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A Model State Act: Remedies for Domestic Abuse

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STATUTE
A MODEL STATE ACT: REMEDIES FOR DOMESTIC ABUSE

LISA G. LERMAN*

The problem of domestic violence has been the subject of increasing national concern. In response to that concern, states have enacted legislation providing protection to victims of domestic violence, encouraging improved police enforcement of protection laws, and constructing appropriate legal sanctions against abusers. Drafting comprehensive legislation to address this problem is difficult because both civil and criminal remedies are needed, because the needs of battered women are diverse and complex, and because effective protection requires a coordinated response by courts, law enforcement agencies, mental health personnel, and the bar. While some new legislation on wife abuse has been enacted in a majority of states, few states have addressed the full range of available remedies, or made relief available to all victims of domestic violence.

In this Article, Ms. Lerman presents a Model Act that consolidates and addresses remedies needed for domestic violence in one comprehensive statute. Ms. Lerman asserts that the primary goal of any law on domestic violence should be to protect the victim. Accordingly, the Model Act facilitates the victim's ability to gain access to the courts and to request protection. The Model Act also acknowledges the need for improved police response to domestic violence and specifies particular police duties. In addition, the Model Act recognizes that domestic violence may be handled as a civil matter, as a criminal matter, or both. Finally, the Model Act considers the appropriate legal treatment of abusers and includes both punitive and rehabilitative dispositional options.

During the last decade, forty-nine states and the District of Columbia have enacted new legislation to provide legal remedies

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to victims of domestic violence.¹ Most of the legislation confers broad injunctive powers on the courts to provide emergency

¹ For a comprehensive analysis of all state statutory provisions providing remedies to victims of domestic abuse, consult Lerman & Livingston, State Legislation on Domestic Violence, Response, Sept.–Oct. 1983, at 1. This article is available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036.
Domestic Abuse protection, and imposes specific duties on law enforcement officials for protection of battered women and other victims of domestic violence. Although little research has been conducted exploring the effectiveness of domestic abuse laws, the collective experience of advocates for battered women suggests that both injunctive relief and expanded law enforcement duties are useful tools in stopping domestic violence.

The earlier statutes, such as the 1976 Pennsylvania law and the 1978 Massachusetts law, provided the template on which other laws have been constructed. Legislatures have amended the laws to correct problems that were not anticipated by the original drafters. The more complex and detailed character of recent statutes is attributable, at least in part, to the experience gained from states that enacted abuse laws during the 1970's.

The goals of the various state laws are similar but the actual relief available and the procedures stipulated vary significantly. Some states articulate more clearly and specifically the remedies provided to a victim of domestic abuse.

This Article explores some of the most effective existing laws and suggests new approaches to resolve issues not yet addressed.


See supra note 1. See generally Lerman & Livingston, supra note 1, at 6–9 (forty-four states and the District of Columbia have enacted protection order laws).


in any statute. This Model Act is to be used to expand the options available to drafters; it is not intended to be adopted in toto by legislatures. The practical or political feasibility of individual provisions will vary depending on local conditions. The Model Act focuses on substantive drafting options; it considers only briefly the political considerations that affect drafting.\(^8\)

To develop the Model Act, I collected all of the existing domestic violence laws. With the assistance of a group of students, I examined existing law addressing each subject topic by topic to identify statutory language that provides maximum relief to victims of domestic violence. I then developed a draft incorporating some of the language and concepts of existing law. The draft was distributed to an advisory board of approximately twenty people who have drafted or assisted in implementing domestic violence laws.\(^9\) Their comments were incorporated, and further revisions were made. Finally, I wrote commentary explaining the policy issues relevant to selected sections of the statute.

The model law does not address all of the legal issues affecting victims of domestic violence. It covers a constellation of issues relating to injunctive relief and police protection in the context of domestic violence.\(^10\) While the remedies created are made available for child abuse as well as adult abuse, this Article does

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\(^8\) For a more detailed discussion of the politics of lobbying for abuse legislation, see J. Hamos, State Domestic Violence Laws and How to Pass Them (1980).

\(^9\) The Advisory Board included the following: Maggie Arzdorf-Schubbe, Director of Programs and Services for Battered Women, Minnesota Department of Corrections; Ann Marie Boylan, Esq.; Sally Buckley, Esq., former Coordinator of the Battered Women's Project, City Attorney's Office, Seattle, Washington; Chris Butler, Esq., Boston, Massachusetts; Marjory D. Fields, Esq., Director of the Family Law Unit, Brooklyn Legal Services Corp. B, Brooklyn, New York; Major Patricia Halsey, Esq., United States Marine Corps, Washington, D.C.; Julie E. Hamos, Esq., Assistant State's Attorney, Cook County, Illinois; Barbara J. Hart, Esq., Harrisburg, Pennsylvania; Donna Hildreth, Legal Services of New Jersey, Inc., New Brunswick, New Jersey; Nancy Loving, Police Executive Research Forum, Washington, D.C.; Catherine G. Lynch, Director, Advocates for Victims, Miami, Florida; Susan May, former Executive Director, Council on Battered Women, Atlanta, Georgia; Marilyn G. Miller, Executive Director, Governor's Commission on Women, Salem, Oregon; Deborah Shaw Rice, Esq., Portland, Maine; Sherrill L. Rosen, Esq., Bogler & York, Kansas City, Missouri; Joanne Schulman, Esq., National Center on Women and Family Law, New York, New York; Marcia Walsh, Esq., Kansas City, Missouri; Laurie Woods, Esq., Executive Director, National Center on Women and Family Law, New York, New York. While most members of the Advisory Board had some input into the content of the statute, and some gave extensive and detailed comments, they have not approved the final product. Therefore, it should not be assumed that the views expressed in the Article are those of the Advisory Board.

\(^10\) See generally Lerman & Livingston, supra note 1.
not consider the social service intervention model, a common legislative response to child abuse. Similarly, the data collection provisions of this draft are based on pertinent provisions of the adult abuse laws, and do not reflect the mandatory reporting system frequently used in child abuse laws.\(^{11}\)

Also outside of the scope of the Model Act are recent developments in shelter funding. However, most states have recently enacted new laws to fund shelters for battered women. In approximately twenty states, "shelter" funds are generated through the imposition of a surcharge on marriage licenses.\(^{12}\)

Though this Act covers legislative changes in law enforcement policy and procedure, recent changes in criminal laws on spousal rape\(^{13}\) and spousal assault\(^{14}\) are not considered.

Most of the domestic abuse laws have been enacted largely as a result of the work of legal services attorneys and staffs of battered women's shelters.\(^{15}\) In the present period of budget reductions for social service agencies, fewer resources are available for work on legislation. This Model Act was written to share the expertise of those who provide services to battered women with others who are in a better position to write legislation but who have less information about what is needed.

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\(^{12}\) See, e.g., ALA. CODE § 30-6-11 (Supp. 1982); FLA. STAT. ANN § 741.01(2) (West Supp. 1983); NEV. REV. STAT. § 122.060(4) (1981). See generally Lerman & Livingston, supra note 1, at 12–13.

\(^{13}\) The trend toward abolishing the spousal exemption in the sexual assault laws is tremendously important because, for the first time, the law has begun to recognize that sexual assault is a form of aggression and that consent to sex is a meaningful concept, even in marriage. See generally D. Russell, Rape in Marriage (1982). Further information on spousal rape is available from the National Center on Women and Family Law, 799 Broadway, Room 402, New York, New York 10003.

\(^{14}\) While several states have enacted spousal assault laws, these are of limited significance because they duplicate other criminal laws and fail to establish any improved enforcement procedures. See, e.g., ARK. STAT. ANN. §§ 41-1653 to -1659 (Bobbs-Merrill 1983); OHIO REV. CODE ANN. § 2919.25 (Page 1982); TENN. CODE ANN. § 39-2-105 (1982).

\(^{15}\) From 1979 to 1981, while I was Staff Attorney for the Family Violence Project of the Center for Women Policy Studies, and since that time, I have received calls and letters from legal services lawyers and shelter staff who were drafting or lobbying for domestic abuse laws in Alabama, Arkansas, Georgia, Maine, Missouri, New Jersey, Ohio, South Carolina, Tennessee, Texas, Vermont, and many other states. I received only occasional calls from state legislators or private attorneys.
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Section 1.00. SHORT TITLE.

This statute may be cited as the Remedies for Domestic Abuse Act.

COMMENTARY: The title of this statute is similar to the titles of
most state abuse laws and indicates the purpose and scope of
the law. The fundamental purpose of the law is to protect victims of domestic abuse by providing them with injunctive relief and police protection.

The term "domestic abuse" is used to refer to any physical violence that occurs in the context of an intimate relationship. The terms "wife abuse" and "woman abuse" were rejected as being too restrictive. The remedies provided by this law also may be invoked to prevent or reduce physical or sexual abuse of children, abuse of parents by adult children, and violence in any ongoing relationship regardless of the sex, sexual preference or marital status of the participants.

The premise of this Model Act is that violence is caused by and is the responsibility of the perpetrator; violence is not the product of a relationship or the result of the interaction of the individuals. Therefore the term "family violence" was rejected. Although victims of domestic abuse may engage in behavior that triggers violence, such as making dinner late, buying the wrong brand of cigarettes or becoming angry if their mate comes home late, they are not responsible for the violent acts of their assailants.

Section 2.00. Findings and Purposes.

The legislature of this state finds that:

Thousands of persons in this state are regularly beaten and abused and some are killed by their spouses, other family members, or sexual partners;¹⁶

Many pregnant women are subject to repeated beatings;
Children are often physically assaulted or witness violence against one of their parents and suffer deep and lasting emotional harm from victimization and from exposure to domestic violence;
Domestic violence is a major health and law enforcement problem in this state and one that affects people of all racial and ethnic backgrounds and all socioeconomic classes;
Domestic violence can be deterred, prevented, or reduced by legal intervention;
Tacit acceptance of domestic violence by courts and law enforcement agencies has resulted in underenforcement of criminal law when the offender and victim are intimates even though criminal law does not distinguish between violence against strangers and friends or men and women;

¹⁶ Forty percent of female homicide victims are killed by family members or boyfriends. U.S. Dep't of Justice, Crime in the United States 1979, 10, 11 (1980). In at least one state, survey results indicated that one in ten women experiences some form of violence from her husband each year. M. Schulman, A Survey of Spousal Violence Against Women in Kentucky 13 (1979).
Victims of domestic violence presently experience substantial difficulty in gaining access to police or court protection, particularly in obtaining prompt police and court response to emergencies; and Battered women and other victims of domestic violence have a right to be safe in their homes.

This Act shall be liberally construed and applied to promote the following purposes:

To assure victims of domestic violence the maximum protection from abuse that the law can provide;

To create a flexible and speedy remedy to discourage violence and harassment against family members or others with whom the perpetrator has continuing contact;

To expand the ability of law enforcement officers to assist victims, to enforce the law effectively in cases of domestic violence, and to prevent further incidents of abuse;

To develop a greater understanding of the incidence and causes of domestic violence through data collection;

To facilitate equal enforcement of criminal law by deterring and punishing violence against family members and others who are personally involved with the offender; and

To recognize that battering is a crime that will no longer be excused or tolerated.

COMMENTARY: This section states the basic premises of the Model Act. Several of the more recent abuse laws, notably those of Illinois, Maine, and New Jersey have findings and purposes sections similar to the one included here. A section of this type can educate legislators who are unaware of the scope of the problem of domestic abuse. Also, since few states maintain any formal legislative history, an explicit "findings and purposes" section can provide guidance as to legislative intent.

In collecting data for a findings section, reference to conser-

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17 U.S. Comm'n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice (1982).
19 Id.
20 Maine law directs law enforcement officers to use "all reasonable means to prevent further abuse." Suggested options include remaining on the scene as long as the officer reasonably believes that the physical safety of a victim or possible victim is in danger, assisting victims to obtain necessary medical treatment, giving the victim notice of her rights, and, if appropriate, arresting the abuser. Me. Rev. Stat. Ann. tit. 19, § 770(6) (1981).
21 Id. tit. 19 § 770(1).
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Domestic abuse is a serious issue that requires careful consideration in drafting legislation. It is essential for drafters to collect accurate and reliable data on the incidence of domestic abuse and the need for improved response by the justice system. Extreme caution should be exercised in selecting data to be cited in a bill to ensure that the data are accurate and not misleading.

Most existing data on the incidence of domestic abuse have been haphazardly collected and may be easily discredited. Drafters should consult with a social scientist to ensure the validity of the statistics selected. In making findings about the inadequacy of remedies available to battered women and other victims of domestic abuse, drafters should refer to national reports and identify particular problems in their own states. National reports cover issues that are not geographically defined; local analysis is also essential. In a largely rural state, for example, the appropriate or feasible law enforcement response may be quite different than in an urban state. In some states, there have been no comprehensive studies of the incidence or the response to domestic violence. Drafters should also examine newspaper or magazine articles or unpublished reports produced by shelters for battered women or legal services offices.

The finding that victims of abuse have a right to be safe in their homes might seem too obvious to mention. However, domestic abuse often causes women to flee their homes, or to stay as virtual or actual prisoners, too terrified to escape and in constant danger. The right to be safe in one’s home also reflects the long-established constitutional principle that “a man’s home is his castle.” This principle has led to important restrictions

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26 One example is Lenore Walker’s statement that “some observers, including myself, estimate that as many as fifty per cent of all women will be battering victims at some point in their lives.” L. WALKER, THE BATTERED WOMEN ix (1979). Among those data most widely discredited are the studies by Straus, Gelles, and Steinmetz on husband beating. Some of their research has concluded that husband beating is almost as frequent as wife beating. See Straus, Wife Beating: Causes, Treatment and Research Needs, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 463, 468–70 (1978). These conclusions are contrary to the experience of service providers and the studies of other sociologists working on domestic violence. See, e.g., S. SCHETTER, supra note 4, at 214 (1982) (discussion and critique of Straus data).

27 See, e.g., U.S. COMM’N ON CIVIL RIGHTS, supra note 17.

on police entry into the home for purposes of criminal law enforcement, and has been part of the family law doctrine of discouraging state interference in domestic matters. The growing recognition of the state's obligation to protect women and children from their mates or relatives extends this privacy principle to require intervention for reasons similar to those given for the historic intervention on intervention.

The purposes section suggests that violence in domestic situations can be stopped by providing police and court assistance tailored to the needs of the victims. Little research has been conducted concerning the effectiveness of the abuse laws since 1976, when this package of remedies was first enacted in Pennsylvania; much remains to be done. In the meantime, thousands of victims of abuse flock to courthouses and call the police, looking for protection. In Philadelphia, for example, the Women Against Abuse Legal Center receives approximately four thousand calls and visits per year from battered women seeking legal assistance. In Cleveland, about 15,000 women called the police to request help in situations classified as domestic disturbances during nine months in 1979. In states that have enacted protection order laws, victims, attorneys, and law enforcement officials have observed that some batterers are affected by the issuance of an order prohibiting abuse. Rather than waiting for definitive research to be conducted, legislators in most states have chosen to respond to a long-neglected problem.

