

# Model Policy For Prosecutors and Judges on Imposing, Modifying and Lifting Criminal No Contact Orders

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ÆQUITAS

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## INTRODUCTION

The goals of the criminal justice system in a domestic violence case are to seek justice, protect the victim and the community, hold the offender accountable for his crimes, prevent and deter future crime, and rehabilitate the abuser. Criminal no contact orders are an effective tool to help protect victims of domestic violence during the pendency of criminal prosecution.<sup>4</sup> Such no contact orders are designed to prevent individuals who have been arrested for domestic violence from contacting the victim and they are commonly used as restrictions placed on defendants prior to the final case disposition.<sup>5</sup> No contact orders are intended to protect the victim, her<sup>6</sup> family (where applicable) and the community. They are also imposed to prevent the offender from committing additional crimes while the domestic violence case is pending. Such an order only exists while the criminal case is open and can also be extended during the post-conviction sentence of incarceration, probation or parole. If the domestic abuse charges are dismissed, or if the batterer is acquitted, any concomitant no contact order ends. Violations of such no contact orders, or conditions of release, can be prosecuted as contempt or as additional crimes. Commonly, judges impose no contact orders at a defendant's initial appearance or arraignment, much like release conditions, although some jurisdictions may require the prosecutor to ask the court to issue a no contact order.<sup>7</sup> Additionally, such orders can be modified by a judge upon motion of the prosecutor or the batterer's attorney, or upon decision of the court.

Unlike their civil counterpart, however, criminal no contact orders generally are not victim-initiated; rather, the order is imposed *sua sponte* by the court or upon request of the prosecution. Such orders are increasingly viewed by both prosecution and courts as an appropriate response to criminal domestic violence.<sup>8</sup> The filing of criminal charges and issues of criminal no contact orders (NCOs) alone, however, do not keep victims safe.<sup>9</sup> In fact, one study showed that 51% of defendants charged with domestic violence felonies were rearrested before their criminal cases were concluded.<sup>10</sup> These challenges require that prosecutors and judges consider various factors, in addition to the wishes of a particular victim, when determining whether to impose or maintain a criminal no contact order or release condition.

No contact provisions, whether in specific and separate orders or as conditions of release, are valid protective tools based on the fact that the defendant has been arrested for a crime against the victim, a crime which has at least threatened or caused her some bodily harm. Unfortunately, such no contact provisions may not always increase a particular victim's safety. Significantly, research has shown that, in some cases, a victim's separation from an abuser actually increases the risk of lethality.<sup>11</sup> The decision by the prosecutor or the court to restrict contact between a batterer and his victim does not always achieve the system's goal of victim protection and safety.

Prosecutors and judges face even greater challenges, however, when they must decide whether to issue or maintain no contact provisions over the objection of a particular victim. Unlike civil protection order proceedings, the victim in a prosecution for domestic violence is not a party to the criminal case. Although the prosecutor advocates for the safety of the victim and community, the prosecutor does not legally represent the victim. The prosecutor represents the government against the abuser because a violation of the criminal code – even one that occurs in private or within a family – is an offense against the peace and dignity of the

jurisdiction in which it occurs. The prosecutor's role as attorney for the community, and not the victim, can give rise to conflicts when the prosecutor's decisions about how to proceed with the case conflict with the victim's wishes.<sup>12</sup>

Some victims leave, but then return; some victims do not want to end contact with the defendant but simply want the violence to end.<sup>13</sup> Some victims object to no contact orders because of negative collateral consequences the order may bring her.<sup>14</sup> Other victims object to no contact orders out of fear of the defendant or due to actual threats and intimidation by the defendant.<sup>15</sup> In some cases, victims have determined that no contact provisions may actually increase the violence to dangerous and deadly levels.<sup>16</sup>

Participants in the criminal justice system must understand the competing factors that make these decisions so important. Although the victim is not a party and the prosecutor does not represent her, her wishes must be considered – along with other factors – when deciding to impose or maintain a criminal no contact order. In order to maximize victim safety and offender accountability, while minimizing the potential collateral consequences to a victim, prosecutors and judges must develop and implement a process to gather timely and accurate information about risk and lethality, a particular victim's wishes and motivations, and possible negative consequences in order to best determine when to impose or maintain a no contact order in the face of a victim's opposition.

