtain "temporary emergency" jurisdiction if a child is present in this state and is abandoned, or if a child, the child's sibling, or the child's parent "is subjected to or threatened with mistreatment or abuse." MCL 722.1204(1).

> **Note**: The UCCJEA defines an emergency in terms of threatened or actual harm to the child, the child's sibling, or the child's parent. Abuse of a parent is significant to a child's welfare. When children are exposed to adult abuse as observers, participants, or victims, they may suffer harm sufficient to invoke a court's protection under the UCCJEA's emergency provisions.

A Michigan court may issue an order to take a child into custody if it appears likely that a child will suffer imminent physical harm or will imminently be removed from the state. MCL 722.1310. If no other proceeding has been commenced or a custody determination made by either another state's court or another Michigan court having jurisdiction, a Michigan court's order made under the temporary jurisdiction provisions remains in effect until an order is obtained from a court of a state having "home state," "significant connection" or "last resort" jurisdiction. MCL 722.1204(2). If a child-custody proceeding has not been or is not commenced in a court of a state having "home state," "significant connection," or "last resort" jurisdiction, a child-custody determination made pursuant to "temporary emergency" jurisdiction becomes a final child-custody determination, if that is what the determination provides and this state becomes the home state of the child. *Id.*

If a proceeding has been commenced in or a custody determination has been made by another state's court, a Michigan court's order must specify a time period during which it will remain in effect. The time period must be adequate to allow a person to seek an order from the other state's court. MCL 722.1204(3). In such circumstances, the Michigan court must immediately communicate with a court in the other state in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." MCL 722.1204(4). For a discussion of the UCCJEA's requirements for communication between courts, see Section 13.7.

> **Note**: A PPO proceeding may often be the procedural vehicle for invoking "temporary emergency" jurisdiction under the UCCJEA because the UCCJEA authorizes the court to assume "temporary emergency" jurisdiction when the child, the child's parent, or the child's sibling has been subjected to or threatened with mistreatment or abuse. An order issued under "temporary emergency" jurisdiction is entitled to interstate enforcement and nonmodification under the UCCJEA only when the notice and hearing requirements of the UCCJEA are fulfilled. See Model Act, Section 204, Comment.

C. Exclusive Continuing Jurisdiction

With the exception of "temporary emergency" jurisdiction, once a Michigan court exercises jurisdiction under the UCCJEA to make an initial child-custody determination or to modify another state's determination, it retains jurisdiction until the Michigan court determines that either of the following has occurred:

> "(a) A court of this state determines that neither the child, nor the child and 1 parent, nor the child and a person acting as a parent* have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

*See Section 13.5(B)(1) for the definition of "person acting as a parent."

> "(b) A court of this state or a court of another state determines that neither the child, nor a parent of the child, nor a person acting as the child's parent presently resides in this state." MCL 722.1202(1)(a)–(b).

Thus, if a child, a parent, or person acting as a parent remains in Michigan, Michigan retains continuing jurisdiction until neither the child, the child and a parent, nor the child and a person acting as a parent have a significant connection with Michigan and there is no longer substantial evidence in Michigan concerning the child's care, protection, training, and personal relations. See Section 13.5(B)(2) on "significant connection" jurisdiction and Model Act, Section 202, Comment. "A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction." Model Act, Section 202, Comment.

If the child, the child's parents, and any person acting as the child's parent no longer reside in Michigan, Michigan loses its continuing jurisdiction. Either a Michigan court or a court of another state may make this determination. If a non-custodial parent returns to Michigan, its exclusive continuing jurisdiction is not re-established. *Id.*

> **Note**: "Residence" is not used in the same sense as the technical term "domicile." "The fact that [a Michigan court] still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from [Michigan]." Model Act, Section 202, Comment.

A Michigan court with exclusive, continuing jurisdiction may subsequently decline to exercise that jurisdiction if it determines that it is an inconvenient forum. MCL 722.1202(2). See Section 13.5(E)(1) for a discussion of inconvenient forum.

A Michigan court that has made a child-custody determination but that does not have exclusive continuing jurisdiction may modify that child-custody determination only if it has jurisdiction to make an *initial* child-custody determination. MCL 722.1202(3). See Section 13.5(B) for a discussion of jurisdiction to make an initial child-custody determination.

D. Modification of Another State's Existing Order

A Michigan court shall not modify another state's decree, judgment, or order unless the Michigan court has "home state" or "significant connection" jurisdiction, and either:

- the court of the other state determines that it no longer has exclusive continuing jurisdiction, or

- the court of the other state has determined that Michigan would be a more convenient forum, or
- the court of the other state or a Michigan court determines that neither the child, nor the child's parent, nor a person acting as a child's parent currently resides in the other state. MCL 722.1203(a)–(b).

Note: It is extremely important for a court to communicate with other courts to determine if another court still has jurisdiction or to determine which court is the most convenient forum. See Section 13.7 for information on communication between the courts pursuant to the UCCJEA.

If a proceeding to modify a child-custody determination is commenced in Michigan, the court must determine whether a proceeding to enforce the child-custody proceeding has been commenced in another state. MCL 722.1206(3). If the court determines that an enforcement proceeding has been commenced in another state, the court may do any of the following:

> "(a) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement.
>
> "(b) Enjoin the parties from continuing with the proceeding for enforcement.
>
> "(c) Proceed with the modification under conditions it considers appropriate." MCL 722.1206(3)(a)-(c).

For a comprehensive discussion of the factors involved in determining whether a court has authority to modify another court's child-custody order, see *Jamil v Jahan*, ___ Mich App ___ (2008) (where the original order was issued in Mississippi, Mississippi later relinquished jurisdiction to Virginia, and Virginia expressly retained jurisdiction, the Michigan trial court did not abuse its discretion when it declined to modify the foreign custody order).

E. Declining to Exercise Jurisdiction

A Michigan court with jurisdiction may decline to exercise its jurisdiction if the court determines any of the following:

- ♦ it is an inconvenient forum and a court of another state is a more appropriate forum;
- ♦ the child-custody determination is incidental to an action for divorce or another proceeding; or
- ♦ the petitioner has engaged in unjustifiable conduct.

1. Inconvenient Forum

A court may decline to exercise its jurisdiction under the UCCJEA if it finds that another state is a more convenient forum. MCL 722.1207(1). "The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or the request of another court." *Id.* To determine the appropriateness of a forum, a court must consider all relevant factors, including all of the following:

> "(a) *Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.*
>
> "(b) The length of time the child has resided outside this state.
>
> "(c) The distance between the court in this state and the court in the state that would assume jurisdiction.
>
> "(d) The parties' relative financial circumstances.
>
> "(e) An agreement by the parties as to which state should assume jurisdiction.
>
> "(f) The nature and location of the evidence required to resolve the pending litigation, including the child's testimony.
>
> "(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence." [Emphasis added.]

The Model Act, Section 207, Comment, notes the following:

> "Subparagraph [(a)] is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse."

The factors listed in MCL 722.1207(1) are not intended to be an exhaustive listing of the circumstances that a court may consider. The statute provides that a court "shall consider *all relevant factors*, including . . . . " [Emphasis added.] See *Stoneman v Drollinger*, 64 P3d 997 (2003) for a case illustrating the application of the statutory factors governing declination of jurisdiction for inconvenient forum. Although *Stoneman* is not binding precedent in Michigan, it discusses in great detail each of the factors as they relate to a situation where a parent and the children move to another state in order to escape from domestic violence perpetrated by the other parent. The *Stoneman*

court urged lower courts to give priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA.

Michigan courts are strongly urged to communicate with other state courts when determining which court has the most convenient forum. Model Act, Section 210, Comment. See Section 13.7 for information on the UCCJEA's requirements for judicial communication.

Unlike the UCCJA, the UCCJEA does not provide that the court should simply dismiss the case if it determines that it is an inconvenient forum. Instead, the UCCJEA provides that the court must stay the proceedings and order that a child-custody proceeding be promptly commenced in another state. The court may also impose other conditions it deems necessary. MCL 722.1207(3).

2. Child-Custody Determination Incidental to Another Action

*See the beginning of Section 13.5 for the definition of "child-custody determination."

A court may decline to exercise its jurisdiction under the UCCJEA if "a child-custody determination* is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding." MCL 722.1207(4).

3. Petitioner Engaged in Unjustifiable Conduct

A Michigan court *must* decline jurisdiction under the UCCJEA if the court finds that the petitioner has engaged in "unjustifiable conduct." MCL 722.1208(1) provides:

*See Section 13.5(B)(4) for more information.

> "(1) Except as otherwise provided in [MCL 722.1204, governing "temporary emergency" jurisdiction*] or by other law of this state, if a court of this state has jurisdiction under this act because a person invoking the court's jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless the court finds 1 or more of the following:
>
> *See Section 13.5(B)(1) for the definition of "persons acting as parents."
>
> > "(a) The parents and all persons acting as parents* have acquiesced in the exercise of jurisdiction.
> >
> > "(b) A court of the state otherwise having jurisdiction under [MCL 722.1201 to 722.1203] determines that this state is a more appropriate forum under [MCL 722.1207].
> >
> > "(c) No court of another state would have jurisdiction under [MCL 722.1201 to 722.1203]."

MCL 722.1201 to 722.1203 govern "home state," "significant connection," "last resort," and exclusive continuing jurisdiction.

"Unjustifiable conduct" is not defined in the UCCJEA. However, the Model Act, Section 208, Comment, provides the following guidance:

> "[T]here are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.
>
> "This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 202 has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section [is] inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law.
>
> "The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. *Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal.* Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section." [Emphasis added.]