The purpose of this law is to stop violence. The goal is neither to keep violent families together nor to force a separation be-

30 The view that the state should keep families together by leaving them alone still has a tremendous influence on family law in this country. See generally Developments in the Law--Family Law 93 HARV. L. REV. 1157 (1980).
31 See infra note 35.
33 Interview with Joan Kuriansky, Director, Women Against Abuse, in Philadelphia (Dec. 15, 1981).
34 Interview with Grace Kilbane, Director of the Cleveland Witness/Victim Assistance Program, in Cleveland (Jan. 15, 1981).
35 To date, no published study has focused on the effectiveness of protection orders. Several agencies have conducted follow-up interviews with victims of abuse who obtain protection orders, and have observed a substantial deterrent effect. See, e.g., Unpublished Follow-Up Study on Women Who Obtain Restraining Orders (n.d.) (available from W.O.M.A.N., Inc, 2940 16th St., San Francisco, CA. 94103). All of the battered women interviewed by Lenore Walker who had obtained restraining orders found them useful. L. WALKER, supra note 26, at 212 (1979).
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between people in violent relationships. The Model Act is designed to increase the possibility that a person being victimized can make herself safe, either by removing herself or the abuser from the situation, or by asking the court system to require that the violence stop. The primary issue is not whether the relationship continues but whether the violence stops.

Section 3.00. Definitions.

As used in this Act:

3.01. Domestic Violence: means the occurrence of any of the following acts, attempts, or threats against a person who may be protected under this Act under section 3.02:

(A) Battery: causing physical harm to another with or without a deadly weapon;\(^{36}\)

(B) Assault: purposely or knowingly placing or attempting to place another in fear of physical harm;\(^{37}\)

(C) Coercion: compelling another by force or threat of force to engage in conduct from which the latter has a right to abstain or to abstain from conduct in which the person has a right to engage;\(^{38}\)

(D) Sexual Assault: causing or attempting to cause another to engage involuntarily in any sexual act by force, threat of force, or duress;\(^{39}\)

(E) Harassment: engaging in a purposeful, knowing, or reckless course of conduct involving more than one incident that alarms or causes distress to another person and serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the petitioner. Such conduct might include but is not limited to:

(1) following another about in a public place or places;

(2) peering in the window or lingering outside the residence of another;

but does not include constitutionally protected activity;\(^{40}\)

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\(^{40}\) See CAL. CIV. PROC. CODE § 527.6(b) (West 1979 and Supp. 1983); N.Y. PENAL LAW § 240.25 (McKinney 1980). The California statute provides the basis for a substantial portion of the Model Act's definition of harassment. The Act expands the requisite course of conduct to include recklessness; the California statute requires that conduct be knowing. The California law also defines a course of conduct as "a series of acts evidencing a continuity of purpose." The New York law includes "following another about" in the definition of harassment.
(F) **Unlawful Imprisonment:** holding, confining, detaining or abducting another person against that person's will;\(^{41}\)

(G) **Unlawful Entry:** entering or remaining in the dwelling or on the property of another against the wishes of the dweller or owner;\(^{42}\)

(H) **Damage to Property:** causing damage to the property of another or to property jointly owned by the perpetrator and another;\(^{43}\)

(I) **Theft:** taking or attempting to take or appropriate property belonging to another or jointly owned by the perpetrator and another;\(^{44}\)

(J) **Other Conduct:** any other conduct that could be punished as a criminal act under the laws of this state.\(^{45}\)

**COMMENTARY:** The definition of domestic violence serves two functions. The first describes what conduct of the abusive party will enable a person subjected to domestic violence to obtain a protection order. Second, the definition is also referred to in the section on violation of protection orders. That section indicates that commission of any act listed in the definition of domestic violence may subject the abuser to criminal penalties.

As to the first function, the definition in the model law makes it very easy for a victim\(^{46}\) to get a protection order. Most existing abuse laws require that the victim show that she has been subjected to physical assault, threats of assault, or attempted assault.\(^{47}\) Under the model law, other types of criminal conduct that commonly occur in abusive relationships may provide the basis for a request for a protection order. For example, under the model law, if a person is victimized by being imprisoned in her home for a period of time, she may seek a protection order even if she suffered no physical abuse.


\(^{42}\) Cf. WASH. REV. CODE § 9A.52.010 (1981) (defining unlawful entry as entry by one not licensed, invited, or privileged to enter or remain).

\(^{43}\) See WOMEN'S LEGAL DEFENSE FUND'S PROPOSED AMENDMENTS TO D.C. CODE ANN. § 16-1001 (1981) [hereinafter cited as WLDF AMENDMENTS]. This draft legislation is available from Women's Legal Defense Fund, 2000 P Street, N.W., Suite 400, Washington, D.C. 20036.

\(^{44}\) See WLDF AMENDMENTS, supra note 43, § 16-1001.


\(^{46}\) Because most victims of domestic violence are female and most abusers are male, feminine pronouns are used in the commentary to refer to victims of domestic abuse and masculine pronouns are used to refer to abusers. The Act, however, is gender neutral; it is designed to protect all persons who are victims of domestic violence, regardless of gender, age, sexual preference, or relationship to the abuser.

The definition of domestic violence is adapted from language used in state criminal codes.\(^4\) This reflects the fact that one of the purposes of the statute is to prevent crime. Most of the conduct which could lead to issuance of a protection order could be the subject of criminal charges in most states. The simultaneous availability of civil and criminal relief is explained in the section on nonexclusive relief.

The Model Act grants judges tremendous discretion in fashioning appropriate relief. It is contemplated that the extent of remedies granted in each case will reflect the seriousness of the danger in each situation. Since a protection order may be limited to an injunction prohibiting conduct that is already prohibited by criminal law, there is no reason to restrict the issuance of orders to circumstances in which serious physical violence has already occurred.

Section 4.07 of the Model Act, which addresses violation of protection orders, requires that commission of a listed act be proven beyond a reasonable doubt before any criminal penalties may be imposed. To obtain a protection order, however, the same act need be proven only by a preponderance of the evidence. The effectiveness of the protection order depends in part on easy filing and proof requirements, so that victims need not hire attorneys or prepare extensively.

Most abuse laws contain definitions of domestic violence that are too narrow.\(^4\) This broader definition is intended to cover all the varieties of cruel and bizarre conduct that are commonly encountered in battering relationships.\(^5\)

Alternative 1

3.02. Victims of Domestic Violence. A victim of domestic violence who may be protected under this Act shall include any person who has been subjected to domestic violence (as defined in section 3.01) by a spouse, former spouse, a parent, a child, or any other person related by blood or marriage, a present or former household member, a person with

\(^4\) See supra notes 36–45 for specific references.

whom the victim has a child in common, or a person who is or has been in an intimate relationship with the victim.\textsuperscript{51}

Alternative 2

3.02. Victims of Domestic Violence. A victim of domestic violence who may be protected under this Act shall include any person who has been subjected to domestic violence (as defined in section 3.01) by another person who has or had some ongoing personal relationship with the victim, regardless of their marital or blood relationship (or lack thereof) or living arrangements.

COMMENTARY: The remedies created by the law must be made available to as broad a group of victims as possible. Chronic violence occurs in many intimate relationships directed toward spouses, children, parents, lovers, siblings, and others. Often the violence continues and even escalates after a relationship is terminated. Patterns of violence may develop in relationships in which the parties are not and have never been cohabiting.\textsuperscript{52} Laws that fail to provide broad coverage might be interpreted as legislative condonation of violence in the excluded relationships.

The first alternative, a long specific list of relationships in which domestic violence occurs, is the more common formulation. The second alternative is admittedly broad, but it attempts to avoid the possibility that some victims might be deprived of a remedy because of imprecision in drafting or because of political compromises made during the drafting process. One risk of a broad definition is that some attorneys might attempt to use the law to remedy domestic relations or landlord-tenant prob-

\textsuperscript{51} Cf. D.C. Code Ann. § 16-1001(5) (Supp. 1983) (covering persons related by blood or marriage, any person with whom the victim has a child in common, a person with whom the victim shares or within the last year shared residence, and any person with whom the victim maintains or maintained an intimate relationship); Or. Rev. Stat. § 107.705(2) (1981) (covering "adult persons related by blood or marriage," or persons who cohabited within one year of the date of filing the petition).

\textsuperscript{52} Almost every existing abuse law requires present or former cohabitation with the abuser for the victim to be eligible for relief. The only exceptions to this requirement are that in a few states if the abuser and victim are related by blood or marriage, no present or former coresidency requirement is imposed. See, e.g., supra note 51. See generally Lerman & Livingston, supra note 1, at 6-7, 14 at n.45. States which require cohabitation may deny relief to a large number of victims. One study of emergency room records found that 72% of the victims of domestic violence in the sample were not living with the abuser at the time of the assault. E. Stark, A. Flitcraft, D. Zuckerman, A. Grey, J. Robeson & W. Frazier, Wife Abuse in the Medical Setting (1980) (published by the Office of Domestic Violence of the U.S. Dep't of Health and Human Services).
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problems in cases where there has been no domestic violence. This general definition also creates a risk of narrow interpretation by judges to whom petitions for protection orders are presented.

The definition of a victim of domestic violence frequently has been the most controversial issue in legislative debate of the abuse laws. Some conservative legislators, fearful of condoning cohabitation, object to the enactment of any law that appears to sanction it. In addition, many legislators do not understand that violence occurs in all types of relationships and want to simplify the rights conferred by the law by narrowing the group of people who might be protected. In any case, a long specific list of relationships is likely to elicit a debate on this subject.

3.03. A Protection Order is any injunction issued under this Act for the purpose of preventing acts of domestic violence. The term refers to both temporary and final orders issued by civil and criminal courts, whether obtained by filing an independent action or as a pendente lite order in another proceeding.

COMMENTARY: The term "protection order" has been selected to describe the injunction authorized by the statute because most abuse laws use this or similar terms to describe the injunctions authorized by this section. Other frequently used terms, including restraining order, protective order, and temporary restraining order, may be confused with other injunctive remedies available in court.

In some jurisdictions the order is called a civil protection order. The word "civil" is not used in the Act because the order contemplated could be issued as an independent civil remedy or as part of another civil or criminal proceeding. In addition, since some violations of the order may lead to criminal penalties, the remedy is quasi-criminal. Reference to it as a civil remedy might be misleading.

53 Compare conflicting language on coverage of unmarried victims in TENV. CODE ANN. §§ 36-1201 to -1295 (Supp. 1979). The language at the end of the statute restricting applicability to spouses was added as an amendment.
Section 4.00. Protection Orders.

4.01. Jurisdiction.

(A) Courts

(1) All district (circuit, superior, municipal, county, probate, criminal, family, domestic relations, etc.) courts shall have concurrent jurisdiction over all proceedings under this chapter.\(^{57}\)

(2) A protection order may be sought:

   (a) as an independent civil action, or joined with any other civil action;
   
   (b) as a part of the preliminary, final, or post-judgment relief in any civil action; or
   
   (c) during a criminal action at the request of the prosecutor or the victim as a condition of pretrial release, as a condition of diversion, or as a condition of probation or parole.\(^{58}\)

COMMENTARY: The purpose of this section is to require all trial-level state courts that have any power to grant injunctive relief to hear petitions for protection orders. The section also rejects classification of domestic violence as solely civil or criminal in nature and terminates the historic tradition of relegating wife abuse exclusively to domestic relations courts.

(B) Venue. A petition for a protection order may be filed in any district where

   (1) the petitioner resides,
   
   (2) the respondent resides,
   
   (3) the alleged abuse occurred, or
   
   (4) the victim is temporarily located if she has left her residence to avoid further abuse.

COMMENTARY: This section gives courts broad discretion to hear petitions for protection orders, and affords victims of abuse easy access to the nearest or most convenient court.

(C) Convenience. Convenience of the forum shall be determined by the preference of the petitioner.

COMMENTARY: This section prohibits transfer of petitions to other courts on grounds of forum non conveniens. Many victims


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of abuse move away from their abusers in search of safety and then seek court protection at the new location. This section prohibits the courts from conditioning protection on a victim's return to a court near her residence.

(D) Non-Exclusive Relief

(1) The remedies and procedures provided in this Act are in addition to and not in lieu of any other available civil or criminal remedies. Petitioners shall not be barred from relief under this Act because of other pending proceedings or existing judgments.\(^5\)

(2) Relief shall be available under this Act without regard to whether the petitioner has initiated divorce proceedings or sought other legal remedies.

(3) As to domestic relations proceedings, if custody or support has already been adjudicated, the terms of a previous court order may be incorporated into a protection order. Custody or visitation arrangements specified in an existing order may be modified in a protection order upon a showing of changed circumstances for the purpose of preventing further domestic violence.

COMMENTARY: This section notifies both judges and parties that the courts' remedial powers are very broad. The statute does not replace existing remedies but expands the alternatives available to the victim.

Issuance of a protection order is preferable to criminal prosecution in many cases because in a protection order hearing the court focuses on the protection of the victim rather than on the punishment or rehabilitation of the offender. The protection order, however, is not intended to serve as an alternative to or a substitute for prosecution. In some cases, victims elect to pursue civil and criminal remedies simultaneously. In other cases, particularly if a protection order has not been effective, prosecution is a logical next step.

Judges sometimes hesitate to act on petitions for protection orders in cases in which other criminal or domestic relations proceedings are pending.\(^6\) This section directs courts to act on protection order petitions regardless of other pending proceedings because many petitions are frequently filed in emergency

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\(^{6}\) In New York it was formerly the case that if relief had been sought in domestic relations court, the criminal court could not act. If a case had been referred for criminal action, no protection order could be issued. See In re Ruth S. v. George S., 63 Misc.2d 1, 10, 311 N.Y.S.2d 169, 178 (1970).
situations and the backlog of cases in many domestic relations courts is often very long.

Copies of protection orders must be included in the files of any other ongoing proceedings. The petition form requires listing of other proceedings; therefore, the judge need only examine the petition when issuing an order and add any court that is handling a related matter to the list of places to which copies of the order will be sent. This process may be facilitated by using order forms with multiple carbon copies.

The section on domestic relations proceedings attempts to balance the cursory nature of the protection order proceedings and the consequent risk of error against the need for immediate action to prevent physical danger to victims of domestic abuse or their children. The risk of error would suggest deference to any existing domestic relations order which may have been the conclusion of a far more deliberative process. But the need for immediate action suggests that a protection order should supersede an existing domestic relations order. If, for example, the custodial parent had begun sexually abusing a child and was preparing to leave the country with the child to reside elsewhere, a protection order could prohibit the removal of the child from the jurisdiction and make a temporary transfer of custody to the other parent. The increasing frequency of child-snatching makes emergency remedies in such circumstances particularly important.61

(E) **Full Faith and Credit**

(1) Any protection order issued pursuant to this Act shall be effective throughout the state in all districts and counties.62

(2) Any protection order issued by the court of another state shall be accorded full faith and credit and enforced as if it were an order of this state.