## VICTIM SAFETY

Victim safety is the ultimate factor behind the decision to issue a no contact order in a criminal domestic violence case. As mentioned earlier, however, victim safety is not always enhanced by the imposition of a no contact order.<sup>17</sup> Prosecutors and judges must recognize that “[w]omen are most at risk of violence after ending, or while trying to end, an abusive relationship.”<sup>18</sup> In many situations, the imposition of criminal charges and no contact orders is viewed by batterers as a step towards that separation. While criminal charges are pending, batterers often attempt to prevent their victims from leaving the relationship, retaliate for her efforts to separate or force her to return to the relationship.<sup>19</sup> According to one study, offenders who were subject to no contact orders were more likely to commit further abuse than offenders whose no contact orders or conditions of release permitted some contact with the victim.<sup>20</sup> Because of the prevalence and real likelihood of “separation assault,”<sup>21</sup> a victim's decision to maintain contact with her batterer may be a calculated strategy of resistance and survival.<sup>22</sup> Thus, a victim's request to terminate or modify a no contact order, often viewed by the criminal justice system as a symptom of weakness or psychological impairment, may actually be a rational assessment of her danger.<sup>23</sup>

Accurately assessing a victim's safety in any given domestic violence case is complicated by several issues. Many victims face an increased risk of violence simply by revealing to prosecutors and judges the nature and extent of the abuse and their fear.<sup>24</sup> Additionally, while domestic violence victims are very accurate reporters of risk and lethality indicators, they often underestimate their partner's actual level of danger.<sup>25</sup> Often, prosecutors and judges are asked to make decisions about the status of a no contact order with incomplete or even inaccurate information, in the midst of crowded and rushed courtrooms and dockets.

Recognizing that a docket of domestic violence cases takes longer to complete than other types of cases, judges should still strive to create conditions that encourage meaningful discussions between prosecutors and victims in the courthouse. Ideally, this would include allowing sufficient time and a private place for prosecutors to meet with victims and establish the rapport needed to obtain valuable safety information. Victims should also be permitted to involve family, friends and community-based advocates in these discussions as a means of additional support and assistance to provide full information about collateral consequences associated with the criminal charge or no contact order.

Legal interventions on behalf of domestic violence victims are most successful when they are integrated with each other (civil and criminal), as well as with non-legal, community resources.<sup>26</sup> For this reason, it is vital that prosecutors and courts participate in an ongoing collaboration with advocacy groups, police, probation and social service agencies in fashioning a coordinated community response to domestic violence.<sup>27</sup> The arrest of a batterer brings a victim into the criminal justice system, but in a coordinated community response, it also brings her into a realm of other services and assistance. An effective interagency approach recognizes that “a domestic violence crime is rarely fully resolved with the first intervention,”<sup>28</sup> and that victims need various kinds of assistance from different agencies at different times.

Judges and prosecutors should understand that the resolution of the case before them is not necessarily going to end the abuse in the victim’s relationship with the defendant. This is especially so if the victim decides to not cooperate with the prosecution and there is insufficient evidence to proceed without her direct testimony. In such a case, even though the charges are ultimately withdrawn or dismissed, the nature of the victim’s interaction with each practitioner in the criminal justice system will impact her future willingness to seek such protections.

## **IDENTIFYING VICTIM MOTIVATIONS**

For a substantial number of women who find themselves in abusive relationships, the ideal outcome is the elimination of the violence while maintaining the relationship. A victim such as this may wish to modify a no contact order to permit some contact between her and the batterer, or she may wish to have the no contact rescinded entirely. On the other hand, many victims ask prosecutors and judges to lift or modify no contact orders due to fear, because they have been threatened or intimidated by their abusers. In this situation, granting an abuser greater access to the victim could place her in greater danger. It is important, therefore, that prosecutors and judges obtain accurate information to determine a victim’s motivations in seeking the termination or modification of a no contact order.

The victim's perception of her risk of further abuse is one of the most important predictors of future violence.<sup>29</sup> The most significant step that prosecutors and judges can take to improve victim safety is to ensure that victims have access to confidential advocates with whom they can work to identify the risks of their current situation and to develop safety plans to complement any court orders.<sup>30</sup> Ideally, such advocates are present in courtrooms and available for consultation with victims, and to facilitate disclosure and respect any rules or statutes regarding confidentiality, there should be private space in which advocates and victims can meet.<sup>31</sup>

In order to gather information about a victim's situation and concerns, it is vital that prosecutors make all efforts to meet with victims, preferably while their abusers are still in custody. Practitioners must recognize that victims are often attempting to cope with the numerous ways in which the battering affects and threatens their lives, not only the threat of physical violence.<sup>32</sup> An examination of the collateral consequences to the victim of the criminal prosecution and imposition of the no contact order should take into account the victim's financial and child care needs specifically. It is also vital to know whether the victim lost other forms of support, such as help from the defendant's family, after his arrest.