See *In the Interest of SLP*, 123 SW3d 685 (Tex App, 2003), for a case illustrating "unjustifiable conduct." In *SLP*, the Texas Court of Appeals applied the provision of the Texas UCCJEA that requires the court to decline jurisdiction if the petitioner has engaged in "unjustifiable conduct." The Court

held that parental kidnapping, lying to the court, and violating numerous court orders constituted "unjustifiable conduct" and declined jurisdiction.

If the court declines to exercise its jurisdiction due to the petitioner's unjustifiable conduct, "the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under [MCL 722.1201 to 722.1203]." MCL 722.1208(2). The Model Act, Section 208, Comment, provides the following guidance:

> "Subsection (b) authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child."

If a court dismisses a petition or stays a proceeding because it declines to exercise jurisdiction based upon the petitioner's unjustifiable conduct, the court must charge the petitioner with the "necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom expenses and fees are sought establishes that the award would be clearly inappropriate." MCL 722.1208(3). However, the court may not assess fees, costs, or expenses against the state of Michigan unless authorized by law other than the UCCJEA. MCL 722.1208(3).

13.6 Required Notice Before Making a Child-Custody Determination Under the UCCJEA

Before a court makes a child-custody determination under the UCCJEA, a petitioner must provide notice to the proper persons. MCL 722.1205(1) states:

> "Before a child-custody determination is made under this act, notice and an opportunity to be heard in accordance with the standards of [MCL 722.1108] must be given to each person entitled to notice under the law of this state as in child-custody proceedings between residents of this state, a parent whose

> parental rights have not been previously terminated, and a person having physical custody of the child."

MCL 722.1108 contains the following requirements for serving notice on persons outside of Michigan:

> "(1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are not effective.
>
> "(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.
>
> "(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court."

If a person has received proper notice and an opportunity to be heard, he or she is bound by a custody determination made under the UCCJEA. MCL 722.1106 states:

> "A child-custody determination made by a court of this state that had jurisdiction under this act binds all persons who have been served in accordance with the laws of this state or notified in accordance with [MCL 722.1108] or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the child-custody determination is conclusive as to all decided issues of law and fact except to the extent the child-custody determination is modified."

A child-custody determination made without notice and an opportunity to be heard is not enforceable under the UCCJEA. MCL 722.1205(2). Therefore, ex parte orders granted by a court are not entitled to interstate enforcement or nonmodification under the UCCJEA. Model Act, Section 205, Comment.

A party responding to a child-custody proceeding under the UCCJEA may appear and participate in the proceeding without submitting to personal jurisdiction for another proceeding or purpose. MCL 722.1109(1).* A party is not subject to personal jurisdiction in Michigan solely by being present in the state for the purpose of participating in a proceeding under the UCCJEA. If the party is subject to personal jurisdiction in this state on a basis other than his or her physical presence, then that party may be served with process in Michigan. MCL 722.1109(2). These provisions provide limited immunity for persons to appear in a custody action without submitting to jurisdiction for a tort or support action.

*See MCL 722.1109(3) for information regarding limitations on this immunity.

The notice provisions in MCL 722.1108 and 722.1109 provide protection for a domestic violence survivor and her children who flee from the state that issued a custody order to a refuge state. If the abuser files an action in the home state to enforce the custody order, the survivor is more likely to receive actual notice of the action under MCL 722.1108 and avoid exposure to parental kidnapping charges. Dunford-Jackson, *The Uniform Child Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and Their Children*, 50 Juvenile and Family Court Journal 55 (1999), in Lemon, *Domestic Violence Law*, p 367 (West, 2001). If the abuser flees with the children to a new state in an attempt to coerce the victim to submit to his control, MCL 722.1109 allows the victim to engage in the custody contest in the court of the "new" state without submitting to that court's jurisdiction over the other aspects of the case. Lemon, *Domestic Violence Law*, p 368 (West, 2001).

13.7 Judicial Communication Under the UCCJEA

When the parties to a relationship involving domestic violence bring their child-custody dispute before multiple courts, communication between these courts is vital to prevent violence and manipulation of the judicial system. Recognizing that a judge needs complete information about the parties' situation in order to adequately meet their needs, the UCCJEA provides procedures for the communication and sharing of information between courts.

A Michigan court may communicate with a court in another state concerning any proceeding arising under the UCCJEA. MCL 722.1110(1).

A. When Communication is Required

Communication between a Michigan court and another state's court is *required* in the following circumstances:

- If a Michigan court has been asked to take "temporary emergency" jurisdiction* to make a child-custody determination and a child-custody proceeding has been commenced in or a child-custody determination has been made by another court having jurisdiction (pursuant to MCL 722.1201–722.1203). MCL 722.1204(4).

*See Section 13.5(B)(4) for more information on "temporary emergency" jurisdiction.

- If a Michigan court determines that at the time of the commencement of the proceedings, a child-custody proceeding has been commenced in a court in another state having jurisdiction pursuant to the UCCJEA. MCL 722.1206(2). (MCL 722.1209(1)(a) requires the pleading in a child-custody determination to include information regarding previous child-custody proceedings.*)

*See Section 13.5(A) for pleading requirements.

- If a Michigan court has been asked to enforce a child-custody determination and the Michigan court determines that a proceeding to modify the child-custody determination has been commenced in another state having jurisdiction to modify the child-custody determination.* MCL 722.1306.

*See Section 13.9 for information on the enforcement of a child-custody determination.

Although a Michigan court is required to communicate with other courts in these circumstances, Michigan courts may also communicate with courts in other circumstances. MCL 722.1110(1). The Model Act, Section 210, Comment, strongly urges courts to communicate with other state courts when determining which court has the most convenient forum.*

*See Section 13.5(E)(1) for more information on determining the most convenient forum.

B. Required Procedures

MCL 722.1110 governs the communications between courts of different states and the participation of the parties in those communications. MCL 722.1110(2) states:

> "The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, the parties shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made."

Except as noted below, a record must be made of communication between a Michigan court and a court of another state. MCL 722.1110(3). The court must also promptly inform the parties of the communication and grant the parties access to the record of the communication. *Id.*

Communication between courts regarding schedules, calendars, court records, or "similar matters" may occur without informing the parties. MCL 722.1110(3). The court is not required to make a record of these communications. MCL 722.1110(3).

For the purposes of MCL 722.1110, a "record" means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." MCL 722.1110(5). A record includes each of the following:

> "(a) Notes or transcripts of a court reporter who listened to a conference call between the courts.
>
> "(b) An electronic recording of a telephone call.
>
> "(c) A memorandum or electronic record of a communication between the courts.

> "(d) A memorandum or electronic record of a communication between the courts that a court makes after the communication." MCL 722.1110(5)(a)-(d).

C. Preservation of Records Under the UCCJEA

The UCCJEA requires the preservation of certain records. MCL 722.1112(4) states:

> "A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child-custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of these records."

13.8 Registration and Confirmation of a Child-Custody Order Under the UCCJEA

A child-custody determination issued by a court in another state may be registered in Michigan. MCL 722.1304(1). There is no fee for registering a child-custody determination in Michigan. MCR 3.214(D).

Registration of the order is not a prerequisite to enforcement. MCL 722.1303(2). However, as explained below, registration and confirmation of a child-custody order precludes certain defenses to enforcement of the order.

In order to register an out-of-state child-custody order all of the following must be sent to the circuit court in this state:

> "(a) A letter or other document requesting registration.
>
> "(b) Two copies, including 1 certified copy, of the child-custody determination sought to be registered, and a statement under penalty of perjury that, to the best of the knowledge and belief of the person seeking registration, the child-custody determination has not been modified.
>
> "(c) Except as otherwise provided in [MCL 722.1209*], the name and address of the person seeking registration and of each parent or person acting as a parent who has been awarded custody or parenting time in the child-custody determination sought to be registered." MCL 722.1304(1).

*MCL 722.1209 governs confidentiality and pleadings. See Section 10.4 for more information on confidentiality.

See Section 13.5(B)(1) for the definition of "person acting as a parent."

An out-of-state order may be registered with or without a simultaneous request for enforcement. MCL 722.1304(1). See Section 13.9 for information regarding the enforcement of an out-of-state child-custody order.

A. Notice of Requested Registration

Once the court receives the documents required by MCL 722.1304(1), the registering court must do both of the following:

> "(a) Cause the child-custody determination to be filed as a foreign judgment, together with 1 copy of any accompanying documents and information, regardless of form.
>
> "(b) Serve notice upon the persons named under [MCL 722.1304(1)(c)] and provide them with an opportunity to contest the registration in accordance with this section." MCL 722.1304(2).

The persons named in MCL 722.1304(1)(c) are the following:

- the person seeking registration of the order, and
- each parent or person acting as a parent* who has been awarded custody or parenting time in the child-custody determination.

*For the definition of "person acting as a parent," see Section 13.5(B)(1).

The notice required by MCL 722.1304(2)(b) must state all of the following:

> "(a) A registered child-custody determination is enforceable as of the date of the registration in the same manner as a child-custody determination issued by a court of this state.
>
> "(b) A hearing to contest the validity of the registered child-custody determination must be requested within 21 days after service of notice.
>
> "(c) Failure to contest the registration will result in confirmation of the child-custody determination and preclude further contest of that child-custody determination with respect to a matter that could have been asserted." MCL 722.1304(3).*

*See SCAO Form FOC 99.