COMMENTARY: The purpose of this section is to facilitate intrastate and interstate enforcement of protection orders. The section directs police to enforce any protection order issued within the state, even if they have had no contact with the court that issued it. It also warns assailants that they may not escape enforcement of a protection order by seeking out the victim in another jurisdiction.

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If a protection order is issued in one state, and the victim then moves to another, the court in the second state must enter a judgment on the order before it may be enforced in the second state. This clause directs courts presented with foreign orders to enforce them even if the relief granted is different from or broader than the relief available under the law of the state in which enforcement is sought.

This section is necessary because victims of abuse frequently flee their abusers to another state or locality, only to be pursued to their new location and victimized again.

4.02. Commencement of Action.

(A) Filing a Petition

(1) An action for a protection order may be commenced by filing a verified petition with the clerk of the court or if the courts are closed, with the judge, as described in section 4.03(E).

(2) Protection order petitions shall be available from the clerk of the court at no charge to the parties.

(3) Protection order petitions may be filed either typed or legibly handwritten.

(4) Protection order petitions used in civil proceedings shall use the following form:

I respectfully request that the Court enter an order protecting me and/or other members of my household from abuse. In support of this request, I state the following facts and swear that they are true:

1. Name(s), address(es), and telephone number(s) of persons needing protection from abuse (DO NOT LIST ADDRESS OR TELEPHONE NUMBER IF DOING SO WOULD ENDANGER THE VICTIM):

2. Home and work addresses and telephone numbers of the abuser (the respondent):

63 United States v. Pearson, 258 F. Supp. 686 (S.D.N.Y. 1966) (filing of Virgin Islands judgment in New York Supreme Court clerk’s office did not by itself render the action enforceable); Bank of Sun Prairie v. Hovig, 218 F. Supp. 769 (W.D. Ark. 1963) (holding that judgment in one state did not become enforceable in another state until a default judgment was entered in the second).

64 "If the wife does manage to escape, her husband often stalks her like a hunted animal. He scours the neighborhood, contacts friends and relatives, goes to all the likely places where she may have sought refuge, and checks with public agencies to track her down . . . .

"Unless she can afford to leave town and effectively to disappear, a woman is never quite safe from a stalking husband. Sometimes the harassment, the threats and the beatings continue for years after a wife has left.” D. MARTIN, note 50, at 78 (1978). See S. SChECtER, supra note 4, at 223.

65 These forms are similar to forms that will appear in Seeking Ex Parte Relief, in 1 MAtRIMONIAL & FAM. L. PrAC. (MB) (1984).
3. Relationship between victim and abuser (indicate any blood relationship, present or former marriage, or present or former cohabitation or dating relationship):

   Date of beginning (and end if applicable) of relationship: ________________

4. On or about ________________, 19______, the Respondent:
   - Physically abused the Petitioner or other victim.
   - Committed some other act of domestic violence against the Petitioner or other victim: Threat / Coercion / Sexual Assault / Harassment / Involuntary Confinement / Unlawful Entry / Damage to Property / Theft / Other: __ (circle act committed),
   at the following location: ________________ by the following acts (describe the incident in detail): ________________.

5. The Respondent has been abusing the victim for _____ months / years (circle one) about _____ times per week / month / year (circle one). The police have been called _____ times; the victim has needed medical treatment for injuries _____ times. Explain any relevant history: ________________.

   Based on the incident described in paragraph 4, the following legal action has been initiated or concluded (check if applicable):
   - Criminal Prosecution: [date started] [date of final order]
   - Divorce: [date started] [date of final order]
   - Another petition for protection from abuse: [date started] [date of final order]
   - Custody: [date started] [date of final order]
   - Other: ________________

6. The Respondent continues to be a threat to the safety of the victim because:
   - They share a residence;
   - The Respondent may become violent again;
   - Other: ________________.

7. To protect the victim from further abuse, I request that the following relief be granted:
   A. _____ That the Respondent be ordered not to abuse, harass, or threaten the victim, or to commit any other domestic violence;
   B. _____ That the Respondent be excluded from a shared residence and that the victim be granted exclusive possession (NOTE: you may ask for exclusive possession even if the residence is solely owned or leased by the respondent; this order will have no effect on title);
   C. _____ That the Respondent be ordered to stay away from the following places, where the victim regularly goes (DO NOT LIST ANY ADDRESS WHICH WOULD FURTHER ENDANGER THE VICTIM):
      - Residence: ________________
      - Place of employment: ________________
      - School attended by victim or children: ________________
      - Other place(s): ________________;
   D. _____ That the Respondent be ordered not to communicate with the victim(s), in person, in writing, or by telephone, except that the Respondent be permitted to communicate under the following circumstances: ________________;
   E. _____ That the Respondent, if ordered to vacate a shared residence, be ordered to make or to continue to make rent or mortgage payments on the residence in the amount of $____ payable to ________________;
   F. _____ If the victim left or wishes to leave a shared residence to avoid abuse, that the Respondent be ordered to pay the victim $____ per month for rent at a new residence;
   G. _____ If the victim is unable to provide support for herself/himself or for her/his children, that the Respondent be ordered to make support payments of $____ per month (attach financial statement if requesting support);
   H. _____ That the court grant to the victim temporary custody of the following minor child(ren): ________________;
   I. _____ That the Respondent be permitted to visit with the children only on the following day(s), at the following place(s) and time(s), under the supervision of the following person(s): ________________.
J. _____ That the Respondent be ordered to compensate the victim for the following expenses, incurred as a result of the abuse:

- Medical care: $____
- Lost earnings: $____
- Property taken or damaged: $____
- Moving expenses: $____
- Travel expenses: $____
- Attorneys' fees: $____
- Court costs: $____

TOTAL: $____.

K. _____ That the Respondent be ordered to give the following personal property to the victim: (circle) automobile / checkbook / credit cards / keys / other: ____________;

L. _____ That the Respondent be ordered not to transfer, encumber, or dispose of property owned by the victim or jointly owned;

M. _____ That the Respondent be ordered to participate in a counseling program designed to control violent behavior, by contacting ____________ at ____________ within two days of the date of this order, and that Respondent submit a report from his counselor to the Court once every four weeks from the date of this order until the program is completed;

N. _____ That the Respondent be ordered to pay the cost of counseling for himself/herself, the victim, or others affected by the violence (circle one or more);

O. _____ That a police officer serve and execute the protection order, including supervising the Respondent in returning to the residence that Respondent has been ordered to vacate to collect personal belongings;

P. _____ That a police officer be ordered to accompany the victim to a residence occupied by the Respondent to obtain physical custody of children or to collect personal belongings;

Q. _____ That the Respondent be ordered to pay a fee of $____ to a shelter for victims of domestic violence where the victim has resided or is residing;

R. _____ Other relief, as follows: ____________

(5) Protection order petitions used in criminal proceedings shall use the following form:

_________________________, the Complaining Witness / Prosecutor / Arresting Officer (circle one) in the above-captioned case, moves that a protection order be issued to prevent injury to or intimidation of the Complaining Witness, ____________.

In support of this motion, it is stated that:

1. The Defendant has been charged with / convicted of (circle one) a violation of ____________.

2. The relationship between the Complaining Witness and the Defendant is (indicate any blood relationship, present or former marriage, or present or former cohabitation or dating relationship): ____________;

   Dates of beginning and end of relationship: ____________;

3. On or about ____________, 19___, the Defendant: ____________;

   Committed some other act of domestic violence against the Complaining Witness: Threat / Coercion / Sexual Assault / Harassment / Involuntary Confinement / Unlawful Entry / Damage to Property / Theft / Other: ____________

   (circle act committed),

   at the following location: ____________, by the following acts (describe the incident in detail):

4. The Defendant has been abusing the victim for months / years (circle one) about ____________ times per week / month / year (circle one). The police have been called ____________ times; the victim has needed medical treatment for injuries ____________ times. Explain any relevant history. ____________
Based on the incident described in paragraph 3, the following legal action has been initiated or concluded (check if applicable):

- Divorce: [date started] [date of final order]
- A petition for protection from abuse: [date started] [date of final order]
- Custody: [date started] [date of final order]
- Other: [date started] [date of final order]

5. The Defendant continues to be a threat to the safety of the Complaining Witness because:
   - They share a residence;
   - The Defendant may become violent again;
   - Other: 

   THEREFORE, ________________requests that the Court require the Defendant:

1. Not to abuse, harass, or threaten the Complaining Witness, or commit any other domestic violence;
2. To vacate a residence shared with the Complaining Witness and allow her/him exclusive possession of the residence (NOTE: this relief may be requested even if the residence is solely owned or leased by the Defendant; the order will have no effect on title);
3. To stay away from the following places, where the Complaining Witness regularly goes (DO NOT LIST ANY ADDRESS WHICH WOULD FURTHER ENDANGER THE COMPLAINING WITNESS):
   - Residence: 
   - Place of Employment: 
   - School attended by the Complaining Witness or children: 
   - Other place(s): 

4. Not to communicate with the Complaining Witness, in person, in writing, or by telephone, except that the Defendant be permitted to communicate under the following circumstances: 

5. To make or continue to make rent or mortgage payments on a residence that the Defendant is ordered to vacate in the amount of $____ payable to 

6. To pay the Complaining Witness $____ per month for rent at another residence;

7. To make support payments in the amount of $____ per month to the Complaining Witness if she/he is unable to provide adequate support for herself/himself or for her/his children (attach financial statement if requesting support).

   It is further requested:

8. That the Court grant temporary custody of the following minor children to the Complaining Witness: [Names] [Ages];
9. That the Defendant be permitted to visit with the children only on the following day(s), and only at the following place(s) and time(s), under the supervision of the following person(s) ;
10. That the Defendant compensate the Complaining Witness for the following expenses, incurred as a result of the crimes charged:
    - Medical care: $____
    - Lost Earnings: $____
    - Property taken or damaged: $____
    - Moving expenses: $____
    - Travel expenses: $____
    - Attorneys' fees: $____
    - Court costs: $____
    - TOTAL: $____;
11. That the Defendant be ordered to give to the Complaining Witness the following personal property: (circle) automobile / checkbook / credit cards / keys / other: 
12. That the Defendant not transfer, encumber, or dispose of property owned by the Complaining Witness or jointly owned;
13. _____ That the Defendant participate in a counseling program designed to control violent behavior, by contacting ________________ at __________ within two days of the date of this order, and that Defendant submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;

14. _____ That the Defendant pay the cost of counseling for himself/herself, the Complaining Witness, or others affected by the violence (circle one or more);

15. _____ That a police officer serve and execute the protection order, including supervising the Defendant in returning to a residence that the Defendant has been ordered to vacate to collect personal belongings;

16. _____ That a police officer accompany the Complaining Witness to a residence occupied by the Defendant to obtain physical custody of children or to collect personal belongings;

17. _____ That the Defendant be ordered to pay a fee of $______ to a shelter for victims of domestic violence where the Complaining Witness has resided or is residing;

18. _____ Other relief, as follows: ________________.

(6) A petitioner seeking a protection order shall not be required to reveal any current address or place of residence except to the judge in camera for the purpose of determining jurisdiction and venue. The petitioner may be required to provide a mailing address unless the petitioner alleges that he or she would be endangered by such disclosure would endanger the victim or others.

Commentary: This section attempts to facilitate speedy relief by keeping procedures as simple as possible. Many abuse laws now require filing of several forms, motions, and/or affidavits to initiate an action for a protection order. This statute contemplates a simple, easy-to-read form on which the basis for jurisdiction and the relief requested can be presented by a petitioner with no legal background. Under the Model Act, the clerk of court would provide petitioners with the short form and offer limited clerical assistance in completion of the forms.

The section permitting nondisclosure of the victim's address is an attempt to protect a victim who has moved to a location unknown to the abuser. Most battered women's shelters in the United States keep their addresses secret. Victims should not be required to choose between requesting legal protection from the court and keeping their addresses secret from assailants.

(B) Who May File a Petition

(1) A person may seek an order of protection:

(a) for herself or himself;

(b) on behalf of a minor child, if the alleged abuser and/or the child is a relative or a household member of the petitioner;
(c) on behalf of any person prevented by physical or mental incapacity from seeking an order of protection;

(d) on behalf of any household member who has been subject to domestic violence, if the petitioner is endangered or adversely affected by the abuse alleged against the household member.66

(2) A petitioner shall not be denied relief under this Act because:

(a) the petitioner used reasonable force in self defense against violence by the respondent;67 or

(b) the petitioner or the respondent is a minor.

(3) Voluntary intoxication shall not be a defense to a proceeding involving issuance or enforcement of a protection order under this Act, except as otherwise provided by law.68

COMMENTARY: This section explains who may seek a petition for a protection order, as distinguished from who may be covered under an order. In most cases of adult abuse, victims are able to file on their own behalf. There are, however, many cases of domestic abuse that involve children or incapacitated adults. In such circumstances the law authorizes other concerned or affected persons to bring the situation to the attention of the court and to request relief on behalf of the victim. The Model Act provides a private right of action for any victim. It allows any person who is living with or related to the victim or the abuser to file a petition on behalf of a minor child. The statute does not permit social service agencies to petition for protection orders for children or adults. If, however, a child abuse case were assigned to a social service worker who felt that a protection order would be a useful option, he or she might encourage relatives or household members of the victim to seek an order. Although allowing the agencies to petition might be very useful in some child abuse cases, the risks of such a procedure might outweigh the benefits. Remedies may best be used by adults who are very familiar with the child’s situation. The Model Act seeks to avoid further expansion of the social service intervention model.

Subsection (c) provides that anyone can file a petition on behalf of an adult who is incapacitated. This is a less intrusive

68 Id., § 768(4).
variant of the most common child abuse laws which mandate intervention by disinterested outsiders because children are often unable to seek help. If an adult is able to assert his or her own rights, there is a privacy interest in avoiding intervention that is not requested by the victim. Where the adult cannot request help, the interest in preventing violence must take priority over the privacy interest.

Subsection (d), which gives a right of action to a person not abused but adversely affected by the respondent’s abuse of another person, is addressed to a situation in which the victim is less willing or able to take steps to stop the abuse than other household members or relatives. While the law does not allow a stranger to intervene on behalf of any victim, it does allow intervention by intimates of victims who are affected by the abuse. This provision generally follows a policy articulated in *Lucke v. Lucke*. In that case, the North Dakota Supreme Court upheld the lower court’s issuance of a protection order to an eighteen-year-old girl whose three sisters had been sexually abused by their father. The order protected all of the daughters.

Subsection (2) states that eligibility for relief is unaffected by violent action taken by the petitioner in self-defense. The courts may not interpret the law to allow relief only to petitioners with “clean hands.” In a situation involving “mutual combat” or in which petitions are filed by each party against the other, the court should, under this provision, grant relief to the party who was more seriously injured or has been battered more frequently. Only in a rare case should protection orders be granted to each party against the other.