## RECOGNIZING VICTIM INTIMIDATION

Intimidation of victims is a crime designed to procure their silence and thwart the efforts of the criminal justice system.<sup>33</sup> A three-state study of domestic violence prosecutions in five jurisdictions found that fear of retaliation by the abuser was the most common barrier to victim participation with prosecution.<sup>34</sup> Batterers often know that the right to confrontation requires the victim to testify in court, and that the failure of a victim to appear in court can result in dismissal of the charges, or other outcomes in his favor.<sup>35</sup> This intimidation can take many forms, including direct contact by the perpetrator, telephone calls or emails, or contact through other people. Undetected, such tactics re-victimize the abused and reward the batterer with impunity from the justice system.<sup>36</sup> Recognition of such intimidation tactics can be especially crucial when a victim seeks to terminate or modify a no contact order, and represent a valuable opportunity for prosecutors to explore with victims whether such is happening.

An abuser may pressure the victim to seek termination of the no contact order, perhaps to test her loyalty to him, as well as to make it easier to gain access to the victim. Prosecutors must ask about intimidation tactics when obtaining a victim's input regarding the no contact order and the charges. It might be appropriate to ask if she has been threatened and if the batterer has contacted her directly or through a third party. But in addition to asking victims about such intimidation, prosecutors should actively look for evidence of such. With prison call logs, prosecutors can determine whether the abuser has called the victim while in custody, and if recordings of those calls are available, police or prosecutors should review the calls for possible evidence of intimidation. Prison visitor logs will show if the victim has visited the defendant in jail, thereby providing an opportunity for face-to-face intimidation.

## **ASSESSING RISK AND LETHALITY**

According to the FBI, approximately one-third of female murder victims are killed by an intimate partner.<sup>37</sup> Prosecutors and judges, therefore, struggle to determine which victims are at the most risk for lethal violence. Such assessment is an important aspect of safety planning with a victim. While there are many lethality assessment tools available<sup>38</sup>, it is important that practitioners use the tools to foster a conversation with the victim, rather than as a checklist or a collection of discrete data.<sup>39</sup> Most assessments consider prior victimization, a batterer's drug and alcohol problems, a batterer's obsessive-possessive behavior and excessive jealousy, a batterer's threats to kill the victim or children, a batterer's possession of, access to, familiarity with and degree of fascination with guns, a batterer's use of violence in settings outside the home, any stalking behavior, a batterer's suicidal ideations, plans, threats and past attempts, the status of the relationship (separated or separating, estranged), or whether the victim is in the process of fleeing. Engaging a victim in a discussion of these risks and dangers improves the information available to prosecutors and judges, not just by learning the simple facts that certain events or behaviors took place, but by filling in the larger context and pattern in which this particular incident occurred. When reviewing the victim's responses, however, it is critical to remember that, while victims are accurate reporters of risk factors for lethality, they consistently underestimate their own risk for future assaults.<sup>40</sup>

## **EXPLORING MODIFIED NO CONTACT ORDERS**

Although many victims will request termination of the no contact order, it is very useful for prosecutors and judges to explore the possibility of various modifications, rather than termination, especially when serious safety concerns are evident. Partial no contact orders, or orders which allow limited contact, may provide an important tool to allow prosecutors to respond to a victim's various concerns about the consequences of the order in her life, while still providing some measure of protection.<sup>41</sup> Partial no contact orders do offer some benefits for victims: contact can be limited to public areas; specific behaviors can be prohibited, such as assault, stalking, threats; provisions can mirror custody orders (if there are children involved) to facilitate visitation and other matters. Of course, with interaction, even defined and limited interaction, comes risk. Physical proximity presents opportunities for physical violence, while batterers may exploit other allowed means of contact for purposes of intimidation, coercion and psychological mistreatment.<sup>42</sup> Of practical concern, such partial no contact orders are more complicated to enforce; violations are more difficult to investigate and prove.<sup>43</sup> An order which accounts for the specific challenges in a victim's life may help victims view the criminal justice system as a safe and effective response, thus making a victim more willing to participate in the prosecution of the charges.<sup>44</sup>

## CONCLUSION

The decision to obtain or maintain a no contact order in the prosecution of a domestic violence case can have a significant impact on the victim’s safety, life and family. Prosecutors and judges often must balance the need to protect the victim and the community and hold the offender accountable against the particular wishes of the victim. There is no universal approach to this issue; rather prosecutors and judges must seek to make thoughtful, fair and beneficial decisions for all of the parties involved. “Applying a single treatment to [all domestic violence cases] inhibits meaningful intervention for victims and perpetrators.”<sup>45</sup> Every case is different, and prosecutors and judges must obtain as much relevant information as possible in order to achieve justice, protect victims and hold offenders accountable. Engaging in such a practice will encourage victim participation in the court process, prevent and deter future crimes, and help to rehabilitate abusers who enter the criminal justice system.