B. Contesting Registration of an Out-of-State Child-Custody Determination

A person contesting the registration of an out-of-state child-custody determination must request a hearing within 21 days after receiving notice of the proposed registration. MCL 722.1304(4).

If a timely request for a hearing to contest the registration is not made, MCL 722.1304(5) provides that "the registration is confirmed as a matter of law,

*See SCAO Form FOC 99a.

and the person requesting registration and each person served must be notified of the confirmation."*

If a timely request for a hearing is made, then MCL 722.1304(4) states that "[a]t the hearing, the court must confirm the registered child-custody determination unless the person contesting the registration establishes one of the following:

*See Section 13.5.

"(a) The issuing court did not have jurisdiction under article 2.*

"(b) The child-custody determination sought to be registered has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under article 2.

*See Section 13.6.

"(c) The person contesting registration was entitled to notice in the proceedings before the court that issued the child-custody determination for which registration is sought, but notice of those proceedings was not given in accordance with the standards of section 108.*"

If the person contesting the registration does not establish one of the above reasons for not confirming the registration, then the court must confirm the child-custody registration. MCL 722.1304(6). Once the court confirms a child-custody determination, the child-custody determination may not be contested with respect to any matter that could have been asserted at the time of the registration. *Id.*

13.9 Enforcement Proceedings Under the UCCJEA

Unlike the UCCJA and the PKPA, the UCCJEA establishes a procedure for swift enforcement of a child-custody order. If the court that issued a custody order exercised its jurisdiction in compliance with the UCCJEA, the respondent was given notice and an opportunity to be heard before the order was issued, and the order has not been vacated, stayed, or modified, the petitioner is entitled to immediate custody of a child under the order.

Article 3 of Michigan's UCCJEA, MCL 722.1301–722.1316, may be invoked to enforce the following:

*See Section 13.5 for the definition of "child-custody" determination.

- A child-custody determination*; and

*See Sections 13.17-13.19 for more information on the Hague Convention.

- An order for the return of a child made under the Hague Convention* on the civil aspects of international child abduction. MCL 722.1302.

  Note: For an order to be enforceable under the UCCJEA, the issuing state must have exercised jurisdiction and provided notice

> and an opportunity to be heard in compliance with the UCCJEA. MCL 722.1303(1). However, there is no requirement that the issuing state have adopted the UCCJEA.

A Michigan court that does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing either of the following:

- A parenting time schedule made by a court of another state;
- The parenting time provisions of a child-custody determination of another state that does not provide for a specific parenting time schedule. MCL 722.1302(2).

If the court issues a temporary order pursuant to MCL 722.1302, the court must specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction pursuant to the UCCJEA. MCL 722.1302(3). A temporary order remains in effect until an order is obtained from the other court or the period expires. *Id.*

A. Petition for Enforcement of Child-Custody Determination Under the UCCJEA

A party must file a petition in order to enforce a child-custody determination. Pursuant to MCL 722.1307(2), the petition must state all of the following:

> "(a) Whether the court that issued the child-custody determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was.
>
> "(b) Whether the child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this act or federal law and, if so, identify the court, the case number of the proceeding, and the action taken.
>
> "(c) Whether a proceeding has been commenced that could affect the current proceeding, including a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption and, if so, identify the court and the case number and nature of the proceeding.
>
> "(d) The present physical address of the child and the respondent, if known.
>
> "(e) Whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought.

*See Section 13.8 for information regarding the registration of child-custody determinations.

> "(f) If the child-custody determination has been registered and confirmed under [MCL 722.1304*], the date and place of registration."

The petition must be verified and accompanied by the following:

- a certified copy of the child-custody determination sought to be enforced, and
- the order, or a certified copy of the order, confirming registration (if any). MCL 722.1307(1).

Application for Warrant to Take Physical Custody of a Child. The petitioner may also file a verified application for the issuance of a warrant to take physical custody of a child if the child is likely to suffer serious imminent physical harm or be removed from the state. MCL 722.1310(1).

Upon the testimony of the petitioner or other witness, if the court finds that the child is likely to suffer serious imminent physical harm or be imminently removed from this state, the court may issue a warrant to take physical custody of the child. MCL 722.1310(2). If the court issues a warrant, the court must hold a hearing on the petition on the next judicial day after the warrant is executed. *Id.*

A warrant issued under MCL 722.1310 must include the same statements that are required under MCL 722.1307(2) to be contained in a petition for enforcement of a child-custody determination. These statements are listed above. MCL 722.1310(2).

A warrant to take physical custody must also include, at least, the following:

> "(a) A recitation of the facts upon which a conclusion of serious imminent physical harm or imminent removal from the jurisdiction is based.
>
> "(b) An order directing law enforcement officers to take physical custody of the child immediately.
>
> "(c) Provisions for the placement of the child pending final relief." MCL 722.1310(3).

The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody. MCL 722.1310(4).

Law Enforcement Participation. MCL 710.1310 also provides:

> "(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or another witness that a less intrusive remedy is not effective, the court may authorize law enforcement

officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

"(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian."

B. Notice and Hearing

Upon the filing of a petition for enforcement of a child-custody determination, the court must issue "an order directing the respondent to appear with or without the child at a hearing and may enter *any order necessary to ensure the safety of the parties and the child*." MCL 722.1307(3).[Emphasis added.] The order directing the respondent to appear "must state the time and place of hearing and must advise the respondent that at the hearing the court will order the delivery of the child and the payment of fees, costs, and expenses under [MCL 722.1311], and may schedule an additional hearing to determine whether further relief is appropriate, unless the respondent appears and establishes either of the following:

"(a) The child-custody determination has not been registered and confirmed under [MCL 722.1304*] and 1 or more of the following:

*See Section 13.8.

(*i*) The issuing court did not have jurisdiction under [MCL 722.1201–722.1210].*

*See Section 13.5 for information regarding jurisdiction under MCL 722.1201 et seq.

(*ii*) The child-custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under [MCL 722.1201–722.1210] or federal law.

(*iii*) The respondent was entitled to notice, but notice was not given in accordance with the standards of [MCL 722.1108*] in the proceedings before the court that issued the order for which enforcement is sought.

*See Section 13.6 for information on notice pursuant to MCL 722.1108.

"(b) The child-custody determination for which enforcement is sought was registered and confirmed under [MCL 722.1304], but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under [MCL 722.1201–722.1210] or federal law."

If the order has been registered and confirmed,* the only defense that a respondent may raise is that the order has been subsequently vacated, stayed, or modified by a court having proper jurisdiction. MCL 722.1304(6).

*See Section 13.8.

*See Sections 13.17-13.19 for information on the Hague Convention.

The petition and order must be served "by a method authorized by the law of this state" upon the respondent and any person who has physical custody of the child. MCL 722.1308. MCL 722.1301 defines "respondent" as "a person against whom a proceeding has been commenced for enforcement of a child-custody determination or enforcement of an order for the return of a child under the Hague Convention on the civil aspects of international child abduction.*"

MCR 3.214(A) provides that actions under the UCCJEA are governed by the rules applicable to other civil actions, except as otherwise provided by the UCCJEA and MCR 3.214. MCR 2.105 governs process and manner of service in civil actions and, in relevant part, states:

> "(A) Individuals. Process may be served on a resident or nonresident individual by
>
> > "(1) delivering a summons and a copy of the complaint to the defendant personally; or
> >
> > "(2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).
>
> . . .
>
> "(I) Discretion of the Court.
>
> > "(1) On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.
> >
> > "(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.
> >
> > "(3) Service of process may not be made under this subrule before entry of the court's order permitting it."

The court must hold the hearing on the next judicial day after service of the order, unless that date is "impossible." If that date is "impossible," then the court must hold the hearing on the first judicial day possible. The court may extend the date of the hearing at the request of the petitioner. MCL 722.1307(3).

At the hearing, if a party is called to testify but refuses to answer because the testimony may be self-incriminating, the court may draw an adverse inference from the refusal. MCL 722.1309(3).

The spousal privilege, protecting communication between spouses, can not be used at an enforcement proceeding under the UCCJEA. Likewise, a defense of immunity based on the relationship of husband and wife or parent and child cannot be invoked in an enforcement proceeding under the UCCJEA. MCL 722.1309(4). For more information on gathering evidence under the UCCJEA, see Section 13.10.

If the court finds the petitioner is entitled to custody, then the court must order the return of the child to the petitioner. MCL 722.1309(1). The court must also:

> ". . . award the fees, costs, and expenses authorized under [MCL 722.1311] and may grant additional relief, including a request for the assistance of law enforcement officials, and schedule a further hearing to determine whether additional relief is appropriate."

See Section 13.11 for information on MCL 722.1311 and the assessment of fees and costs pursuant to the UCCJEA.

C. Appeals of Final Orders in Enforcement Proceedings

An appeal of a final order issued in an enforcement proceeding under the UCCJEA is subject to expedited appellate procedures. MCL 722.1313 states:

> "An appeal may be taken from a final order in a proceeding under this article [article 3, governing enforcement procedures] in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 204,* the enforcing court may not stay an order enforcing a child-custody determination pending appeal."

*See Section 13.5(B)(4) for information on "temporary emergency" jurisdiction.

13.10 Gathering Evidence Safely From the Parties Under the UCCJEA

In interstate cases involving domestic abuse, the logistical problems with gathering evidence are exacerbated by the potential for further violence and the possibility that the abusive party may manipulate the proceedings as a

tactic for asserting control. To decrease the risk of violence, courts can utilize procedures under the UCCJEA that permit the taking of evidence while the parties are separated. Where the parties appear at a hearing, a court may enter orders to ensure their safety. To deter abusive manipulation of the proceedings, courts can assess certain costs of interstate litigation against one of the parties where justice requires.