A harder case is presented when a petition is filed by the abusive party but not by the victim. In such circumstances the court has no power to issue an order against the petitioner. It can only decline relief and advise the respondent of her right to relief.

Petitions may be filed by minors under the model law. In many situations, a child may be the only person other than the parties who knows the extent of the violence being perpetrated by one parent against another. Exposure to domestic abuse is harmful to children. Those who are sufficiently literate and mobile to go to the courthouse and fill out a petition should not

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69 Lucke v. Lucke, 300 N.W.2d 231 (N.D. 1980).
be deprived of the remedy on the basis of age. If a child requests protection for an adult and the adult objects, in many cases the court might decline to grant relief. However, it might be appropriate to evict a man who abuses his wife and his children even if the wife objects to the order. The woman would be required to give her children's safety priority over her emotional attachment to the abuser.

The Model Act points out that intoxication does not excuse abusive behavior. Many people engaged in patterns of violence against family members only become violent when they are drunk. One researcher suggests that abusers drink in order to give themselves permission to be violent, and that the physiological effects of the alcohol are not the cause of the violence.\footnote{See A. Ganley, Court-Mandated Counseling for Men Who Batter: A Three-Day Workshop for Mental Health Professionals 34-35, 53-54 (1981).}

(C) Right to Proceed Pro Se; Court Clerk Assistance

(1) Each party may proceed with or without legal representation at any or all stages of protection order proceedings.\footnote{See Hawaii Rev. Stat. § 585-3 (Supp. 1980).}

(2) Clerks of court shall provide all parties with information about:

(a) the availability of protection orders;

(b) procedures for filing petitions for protection orders;

(c) the right of parties to proceed with or without legal representation as they may choose;

(d) the procedures for waiver of filing and service of process fees; and

(e) the right of the petitioner to have her place of residence remain secret.

(3) Clerks of court or other persons designated by the court shall assist the parties in completing and filing the petition, affidavits, summons, answer, petition to proceed in forma pauperis, and other papers and pleadings necessary to initiate or respond to a petition for a protection order.

COMMENTARY: The law must be structured to allow pro se proceedings to make protection orders available to indigent victims of abuse who seek court assistance. Poor women who are battered seek help from the police more than twice as often as women with higher incomes. Unless the law also allows clerks to explain to petitioners that they may seek waiver of court filing fees, petitioners may wrongly believe that they cannot afford to go to court.

To allow pro se petitions is not to disparage the value of representation in a protection order proceeding. Particularly in situations in which temporary custody or support is sought, or in which visitation restrictions are requested, legal assistance may help the victim to understand and assert her rights. If the victim proceeds without counsel, she might request less support than she is entitled to, and inevitably, such an award might influence a subsequent support award in a divorce proceeding. But the cutbacks in legal services and the rising cost of private legal assistance effectively foreclose the preferred option of providing counsel for all victims of abuse. Therefore, the procedural requirements of the Model Act are extremely simple and may be understood by someone with no legal training.

Many state laws now require that clerks of court provide minimal assistance to pro se parties. This provides the parties with access to someone who can answer questions about the procedure for obtaining a protection order and facilitates smooth proceedings. Despite the acceptance of this practice in federal courts and in small claims courts, a constitutional challenge was made to a provision in the Minnesota abuse act requiring clerk assistance to victims. In State v. Errington, the Supreme Court of Minnesota interpreted the legislative requirement that “the court” assist victims of domestic abuse to require assistance by the court clerk rather than the judge. The court further held that this provision did not violate the separation of powers doctrine or create a biased court by mandating assistance only to victims of abuse and not to respondents.

One major study conducted in Kentucky found that 14% of incidents of spouse abuse involving lower income women (household income below $7500) were reported to the police, and only 6% of incidents were reported when the victims lived in households earning $15,000 or more. M. SCHULMAN, supra note 16, at 36 (1979).


310 N.W.2d 681 (Minn. 1981).
In the Model Act, however, the clerks are directed to assist both petitioners and respondents, so that neither need be represented by counsel, and so that both parties will have access to information about court procedures.

Court clerks, however, may not render legal advice without a license to practice law. The line between clerical assistance and legal advice is not an easy one to draw. Subsection (4) prohibits court clerks from giving legal advice to parties. If the assistance offered is limited to explaining court procedures, explaining how to fill out forms, or in the case of illiterate parties, acting as a scribe, no question of unauthorized practice is presented. More difficult questions arise when a petitioner is literate but cannot write a coherent statement of facts, or when a petitioner asks the clerk if her relationship to her assailant would make her eligible for a protection order. To the extent that questions can be answered or assistance offered without the exercise of the type of professional judgment which requires legal training, clerks may facilitate the conduct of expeditious court proceedings without violating the unauthorized practice laws. But if, for example, the petitioner requests an analysis of a point of law that is susceptible of varied interpretation, the clerk should decline to respond because such assistance would constitute legal advice.

**Ethical Consideration 3-5** states:

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer . . . . Where this professional judgment is not involved, non-lawyers, such as court clerks, . . . [and others] may engage in occupations that require a special knowledge of law in certain areas.

**Model Code of Professional Responsibility EC 3-5 (1976).**

In Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979), a secretary was found to have engaged in the unauthorized practice of law by providing customers with do-it-yourself divorce kits and by helping them to fill out forms and to prepare for pro se court appearances. The clerk assistance authorized by the Model Act is similar in some respects to the conduct found illegal in *Furman* but is clearly distinguishable.

Several factors distinguish the clerk assistance provisions of the Model Act from the situation addressed by the Florida Supreme Court in *Furman*. Most important, in *Furman* there was no explicit statute authorizing the conduct in question. The clerk assistance in the Model Act is quite literally authorized and therefore not illegal. Under the Model Rules of Professional Conduct Rule 5.5 (1983), the question of whether the assistance contemplated in the Act may be authorized is indirectly addressed:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment: The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice
Alternative 1

(D) **Filing and Service Fees: Petitions of Poor Persons**

1. A petitioner may file an affidavit stating that he or she is seeking a protection order and lacks the funds to pay for filing and service. If such an affidavit is filed, the petition shall be filed and service shall be made without payment of costs or prior leave of the court to proceed in forma pauperis.

2. When the petition is filed without payment of costs, the court shall determine at the hearing on the petition whether the petitioner or the respondent is indigent. If the court finds that the petitioner is not indigent, the court may order the petitioner to pay the court costs. If the respondent is found not to be indigent and the petitioner prevails on the merits, the respondent may be ordered to pay court costs.

3. In determining whether a petitioner has the funds available to pay the costs of filing and service under this Act, the income of the respondent shall not be considered.79

Alternative 2

(D) **Filing and Service Fees: Petitions of Poor Persons.** No fees shall be charged for forms, filing of petitions, service of petitions or orders, copies of orders, or other services provided by this Act.80

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COMMENTARY: This subsection presents two alternative methods of fee waiver. The first enables the court to determine eligibility for fee waiver on a case-by-case basis; the second is automatic and applies in all cases. The option of fee waiver, like the pro se provisions, may determine whether the remedy will be available to those who need it or whether most victims will be unable to enforce their legal rights due to lack of funds. In some courts the cost of filing and service is as high as sixty to one hundred dollars. The need for fee waiver provisions is stronger in states in which the courts impose high filing fees.

Several considerations are relevant in determining if the state abuse law should waive fees in all abuse cases or should require case-by-case determination. Most important, because victims of abuse frequently will file pro se, each additional procedural requirement will deter some people from requesting relief. A blanket fee waiver would not maximize victims' access to legal protection. A legislature should also consider whether the court system can afford to subsidize protection order proceedings and whether the additional cost to the court of processing and determining in forma pauperis petitions would be greater than the income received from fees paid. If in forma pauperis petitions would be filed and granted in a high percentage of abuse cases, the income received from filing fees might be small.

Alternative 1 requires that respondent's income not be attributed to the petitioner in determining eligibility for fee waiver. In many abusive relationships, the batterer controls family finances and the victim has no access to cash, bank accounts, or credit cards. Many abusers will go to great lengths to prevent their victims from calling the police, going to court, or seeking other help. Therefore, the victim must have the option to file a petition in secret, without asking her abuser for money to go to court.

4.03. Hearings: Civil Proceedings.

(A) Emergency Conditions. The respondent is entitled to notice and hearing prior to issuance of a protection order unless the petitioner demonstrates the existence of an emergency by:

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81 Lerman, Protection of Battered Women: A Survey of State Legislation, 6 WOMEN'S RTS. L. REP. 271, 279 (1980). In particular, some courts in California, Kentucky, Ohio, and Texas charge high filing fees. Fees often vary widely among courts within a particular state.
(1) A showing that the petitioner or other victim was recently the victim of an act or acts of domestic violence committed by the respondent that resulted in physical or emotional injury or damage to property; or

(2) Alleging that the petitioner or others are likely to suffer harm if the respondent is given notice.82

COMMENTARY: In many abuse cases, victims seek help at a point of dire emergency, during or immediately after an abusive incident.83 Often a protection order must be issued before giving notice to the respondent because of the imminent danger of further harm.

The purpose of this section is to define when an emergency exists. "Emergency" is defined to include situations in which some harm has recently been inflicted — as evidence of possible future or continuing harm — as well as instances in which there is an evident danger of serious harm unless an order is issued without the delay that would be necessary to give the respondent notice. The second part of the definition recognizes that if the victim of abuse tells the abuser that she might seek help, he may respond by threatening more serious violence.84 These threats may prevent the victim from leaving the situation or from seeking protection. By punishing the victim for filing a protection order petition, the abuser may persuade her to withdraw the petition or simply to fail to appear on the court date.

Most existing laws are less specific than the model law in their articulation of what may be included as an emergency situation justifying ex parte relief. Most of the statutes simply authorize ex parte relief whenever there is "immediate and present danger of abuse". In some jurisdictions, conservative judges have refused to grant ex parte orders because they view the remedies provided by the law as inappropriate.85 The specificity of this draft is designed to overcome judicial reticence that might narrow the definition of "emergency". More explicit statutory direction is more difficult to misinterpret.

Ex parte orders that involve deprivations of liberty or prop-

82 See WLDF AMENDMENTS, supra note 44, § 16-1003(b) (referring to bodily harm).
83 Walker points out, however, that some women are immobilized by the abuse and do nothing for a few days after a beating. L. WALKER, supra note 26, at 64, 66.
84 D. MARTIN, supra note 50, at 77–81.
85 For example, in Memphis, Tennessee, after a state protection order law was enacted in 1979, the judges joined together not only in refusing to enforce the law, but in working to repeal it. "Judges Ignore Law Shielding Abused Wives," Memphis Press-Scimitar, Oct. 27, 1979, at 1. This attempt was unsuccessful.
erty (such as eviction of the respondent from his residence and restrictions on visitation with children) are consistent with the Due Process Clause only if notice and opportunity for a hearing are postponed rather than cancelled, and if procedural protections are provided to minimize the deprivation.

The section defining emergency conditions restates current due process doctrine. Ex parte orders may be issued only when harm would result from prior notice and hearing. The orders must be issued by judges and there must be a showing that harm might result from delay. The notice and opportunity for hearing must be provided as soon as possible after the order is issued.

(B) Ex Parte Relief. If an emergency exists, a petition for a protection order shall be heard ex parte or granted based on the allegations contained in the petition and affidavit. Such petitions shall be given priority over all other docketed matters and shall be decided by a judge available for emergency proceedings the same day the petition is filed, or the following morning if the petition is filed after 4:00 p.m. If the judge finds that the petitioner for ex parte relief has proven by a preponderance of evidence that emergency conditions

67 Cf. Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (upholding the constitutionality of ex parte procedures contained in the Missouri Adult Abuse Act against state and federal due process challenges). For an extensive discussion of the due process issue as it relates to remedies for battered women, see Taub, Equitable Relief in Cases of Adult Domestic Violence, 6 Women's Rts. L. Rep. 241 (1981).
68 The preponderance standard as it is used here means that “the existence of a contested fact is more probable than its nonexistence.” C. McCormick, McCormick on Evidence (E. Cleary 2d ed. 1972). Although this standard is generally applied in a comparative fashion to find one set of evidence more convincing than opposing evidence, it would be applied in an ex parte hearing to determine whether affirmative evidence of domestic violence was convincing by itself. The petitioner is required to prove more facts in an ex parte hearing (i.e., she must prove the presence of conditions requiring emergency action), but the standard of proof is the same whether the respondent is present or not. That standard is that the trier of fact must find it somewhat more likely than not that the acts in question occurred.

While some states might wish to impose a standard of “clear and convincing” proof before issuing ex parte protection orders, the case law suggests that a lower standard is permissible. In Addington v. Texas, 441 U.S. 418 (1979), the Supreme Court held on the facts that clear and convincing proof was required to commit involuntarily an individual to a mental institution for an indefinite period of time. In protection order proceedings, the low risk of erroneous decision and the rapid opportunity for correction of any error makes application of a less demanding standard of proof appropriate.

To apply a higher standard of proof would be to subvert the intention of the law because so many women come into court in emergency circumstances without having had a chance to prepare formally to prove their allegations. The higher standard might operate to deny relief in many of the cases for which the ex parte provisions are intended.

The Court explained in Addington that the burden of proof functions to “allocate the risk of error between the litigants.” Id. at 423. When the burden of proof is a preponderance of evidence, “[t]he litigants share the risk of error in roughly equal fashion.” Id. This seems a fair approach in this case because an error in denying needed relief
are present and that an act of domestic violence has occurred, the judge shall grant any of the requested relief contained in section 4.05(A) No Further Abuse, (B) Exclusive Possession, (C) Stay Away, (D) No Communication, (I) Temporary Custody and Visitation, and (O) Police Supervision of Return to Residence. In an emergency situation, the judge may grant any other necessary relief. The ex parte protection order will remain in effect pending a full hearing. If a hearing is continued, the ex parte order may be extended until the hearing is completed.

COMMENTARY: This section establishes procedures for issuing emergency orders. The language of the Model Act is largely original. Most advocates for battered women believe that to provide effective protection the protection order law must contain simple proof requirements and provide for almost contemporaneous relief. The requirement that the ex parte hearing be held the same day a petition is filed was suggested by several reviewers who agreed that a prompt response to the needs of victims of domestic violence is crucial. A delay of one or two days between petition and order could be dangerous to many petitioners.

In contrast to proceedings for child custody or support, the petitioner is not required to submit detailed proof of her entitlement to each type of relief requested. Once she establishes that she is a victim of domestic violence, she need only prove that the relief is needed to protect her from subsequent violence. The nature of the relief granted should be related to the seriousness of the alleged abuses. For example, a judge might decline to grant an eviction order absent a showing that there had been or was likely to be serious physical abuse. If a petitioner demonstrates that she has been injured, a judge might grant her temporary custody of her children merely upon a

could cost the petitioner her physical well-being or even her life. An erroneous grant of relief would at worst exclude the respondent from his residence for a few days or a week.