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## ENDNOTES

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- <sup>4</sup> See, e.g., R. Brame et al., Impact of Proactive Enforcement of No-contact orders on Victim Safety and Repeat Victimization, Nat'l Institute of Justice, grant no. 2004-WG-BX-0007, U.S. Dep't of Justice, Washington, DC (Aug. 2009), available at <http://www.ncjr.gov/pdffiles1/nij/grants/228003.pdf> (stating "No-contact orders may offer swifter relief than criminal actions by serving as an immediate remedy to the continued threat of violence, prohibition contact by a woman's abusive partner, and serving as a symbolic threat of the criminal justice system.").
- <sup>5</sup> Id. at 8.
- <sup>6</sup> Because research has shown that the overwhelming number of victims of domestic violence are female, and offenders male, this paper refers to victims as female and defendants/batterers as male. See INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004), U.S. Dep't of Justice, Office of Justice Pgms., Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/intimate/htm> (indicating that, in 2004, 96.9% of victims of intimate partner violence were female where offender was male).
- <sup>7</sup> See, e.g., I.C.A. §664A.3 (2008), which requires magistrates in Iowa to issue no contact orders at the defendant's initial appearance in a criminal domestic violence case if contact with the defendant would pose a risk to the victim or her family.
- <sup>8</sup> Brame at al., supra n. 3, at 23.
- <sup>9</sup> In order to maximize victim safety, victim advocates in community-based agencies should work with victims to identify and address risk and lethality indicators and to develop and monitor safety plans. Victim safety is further enhanced when prosecutors and judges monitor defendants' compliance with such orders and impose immediate sanctions upon violation.
- <sup>10</sup> L. NEWMARK, M. REMPEL, K. DIFFILY, AND K. KANE, SPECIALIZED FELONY DOMESTIC VIOLENCE COURT: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE, Final report for National Institute of Justice, grant number 97-WT-VX-0005. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice, October 2001 (NCJ 191861) and 2004 (NCJ 199723); available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=191861> and <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=199723>.



- <sup>11</sup> J. Campbell et al., Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study, *AM. J. PUBLIC HEALTH*, vol. 93, no. 7 (July 2003). See also, T.K. Logan & R. Walker, Separation as a Risk Factor for Victims of Intimate Partner Violence: A Response to Campbell, J. *INTERPERSONAL VIOL.*, vol. 19, issue 12 (Dec. 2004) (noting that women separating in the context of victimization are also at high risk for stress, mental and physical health problems; have increased conflict over the children and concern for child safety; and have economic, structural, psychological and social barriers to help seeking).
- <sup>12</sup> S. F. Goldfarb, Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?, 29 *CARDOZO L. REV.* 1487 (2008) (stating, “The legal system must confront the tension between legal rules that assume that the only solution to domestic violence is to dissolve the relationship and the wishes of many battered women to maintain the relationship in a non-abusive form.”).
- <sup>13</sup> *Id.* at 1499.
- <sup>14</sup> Domestic violence victims may face significant financial consequences, loss of housing and other necessary support due to a no contact order. See, e.g., *Id.* at 1499 (stating “Victims have many reasons for staying with or returning to violent partners, including financial dependency, fear of retaliation, social isolation, community pressure, and concern about losing custody of the children.”).
- <sup>15</sup> Brame et al., *supra* n. 3, at 24-25; J.L. GREIP & R.L. MARTINSON, Monograph: Witness Intimidation, *ÆQUITAS: The Prosecutors’ Resource on Violence Against Women*, Washington, DC: (forthcoming 2010).
- <sup>16</sup> Goldfarb, *supra* n. 12 at 1520 (protection order that purports to terminate contact between the parties may be the trigger for an intensification of abuse).
- <sup>17</sup> See, e.g., A.R. KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES, SPECIAL REPORT FOR THE NATIONAL INSTITUTE OF JUSTICE, Washington, DC: U.S. Dept. of Justice, Nat’l Inst. of Justice (June 2006) (NCJ 225722) (stating “Studies agree that for those abusers who reoffend, a majority do so relatively soon after their arrest. In states where courts automatically impose no-contact orders after an arrest for domestic violence, re-arrests for order violations begin to occur immediately upon the defendant’s release from custody. In both a Massachusetts misdemeanor arrest study and a Brooklyn, N.Y., felony arrest study, the majority of defendants rearrested for new crimes of abuse were arrested while their initial abuse cases were still pending in the court.” (citing, E. BUZAWA, G. HOTALING, A. KLEIN, & J. BYRNES, RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT SETTING, Final report for National Institute of Justice, grant number 95-IJ-CX-0027. Washington, DC: U.S. Dept. of Justice, Nat’l Institute of Justice, July 1999, NCJ 181427, available at <http://www.ncjrs.gov/App/Publications/abstracts.aspx?ID=181427>; and L. NEWMARK, M. REMPEL, K. DIFFILY, & K. KANE, SPECIALIZED FELONY DOMESTIC VIOLENCE COURT: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE, Final report for the National Institute of Justice, grant number 97-WT-VX-0005. Washington, DC: U.S. Dept. of Justice, Nat’l Institute of Justice, October 2001, NCJ 191861, and 2004, NCJ 199723; available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=191861> and <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=199723>)).