A. Judicial Cooperation in Evidence Gathering

The following procedures can be used to gather evidence from another state:

- In addition to other procedures available to a party, testimony of witnesses may be taken by deposition or other means allowable in this state for testimony taken in another state. MCL 722.1111(1).

- One court may request another to assist with evidence-gathering in a variety of ways: holding hearings to receive evidence; ordering a party to produce or give evidence; ordering an evaluation with respect to custody of the child involved; and ordering a party or person having physical custody of the child to appear in the proceeding with or without the child. The assisting court may then forward certified copies of hearing transcripts, evidence, or evaluations prepared in compliance with the request. MCL 722.1112(1)(a)–(e).

The court may order testimony on its own motion and may prescribe the manner and terms upon which the testimony is taken. MCL 722.1111(1). A Michigan court may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means. MCL 722.1111(2). A Michigan court must cooperate with courts of other states in designating an appropriate location for a deposition or testimony. *Id.* For more information on communication between courts, see Section 13.7.

MCL 722.1111(3) provides:

> "Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission."

The court may assess the travel and other "necessary and reasonable expenses" incurred under MCL 722.1112(1) or (2) against the parties according to Michigan law. MCL 722.1112(3). See Section 13.11 for more information on assessing costs.

B. Ensuring the Safety of Parties Ordered to Appear at a Hearing

A Michigan court may enter any orders necessary "to ensure the safety of the child or of a person ordered to appear. . . ." MCL 722.1210(3). The court has the authority to order a party to personally appear at a child-custody proceeding with or without the child. MCL 722.1210(1)-(2).

If the party whose presence is ordered by the court lives outside of Michigan, the court must order that notice be provided to that person in accordance with MCL 722.1108* and must provide that failure to appear may result in a decision adverse to that party. MCL 722.1210(2). If the court orders an out-of-state party to appear before the court, the court may require another party to pay the "reasonable and necessary travel and other expenses of the party directed" to appear. MCL 722.1210(4).

*See Section 13.6 for information on notice pursuant to MCL 722.1108.

13.11 Assessing Costs Under the UCCJEA

To prevent abusive parties from manipulating the proceedings, courts can assess certain costs of interstate litigation against them:

- If a court declines to exercise jurisdiction because the person invoking the court's jurisdiction has engaged in unjustifiable conduct,* the court shall order that party to pay the "necessary and reasonable expenses including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom expenses and fees are sought establishes that the award would be clearly inappropriate." MCL 722.1208(3).

  Note: The court may not assess fees, costs, or expenses against the state of Michigan unless authorized by law other than the UCCJEA. MCL 722.1208(3).

*See Section 13.5(E)(3) for information on "unjustifiable conduct."

- The court shall award the prevailing party,* including a state, the necessary and reasonable expenses incurred by or on behalf of the party including costs, communication expenses, attorney fees, investigative fees, witness expenses, travel expenses, and child care expenses during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate. MCL 722.1311(1).

  Note: MCL 722.1311(2) provides that the "court shall not assess fees, costs, or expenses against a state except as otherwise provided by law other than this act."

*"Prevailing party" should be defined according to state law. See Model Act, Section 312, Comment, and MCR 2.625(B).

MCL 722.1316 states:

> "If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or attorney general and law enforcement officers . . . ."

13.12 Jurisdiction Under the PKPA

In 1980, the U.S. Congress enacted the PKPA. The PKPA was adopted to fill gaps in the law left by the UCCJA and to afford full faith and credit to the orders of all states, including those that did not adopt the UCCJA. Further, the PKPA was enacted to prevent jurisdictional conflict and competition over child custody and to deter parents from abducting children for the purpose of obtaining a custody award in a different jurisdiction. *Cunningham v Cunningham*, 719 SW2d 224, 227 (Tex App, 1986) and *Peterson v Peterson*, 464 A2d 202, 204 (Me, 1983). The UCCJEA was developed after the PKPA to address legal issues that still arose concerning the UCCJA. The UCCJEA and the PKPA are now substantially consistent with regard to jurisdiction and notice. Thus, if an order is entitled to full faith and credit under the UCCJEA, it is entitled to full faith and credit under the PKPA. Because of this, only significant differences between the two acts are noted in this section. More importantly, the PKPA preempts the UCCJEA if they conflict. On federal preemption, see *People v Hegedus*, 432 Mich 598, 620-622 (1989). A discussion of the federal preemption doctrine is outside of the scope of this benchbook.

The PKPA requires Michigan courts to give full faith and credit to sister state custody and visitation determinations that meet the statute's notice and jurisdictional standards:

> "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in . . . this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 USC 1738A(a).

"Custody determinations" are defined as "a judgment, decree, or other order of a court providing for the custody of a child, and include[] permanent and temporary orders, and initial orders and modifications." 28 USC 1738A(b)(3). A "visitation determination" is "a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications." 28 USC 1738A(b)(9).

> **Note:** Although Indian tribes are not mentioned in the definition of "state" that appears in the PKPA at 28 USC 1738A(b)(8), a federal appeals court has held that Indian tribes are subject to its provisions. *In re Larch* 872 F2d 66, 68 (CA 4, 1989). This construction is consistent with 28 USC 1738B, which specifically applies to Indian tribes and provides for full faith and credit to child support orders made consistently with its provisions.

A. "Home State" Jurisdiction

The PKPA provides for "home state" jurisdiction as follows:

> "[S]uch State (*i*) is the home State of the child on the date of the commencement of the proceeding, or (*ii*) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State . . . ." 28 USC 1738A(c)(2)(A).

A "contestant" is "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 USC 1738A(b)(2).

The "home state" is defined in as follows:

> "'[H]ome State' means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period." 28 USC 1738A(b)(4).

A "person acting as parent" means "a person, other than a parent, who meets both of the following criteria:

> "(*i*) Has physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding.
>
> "(*ii*) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state." MCL 722.1102(m).

B. "Significant Connection" Jurisdiction

The PKPA provides for "significant connection" jurisdiction where:

> "(*i*) it appears that no other State would have ["home state" jurisdiction], and (*ii*) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection,

> training, and personal relationships. . . .” 28 USC 1738A(c)(2)(B).

A “contestant” is “a person, including a parent or grandparent, who claims a right to custody or visitation of a child.” 28 USC 1738A(b)(2).

*For the definition of a person “acting as a parent” see Section 13.12(A).

“Significant Connection” jurisdiction under the PKPA differs from “significant connection” jurisdiction under the UCCJEA in two significant ways. First, the PKPA provides that “at least one contestant” has a significant connection with the state. The definition of a contestant includes a parent or a grandparent who claims a right to custody or visitation. The UCCJEA requires that a child and the child’s parents, parent, or person acting as a parent have a significant connection to the state. The UCCJEA’s definition does not include a grandparent, unless that grandparent is “acting as a parent.”*

Second, the PKPA requires a court to consider whether it would be in the best interest of the child to assume jurisdiction. The UCCJEA does not require the court to determine the best interest of the child. MCL 722.1201(1)(b). For more information on “significant connection” jurisdiction pursuant to the UCCJEA, see Section 13.5(B)(2).

C. “Last Resort” Jurisdiction

The PKPA provides for “last resort” jurisdiction where:

> “(*i*) it appears that no other State would have [home state, significant connection, emergency, or continuing jurisdiction*], or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (*ii*) it is in the best interest of the child that such court assume jurisdiction.” 28 USC 1738A(c)(2)(D).

*Continuing jurisdiction arises after a court has made an initial child custody or visitation determination consistently with the PKPA. See Section 13.12(E).

To assert “last resort” jurisdiction under the PKPA, a Michigan court must make the following determinations:

- No other court has “home state,” “significant connection,” “emergency”, or continuing jurisdiction; *or*
- A court with “home state,” “significant connection,” “emergency,” or continuing jurisdiction has declined to exercise it because Michigan is a more appropriate forum;* *and*
- It is in the best interest of the child for a Michigan court to assume jurisdiction.

*Grounds for declining to exercise jurisdiction are discussed in Section 13.5(E).

Note: Although the requirements for “last resort” jurisdiction under the PKPA and the UCCJEA are substantially similar, the PKPA requires the court to determine if it is in the best interest of the child for a Michigan court to assume jurisdiction. The

UCCJEA does not contain a best interest requirement. See Section 13.5(B)(3) for more information on "last resort" jurisdiction pursuant to the UCCJEA.

D. "Emergency" Jurisdiction

In applying the PKPA jurisdictional standards in cases where domestic violence is at issue, the provisions for emergency jurisdiction in 28 USC 1738A(c)(2)(C) are of particular significance. The PKPA provides for "emergency" jurisdiction as follows:

> "[T]he child is physically present in such State and (*i*) the child has been abandoned, or (*ii*) it is necessary in an emergency to protect the child *because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse. . . .*" 28 USC 1738A(c)(2)(C). [Emphasis added.]

In *Bull v Bull*, 109 Mich App 328, 342-343 (1981), overruled on other grounds 442 Mich 648, 675 (1993), the Court of Appeals held that a Michigan circuit court had emergency jurisdiction where a party alleged that her former spouse had abused her and threatened to take the child out of the country.

E. Continuing Jurisdiction

The PKPA contains the following provision for continuing jurisdiction:

> "The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as [such court continues to have jurisdiction under the laws of such State] and such State remains the residence of the child or of any contestant."* 28 USC 1738A(d).