Finally, the relief granted in protection orders has consequences far less drastic and permanent than those cases in which the Supreme Court has previously required proof by clear and convincing evidence. Even if the abuser is asked to vacate his residence for a year (after a final hearing) the deprivation is far less than that imposed by involuntary indefinite hospitalization in a mental institution, id., by deportation, Woody v. INS, 385 U.S. 276 (1966), or by denaturalization, Chaunt v. United States, 364 U.S. 350 (1960).

showing that continued coresidence of the parties would create a continuing danger. No hard lines should be drawn here; the circumstances of abusive relationships vary so widely that broad judicial discretion is necessary.

In many jurisdictions where these remedies exist, it has been necessary to educate the private bar and the judiciary that relief should not be requested under the abuse law except to protect individuals from domestic violence. Attorneys who are unfamiliar with the abuse laws sometimes petition for a protection order to expedite temporary resolution of support, custody, or visitation issues in domestic relations cases in which there has been no violence. This may be a particular problem in jurisdictions with crowded dockets and long backlogs. If the private bar is not educated and inappropriate petitions are filed, some judges may become suspicious of legitimate petitions and become more reluctant to grant relief.

Alternative 1: Required Second Hearing.

(C) Due Process

(1) The court shall schedule a full hearing within fourteen days after the date that any ex parte order is issued. If the respondent wishes to be heard sooner than the date set by the court, then after at least two days notice to the petitioner, or after such shorter notice as the court may prescribe, the respondent may appear and move for the dissolution or modification of that order. The court shall hear such motion as expeditiously as possible.91

(2) If after the hearing the court finds that allegations of abuse have been proven by a preponderance of the evidence, a final protection order shall be issued that may include the relief granted in the ex parte order and any additional relief requested by the petitioner.

Alternative 2: Optional Second Hearing.

(C) Due Process

(1) When an ex parte order is issued, the respondent may file a request for a hearing with the clerk of the court within twenty days after being served with the order. Such hearings shall be scheduled after at least two days notice to the petitioner or after such shorter notice as the court may prescribe.

(2) A full hearing may also be requested by the petitioner if all of the relief requested in the ex parte hearing is not granted or for other appropriate reasons. Such hearings shall be scheduled after at least five days notice to the respondent or after such shorter notice as the court may prescribe.\(^9\)

(3) If the judge issuing the ex parte order determines that a full hearing is necessary, he or she may order sua sponte that a full hearing be held at which both parties may present evidence. Such hearing shall be scheduled after at least five days notice to both parties or after such shorter notice as the court may prescribe.

(4) If after hearing evidence from both parties, the court is satisfied that allegations of abuse have been proven by a preponderance of the evidence, the court shall issue a final protection order.

(5) If a full evidentiary hearing is not ordered by the judge, and none is requested by the petitioner or the respondent within twenty days after proof of service is filed, the ex parte order shall become a final order.\(^9\)

**COMMENTARY:** Most jurisdictions require that a full hearing be held before a final order may be issued. A minority of states, however, provide that ex parte orders will become final unless a hearing is requested. The former alternative is the recommended approach in the Model Act. The section requires that a full hearing be scheduled within fourteen days after the order is issued, or sooner if the respondent so requests.

Requiring a second hearing before issuing a final order is desirable for several reasons. First, the law may be less vulnerable to a constitutional challenge if the burden to request a hearing is not imposed on the respondent. The laws that require no second hearing should be able to survive a constitutional challenge if appropriate due process protections are included, but the more conservative approach may be less likely to elicit a challenge.

Second, the law provides that only some of the listed relief may be included in the ex parte order (no abuse, stay away, eviction, custody, and visitation) because other relief is less responsive to the immediate danger, and because a more formal hearing is appropriate to determine whether certain available relief (e.g., support, monetary compensation, two-year eviction) shall be granted.


Finally, protection orders that are issued after a hearing at which the abuser is present may be more effective than those which are issued ex parte. If the judge confronts the abuser in public with the prohibitions contained in the order and emphasizes the consequences of violation, the abuser may take the order more seriously.\footnote{I have observed the deterrent effect of verbal interaction between judges and offenders in the District of Columbia Superior Court.} In many cases, the abuser will not appear for the full hearing, at which time all of the relief provided in the law becomes available on default, subject to ex parte proof.

The second alternative provides that after an ex parte order is granted, a hearing may be requested by the petitioner or the respondent any time within twenty days after the order is issued. It provides that hearings shall be held within five days after the party not requesting the hearing receives notice. A hearing may also be ordered by the judge even if not requested by either party. If no one requests that a full hearing be held at which both parties may present evidence, the temporary order automatically becomes a final order.

This optional second hearing approach was included in the Model Act for several reasons. First, it imposes less of a burden on courts and parties by not requiring that a hearing be held unless one of the parties or the judge deems it necessary. Judicial efficiency in these matters is necessary because of the high volume of petitions for protection orders.

Second, this section is premised on the notion that where sufficient evidence of abuse has been put forward to demonstrate the need for an emergency order, it is likely that continued court protection is necessary. Research has demonstrated that most violent relationships go through cycles — each assault may be followed by a period of calm, but the violence tends to recur and to escalate over time.\footnote{A. Ganley, supra note 71, at 16.} Victims often believe promises that “it will never happen again” and abandon court action they have initiated, not realizing that the peace is only temporary. Victims also may be subject to retaliation after a temporary order is issued and may be coerced not to appear at any subsequent proceedings. By requiring a second appearance to get more than a few weeks’ relief, the legislature essentially dares the abuser to try to abort further proceedings.

Finally, the benefit of a longer period of protection generally outweighs the possible harm from allowing maturation of an ex
parte order into a final order. Many orders merely prohibit conduct that is already illegal. At any time either party can file a petition for modification of an order. This would enable the court to correct any error made by continuance of an order without a full hearing.

Because second hearings will not be held in many cases, relief should be granted ex parte with the knowledge that the order may remain in effect without modification for a specified period of up to two years. Each order should specify what relief will be added in the final order and what the duration of the final order will be if no further hearing is held in the case.

Under Alternative 2, the victim is permitted to request a full hearing for two reasons. First, sometimes the victim knows that the abuser will not obey the order unless he is told in person by a judge that he must do so. In some cases, the victim will be granted some but not all of the relief she requested in an ex parte petition. Thus, the petitioner may request a full hearing in order to obtain all of the relief for which she initially applied. In either of these circumstances, it is appropriate that the respondent be given notice and a full hearing be held.

This Act permits a judge to order a full hearing sua sponte because in some cases ex parte proof is inadequate to justify long-term relief. Particularly in cases in which the petitioner requests temporary child custody, possession of substantial property, or support for herself or her children, the judge may wish to hear evidence from both parties.

When second hearings are to be held, the statute provides that ex parte orders must remain in effect until after the full hearing in cases. If the ex parte order expires before a final order is issued, the abuser may view that gap in legal protection as permission from the court to violate the terms of the order.

(D) Protection Orders issued under this Act shall use the following forms:

(1) Ex Parte Order of Protection and Notice of Hearing

After reviewing the verified petition requesting an ex parte order of protection, this Court finds that there is good cause to believe that the petitioner and/or others are in immediate danger of abuse and that such an order should be issued.

THEREFORE THE COURT ORDERS AS FOLLOWS:

That respondent, ______________________, 

1. Not abuse or threaten the Petitioner or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion, sexual assault, harassment, unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;
2. _____ Vacate the residence at ________________ and relinquish temporary possession of that residence to the victim(s) (this order will not affect title to the property);

3. _____ Stay away from the following places frequented by the victim(s) (list addresses):
   A. Residence: ______________________
   B. School: _________________
   C. Workplace: _____________________
   D. Other: _______________________

4. _____ Avoid all communication with the victim(s) in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: ________________;

5. _____ That custody of the minor children listed below be granted to the Petitioner: ______________________[Names] [Ages];

6. _____ That Respondent may visit with children only on the following day(s), and only at the following place(s) and time(s), and under the supervision of the following person(s): ______________________;

7. _____ That this order be served and executed by a police officer including supervising the Respondent in returning to his residence to collect personal belongings; and

8. _____ That a police officer be ordered to accompany the victim to a residence occupied by a Respondent to obtain physical custody of children or to collect personal belongings.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY UP TO TWELVE MONTHS IMPRISONMENT AND/OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

Notice of Hearing
A full hearing on the Petition will be held at the above-listed Court at _____ on ________________, 19____. At that time you may appear with or without counsel and present testimony. Failure to appear may result in a default judgment for the petitioner.

You are entitled to request an immediate hearing on this matter. To request a different hearing date, go to the Clerk’s office at ________________ and request an application for hearing. The petitioner must be notified at least two days prior to the date set.

Copies of this order shall be furnished by the Clerk to the ________________ (law enforcement agency).

(2) Full Civil Protection Order

After reviewing the verified petition requesting an order of protection, and properly notifying the respondent that a hearing was scheduled on this matter, and hearing the testimony of (the parties / the petitioner, upon default by the respondent), this Court finds that the petitioner has proven the allegations of domestic violence by a preponderance of the evidence.

THEREFORE THE COURT ORDERS AS FOLLOWS:
That respondent, ________________,
1. _____ Not abuse or threaten the petitioner or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion,
sexual assault, harassment, unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;

2. ______ Vacate the residence at _______________ and relinquish temporary possession of that residence to the victim(s) (this will not affect title to the property);

3. ______ Stay away from the following places frequented by the victim(s) (list addresses);
   A. Residence: ____________________________
   B. School: _______________________________
   C. Workplace: __________________________
   D. Other: ________________________________

4. ______ Avoid all communication with the victim(s) in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: ________________________;

5. ______ Make or continue to make rent or mortgage payments on the residence vacated in the amount of $____ payable to ______________________;

6. ______ Pay the victim $____ per month for rent on a separate residence from the Respondent;

7. ______ Provide support for the victim and/or minor children in the amount of $____ per month;

8. ______ Give physical custody of minor children to the Petitioner, on __________________________, at _______________________;

9. ______ Visit with the children only on the following day(s), at the following places and times, and under the supervision of the following person(s):

10. ______ Compensate the victim in the amount of $____ for expenses incurred as a result of the abuse;

11. ______ Give possession of the following items of personal property to the Petitioner or other specified victims: __________________________;

12. ______ Not transfer, encumber, or otherwise dispose of property owned by the victim or jointly owned;

13. ______ Participate in a counseling program designed to control violent behavior by contacting _______________ at _________________ within two days of the date of this order, and that Respondent submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;

14. ______ Pay the costs of counseling for himself/herself, or for ______;

15. ______ Pay a fee of $____ to a shelter for victims of domestic violence where the victim has resided or is residing;

16. ______ Other relief as follows: ________________________.

THE COURT FURTHER ORDERS THAT:

17. ______ Custody of the minor children listed below will be granted to the Petitioner: [Names] [Ages];

18. ______ That a police officer shall accompany the Petitioner to a residence occupied by Respondent to obtain physical custody of children or to collect personal belongings;

19. ______ A police officer shall serve and execute the protection order, including supervising the Respondent in returning to a residence that the Respondent has been ordered to vacate to collect personal belongings;

20. ______ Other relief, as follows: ________________________

This Order shall remain in effect for ______ months, until ______________ but may be renewed, extended, or modified upon motion of either party.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY UP TO TWELVE MONTHS IMPRISONMENT AND/
OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

(3) Full Criminal Protection Order

The Defendant, __________________, has been charged with / convicted of (circle one) a violation of __________________, against a person protected under the Remedies for Domestic Abuse Act. The Court, finding it likely that the Defendant may injure or intimidate the victim in the future, ORDERS, as a condition of release / probation that:

The Defendant, __________________, 
1. ____ Not abuse or threaten the Complaining Witness or other alleged victims, or commit any other act of domestic violence, including battery, assault, coercion, sexual assault, harassment and unlawful imprisonment, unlawful entry, damage to property, theft, or other acts prohibited by the criminal code of this State;
2. ____ Vacate the residence at _____________and give temporary possession of that residence to the Complaining Witness (this will not affect title to the property);
3. ____ Stay away from the following place(s) frequented by the Complaining Witness (list addresses):
   A. Residence: ________________
   B. School: ________________
   C. Workplace: ________________
   D. Other: ________________;
4. ____ Avoid all communication with the Complaining Witness in writing, in person, or by telephone, except that communication is permitted under the following limited circumstances: ________________;
5. ____ Make or continue to make rent or mortgage payments on the residence vacated in the amount of $____ per month payable to __________;
6. ____ Pay the Complaining Witness $____ per month for rent on a separate residence from the Defendant;
7. ____ Provide support for the Complaining Witness and/or minor children in the amount of $____ per month;
8. ____ Give possession of minor children to the Complaining Witness on ______________, at ______________, and visit with children only on the following day(s), and only at the following place(s) and time(s), and under the supervision of the following person(s): ________________;
9. ____ Compensate the Complaining Witness in the amount of $____, for expenses incurred as a result of the abuse;
10. ____ Give possession of the following items of personal property to the Complaining Witness: ________________;
11. ____ Not transfer, encumber, or otherwise dispose of property owned by the Complaining Witness or jointly owned;
12. ____ Participate in a counseling program designed to control violent behavior, by contacting at _______________within two days of the date of this order, and that Defendant submit a report from the counselor to the Court once every four weeks from the date of this order until the program is completed;
13. ____ Pay the costs of counseling for himself/herself, or for __________;
14. ____ Pay a fee of $____ to a shelter for victims of domestic violence where the Complaining Witness resides or has resided;
15. ____ Other relief, as follows: ________________.
THE COURT FURTHER ORDERS THAT:

16. __________ Custody of the minor children listed below will be granted to the Complaining Witness: ______________[Names] [Ages];

17. __________ A police officer shall accompany the Complaining Witness to a residence where the Defendant resides to obtain physical custody of children or to collect personal belongings;

18. __________ A police officer shall serve and execute the protection order, including supervising the Defendant in returning to a residence that the Defendant has been ordered to vacate to collect personal belongings.

19. __________ Other relief, as follows: ____________________

This Order shall remain in effect until the above-indicated case has come to trial and the Defendant has been sentenced if found guilty, or, if a condition of probation, until ____________, when the period of probation expires. The order may be modified upon motion of either party.

WILLFUL VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT OF DOMESTIC VIOLENCE, INCLUDING ENTRY INTO A RESIDENCE IN VIOLATION OF A VACATE ORDER, IS A MISDEMEANOR PUNISHABLE BY TWELVE MONTHS IMPRISONMENT AND/OR A FINE OF UP TO $1,000. A SECOND VIOLATION IS A FELONY PUNISHABLE BY NOT LESS THAN SEVENTY-TWO HOURS IMPRISONMENT AND NOT MORE THAN TWO YEARS, AND/OR A FINE OF UP TO $2,000.

VIOLATION OF THIS ORDER OTHER THAN BY ABUSIVE BEHAVIOR IS CONTEMPT OF COURT AND PUNISHABLE IN ACCORDANCE WITH LAW.

COMMENTARY: No comment.