- <sup>18</sup> Goldfarb, *supra* n. 12 at 1520; M. R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); P. TJADEN & N. THOENNES, *PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY*, NCJ 172837. Washington, DC: U.S. Dept. of Justice (1998); P. TJADEN & N. THOENNES, *EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY*. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice (2000).
- <sup>19</sup> See e.g., K. Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. OF JUSTICE RESEARCH IN ACTION, U.S. Dept. of Justice, Washington, DC (October 1995); N. Cline et al., *Prosecuting Witness Tampering, Bail Jumping and Battering From Behind Bars*, ENHANCING RESPONSES TO DOMESTIC VIOLENCE: PROMISING PRACTICES FROM THE JUDICIAL OVERSIGHT DEMONSTRATION INITIATIVE, Vera Inst. of Justice (2006).
- <sup>20</sup> Goldfarb, *supra* n. 12 at 1520.
- <sup>21</sup> See generally Mahoney, *supra* n. 16; R. E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363 (2000).
- <sup>22</sup> Goldfarb, *supra* n. 12 at 1502 (“Battered women’s acts of resistance can take many forms, including protecting their children, seeking help from formal and informal sources, carving out opportunities for safety, and ending the relationship temporarily or permanently. ... [A] decision to continue the relationship may itself be a carefully calculated strategy of resistance to violence.” (citations omitted)).
- <sup>23</sup> *Id.*
- <sup>24</sup> PRAXIS INTERNATIONAL ET AL., *THE ST. PAUL BLUEPRINT FOR SAFETY: AN INTERAGENCY RESPONSE TO DOMESTIC VIOLENCE CRIMES*, 61 (2009).
- <sup>25</sup> See L. Bennett Cattaneo & L. A. Goodman, *New Directions in Risk Assessment – An Empowerment Approach to Risk Management*, in *INTIMATE PARTNER VIOLENCE*, 1-10 (Kathleen A. Kendall-Tackett & Sarah M. Giacomoni eds., 2007); A. N. Weisz et al., *Assessing the Risk of Severe Domestic Violence: The Importance of Survivors’ Predictions*, 15 J. INTERPERSONAL VIOLENCE 75, at 87 (2000).
- <sup>26</sup> P. FINN & S. COLSON, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT*, U.S. Dep’t of Justice at 63 (1990).
- <sup>27</sup> See generally *COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND* (Melanie F. Shepard & Ellen L Pence, eds., 1999).
- <sup>28</sup> *THE ST. PAUL BLUEPRINT FOR SAFETY*, *supra* n. 22, at 5 (2009).
- <sup>29</sup> See, Cattaneo & Goodman, *supra* n. 25; J. CAMPBELL, *PSYCHOMETRIC DATA: DANGER ASSESSMENT*, available at <http://www.dangerassessment.org/WebApplication1/pages/psychometric.aspx>.