*A "contestant" is "a person, including a parent or grandparent, who claims a right to custody or visitation of a child." 28 USC 1738A(b)(2).

Under the PKPA's continuing jurisdiction provision, the initial court's jurisdiction continues to the exclusion of all others as long as:

- The initial court has jurisdiction under its own laws;
- The initial determination was made consistently with the notice and jurisdictional requirements of the PKPA; and
- The initial court's state remains the residence of the child or of any contestant.

For a case in which the Michigan court's jurisdiction over a child-custody dispute was excluded by another state's continuing jurisdiction under the PKPA, see *In re Clausen*, 442 Mich 648, 671-674 (1993).

*For the definition of person "acting as a parent" see Section 13.5(B)(1).

Note: Continuing jurisdiction under the PKPA differs from continuing jurisdiction under the UCCJEA. The PKPA provides that jurisdiction continues as long as the residence of the child or "any contestant" remains in the state. The definition of a contestant includes a parent or a grandparent who claims a right to custody or visitation. Continuing jurisdiction under the UCCJEA requires a child and a parent or person acting as a parent to continue to reside in the state. The UCCJEA's definition does not include a grandparent, unless that grandparent is "acting as a parent."* For more information on continuing jurisdiction under the UCCJEA see Section 13.5(C).

F. Modification of Another Court's Order When It No Longer Has Jurisdiction or Declines to Exercise Jurisdiction

Under the PKPA, modification of another court's custody decree or judgment will not be given full faith and credit, except in cases meeting the following prerequisites:

> "(1) [The modifying court] has jurisdiction to make such a child custody determination; and
>
> "(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 USC 1738A(f).

Similarly, modification of another court's visitation determination will not be given full faith and credit unless "the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination." 28 USC 1738A(h).

13.13 Notice Under the PKPA

Pursuant to 28 USC 1738A(e), before a court may make a child custody or visitation determination, "reasonable notice and an opportunity to be heard" must be provided to all of the following:

- the contestants,
- any parent whose parental rights have not been previously terminated, and
- any person who has physical custody of a child.

13.14 Simultaneous Proceedings Under the PKPA

In some cases, a litigant may file a custody or parenting time petition in Michigan after his or her opponent has filed a similar petition in another jurisdiction, but before the other court has made its determination. If the Michigan court exercises jurisdiction in this situation, the PKPA will not accord full faith and credit to the Michigan court's orders:

> "A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination." 28 USC 1738A(g).

See Section 13.5(D) for a discussion of simultaneous proceedings under the UCCJEA when one court has a petition to modify a child-custody determination and another court has a petition to enforce a child-custody determination.

13.15 State and Federal Authorities Governing International Cases

When a child is brought into the United States from another country, two civil remedies are available in Michigan courts to secure access to the child:

- **The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq.**

  The UCCJEA provides for Michigan courts to enforce foreign nation custody decrees that meet the Act's jurisdictional and notice standards. It applies regardless of whether the foreign nation has adopted the UCCJEA.

- **The Hague Convention on the Civil Aspects of International Child Abduction, 42 USC 11601-11611.**

  Under the Hague Convention, a party in a foreign nation may seek the return of a child under 16 who has been wrongfully taken from the nation of his or her habitual residence and brought to the United States. The Convention also provides for the enforcement of visitation rights to children in the United States. The Michigan courts have concurrent jurisdiction with the federal courts to hear actions under the Convention. Relief is available in cases where both the nation of the child's habitual residence and the nation where the child is located have acceded to the Convention. In such cases, the Convention, as implemented by the federal statutes, preempts the UCCJEA.

The following sections provide an overview of the above statutes, with particular attention to domestic violence as a factor in affording relief.

Note: For federal criminal penalties for international child abduction, see 18 USC 1073 and 1204. See Section 3.5 on Michigan's parental kidnapping statute. Section 12.10 addresses measures courts can take in cases where there is a risk of parental abduction or flight.

13.16 Applying the UCCJEA to International Cases

Under the UCCJEA, a Michigan court must treat a foreign country in the same manner it would treat another state for the purposes of the general and jurisdictional provisions of the UCCJEA contained in MCL 722.1101–722.1210. MCL 722.1105(1). A child-custody determination made in a foreign country must be recognized and enforced under MCL 722.1301 et seq. if the foreign child-custody determination was made "under factual circumstance in substantial conformity with the jurisdictional standards" of the UCCJEA. MCL 722.1105(2). A Michigan court does not have to apply the UCCJEA if the child-custody law of the foreign country violates fundamental principles of human rights. MCL 722.1105(3).

In cases where both the nation of the child's habitual residence and the nation where the child is located have acceded to the Hague Convention on the Civil Aspects of International Child Abduction, the Convention, as implemented by 42 USC 11601–11611, may preempt the UCCJEA.* A general discussion of the federal preemption doctrine appears in *People v Hegedus*, 432 Mich 598 (1989). See Sections 13.17-13.19 for more information on the Hague Convention.

*Rigler, *The Epidemic of Parental Child-Snatching: An Overview*, http://travel.state.gov/je_prevention.html, p 7 (visited January 29, 2004).

13.17 Applying the Hague Convention to International Cases

The United States is one of more than 70 nations that have ratified or acceded to the Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). The enabling legislation for the Convention (42 USC 11601-11611) states that its purpose is two-fold: 1) to "establish legal rights and procedures for the prompt return of children who have been wrongfully removed or retained"; and 2) to "secur[e] the exercise of visitation rights." 42 USC 11601(a)(4). See also Convention, Article 1.*

*For the full text of the Convention, see www.hcch.net, or http://travel/state.gov (visited January 29, 2004), or Department of State, *Hague International Child Abduction Convention: Text & Legal Analysis,* 51 Fed Reg 10494 (March 26, 1986) (hereinafter "State Department Analysis").

To effectuate its purpose, the Convention requires that signatories act promptly to restore the status quo that existed prior to the child's removal from the country in which he or she habitually resides. The Convention is *not* a vehicle for deciding child access questions. Instead, its main purpose is to ensure that abducted children are returned to the country of habitual residence. It presumes that such disputes are properly resolved in the country where the child habitually resides. *Tyszka v Tyszka*, 200 Mich App 231, 235 (1993); *Friedrich v Friedrich*, 78 F3d 1060, 1063-1064 (CA 6, 1996); *Currier v Currier*, 845 F Supp 916, 920 (D NH, 1994).

The Convention provides an administrative and a judicial avenue for parties seeking relief. These two remedies are not mutually exclusive; the aggrieved party may pursue one or both of them:

- Administrative assistance in securing a child's return can be obtained by making an application to the designated Central Authority in the nation where the child habitually resides, or in any other nation that is a party to the Convention. Convention, Article 8. The United States has designated the State Department's Office of Children's Issues in the Bureau of Consular Affairs as its Central Authority. 22 CFR 94.2. The address is: U.S. Central Authority, Office of Children's Issues, SA-29, 2201 C. Street NW, U.S. Department of State, Washington, D.C., 20520. The telephone number is 1-800-407-4747. The website is www.travel.state.gov/officeofchildissues.html (last visited January 29, 2004).

- A party may also initiate judicial proceedings in the nation where the child is located. Convention, Articles 12, 29. In the United States, federal and state courts have concurrent jurisdiction over Hague Convention cases. 42 USC 11603(a). A U.S. state or federal court must give full faith and credit to the judgment of any other U.S. state or federal court entered in an action brought under the Convention. 42 USC 11603(g). One federal appeals court has held that decisions of the courts of *foreign nations* under the Convention are not entitled to full faith and credit; however, they are entitled to deference under principles of international comity. *Diorinou v Mezitis*, 237 F3d 133, 142-143 (CA 2, 2001).

In addition to the foregoing remedies, the aggrieved party may pursue other available remedies outside the Convention; its provisions are not exclusive. 42 USC 11603(h).

A party initiating judicial proceedings under the Convention may request either: 1) the return of wrongfully taken children; or 2) "arrangements for organizing or securing the effective exercise of rights of access to a child." 42 USC 11603(b); Convention, Article 1. "Rights of access" include "visitation rights" and "the right to take a child for a limited period of time to a place other than the child's habitual residence." 42 USC 11602(7); Convention, Article 5b.

The remedy to protect a party's "rights of access" is less well-defined than the remedy to secure a child's return. Article 21 of the Convention provides that signatory nations are "bound . . . to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject." Moreover, the authorities in the signatory nations are to "take steps to remove, as far as possible, all obstacles to the exercise of such rights." In *Teijeiro Fernandez v Yeager*, 121 F Supp 2d 1118 (WD Mich, 2000), a federal district court held that federal courts do not have jurisdiction to enforce a petitioner's rights of access under the Convention: "Given the absence of any specific remedy for rights of access [under the Convention], this Court believes that matters relating to access are best left to the state courts, which are more experienced in resolving these issues." 121 F Supp 2d at 1126.

> **Note:** To the extent that it is not preempted by the federal enabling legislation for the Convention, the UCCJEA may provide more specific remedies for parties seeking to enforce their "rights of access" to children in the Michigan courts.

The rest of this discussion will be devoted to the substantive requirements for judicial proceedings to obtain the return of a child under the Convention. Michigan courts may encounter such proceedings where a parent in a foreign nation brings an action under the Convention alleging that a child was wrongfully taken to or retained in Michigan. A foreign parent might also invoke the Convention's protections in response to a custody action brought in Michigan by the parent who brought the child to this state.