(E) Non-Emergency Conditions: In those cases that do not present emergency conditions, a hearing upon the petition shall be scheduled within fourteen days after the petition for protection from abuse is filed. If after the hearing the court is satisfied that allegations of abuse have been proven by a preponderance of the evidence, a final protection order shall be issued.96

COMMENTARY: In some cases protection is needed but the danger of domestic abuse is not immediate. For example, the victim recently may have moved to a different city and may fear that, even if the abuser does not know where she is, he will eventually find out and pursue her. The urgency of obtaining an order might be reduced if the abuser is out of town for a period of time, or if other circumstances indicate that immediate violence is unlikely. If there is no emergency, other matters on the docket need not be displaced in order to provide immediate relief.

(F) Emergency Jurisdiction

(1) When the courts that handle protection orders in the locality where the petitioner seeks relief are closed, the petitioner may apply

for ex parte relief to any available judge whose court has jurisdiction to issue protection orders. Upon a showing that emergency conditions exist, the court may order ex parte any relief authorized under section 4.05.

(2) Any order issued under this section and any supporting documentation shall be forwarded immediately to the clerk of any court selected by the petitioner that has jurisdiction and venue in the action. Such action shall have the effect of commencing proceedings under section 4.02.

(3) The respondent, upon being served with an order, may request a hearing to show why the order should be dissolved or modified pursuant to section 4.03(C). If a full evidentiary hearing is not requested within twenty days after proof of service is filed, the emergency order shall become a final order.97

COMMENTARY: This section is addressed to situations of extreme emergency. The Model Act provides for issuance of ex parte orders at night and on weekends by any available judge, either a judge on call for emergencies, or any judge who can be reached if the jurisdiction has no emergency assignment rotation. The section then establishes a procedure for transferring papers to the appropriate court invoking the due process procedures.

(G) Duration of Orders: Any final protection order issued under section 4.03 of this Act shall be effective for a fixed period of time not to exceed twenty-four months, except that such order may be extended, renewed, or modified by order of the court as described in section 4.03(H).98

COMMENTARY: No comment.

(H) Motions for Renewal, Extension, or Modification of Protection Orders

(1) A petitioner to whom a protection order has been issued may by request motion that the order be renewed or extended for up to twenty-four months, or that any terms of the order be modified to address unanticipated problems or changed circumstances. Hearings on such motions shall be scheduled within ten days after proof of service on the respondent is filed. If emergency circumstances are shown, motions shall be heard ex parte the same day they are filed.

COMMENTARY: This section is addressed to two frequent problems. First, women are often battered the day after a protection

97 See id. § 765(3).
order expires. The victim may be in a good position to predict the abuser's likely response to the expiration of the order and may avoid the situation by asking for renewal or extension before it expires.

Second, in many cases the parties' relationship continues after a protection order is issued despite a long history of violence. The issuance of an eviction order allows a temporary separation. In some cases the parties decide that they would like to resume cohabitation. To make clear that a protection order remains in effect even if an eviction order is no longer observed, the court should encourage parties in such circumstances to file a motion for modification of the order. The order may be changed to impose realistic restrictions to reduce the risk of injury to parties who are in an ambivalent relationship and have a history of violence. The judge cannot prohibit cohabitation even if there has been serious violence, but the judge can indicate an assessment of the risks involved by refusing to dissolve an order prohibiting violence. Some couples are anxious to pretend that there was never a breach between them; a continuing protection order can be a useful reminder that the respondent has a responsibility to cease violent behavior.

(2) Proof. The court shall evaluate requests for renewal, extension or modification using the same standards of proof imposed in initial proceedings for protection orders. The petitioner may request additional relief based on facts proven or admitted in the original hearing.

(3) Effect of Reconciliation. Only the court can modify an order issued under this Act and reconciliation of parties shall not affect the validity of a protection order.

COMMENTARY: This section makes clear that consensual violation of part of a protection order does not void the entire order. As discussed above, many victims of abuse separate from their assailants for a period of time and then decide to resume coresidence. Optimally, if the protection order requires that the respondent vacate a residence shared with the victim, the order should be modified to reflect a change in the parties' arrangements. Where the parties agree to resume coresidence or contact

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99 Abused women who leave their abusers often seek help from a legal or social service agency. Most return at least once after leaving because of reconciliation, fear of reprisals, or other reasons. See D. Martin, supra note 50, at 73-76; L. Walker, supra note 26, at 65-70.

without requesting modification of a protection order, however, the other provisions of the order should remain in effect and be enforceable.


(A) Upon the filing of any criminal action involving domestic violence, the prosecuting attorney shall request by motion that a protection order be issued as a condition of pretrial release or diversion to protect the complainant or others affected by the action and to prevent the defendant from attempting to interfere with the proceedings by intimidating witnesses.

(B) Motions for protection orders in criminal cases shall use the form provided at section 4.02(A)(5) of this statute.

(C) The procedures prescribed for obtaining a protection order in an independent civil action shall be used in criminal proceedings. The court may grant any relief described in section 4.05. The criminal court may elect not to issue a final order regarding a request concerning child custody, support, or involving personal property. In such cases, the court may issue an interim order providing limited relief and forward the petition to civil court for determination of remaining issues.

(D) A protection order issued as a condition of pretrial release under this section shall not be construed as a finding that the alleged offender committed the alleged offense, and shall not be admissible to prove commission of the offense charged.

(E) A protection order issued as a condition of pretrial release is effective only until the disposition of the criminal complaint under which it was filed. If the defendant is convicted of or pleads guilty to the offense charged, a protection order may be issued as a condition of probation or parole or included in any other disposition.\(^{101}\)

Commentary: This section makes the protection orders available in civil proceedings available in criminal proceedings as conditions of release, diversion, or as a condition of probation.\(^{102}\) Battered women need the same protection from harm when prosecution is initiated as they do absent criminal action; the filing of charges affords no automatic protection to any crime victim. The need for protection may be even greater during criminal proceedings because of the threatening effect of prosecution and the consequent risk of reprisals.

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\(^{101}\) This section is influenced by the structure of the Ohio abuse law. See Ohio Rev. Code Ann. § 2919.26(E) (Page Supp. 1982).

\(^{102}\) Id.
Use of protective injunctions in criminal proceedings is common practice. As in domestic relations proceedings, orders restricting the parties' conduct during the proceedings are frequently issued, but they often are not put in writing and are often issued without any consultation with the victim. Violations of such orders are rarely penalized. This section strengthens this long-established remedy.

The most important difference between protection orders in civil and criminal court is the basis for the court’s jurisdiction. In a criminal proceeding, the court may require or prohibit certain conduct during the pendency of criminal charges in order to prevent intimidation of witnesses and to ensure orderly administration of justice. If prosecution of the charge is deferred based on the defendant’s agreement to comply with certain conditions, a protection order may be included as a condition of deferral. If the defendant pleads guilty or is convicted, a protection order may be issued as part of the defendant’s sentence. In civil court, the basis of the court’s power is to settle private conflicts between individuals.

Because the basis of jurisdiction in criminal court is related to the pendency of charges or to post-conviction penalties, the initial order must expire when the charge is disposed and a new order must be issued. Although this procedure is complicated, it is less complicated than requiring the petitioner to initiate a separate court action to get protection.

The Model Act provides that all the relief available in civil proceedings may be included in a criminal order. In many cases, support, child custody, visitation, and property issues are integrally related to the safety of victims of abuse. Visitation may be used as an opportunity to abuse the victim again. An award of temporary custody would allow a woman to take her children with her if she fled for safety to another city. Authority over property issues would allow the court to require the abuser to return the victim’s car or credit cards to her.

Despite the relevance of these issues, some criminal judges will not be comfortable ruling on such a broad range of issues. To prevent judges from avoiding these problems by issuing narrow orders, the statute allows criminal court judges to issue interim orders and to transfer protection order petitions to civil judges for rulings on remaining issues.

See Thomas, supra note 70, for suggestions on how to structure visitation to protect the safety of the victim.
Available Relief. In both civil and criminal proceedings in which petitions for protection orders are filed, the court shall grant relief that is necessary to prevent further abuse. Final relief may include but shall not be limited to ordering the following:

COMMENTARY: No comment.

(A) No Further Abuse: restraining the assailant from subjecting the victim(s) to domestic violence, as defined in section 3.01;

COMMENTARY: No comment.

(B) Exclusive Possession: granting exclusive possession of the residence or household to the petitioner or other resident regardless of whether the residence is jointly or solely owned or leased by the parties or others.

COMMENTARY: Exclusive possession is the most important of the listed remedies. It addresses the fundamental issue of who should bear the expense and inconvenience resulting from the violence between two people who live together. The provision, in effect, creates for the victim the right to be safe at home. Although the exclusion of a man from his own home may appear to be a radical form of relief, the remedy has been authorized in most states. An order for exclusive possession is available regardless of which party is named in the deed or lease. The order, however, does not affect title to any property.

(C) Stay Away: ordering the respondent not to enter the residence, school, or place of employment of the victim or other family or household members of the victim and to stay away from any specified place that is frequented regularly by the victim or other family or household members;

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108 See infra text accompanying note 144.
COMMENTARY: This remedy is intended to enable the victim to move freely without encountering her assailant. An order under the provision might be most effective if it included a list of the addresses or localities that the defendant must avoid.

Including the victim's workplace is especially important. If the victim has separated from the abuser, her safety, independence, and ability to earn a living are all inextricably linked. Abusers may harass their victims at work so frequently that the victims may lose their jobs. This section addresses this specific problem.

(D) No Communication: ordering the respondent to avoid any communication whatsoever, including personal, written, or telephone contact, with the victim or others with whom communication would create a danger that acts of domestic violence would be committed, or specifying limited circumstances in which communication is permissible;\(^{110}\)

COMMENTARY: No comment.

(E) Rent and Mortgage Payments: ordering a respondent to make or to continue to make rent or mortgage payments on a residence occupied by the victim if the respondent is found to have a duty to support the victim or other dependent household members;

COMMENTARY: No comment.

(F) Alternative Housing: ordering the respondent to pay the victim's rent at a residence other than the one previously shared by the parties if the respondent is found to have a duty to support the victim and the victim requests alternative housing;\(^{111}\)

COMMENTARY: In some cases, the victim must leave her residence to be safe from her assailant. The abuser, in such a case, may be ordered to pay the rental expenses incurred by the victim as a result of the alternative living arrangements. The subsection provides that the payment of such rent shall be at the victim's option.

(G) Nonadmission: recommending to the victim or other household members that they not invite the respondent to the residence and that they decline any request or demand to admit the respondent

\(^{110}\) Cf. Alaskan State § 09.55.600(b)(3) (Supp. 1982) (court may restrain respondent from direct or indirect communications with petitioner).

while an order evicting the respondent or requiring the respondent
to stay away from the residence of the victim is in effect;\textsuperscript{112}

**Commentary:** The court has no power to restrict the conduct of the victim, unless the respondent files a petition against her. The judge, in pursuit of an effective remedy for a violent situation, can recommend to the victim not to admit the respondent if he appears at her residence after being ordered to stay away. By issuing such an order, the judge may reduce the likelihood that the respondent will try to persuade the petitioner to allow him to violate the order.

**(H) Payment of Support:** ordering the respondent to pay for the support of the victim or other dependent household members if the respondent is found to have a duty to provide such support, and ordering that payments be made through the court clerk if necessary;\textsuperscript{113}

**Commentary:** This provision, as well as those that follow, is intended to provide comprehensive, short-term relief that will give victims of abuse protection from and alternatives to living in a chronically violent relationship. The provision allows the petitioner to seek support payments for herself or for children. The petitioner, however, has a higher burden of proof for obtaining relief under this provision than for obtaining other relief under this section. She must establish not only that she or the children are victims of domestic violence under section 3.02(A), but also that the respondent owes her or the children a duty of support. In the case of obtaining support for herself, a finding that the respondent owes the petitioner a duty of support would be established under applicable state law.\textsuperscript{114} In the case of obtaining support for children, an uncontested allegation that the respondent is the father of the children may be sufficient to show respondent's duty of support.\textsuperscript{115}

A support award that is part of a protection order should not be treated as a substitute for a more thorough inquiry into the financial relationship between the parties but as a temporary measure to provide emergency financial help to victims of abuse who are extricating themselves from violent relationships. Nor

\textsuperscript{112} Cf. **Ohio Rev. Code Ann.** § 3113.31(E)(2) (Page 1980 & Supp. 1982) (court may prohibit respondent from returning to residence and may prohibit petitioner from admitting respondent to residence).


\textsuperscript{114} See, e.g., **D.C. Code Ann.** § 16-916(b) (1981) (explaining duty to support spouse).

\textsuperscript{115} See, e.g., **D.C. Code Ann.** § 16-916(c) (1981) (explaining duty to support children).
Domestic Abuse

should this section be used as a speedy alternative to a complaint for divorce, separation, support, or custody.

(I) Temporary Custody and Visitation: granting temporary custody of children to the victim upon a determination by the court that it has jurisdiction under the Uniform Child Custody Jurisdiction Act, and specifying arrangements for visitation by the respondent and requiring third-party supervision of visitation if necessary to protect the victim or the children.

(1) For the purpose of determining jurisdiction, if the petitioner alleges that disclosure of the children’s current address, pursuant to section 9 of the Uniform Child Custody Jurisdiction Act, would endanger the victim or the children, or would disclose the confidential address of a shelter for victims of domestic violence, then such disclosure shall be made orally and in camera.

(2) In determining temporary custody and visitation rights under this section, the court shall presume that a person who has committed an act or acts of domestic violence against any other family member is unfit to be a custodial parent and that the best interest of the children is served by an award of temporary custody to the nonabusive parent. This presumption may be rebutted by a showing of abuse or neglect of the children by the nonabusive parent, or by a showing that the abusive parent is the children’s primary caretaker and is the more fit parent. If the presumption is rebutted, the court may decline to award custody as part of a protection order.

COMMENTARY: In addition to providing protection to children who may be exposed to domestic violence, this section attempts to prevent an abuser from using the custody of his children as a bargaining chip to persuade his victim to remain in the relationship or to spend time with him. When a victim of abuse separates from a violent mate or takes legal action to stop the violence, the abuser often reacts by persuading or coercing the victim to resume the relationship. In recent years, men increasingly have resorted to snatching children from their mates in an effort to persuade their mates to return to them. Some

119 See generally D. MARTIN, supra note 50, at 72–79.
120 Cf. P. HOFF, J. SCHULMAN, A. VOLENKI & J. O’DANIEL, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 6-6 to
men use their visitation rights with children as an excuse to see their estranged mates. Because the relationship of the batterer to the children is so integrally connected with the safety of the victim, temporary custody and visitation arrangements must be available as part of a protection order.

This section includes a presumption of the abusive party's unfitness as a custodial parent for several reasons. First, men who are violent toward one family member frequently become violent toward others. Second, such a presumption makes it more difficult for the abuser to use the law to obtain custody of his children and thereby manipulate his victim into returning to him. Finally, the presumption is needed to counteract the growing trend toward awards of joint and paternal custody. Even if children are not victimized by the abuser, they are often aware of the violence in the home and become fearful of the abuser. In most cases, the parent who is not abusive is a better caretaker and can provide a more stable environment for the children. Many courts, however, currently fail to recognize "primary caretaker" as a critical determinant of a child's best interest and instead award custody to the parent who is in a better financial position to support the child. These patterns often operate to deprive women (including battered women) of custody of their children.