- <sup>30</sup> A. HARRELL, J. CASTRO, L. NEWMARK, & C. VISHER, FINAL REPORT ON THE EVALUATION OF THE JUDICIAL OVERSIGHT DEMONSTRATION: EXECUTIVE SUMMARY, Final Report for the National Institute of Justice, grant number 99-WT-VX-K005. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice and The Urban Institute, June 2007, NCJ 219386, available at <http://www.urban.org/publications/411498.html> (three-state study showed that victims' fear of retaliation was reduced in jurisdictions with specialized domestic violence prosecution units, increased victim advocacy, and specialized domestic violence courts.). In developing a safety plan, an advocate assists a victim to identify the options and resources available and to outline how she will protect herself and her children in a variety of settings and circumstances. See generally, J. DAVIES ET AL., SAFETY PLANNING WITH BATTERED WOMEN, 73-92 (1998).
- <sup>31</sup> For additional information on the role of confidentiality when working with battered women, and the obligations of victim advocates to help protect it, see J. KUNCE FIELD ET AL., CONFIDENTIALITY: AN ADVOCATE'S GUIDE, Battered Women's Justice Project, Minneapolis, MN (rev'd Sept. 2007).
- <sup>32</sup> S. HAMBY WITH A. BIBLE, BATTERED WOMEN'S PROTECTIVE STRATEGIES, VAWNet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence, Harrisburg, PA (July 2009), available at <http://www.vawnet.org>.
- <sup>33</sup> GREIP & MARTINSON, *supra* n. 15.
- <sup>34</sup> A. HARRELL, J. CASTRO, L. NEWMARK, AND C. VISHER, FINAL REPORT ON THE EVALUATION OF THE JUDICIAL OVERSIGHT DEMONSTRATION: EXECUTIVE SUMMARY, Final report for the National Institute of Justice, grant number 99-WT-VX-K005. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice and The Urban Institute, June 2007, NCJ 219386, available at [www.urban.org/publications/411498.html](http://www.urban.org/publications/411498.html).
- <sup>35</sup> See *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington/Hammon v. Indiana*, 547 U.S. 813 (2006); and *Giles v. California*, 128 S.Ct. 2678 (2008). See also, THE ST. PAUL BLUEPRINT, *supra* n. 22 at 9 (“abusers discourage victims’ participation and reinforce the message that interveners cannot or will not help”).
- <sup>36</sup> GREIP & MARTINSON, *supra* n. 15.
- <sup>37</sup> Bureau of Justice Statistics, INTIMATE PARTNER HOMICIDE: HOMICIDE TRENDS IN THE U.S., available at <http://www.bjs.ojp.usdoj.gov/content/homicide/intimates.cfm#intprop>. However, a 1998 report indicates that, when looking at city- and State-specific databases, rather than the federal homicide data, intimate partner homicides make up 40 to 50 percent of all murders of women in the United States. J. Campbell et al., Assessing Risk Factors for Intimate Partner Homicide, NIJ JOURNAL, No. 250, 15-19 (2003), available at <http://www.ncrjs.gov/pdffiles1/jr000250e.pdf> (citing J. Campbell, If I Can't Have You, No One Can: Power and Control in Homicide of Female Partners, in FEMICIDE: THE POLITICS OF WOMAN KILLING, (ed. Jill Radford & Diana E.H. Russell, eds., New York: Twayne Publishers, 1992) 99-113; and Linda Langford, Nancy Isaac & Stacey Kabat, Homicides Related to Intimate Partner Violence in Massachusetts, HOMICIDE STUDIES 2(4) (1998): 353-377.).

- <sup>38</sup> See, e.g., J. Campbell, Assessing Risk Factors, *supra* n. 37; P.R. Kropp, Intimate Partner Violence Risk Assessment and Management, *VIOLENCE AND VICTIMS* 23(2), 202-20 (2008); J. ROEHL ET AL., INTIMATE PARTNER VIOLENCE RISK ASSESSMENT VALIDATION STUDY, FINAL REPORT, Nat'l Inst. of Justice (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf>; N. WEBSDALE, LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS, VAWNet: a partnership of the Nat'l Resource Ctr. on Domestic Violence/PA Coal. Agst. Domestic Violence (2000), available at [http://www.vawnet.org/category/Main\\_Doc.php?docid=387](http://www.vawnet.org/category/Main_Doc.php?docid=387).
- <sup>39</sup> THE ST. PAUL BLUEPRINT, *supra* n. 22 at 6 (“engage in a dialogue with the victim rather than treating her or him as a data point”).
- <sup>40</sup> Cattaneo & Goodman, *supra* n.25; Campbell, *supra* n. 38.
- <sup>41</sup> Goldfarb, *supra* n. 12 at 1521 (Other harms to victims may include: loss of access to the abuser’s income and subsequent poverty, loss of batterer’s assistance with child care which may result in victim losing her job, and loss of support from extended family and community.).
- <sup>42</sup> *Id.* at 1538. Several studies show that psychological abuse is more common than physical abuse after a protection order is issued. A. HARRELL AT AL., THE URBAN INST., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS, 50 (1993); S. L. KEILITZ ET AL., NAT’L CTR. FOR STATE COURTS, CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, 38-39 (1997); J. PTACEK, BATTERED WOMEN IN THE COURTROOM, 163-64 (1999); J. Grau et al., Restraining Orders for Battered Women: Issues of Access and Efficacy, in CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE, 22-23 (Claudine SchWeber & Clarice Feinman eds., 1985); V. L. Holt et al., Civil Protection Orders and Risk of Subsequent Police-Reported Violence, 288 J. AM. MED. ASS’N. 593 (2002).
- <sup>43</sup> See, e.g., J. Suk, Criminal Law Comes Home, 116 YALE L.J. 2, 18-22 (2006) (provisions prohibiting contact with the victim and presence in the victim’s home make it easy for prosecutors to obtain evidence of violations).
- <sup>44</sup> THE ST. PAUL BLUEPRINT, *supra* n. 22, at 123; E.S. Buzawa & C.G. Buzawa, DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, 3rd ed. (2003); J. Belknap & D.L. R. Graham, Factors related to domestic violence court dispositions in a large urban area, DOMESTIC VIOLENCE RESEARCH: SUMMARIES FOR JUSTICE PROFESSIONALS, 11-14 (B.E. Smith ed.). Washington, DC: Nat’l Inst. of Justice (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/202564.pdf>; C.S. O’SULLIVAN ET AL., A COMPARISON OF TWO PROSECUTION POLICIES IN CASES OF INTIMATE PARTNER VIOLENCE. Washington, DC: Nat’l Inst. of Justice (2007), available at [http://www.courtinnovation.org/\\_uploads/documents/Case\\_Processing\\_Report.pdf](http://www.courtinnovation.org/_uploads/documents/Case_Processing_Report.pdf).
- <sup>45</sup> THE ST. PAUL BLUEPRINT, *supra* n. 22 at 4.