For more information on hearing procedures under the Convention, see Goelman, et al, *Interstate Family Practice Guide: A Primer for Judges* (ABA Center on Children & the Law, 1997), §205. For more information about administrative remedies, see Convention, Article 8; http://travel.state.gov (visited January 29, 2004); and State Department Analysis, 51 Fed Reg 10494. Additional cases construing the Convention and its enabling legislation are digested in Rigler, *The Epidemic of Parental Child-Snatching: An Overview*, http://travel.state.gov/je_prevention. html, p 7 (visited January 29, 2004). A booklet for parents on international child abduction and resource materials for judges also appear at this web site.

A. Nations Where the Convention Applies

Under Article 4, the Convention applies in cases where both the country of the child's habitual residence and the country to which the child was taken have acceded to the Convention. The following chart lists the nations that have either ratified or acceded to the Convention. For a current listing of nations, see http://travel.state.gov/hague_list.html (last visited February 2, 2004).

Nations Acceding to the Hague Convention on the Civil Aspects of International Child Abduction

Argentina	France	Poland
Australia	Germany	Portugal
Austria	Greece	Romania
Bahamas	Honduras	Slovak Republic
Belgium	Hungary	Slovenia
Belize	Iceland	South Africa
Bosnia & Herzegovina	Ireland	Spain
Brazil	Israel	St. Kitts and Nevis
Burkino Faso	Italy	Sweden
Canada	Luxembourg	Switzerland
Chile	Former Yugoslav Republic of Macedonia	Turkey
China	Malta	United Kingdom
-Hong Kong Special Reg	Mauritius	-Bermuda
- Macau	Mexico	-Cayman Islands
Columbia	Monaco	-Falkland ISlands
Croatia	Netherlands	-Isle of Man
Czech Republic	New Zealand	-Monsserrat
Cyprus	Norway	United States
Denmark	Panama	Venezuela
Ecuador		Federal Republic of Yugoslavia
Finland		Zimbabwe

B. Children Who Are Subject to the Convention; Effect of Existing Custody Decrees

Relief under the Convention is only available until the child in question reaches age 16, regardless of whether the child was wrongfully taken or retained at an earlier age. Children who fall within the scope of the Convention are subject to its protections regardless of whether a court has issued a custody award concerning them. 42 USC 11603(f)(2).

If there is a custody decree, the Convention applies even if the award was made or is entitled to recognition in the nation to which the child was taken. Convention, Article 17.* Under Article 17, a court may take into account the reasons underlying an existing custody decree when it applies the Convention. However, a court cannot refuse to return a child solely on the basis of an order awarding custody to the alleged wrongdoer entered in the state to which the child was taken. Article 17 is designed to ensure that a person who wrongfully removes or retains a child will not escape the Convention's return provisions by obtaining a custody order in the country of new residence.

*State Department Analysis, *supra*.

C. The Petitioner's Burden of Proof in Actions to Secure the Return of a Child

Petitioners seeking return of a child under the Hague Convention must establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." 42 USC 11603(e)(1)(A). Once a petitioner makes this showing, the burden shifts to the respondent to establish that one of several exceptions to return (discussed below) applies. If the respondent fails to establish the existence of an exception, the child must be returned to his or her place of habitual residence. Convention, Article 12. If an exception is established, return is discretionary. *Krishna v Krishna*, 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997). The court in *Krishna*, provided the following regarding the limited discretion of the court:

> "'The affirmative defenses . . . offer an opportunity, in extraordinary cases, for a court in the country of flight to consider the practical realities of the situation. However, it is the clear import of the [ICARA] that in most cases the duty of that court, when the niceties of the convention are met, is to return the child to the country of habitual residence for resolution of the custody dispute under the laws of that country.' *Friedrich* [*v Friedrich],* 983 F2d 1396 at 1403."

1. "Wrongful Removal"

"Wrongfulness" is defined as follows in Article 3 of the Convention:

> "The removal or the retention of a child is to be considered wrongful where —
>
> > "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> >
> > "(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> "The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Under Article 5a, "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Questions about a person's custody rights are governed by the

law of the child's habitual residence. *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000) (Mexican law governed custody rights of unmarried father), and *Friedrich v Friedrich*, 983 F2d 1396, 1402 (CA 6, 1993).

In *Harkness v Harkness*, 227 Mich App 581, 587 (1998), the Michigan Court of Appeals required a mother seeking her children's return to Germany to establish the following three elements set forth in Article 3 of the Convention:

- Germany was the children's "habitual residence" prior to the children relocating to the United States;
- The mother had either sole or joint rights of custody concerning the children under German law; and
- At the time the children were retained in the United States, the mother was exercising her custodial rights.

See also *Teijeiro Fernandez v Yeager*, 121 F Supp 2d 1118, 1124 (WD Mich, 2000), finding that no material issue of fact existed with respect to a petitioner's claim that his children had been wrongfully removed from Spain, where the record demonstrated that he only had a right of access to them.

2. "Habitual Residence"

The question of "habitual residence" is among the most-litigated issues under the Convention. The Convention does not define a child's "habitual residence." In *Friedrich v Friedrich*, 983 F2d 1396, 1401 (CA 6, 1993), the U.S. Court of Appeals for the Sixth Circuit noted that "habitual residence" is a flexible concept that bears no real distinction from "ordinary residence." The Sixth Circuit cited the following language from *In re Bates*, No CA 122.89, High Court of Justice, Family Div'n Ct Royal Court of Justice, United Kingdom (1989):

> "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." 983 F2d at 1401.

In determining a child's "habitual residence" for purposes of the Hague Convention, the court in *Friedrich, supra*, 983 F2d at 1401-1402, set forth the following guidelines:

- A child's citizenship is not determinative of habitual residence.
- A person can have only one habitual residence.

- "On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward."

- "[H]abitual residence can be altered only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal."

See also *Harkness v Harkness, supra,* 227 Mich App at 596 ("Habitual residence should not simply be equated with the last place that the child lived"), and *Feder v Evans-Feder,* 63 F3d 217, 224 (CA 3, 1995) ("A child's habitual residence is the place where he or she had been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective . . . . [The court's determination] must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.")

If the child's habitual residence in another country was established because the petitioner fled the United States to avoid criminal penalties, the petitioner may be disentitled to access to U.S. courts. See *Degen v United States,* 517 US 820 (1996), and *Prevot v Prevot,* 59 F3d 556 (CA 6, 1995) (convicted felon who fled to France was disentitled to seek return of his children in the U.S. district court). However, in a case involving a petitioner who left the United States while subject to civil contempt sanctions, the U.S. Court of Appeals for the Sixth Circuit upheld the district court's refusal to apply the fugitive disentitlement doctrine, finding that "disentitlement will generally be too harsh a sanction in a case involving an ICARA petition [i.e., a petition under the enabling legislation for the Hague Convention]." *March v Levine,* 136 F Supp 2d 831, 856-861 (MD Tenn, 2000), aff'd 249 F3d 462, 470 (CA 6, 2001). See also *Walsh v Walsh,* 221 F3d 204 (CA 1, 2000) (court would not apply the disentitlement doctrine to a petitioner who absconded to Ireland prior to trial on criminal charges, finding among other things that its application "would impose too severe a sanction in a case involving parental rights.")

D. Exceptions to Return of a Child — The Respondent's Burden of Proof

If the petitioner in an action to return a child meets his or her burden of proof as described above, the burden shifts to the respondent to show that one of several exceptions to return apply. If the respondent fails to show that an exception exists, the court must "order the return of the child forthwith." Convention, Article 12. If the respondent establishes an exception to return, however, the mandatory return of the child is made discretionary. *Krishna v Krishna,* 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997).

The Convention provides the following exceptions to the mandatory return of a child:

- There is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention, Article 13b. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). More discussion of this exception appears at Section 13.18(C).

- The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention, Article 20. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A). For a case discussing this exception, see *March v Levine, supra*, 136 F Supp 2d at 854-855.

- If more than one year has elapsed from the date of the alleged wrongful removal or retention, the respondent must prove by a preponderance of the evidence that the child has now presently settled in his or her new environment. Convention, Article 12; 42 USC 11603(e)(2)(B). For a case discussing this exception, see *Blondin v Dubois*, 238 F3d 153, 164 (CA 2, 2001).

- The petitioner was not exercising his or her custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. Convention, Article 13a. The respondent must prove this basis for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Whallon v Lynn*, 230 F3d 450, 459 (CA 1, 2000) and *Ostevoll v Ostevoll*, 2000 U.S. Dist. LEXIS 16178 (SD Ohio, 2000).

- The child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views." Convention, Article 13b. The respondent must prove this grounds for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B). For discussion of this exception, see *Blondin v Dubois*, *supra*, 238 F3d at 165-168, *Raijmakers-Eghaghe v Haro*, 131 F Supp 2d 953 (ED Mich, 2001) and *Ostevoll v Ostevoll, supra.*

Article 13 of the Convention further provides that "[i]n considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The foregoing exceptions are to be narrowly construed. 42 USC 11601(a)(4). They "are not a basis for avoiding return of a child merely because an American court believes it can better or more quickly resolve a dispute."

Friedrich v Friedrich, 78 F3d 1060, 1067 (CA 6, 1996). See also *Walsh v Walsh*, 221 F3d 204, 217 (CA 1, 2000).

13.18 Domestic Violence as a Factor in Judicial Proceedings Under the Hague Convention

This section will consider domestic violence as a factor in the following contexts under the Convention:

- Was there a wrongful taking or retention of the child?
- Was a particular nation the place of the child's "habitual residence?"
- Is there a grave risk that returning the child would expose him or her to physical or psychological harm?