(J) Monetary Compensation: ordering the respondent to pay the victim or the petitioner monetary compensation for the losses suffered as a direct result of the abuse, including but not limited to medical expenses, loss of earnings or other support, cost of repair or replacement of real or personal property damaged or taken, moving or other travel expenses, attorney's fees, and court costs.

COMMENTARY: This provision compensates the victim or the petitioner for the immediate and tangible losses caused by acts
of domestic violence. Although a majority of states have abolished interspousal immunity in personal injury actions, those lawsuits are long and costly and therefore are not a realistic option for most battered women. This section makes possible a simple and expedient claim for damages.126

(K) **Possession of Personal Property:** ordering that the victim be given temporary possession of specified personal property belonging to either party such as automobiles, checkbooks, keys, and other personal effects;127

**COMMENTARY:** Often violence in a close relationship represents the desire of the batterer to control the victim.128 Sometimes, this quest for control is expressed not only through physical abuse, but also through the appropriation of the victim’s personal possessions, especially those items which give the victim economic freedom or geographic mobility.129 This section is designed to preserve such freedom and mobility.

(L) **Nondisposition of Property:** prohibiting the respondent from transferring, encumbering, or otherwise disposing of specified property mutually owned or leased by the parties;130

**COMMENTARY:** No comment.

(M) **Counseling:** ordering the respondent to participate in a minimum of sixty hours of a court-approved counseling program which is designed specifically to help batterers stop violent behavior, and requiring the respondent to provide the court at four-week intervals with documentation of participation in such program;131

**COMMENTARY:** Court-mandated counseling for abusers has been widely used in criminal proceedings.132 Where the courts have ordered counseling in civil cases involving domestic rela-

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128 Russell and Rebecca Dobash explain that “the use of physical force against wives should be seen as an attempt on the part of the husband to bring about a desired state of affairs.” R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 23–24 (1979); see A. GANLEY, supra note 71, at 16.
129 The author has spoken with numerous battered women who have reported that their mates appropriated wallets, checkbooks, credit cards, car keys, money in joint checking accounts, automobiles, and other personal property.
132 See generally L. LERMAN, supra note 4, at 91–115 (discussing various criminal diversion programs for abusers).
tions, they have traditionally referred parties to couples counseling or family therapy, focusing on the preservation of the marital relationship. Recent experience indicates that group counseling for batterers is more likely to be an effective treatment than counseling couples or individuals. Careful tracking of counseling orders is necessary to ensure that the orders will be obeyed.

(N) Payment of Costs of Counseling: ordering the respondent to pay the cost of counseling mandated under section 4.05(M) or the cost of counseling for the victim, or other household members affected by the violence;

COMMENTARY: In some places, public funding is available to pay the costs of establishing a treatment program for abusers. In most jurisdictions, however, the participants must absorb the costs. If other family members seek counseling on issues related to the abuse, that expense should be borne by the perpetrator of the violence.

Under the Model Act, the court cannot order the victim to undergo counseling; to allow the court to issue such orders would imply victim responsibility for the violence. Victims of abuse, however, may wish to seek counseling on their own. This section makes counseling possible for victims who can not afford to pay for therapy.

(O) Supervision of Return to Residence by Law Enforcement Officers: ordering that the protection order be served and executed by law enforcement officers, or that law enforcement officers accompany the victim to her residence to collect personal belongings, or both;

COMMENTARY: Many police officers regard domestic violence as fundamentally a civil matter and therefore outside their law enforcement jurisdiction. The section of the Model Act on police duties requires that police supervise the return of the victim to the residence to collect belongings and that officers

133 See A. Ganley, supra note 71, at 68–70.
134 See generally A. Ganley, supra note 71, at 89–91.
135 Iowa and North Dakota authorize government payment for counseling programs but only if the parties are indigent. See Iowa Code § 236.5(1) (1981); N.D. Cent. Code § 14-07.1-02(4)(d) (1981). See generally Lerman & Livingston, supra note 1, at 12.
136 See generally D.C. Code Ann. § 16-1005(c)(9) (Supp. 1983) (authorizing the court to order appropriate police action with regard to the issuance of the protective order).
137 See D. Martin, supra note 50, at 92–99. Martin quotes the former policy of the police department of Oakland, Cal.: “The police role in a dispute situation is more often that of a mediator and peacemaker than enforcer of the law.” Id., at 93.
supervise a respondent’s departure from a residence when exclusive possession has been granted to the petitioner.\(^{138}\) These functions may be specifically ordered as part of a protection order; this enables the court to reinforce the mandate of the law.

Police service and execution is particularly important when an ex parte eviction order is issued because the respondent, upon learning of such action, may become angry and need restraint. Police assistance may also be necessary when a victim who has decided to move to another residence returns to her original residence to collect personal belongings or children who were left behind. It can be dangerous for a victim to confront her abuser alone immediately after deciding to separate from him.\(^{139}\)

(P) **Payment of Shelter Expenses:** ordering the respondent to pay a reasonable fee for housing and other services that have been provided or that are being provided to the victim by a shelter for victims of domestic violence;

**COMMENTARY:** Most shelters for battered women and for runaway children operate on minimal budgets and often have no stable source of funds. The withdrawal of limited federal funds from LEAA, CETA, Title XX, Community Development Block Grants, and other programs, which had been available for battered women’s shelters, has caused the closing of many such shelters.\(^{140}\) Alternative funding mechanisms are now being explored, including the use of revenue from surcharges on marriage licenses or filing fees for divorce, or from fines imposed on abusers convicted of crimes.\(^{141}\) Since most shelter residents are poor women, a fee-for-service arrangement is unlikely to work. If the petitioner has been staying in a shelter as a result

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\(^{138}\) *See infra* § 5.02.

\(^{139}\) According to Joan Kelly, a psychologist, many nonviolent couples experience an incident of violence at the point of separation. Such violence may be the result of the intense emotions that the individuals experience during that transition. Presentation by Joan Kelly, Panel Discussion on Custody and Domestic Violence, Nat’l Women Judges Ass’n Conference, San Francisco, Cal. (Oct. 8, 1983). For couples with histories of violence, the risk of violence during separation may be even higher.


\(^{141}\) *See, e.g.,* ARIZ. REV. STAT. § 11-554(A)(16) (Supp. 1983) (surcharge imposed on marriage licenses); IND. CODE § 4-23-17.3-4(b) (Supp. 1981) (surcharge on filing of an action for dissolution of marriage); WIS. STAT. ANN. § 973.055(1)(a) (West Supp. 1982) (surcharge of 10% of fine imposed for criminal violation of abuse laws).
of the respondent's violence, then the respondent should pay the costs of housing the petitioner in the shelter if he is financially able to do so.

(Q) Other Relief: granting any other requested relief necessary or appropriate to prevent or reduce the likelihood of subsequent domestic violence.\(^{142}\)

Commentary: Section 4.05 provides an array of remedies that address the typical problems for which a victim of abuse might go to court for assistance. No list of this sort, however, could be complete. Some abusers are strangely sadistic toward intimates and engage in forms of cruelty which are unimaginable to most of us.\(^{143}\) Therefore, this section allows the victim to fashion specific remedies for abuse that are not provided for in the statute.

(R) Effect on Title: No order under this Act shall in any manner affect title to any real property.\(^{144}\)

Commentary: No comment.

(S) Ex Parte Relief: Ex parte relief granted before the respondent is notified and given an opportunity for a hearing may include (A) No Further Abuse, (B) Exclusive Possession, (C) Stay Away, (D) No Communication, (I) Temporary Custody and Visitation, (O) Police Supervision of Return to Residence, and other relief necessary on an emergency basis.

Commentary: Only some of the relief allowed under section 4.05 is available as part of an ex parte order issued before the abuser has received notice or had an opportunity to appear.

As a general rule, the necessities of the emergency determine the appropriateness of issuing an order ex parte. Issues connected with the immediate safety of the victim and her children

\(^{142}\) Cf. Tex. Fam. Code Ann. §71.11(a)(7) (Vernon Supp. 1982) (court may prohibit a party from doing specific acts or may require a party to do specific acts necessary or appropriate to prevent or reduce the likelihood of family violence).

\(^{143}\) Lenore Walker described the types of serious injuries that had been inflicted on 120 women whom she had interviewed:

Major physical assaults included: slaps and punches to the face and head; kicking, stomping, and punching all over the body; choking to the point of consciousness loss; punching and throwing across a room, down the stairs, or against objects; severe shaking; arms twisted or broken; burns from irons, cigarettes, and scalding liquids; injuries from thrown objects; forced shaving of pubic hair; forced violent sexual acts; stabbing and mutilation with a variety of objects, including knives and hatchets; and gunshot wounds.

L. Walker, supra note 26, at 79.

should be decided ex parte. Issues that can wait a week or two should not be decided ex parte. In most cases, it would be inappropriate to order support or compensation, to decide other property issues, or to order counseling as part of an ex parte order. These limitations, however, are intended only as guidelines.

4.06. Notification and Service of Orders.

(A) The court shall order a law enforcement agency to serve the respondent personally with a protection order issued pursuant to this Act and to file proof of service with the clerk of the court by the end of the next weekday after service is made.145

(B) Within twenty-four hours of the issuance of a protection order, the clerk of the court shall forward a copy of the order to the local law enforcement agency with jurisdiction over the residence of the petitioner, and to any other law enforcement agencies with jurisdiction over the addresses listed in a stay away order.146

(C) The clerk of the court shall issue, without fee, a copy of any protection order to the petitioner and the respondent.147

COMMENTARY: Service of protection orders on respondents has been a chronic problem in implementing protection order laws.148 Law enforcement agencies often abdicate responsibility for serving orders and insist that the petitioner pay a private agency to perform the service.149 Some law enforcement agencies charge fees to victims for the service of protection orders.150 Service and enforcement of protection orders also may be difficult to obtain because some male law enforcement officers may identify more readily with the male abuser than with the female victim.151

The most appropriate and available law enforcement agency to handle service may vary from state to state. Yet personal

146 Cf. Minn. Stat. § 518B.01(13) (1980) (protection order forwarded to local agency upon petitioner’s request, and order made available to any other agency so needing it).
149 Id.
150 Id.
151 See Presentation by John Dean, District of Columbia Police Officer, at Baltimore County Criminal Justice Conference on Domestic Violence, Towson, Md. (Mar. 29, 1983).
service by a law enforcement officer is critical if the respondent is to perceive the protection order as a serious matter.

To facilitate enforcement of protection orders, copies of all orders should be provided to the petitioner, the respondent, and the law enforcement agency most likely to respond to a call regarding a violation of the order. Because the protection order contains information about the respondent's previous assaults, police officers who have copies of such orders may be better prepared to encounter the respondent if called upon for enforcement. Providing police with a copy of each protection order also permits the officers to enforce the order even if the victim's copy of the order has been lost or destroyed.

4.07. Violation of Protection Orders.

(A) A respondent who has received notice of a protection order issued against the respondent and who violates the order by commission of an act of domestic violence, as defined in section 3.01, is in contempt of court and is subject to criminal charges, as defined in section 4.07(C) and as defined in the criminal code of this state.

(B) A respondent who has received notice of a protection order issued against the respondent and who violates the order by conduct other than domestic violence is in contempt of court.

(C) Commission of an act of domestic violence, as defined in section 3.01, in violation of a protection order is a misdemeanor of the first degree, punishable by up to twelve months imprisonment or a fine of up to $1000, or both.

(D) Commission of an act of domestic violence, as defined in section 3.01, in violation of a protection order by a person previously convicted under section 4.07(C) of a violation of a protection order is a fourth degree felony, punishable by not less than seventy-two consecutive hours of imprisonment. This offense may be punished by up to two years imprisonment or a fine of up to $2000, or both. The minimum sentence may not be suspended and probation or parole may not be granted until the minimum sentence is served.

(E) Any violation of a protection order places the respondent in contempt of court. The court may require a respondent found in contempt of court to remedy the violation in accordance with law.

(F) Upon finding probable cause that a respondent has violated a protection order by commission of an act of domestic violence, as defined in section 3.01, the court shall, if the respondent has not been arrested for the alleged violation, issue an arrest warrant and

a summons requiring the respondent to appear for a hearing within fourteen days at which the court shall determine whether the respondent is guilty of the alleged violation.

(G) If the respondent is alleged to have violated a protection order by conduct other than domestic violence, as defined in section 3.01, the court shall issue a summons requiring the respondent to appear at a hearing within fourteen days at which the court shall determine whether the respondent has violated the order.153

(H) Criminal violations of protection orders shall be prosecuted by the city, county, or district attorney in criminal court.

(I) Any protection order issued under this section shall indicate in a clear and conspicuous manner the consequences of violation of the order.154

(J) Prosecution of a respondent for violation of a protection order shall not preclude prosecution for other crimes arising out of the incident in which the protection order is alleged to have been violated, but all such charges shall be brought in one proceeding.

(K) Revenues collected from fines imposed for violation of protection orders shall be deposited into a trust fund to be used to fund shelters and other services for victims of domestic violence and treatment programs for abusers.155

COMMENTARY: Some jurisdictions treat the violation of a protection order as contempt of court, others treat it as a criminal offense, while a third group treats some violations as criminal offenses and other violations as contempt of court.156 This Model Act uses the last alternative primarily because some violations involve acts that are criminal offenses under most state codes, while other violations involve far less damaging misconduct.

To facilitate the enforcement of protection order laws, it is important to prescribe penalties for violation of protection orders within the domestic violence statute. It is also necessary to tailor penalties and remedies to fit the particular violations. A respondent may violate a protection order by committing a serious assault or some other act that could be prosecuted. The

Model Act provides for criminal prosecution of such violations. To treat such violence as less than a criminal offense would suggest that this conduct, when committed within an intimate relationship, is less serious than when committed against a stranger. Inclusion of criminal penalties for violation of protection orders puts respondents, law enforcement officials, and others on notice that the statute contemplates serious enforcement efforts.

In other cases, a respondent may violate a protection order by failing to appear at a counseling session, by failing to pay monetary compensation to the petitioner, or by committing some other act which, while flaunting the order of the court, might be inappropriate for criminal prosecution or a jail sentence. This type of violation of a protection order should be treated as a civil contempt of court, which may be remedied by the issuance of additional court orders.

The penalties listed for criminal violations become increasingly severe for repeat violations. In some cases, violence may be deterred by issuance of an injunction; in other cases, it may be deterred only by imposing a penalty. As a result, a respondent who violates an initial protection order may take subsequent orders more seriously because of the mandatory jail sentence and felony charges attached to subsequent violations.