# Prosecutor Analysis on Imposing, Modifying and Terminating Criminal No Contact Orders

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1. Victim safety is paramount.
2. Consider each request to modify or terminate a no contact order individually. Analyze the request using all available information and make each decision based upon a totality of the circumstances. Make every effort to speak with the victim – in person or by phone if necessary – while the defendant is still in custody following his arrest.
  - Determine whether the victim’s request is based on fear of defendant.<sup>1</sup>
    - *Is there information that indicates or suggests the defendant is engaging in ongoing intimidation, coercion<sup>2</sup> or violence towards the victim?<sup>3</sup> Sources for such information may include:*
      - Police reports of the current offense;
      - Additional information obtained from officers/investigators;
      - 911 calls and Computer Aided Dispatch (C.A.D.) reports;
      - Jail calls;
      - Past police reports involving the same defendant;
      - Prior arrests and convictions of the same defendant;
      - Input from victim or victim advocate if the victim has given the advocate permission;<sup>4</sup>
      - Petitions for civil protection orders and any supporting documents;
      - Prior pre-sentence investigation reports; and
      - Any probation status and/or compliance.
  - Encourage the victim to meet with a community-based advocate prior to modifying or terminating the no contact order as a means of linking the victim with appropriate assistance and helping her assess the level of risk she may be facing.
  - Consider input from the victim or, if the victim has given the advocate permission, the advocate to assist in determining: circumstances of the case; context and severity of the offense; and bail/pretrial release conditions most likely to ensure the safety of the victim, witnesses, their families and the public.
    - *Use all available sources of background information (as listed earlier) to understand the severity of the offense and danger that defendant poses to the victim.<sup>5</sup>*
    - *Do not require the advocate to provide testimony or information to the court about the victim or the case.<sup>6</sup>*

3. In some circumstances, terminating or modifying the no contact order may not be advisable, despite a victim's objections. The following factors<sup>7</sup> indicate a case/defendant that poses an increased risk to the safety of the victim, suggesting that the no contact order should remain in place.

○ **Severity of Offense Alleged**

- Nature of violence/injury to victim
  - Strangulation
  - Burning
  - Permanent physical damage
  - Head injuries
  - Weapons involved
- Nature of threats<sup>8</sup>
  - Threats of future injury or death (the more specific the threat, the greater the risk)
  - Threats to use a weapon
  - Threats of child abduction or denial of visitation rights
  - Threats made openly and in presence of others
- Child abuse
  - Child injured during the incident
  - Children witness offense
  - Other violence or threats made in the presence of children
- Evidence of escalating violence
  - Use of weapon
  - Sexual abuse
  - Animal abuse
  - Property damage or threats of future property damage
  - Stalking
  - Hostage-taking
  - Recency of any such conduct
  - Victim's increased vulnerability due to age, disability, pregnancy

- **Severity of Defendant's Other Conduct**
  - Prior criminal history
  - History of violence in prior relationships
  - Other pending charges
  - Previous DV charges dismissed
  - Previous DV contacts with police or prosecutor's office
  - Other evidence of violence or threats to victim or others
- **Defendant's Proclivity to Respect Court Rules**
  - Record of violation of court orders
  - Record of failure to follow pretrial release or probation rules
  - Previous participation in batterer treatment program
- **Other Background Factors of Defendant**
  - Evidence of suicide threats
  - Evidence of depression
  - Evidence of paranoid thinking
  - History of mental health or emotional problems
  - Substance abuse
  - Availability of weapons
- **Situational Factors**
  - Imminent break-up, separation or divorce initiated by victim
  - Imminent change in child custody
  - Imminent change in victim's residence
  - Imminent change in victim's employment
  - Defendant's loss of employment

#### 4. Guidelines for Modifications

- Consider adjusting the duration of the no contact order to provide for victim safety while reducing collateral burdens on the victim.
  - *A short no contact order (10 - 30 days) may enable a victim to file for a civil protection order if she wishes, to locate alternative housing, and to make decisions about the charges and no contact order without influence from the defendant.*