A. Wrongful Taking or Retention

The Hague Convention makes no mention of domestic violence as a factor in determining whether an alleged taking or retention was wrongful. A parent's motivation for removing a child from his or her habitual residence is not relevant to a determination of wrongfulness — the Convention defines a "wrongful" taking as one that violates the petitioner's rights to custody that were being exercised at the time of removal. Convention, Article 3. In *Friedrich v Friedrich*, 983 F2d 1396 (CA 6, 1993) (hereinafter "*Friedrich I*"), the U.S. Court of Appeals for the Sixth Circuit described the "central core of matters at which the Hague Convention was aimed" as "situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country . . . ." 983 F2d at 1402. In such cases, the Convention's primary assumption is that the merits of the parties' custody dispute are best decided in the state where the child habitually resides. This assumption governs regardless of whether a party has taken a child to perpetrate or flee from abuse. As the Sixth Circuit panel noted in *Friedrich I, supra*:

> "[A] United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. It is important to understand that 'wrongful removal' is a legal term strictly defined in the Convention. It does not require an ad hoc determination or a balancing of the equities. Such action . . . would be contrary to a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." 983 F2d at 1400.

Although the court may not use evidence of abuse to "balance the equities" between the parties to a Convention case, domestic violence may be relevant to the *existence* of a parent's custody rights in cases arising under the

Convention, and thus to the question of whether a taking was wrongful. The question whether a parent has custody rights is to be resolved using the choice of law rules of the state of habitual residence. See *Whallon v Lynn*, 230 F3d 450, 455-456 (CA 1, 2000), and *Feder v Evans-Feder*, 63 F3d 217, 225 (CA 3, 1995). If the applicable law imposes limits on a parent's custody rights as a result of domestic violence, U.S. courts are bound to apply such laws. Convention, Article 3a. See also *Friedrich v Friedrich*, 78 F3d 1060, 1066, n 6 (CA 6, 1996) (hereinafter "*Friedrich II*") (noting that a U.S. court would be bound to apply a foreign law that expressly defines acts constituting the "exercise" of custody for purposes of the Convention). Thus, a U.S. court might be justified in finding that removal of a child is not wrongful under the Convention where the petitioner had assaulted the respondent in violation of a court order or law in the state of habitual residence that conditions access to children on the petitioner's cessation of violence. Such findings must be based on explicit provisions of the law of the habitual residence state, however. In determining whether domestic violence affects the existence of parental rights, a U.S. court must remember that its role is not to make traditional custody decisions, but to determine the proper jurisdiction for making them. Examination of the best interests of a child under traditional U.S. state laws violates the aim and spirit of the convention. *Ciotola v Fiocca*, 684 NE2d 763, 769-770 (1997).

B. "Habitual Residence" of the Child

In determining a child's "habitual residence," United States courts have considered whether a parent has been forced to reside with the child in a location against his or her will. In *In re Ponath*, 829 F Supp 363, 366 (CD Utah, 1993), a German citizen forced his wife (a U.S. citizen) to remain in Germany with their U.S.-born child "by means of verbal, emotional and physical abuse." As a result of the husband's behavior, the wife and child remained in Germany for ten months against the wife's will. The husband eventually permitted the wife and child to return to the U.S. but later filed a request for return of the child under the Convention. The U.S. District Court denied the husband's petition, finding that the child's habitual residence was in the U.S. The court reasoned:

> "Although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant. The concept of habitual residence must . . . entail some element of voluntariness and purposeful design . . . . In this case, what began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose . . . . The aim of the Hague Convention is to prevent one parent from obtaining an advantage over the other in any future custody dispute . . . . For the court to grant

> petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle purpose of the Hague Convention. In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention." 829 F Supp at 367-368.

In cases involving coerced residence, the Eighth Circuit's decision in *Nunez-Escudero v Tice-Menley*, 58 F3d 374 (CA 8, 1995) should also be consulted. In that case, a U.S. citizen fled from Mexico with her Mexican-born infant to escape physical, sexual, and verbal abuse at the hands of her Mexican husband. Overruling the district court's denial of the husband's petition for return of the child, the Eighth Circuit panel remanded the case for a determination of the child's habitual residence, finding that the record before it was insufficient in this regard. In response to the wife's assertion that the child was not habitually resident in Mexico because she had been forced to remain there against her will, the panel distinguished *In re Ponath, supra*, as follows:

> "In *Ponath* . . . the child was born and lived in the United States before visiting Germany where his father forced the family to remain . . . . In contrast, here, the baby was born and lived only in Mexico until his mother fled to the United States. To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be." 58 F3d at 379.

C. "Grave Risk" of Exposing the Child to Harm

In Convention cases where domestic violence is at issue, an important question is the applicability of the Article 13b exception for situations where there is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." U.S. courts have not taken a consistent approach in weighing domestic abuse as a factor under Article 13b.

The U.S. Court of Appeals for the Sixth Circuit has articulated in dicta a narrow, two-pronged standard for evaluating when a child faces a grave risk of harm for purposes of the Convention:

> "[A] grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute — e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual

> residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." *Friedrich II, supra*, 78 F3d at 1069. See also *Freier v Freier*, 969 F Supp 436, 442 (ED Mich, 1996).

The Sixth Circuit revisited this standard in *March v Levine*, 249 F2d 462 (CA 6, 2001). Here a state court had entered a default judgment as a sanction for a discovery violation in a wrongful death action against the father of two children. The children's maternal grandparents brought the wrongful death action, alleging that the father had caused the death of the children's mother, who disappeared and was never found. No criminal charges were filed against the father. The father moved to Mexico with the children prior to the filing of the wrongful death action. The maternal grandparents abducted the children during visitation and the father sought their return under the Convention. The U.S. district court in Tennessee found that the grandparents had failed to establish by clear and convincing evidence that return would subject the children to a "grave risk of harm." 136 F Supp 2d 831, 854 (MD Tenn, 2000). The U.S. Court of Appeals agreed:

> "Even assuming that the default judgment would be upheld on appeal, that it should be given preclusive effect in the proceedings, and that it is sufficient to show that there is some risk of harm to the children in being returned to March, this default judgment is not clear and convincing evidence that there is a *grave* risk of harm to the children in being returned to their father." 249 F3d at 472. [Emphasis in original.]

The Court of Appeals also found no evidence that the father had abused or neglected the children, and the Mexican authorities had not been shown to be unwilling or incapable of protecting the children. *Id*.

The U.S. Court of Appeals for the Eighth Circuit has also taken a narrow view of the relevance of domestic violence to the question whether return poses a "grave risk of harm" to the child. This Court regards domestic violence as a matter for consideration in the underlying custody dispute, which must be resolved in the country of the child's habitual residence. In *Nunez-Escudero v Tice-Menley*, 58 F3d 374 (CA 8, 1995), the respondent, the mother of an infant child born in Mexico, fled to the U.S. from her husband's home in Mexico. In response to the husband's petition for return of the child under the Convention, the respondent invoked the Article 13b "grave risk of harm" exception by way of affidavits stating that her husband and his family had physically, sexually, and verbally abused her, and treated her as a prisoner in her home. Without deciding whether Mexico was the child's habitual residence, the district court refused to order the child's return to Mexico, finding that there was a grave risk that return would expose him to physical and psychological harm and place him in an intolerable situation. In reaching its conclusion, the district court based its decision on the child's young age, his dependency on his mother, and the possibility that he would be institutionalized in Mexico as a result of the custody action between his

parents; the district court did not base its decision on the respondent's allegations of domestic violence.

On appeal, the Eighth Circuit panel reversed and remanded the case for further proceedings, finding that it could not rule on the district court's decision regarding the Article 13b exception without a prior finding as to the child's habitual residence. However, the panel stated that only "specific evidence" of "severe potential harm to the child" will trigger the Article 13b exception. 58 F3d at 376-377. Applying this standard, the panel noted that the district court incorrectly factored the possible separation of the child from his mother in assessing whether his return to Mexico would constitute a grave risk of harm under the Article 13b exception. The panel further found that most of the evidence of domestic abuse was "general and concern[ing] the problems between [the wife], her husband and father-in-law," and thus "irrelevant to the Article 13b inquiry." 58 F3d at 377. It explained as follows:

> "The Article 13b inquiry does not include an adjudication of the underlying custody dispute . . . . It is not relevant to this Convention exception who is the better parent in the long run, or whether [the wife] had good reason to leave her home in Mexico and terminate her marriage to [the husband] or whether [the wife] will suffer if the child she abducted is returned to Mexico." 58 F3d at 377.

*See Section 13.19 for a discussion of "undertakings."