- If a victim requests contact, consider the request, keeping in mind that, in some cases, a prolonged no contact order may result in hardship for the victim.<sup>9</sup>
  - *Obtain specific information about the victim and implications of the no contact order on the victim and her family.*<sup>10</sup>
  - *Evaluate the case in context while considering the totality of circumstances, including victim opposition, economic impact, offender intimidation, victim fear, and danger posed by defendant.*<sup>11</sup>
  - *Be sensitive to victim's reliance on defendant for child care, transportation or income and collaborate closely with advocates/agencies to fill gaps created by restrictions on contact with defendant in order to provide victim with necessary resources and assistance.*
  
- Consider options that allow contact under limited conditions in cases where risk factors indicate minimal risk, the victim has requested contact and there is no evidence of coercion or intimidation.<sup>12</sup> At an absolute minimum, an order should preclude defendants from abusing, harassing, intimidating, retaliating against/tampering with or committing any other crimes or acts against any victim or witness in a criminal domestic violence case.<sup>13</sup>
  - *Contact should be limited and monitored; communication could be limited to email, letters or phone calls (subject to recording if possible) or to public places.*
  - *Topics of communication could be limited, e.g., discussions about children.*
  - *Prohibit assaultive, harassing, threatening and stalking behaviors and communication.*
  - *Prohibit firearms possession.*
  - *Request random drug testing when abuse is indicated.*
  - *Request compliance with batterer treatment and/or alcohol treatment programs.*
  - *Allow contact but exclude defendant from victim's residence.*
  
- Victim presence in court. Any modification of the no contact order should only be considered when a victim is present in court and requests modification. However, as any statements made in open court may be designed to protect or mollify the defendant, the best information about the victim's wishes and needs will be obtained by victim/witness staff or the prosecutor and presented to the court.
  
- Amendments in writing. All changes to existing no contact orders should be done in writing in clear, simple language to ensure certainty, fairness and predictability for all parties. All parties should receive a copy of any modifications to court orders.

## 5. No Contact Order Enforcement

- Defendants should not be eligible for bond/bail until personally advised by court of any conditions to be imposed, which may include a criminal no contact order. Defendants must acknowledge an understanding of any conditions imposed.
- Take prompt action upon report of any violation
  - *Seek commitment of defendant to jail pending any hearing.*
  - *Argue for imposition of greater restrictions on any release.*
  - *Seek revocation of any bail/bond posted.*
- Appear at all criminal proceedings to address any violations of the no contact order and to argue for imposition of greater sanctions in all cases involving new threats or acts of abuse.<sup>14</sup>
  - *Revoke any pretrial release or probation.*
  - *File any new criminal charges appropriate.*

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## ENDNOTES

- 1 PRAXIS INTERNATIONAL ET AL., THE ST. PAUL BLUEPRINT FOR SAFETY: AN INTERAGENCY RESPONSE TO DOMESTIC VIOLENCE CRIMES, 82 (2009); J.L. GREIPP & R.L. MARTINSON, Monograph: Witness Intimidation, *ÆQUITAS: The Prosecutors' Resource on Violence Against Women*, Washington, DC: (forthcoming 2010).
- 2 See, T. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much*, 22 BERKELEY J. GENDER, L. & JUST. 2 (2007) (discussing batterers' coercion of domestic violence victims seeking protection orders).
- 3 GREIPP & MARTINSON, *supra* n. 1.
- 4 Due to confidentiality requirements, an advocate from a community-based domestic violence program may only speak with a prosecutor upon the informed consent of the victim. Prosecutors should not, as a general rule, attempt to force advocates to share information obtained from a victim. For more information, see J. KUNCE FIELD ET AL., CONFIDENTIALITY: AN ADVOCATE'S GUIDE, Battered Women's Justice Project, Minneapolis, MN (rev'd Sept. 2007).
- 5 THE ST. PAUL BLUEPRINT, *supra* n. 1, 82.
- 6 See, KUNCE FIELD ET AL, *supra* n. 5; REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS, FINDINGS AND MODEL LEGISLATION, available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=169588> (discussing the importance of victim advocate confidentiality).
- 7 Adapted from Milwaukee, WI District Court, GUIDELINES GOVERNING IMPOSITION OF NO CONTACT ORDERS IN MISDEMEANOR DOMESTIC VIOLENCE CASES (2007) (on file with the authors).
- 8 GREIPP & MARTINSON, *supra* n. 1.
- 9 THE ST. PAUL BLUEPRINT, *supra* n. 1, 82.
- 10 *Id.* at 86.
- 11 *Id.*
- 12 *Id.*
- 13 Such "protection only" orders still provide for rapid enforcement (i.e., mandatory arrest) and comparatively quick sanctioning by contempt powers, as compared to proceeding with any such acts as traditional criminal charges.
- 14 *Id.*

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