In contrast, the U.S Court of Appeals for the First Circuit has concluded that domestic violence may pose a "grave risk of harm" to children under Article 13b. In *Walsh v Walsh*, 221 F3d 204 (CA 1, 2000), the petitioner-father, while living in the U.S., severely physically abused the respondent-mother over a long period, at times in front of the children. The petitioner also assaulted others and fled the U.S. to Ireland after being charged with threatening to kill a neighbor. After the respondent and children joined the petitioner in Ireland, the domestic violence continued, despite the entry of a protective order by an Irish court. Respondent-mother returned to the U.S. with the children, one of whom was diagnosed with post-traumatic stress disorder. The U.S. district court granted the father's petition, concluding that the respondent had failed to meet her burden of proof under Article 13b. The district court also required several "undertakings,"* including a "no-contact" order if respondent returned to Ireland with the children. The district court concluded that the evidence did not reveal an immediate and serious threat to the children's physical safety that could not be dealt with by Irish authorities. Regarding psychological harm, the district court found that the disorders suffered by one of the children might be mitigated by the lack of exposure to the physical abuse of the respondent-mother. The U.S. Court of Appeals reversed, finding that the district court erred in requiring evidence of immediate harm. *Id*. at 218. Furthermore, the Court of Appeals found that because the petitioner had disobeyed court orders in the U.S. and Ireland, the risk of harm to the children would not be mitigated by the undertakings ordered by the district court. *Id*. at 220-221. The Court summarized the district court's errors as follows:

> "In our view, the district court committed several fundamental errors: it inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse; it failed to credit John's more generalized pattern of violence, including violence directed at his own children; and it gave insufficient weight to John's chronic disobedience of court orders. The quantum here of risked harm, both physical and psychological, is high. There is ample evidence that John has been and can be extremely violent and that he cannot control his temper. There is a clear and long history of spousal abuse, and of fights with and threats against persons other than his wife. These include John's threat to kill his neighbor . . . and his fight with his son Michael." *Id*. at 219-220.

A subsequent decision by the First Circuit Court of Appeals relied on *Walsh*, but found that allegations of verbal abuse and a single incident of shoving established an insufficient risk of harm to meet the requirements of Article 13b. In *Whallon v Lynn*, 230 F3d 450, 460 (CA 1, 2000), there were no allegations that the petitioner-father abused the daughter who was the subject of the petition. Although the respondent-mother and daughter were held at gunpoint by unknown persons as they attempted to leave Mexico, the Court upheld the district court's finding that the father's denial of responsibility for the incident was credible.

The Second Circuit Court of Appeals has interpreted the "grave risk of harm" exception broadly in a case involving domestic violence. In *Blondin v Dubois*, 238 F3d 153, 163 (CA 2, 2001), the Court held that "a 'grave risk of psychological harm,' even construed narrowly, undoubtedly encompasses an 'almost certain[]' recurrence of traumatic stress disorder." In *Blondin*, the respondent-mother presented uncontested expert testimony that the children would face a recurrence of traumatic stress disorder if returned to France, the site of physical and psychological abuse of them and their mother. *Id*. at 159. The Court also concluded that the district court properly considered whether the children were settled in their new environment, and the objection to returning to France by one of the children, aged eight, in deciding whether Article 13b applied. *Id*. at 164, 166-167. The Court noted, however, that these factors are not conclusive of the issue of "grave risk of harm." *Id*.

A federal district court in California has liberally construed the "grave risk of harm" exception to include domestic violence as a factor in the court's decision whether to return a child. In *Krishna v Krishna*, 1997 U.S. Dist. LEXIS 4706 (SC ND Cal, 1997), the petitioner sought return of his child after his wife took the child from Australia to the U.S. Although the petitioner met his threshold burden under the Convention, the district court denied his petition based on the Article 13b exception for situations posing a grave threat of harm to the child. The court found that the respondent had left Australia with her child after allegedly suffering regular and serious beatings at the hands of the petitioner. The respondent had come to the U.S. not to "forum

shop," but to find family and financial support. Based on these findings, the court held:

> "In light of the prior history of alleged abuse and discord that has existed between the parties, the court finds that the return of the child to Australia would pose a grave risk to the child's well being. Although there is little evidence that relocation of the child to Australia poses a grave threat of physical harm to the child, the court finds that there is compelling evidence establishing the potential for serious psychological harm . . . . Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly because [respondent] has relatively limited familial support in Australia. Moreover, the child is currently well settled in the United States where a divorce proceeding has been filed and can be expedited to minimize the costs to [petitioner]."

13.19 Entering Orders That Minimize the Risk to the Child in Hague Convention Cases

Once proceedings have been initiated under the Convention, Article 7b provides for appropriate "provisional measures," which shall be taken "to prevent further harm to the child or prejudice to interested parties." 42 USC 11604(a) empowers courts deciding cases under the Convention to "take or cause to be taken measures under Federal or State law . . . to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." A court's authority to take such measures is limited by a requirement that the "applicable requirements of State law" be satisfied before a child is removed from the person having physical custody. 42 USC 11604(b).

The State Department's legal analysis of the Convention makes the following comment regarding Article 7b:

> "To prevent further harm to the child, the [Central Authority] would normally call upon the state welfare agency to take whatever protective measures are appropriate and available consistent with that state's child abuse and neglect laws. The [Central Authority], either directly or with the help of state authorities, may seek a written agreement from the abductor (and possibly from the applicant as well) not to remove the child from the jurisdiction pending procedures aimed at return of the child. Bonds or other forms of security may be required."

If a court decides that a child must be returned to its country of habitual residence under the Convention, it need not limit its involvement in the case to a bare statement that return is ordered. In *Feder v Evans-Feder,* 63 F3d 217, 226 (CA 3, 1995), the U.S. Court of Appeals for the Third Circuit noted that

in appropriate circumstances, courts may ameliorate any short-term harm to the child by making return contingent upon "undertakings" from the petitioning parent. See also *Walsh v Walsh*, 221 F3d 204, 217-218 (CA 1, 2000). Such "undertakings" may include:

- A requirement that the petitioner pay for the respondent and child to travel to the country where the child habitually resides.
- A requirement that the petitioner make appropriate housing arrangements for the respondent and child in the country where the child habitually resides.
- A requirement that the petitioner pay living expenses for the respondent and child in the country of the child's habitual residence.
- Orders that the petitioner have no contact with the respondent if the respondent returns to the country of the child's habitual residence.
- Orders that the petitioner will have no contact or limited (e.g., supervised) contact with the children once they return to the country of the child's habitual residence.

If implementation of such undertakings is necessary to avoid grave risk to the child, the petitioned court may need to investigate whether they would be enforceable in the country of the child's habitual residence. See *Walsh v Walsh*, *supra*, 221 F3d at 219.

The court must take care when crafting undertakings to ensure that the order is enforceable and does not exceed the court's authority by imposing upon foreign courts. In *Danaipour v McLarey*, 286 F3d 1 (CA 1, 2002), the parties sought a child-custody agreement in Sweden. The Swedish court granted the parties joint custody of the children. McLarey fled to the United States with the children and claimed that Danaipour was sexually abusing at least one of the children. Danaipour filed a petition in Massachusetts seeking the return of the children under the Hague Convention. McLarey claimed that returning the children to Sweden exposed them to a "grave risk" of physical or psychological harm or would otherwise place the children in an intolerable situation.* The Massachusetts court did not make findings regarding the sexual abuse or a "grave risk." Instead the court determined that a sexual abuse evaluation was necessary to determine if a "grave risk" precluded the return of the children. The court concluded that the evaluation could be made in Sweden without putting the children at risk. The court ordered that the children be returned to Sweden. The order included, among other things, the following "undertakings":

- that a forensic evaluation be conducted in Sweden;
- that a Swedish court decide the implications of the forensic evaluation for the custody of the children;

*See Section 13.18(C) for more information regarding a "grave risk" of exposing a child to harm under the Hague convention.

- that Danaipour have no contact with the younger daughter unless ordered by the Swedish court;
- that Danaipour have only telephone contact three times a week with the older daughter unless the Swedish court ordered otherwise;
- that Danaipour request that a Swedish court enter the terms of the order as a "mirror order" enforceable in Sweden. *Id.* at 22.

The trial court's order was appealed to the United States Court of Appeals. The U.S. Court of Appeals held that the trial court's order went beyond its authority by imposing requirements on a foreign court. In addition, the trial court incorrectly assumed that the order would be enforced by a foreign court. *Id.* at 16. The U.S. Court of Appeals concluded:

> "In sum, the district court offended notions of international comity under the Convention by issuing orders with the expectation that the Swedish courts would simply copy and enforce them. The district court had no authority to order a forensic evaluation done in Sweden, or to order the Swedish courts to adjudicate the implications of the evaluation for the custody dispute. . . . Moreover, its assumption that Swedish courts would enforce the undertakings was both legally and factually erroneous.
>
> . . .
>
> There is also authority indicating that undertakings should be used more sparingly when there is evidence that the abducting parent is attempting to protect the child from abuse. . . . [U]ndertakings are most effective when the goal is to preserve the status quo of the parties prior to the wrongful removal. This, of course, is not the goal in cases where there is evidence that the status quo was abusive." *Id*. at 25.

In *Blondin v Dubois*, 238 F3d 153, 158-161 (CA 2, 2001), the U.S. Court of Appeals for the Second Circuit upheld a district court's findings that no "undertakings" by the parties could sufficiently mitigate the psychological harm that the children would suffer upon being returned to the country where they and their mother were abused.

In cases where return of a child is mandated despite serious safety concerns, one scholar has suggested that courts consider sending the child to a "safe harbor" until the custody dispute can be resolved in the country of habitual residence. This "safe harbor" might be the location of the parent who took the child from its habitual residence. In cases involving allegations of domestic violence, a "safe harbor" provision might protect a child and fleeing parent in the refuge state while the courts of the habitual residence state take evidence regarding the effect that the alleged abuse should have on rights of access to the child. Comment, *Domestic Violence: Is It Being Sanctioned By the Hague*

Convention? 4 Southwest Journal of Law and Trade in the Americas 71, 83 (1997), citing Hilton, *Dreaming the Impossible Dream: Responding to a Petition Under the Convention on the Civil Aspects of International Child Abduction*, in North American Symposium on International Child Abduction, 6, 13 (September 30, 1993).