The Model Act states that prosecutors should handle criminal violations. Existing abuse laws do not require this treatment, and only in a few jurisdictions have prosecutors handled criminal violations of protection orders. Because of the confusion about the quasi-criminal nature of most protection order laws, some jurisdictions treat criminal violations as civil matters, while in others civil courts impose criminal penalties without the use of proper criminal procedures. To avoid this confusion, this statute makes a clear distinction between civil contempt violations and criminal violations and ensures that criminal violations of protection orders will be prosecuted by persons familiar with the protections accorded to criminal defendants.

4.08. Court Duties.

(A) The administrative offices of those courts that have jurisdiction to issue protection orders shall maintain a record of all requests for

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157 In Ventura County, Cal., for example, the District Attorney’s Office participates in obtaining and enforcing protection orders. See generally Ventura County Dist. Att’y, Domestic Violence Temporary Restraining Order Manual (1981).
orders pursuant to this Act. This record shall include the following information:

(1) the names, genders, and relationship (blood relationship or living arrangements) of the parties;

(2) the abuse alleged, whether the abuse alleged involved weapons or resulted in injuries, and whether injuries inflicted required medical attention; and

(3) the effective date and terms of each order issued.

(B) All case records maintained and names of parties shall be confidential and shall not be made available except as otherwise provided by law.

(C) If practicable, the court administrative officer shall tabulate incidence data using the information maintained pursuant to section 4.08(A). Parties shall not be identified in such tabulated data. Reports generated from court records shall be submitted to the governor, the state legislature, the state bureau of investigation, and the state coalition of shelters for victims of domestic violence. If tabulation of data by an officer of the court is impracticable, other persons wishing to prepare a report based on court records shall be permitted access to those records but shall be required not to disclose the identity of the parties named in the records.

COMMENTARY: Empirical data are useful in generating information about the scope of the problem of domestic violence in any community and in assessing the effectiveness of a legislative scheme. In some states, the courts have access to a computer system that would facilitate the maintenance and tabulation of relatively detailed data. In other states, the police department has access to such a system. The record-keeping requirements imposed on the courts, like some of the other data collection systems prescribed by the Model Act, are aspirational in nature. The requirements are not intended for rote adoption by any legislature. Instead, they should be considered by legislatures to evaluate which types of data should be collected and analyzed.


Except as otherwise stated in this chapter, hearings regarding the issuance of protection orders and hearings on alleged civil violations of orders shall be governed by the rules of civil procedure of this state. Except as otherwise stated in this chapter, hearings on alleged criminal

158 See generally N.J. Stat. Ann. § 2C:25-16 (West 1981) (providing for the maintenance of similar records on petitions and orders and for the compilation of annual reports based on such records).
violations of this chapter shall be governed by the rules of criminal procedure of this state.

COMMENTARY: No comment.

Section 5.00. LAW ENFORCEMENT RESPONSE TO DOMESTIC VIOLENCE.

5.01. Duty to Respond to Calls for Assistance.

(A) Law enforcement agencies shall respond to every request for assistance or protection, from or on behalf of a victim of alleged domestic violence, whether or not a protection order has been issued against the alleged abuser.159

(B) Law enforcement agencies shall not assign lower priority to calls involving alleged incidents of abuse or violation of protection orders than is assigned in responding to like offenses involving strangers. Existence of any of the following factors shall be interpreted by police dispatchers as indicating a need for immediate response:

(1) the caller indicates that violence is imminent or in progress;

(2) a protection order is in effect; or

(3) the caller indicates that incidents of domestic violence have occurred previously between the parties.160

COMMENTARY: The prevalence of domestic abuse is caused in part by underenforcement of the criminal law in domestic abuse cases.161 Many police departments treat domestic violence as the least important aspect of police work,162 even though many cases of domestic abuse involve the commission of violent crimes that pose serious risks to the lives of the victims. It often takes the police longer to respond to abuse calls than to other types of calls; sometimes the police fail to appear at all, even after urgent calls for help.163

159 See WLDF AMENDMENTS, supra note 43, § 16-1006(b).
160 See Mo. ANN. STAT. § 455.080(2) (Vernon Supp. 1983). The provisions on police response are taken both from existing state laws and from consent decrees signed by police departments in New York City, Oakland, Cal., and other cities where police have been sued for failure to protect battered women. See Woods, Litigation on Behalf of Battered Women, 5 WOMEN'S RTS. L. REP. 7, 27–28, 32 (1979) [hereinafter cited as Woods (1979)]. The language of the Model Act also reflects the concerns addressed in an exhaustive analysis of police policy on domestic abuse. See generally N. LOVING, RESPONDING TO SPOUSE ABUSE AND WIFE BEATING: A GUIDE FOR POLICE (1980) [hereinafter cited as N. LOVING, A GUIDE FOR POLICE].
161 See generally R. DOBASH & R. DOBASH, supra note 128, at 207–22. One thesis of this book is that wife abuse is perpetuated by inadequate response by institutions from which abused women seek help.
162 See generally N. LOVING, A GUIDE FOR POLICE, supra note 160, at 4.
163 One study indicated that police did not respond to 17% of reported incidents of domestic abuse. M. SCHULMAN, supra note 16, at 40.
Enforcement of the criminal law against those who victimize their intimates is critical to the reduction of domestic abuse and requires no substantive change in existing law.\textsuperscript{164} This section merely restates the obligation of police officers to respond to the scene of all “disturbance” calls that involve domestic violence as they respond to other calls for police assistance.\textsuperscript{165} This statutory mandate encourages law enforcement officers to respond more frequently and quickly to abuse calls and may provide battered women with a basis for negotiation with or litigation against a police department whose practices fail to conform to the law.

Subsection (B) lays out criteria for police dispatchers to use in determining when calls involving domestic abuse need immediate response. These criteria are spelled out to aid police dispatchers in distinguishing disturbances that are routine in nature from those requiring immediate response. The presence of any one item on the list should result in the call’s being assigned emergency priority.

5.02. Duties of Police Officers Responding to Calls.

(A) Duties of Protection: If a police officer has any reason to believe that a person is a victim of domestic violence, the officer shall use all reasonable means to prevent further domestic violence and to ensure the victim’s safety, including:

(1) exercising arrest powers pursuant to section 5.03 of this Act;

(2) removing the offender from the household, if there is probable cause to make an arrest and an arrest is not made, and if the victim perceives continuing danger;

(3) attempting to persuade the offender to leave the household if there is not probable cause to make an arrest and the victim perceives continuing danger;

(4) filling out and filing a domestic violence offense report using the form prescribed in section 5.05(B);


\textsuperscript{165} Abuse calls generally are classified as “disturbance” calls and are accorded low priority. Disturbance calls include a wide range of problems, some trivial and some serious, from a call complaining of loud neighborhood noise to a woman’s report that her husband is outside her locked bedroom door with a loaded gun. The FBI defines disturbance calls to include “family quarrels, man with gun calls, bar fights, etc.” FBI, U.S. DEP’T OF JUSTICE, \textit{Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted} 41 (1982).
(5) interviewing the parties in separate rooms to ensure that the victim has an opportunity to speak freely;

(6) providing or arranging transportation for the victim to a safe place or shelter if such transportation is desired;

(7) providing or arranging transportation for the victim to the nearest hospital or medical facility for treatment of injuries if such care is needed or desired;

(8) reading the victim the oral notice of rights to protection as provided under section 5.02(B) and written information about the nearest shelter or other agency providing service to victims of domestic violence;

(9) advising the victim of the importance of preserving evidence and of the types of evidence that should be preserved;

(10) taking photographs of any visible injuries or property damage whenever necessary or appropriate;

(11) remaining on the scene of an incident of domestic violence as long as the victim remains in danger;

(12) accompanying the victim to a previous residence to remove personal belongings; and

(13) supervising the court-ordered removal of an abuser from a residence shared with a victim.\(^{166}\)

COMMENTARY: Subsection (A) imposes thirteen specific duties under the general mandate requiring the police to protect victims of domestic violence. The statute uses the word “shall” in describing the duties of the police. Thus, the police officer is required to take the measures listed to protect the victim, and the victim may sue the police department if this statutory duty is violated.\(^{167}\)

This section requires the police officer to exercise his or her arrest powers pursuant to section 5.03. Depending upon which alternative is adopted under section 5.03(A), the officer’s arrest power may be mandatory or permissive. Although many state legislators may be reluctant to remove police discretion not to make arrests, a recent study by the Police Foundation indicated that reincidence of violence is less likely if the police arrest an

\(^{166}\) See generally Illinois Domestic Violence Act § 304(a), ILL. ANN. STAT. ch. 40, § 2303-4 (Smith-Hurd Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, § 6 (West Supp. 1982); UTAH CODE ANN. § 30-6-8(2) (Supp. 1981); WLDF AMENDMENTS, supra note 43, § 16-1006(c).

\(^{167}\) The Oregon Supreme Court recently held that a victim injured as a result of an officer’s failure to fulfill his duty to arrest (as determined by statute) may sue the police department for damages. Nearing v. Weaver, 295 Or. 702 (1983).
abuser than if they separate the parties or mediate the “dispute.”

The duty to remove the offender from the household under certain circumstances is an extension of the traditional police response to wife abuse, which was to walk the offender around the block. The section contemplates that the officer might persuade the abuser to move to another place of lodging for the night and that the officer would accompany the abuser to the place chosen. The final decision on appropriate action, however, is left to the officer rather than to the victim, because some victims are unaware of or unable to express their need for protection. In some circumstances, the officer should act to protect a victim of abuse even over her own objection.

The requirement that incident reports be filed simply restates an existing duty of police officers that is generally ignored in practice. One survey of police officers found that thirteen percent of those interviewed said that they did not write reports in family disturbances, while seventy percent said that they completed written reports on between one to four incidents out of twenty. Filing a report creates a useful record when a police department receives subsequent calls from the same residence. It also may be used to verify the parties’ accounts of an abusive incident when a case goes to court.

168 The Police Foundation study focused on whether police should use law enforcement procedures or social work techniques in responding to disturbance calls. It was designed to determine through an experiment using real cases whether arrest, informal mediation, or temporary separation of the parties was most effective in deterring subsequent assault.

The participating officers were divided into three groups. Each officer responded to a sample of actual wife abuse cases according to the instructions the officer’s group had been given. One-third of the officers made arrests, one-third separated the parties, and one-third mediated the disputes.

A six-month follow-up study found that there had been a recurrence of violence in 24 percent of the cases in which the police had separated the parties for eight hours, a 17 percent recurrence in cases which were mediated, and only a 10 percent reincidence of violence in cases in which an arrest was made. The researchers found that the data on arrest and separation was statistically significant and the data on mediation was close to being statistically significant.

The study revealed the dramatic deterrent effect of arrest on domestic abuse compared to the effect of other, more common police responses to abuse cases. As of 1977, 70% of police departments with 100 or more officers trained their officers to use mediation rather than arrest in abuse cases. The Police Foundation study may lead to a major shift in police policy away from “crisis intervention” (or mediation) and toward more traditional law enforcement. L. Sherman & L. Berk, Police Responses to Domestic Assault: Preliminary Findings (1983) (unpublished manuscript available from the Police Foundation, Washington, D.C.).

Clauses (5) through (11) are common sense forms of assistance that battered women can receive from police officers who arrive at a residence during or immediately following a battering incident. Some police departments have improved their policies regarding response to domestic violence as a result of internal policy changes,\textsuperscript{170} while others have done so as a result of litigation\textsuperscript{171} or the enactment of new legislation.\textsuperscript{172}

Clause (12) requires police officers to accompany victims who request assistance in retrieving personal belongings from residences that they are temporarily or permanently leaving. These situations may involve extreme danger to victims, because batterers often become violent when their mates attempt to separate from them.\textsuperscript{173}

Finally, the section requires police officers to supervise court-ordered evictions of domestic abusers for the reasons explained in the commentary to section 4.05(O).

(B) Requirements of Notice:

(1) In giving notice to a victim of the victim's rights as provided in section 5.02(A)(8), the officer shall read the following statement aloud and provide the victim with a card bearing the same information: My name is Officer \underline{\text{_________}}; my badge number is \underline{\text{_________}}. The law requires that I offer the following services to persons such as yourself who are victims of domestic violence:

(a) if a crime has been committed against you, I must arrest the suspect immediately, or I must remove the suspect from the household or try to persuade him to leave the household;

(b) I must drive you or help you find transportation to the nearest hospital or medical facility for treatment of injuries if you need or want treatment;

(c) if you want to leave the residence, I must drive you or help you find transportation to the nearest shelter for victims of domestic violence or to any other nearby place where your safety will be assured; and

\textsuperscript{170} See, e.g., Philadelphia Police Department Directive 90, Protection from Abuse (Nov. 15, 1983).


\textsuperscript{172} See, e.g., Illinois Domestic Violence Act \textsection{} 304(a), ILL. ANN. STAT. ch. 40, \textsection{} 2303-4 (Smith-Hurd Supp. 1982); MASS. GEN. LAWS ANN. ch. 209A, \textsection{} 6 (West Supp. 1982); UTAH CODE ANN. \textsection{} 30-6-8(2) (Supp. 1981).

\textsuperscript{173} See supra note 139.
(d) I must make all reasonable efforts to make sure that you are safe.

(2) In addition, the officer shall give the victim a written copy of the following statement in English, Spanish, or any other language commonly used in the community:

(a) The law provides that you may seek a court order prohibiting further abuse of yourself, your children, or anyone in your household, if you are affected by the abuse or if the victim is unable to seek help. You do not need to hire a lawyer to get a protection order.

(b) The protection order may order the person who abused you to move out of the residence where you live, to pay your rent there or elsewhere, or to pay support for you or your children. The order may give you custody of your children. It may order the abuser to stay away from your workplace or other places you regularly go. The order may require the abuser not to call you or write you letters. It may order the abuser to pay your medical bills or to participate in counseling. You may request any or all of these things, or ask for other protection, as part of a protection order.

(c) To get a protection order, go to room number ______ at the courthouse, which is located at ______________. Ask the clerk of the court for protection order forms. If you are in immediate danger you usually can get an order the day you file the petition.

(d) If the person who assaulted you violates this order, that person may be arrested and punished or required to remedy the violation.

(e) You also have the right to request that the prosecutor file a criminal complaint against the person who assaulted you. If convicted of a crime, the abuser may be placed on probation and ordered to see a counselor, or the abuser may be put in jail or fined.

(f) On nights, weekends, and holidays, when the courts are closed, you may obtain emergency assistance by calling the police or by calling ____________ to find a judge.174

COMMENTARY: This section requires that victims be given notice of their rights under the law. Notice provisions of this sort appear only in a relatively small number of states, but are included in many of the newer laws.175 The Model Act requires


officers to read aloud a short notice to ensure that the victim will receive information about her right to police protection while the officer is present. Also, reading the notice aloud will remind officers of their statutory duties under the law. The police officers must also provide the information contained in the oral notice to the victim in writing.

As a practical matter, it is necessary that the oral notice be brief and include only information that is immediately relevant. The police department, however, is often the first and only agency that a victim of abuse contacts. Therefore, officers have a responsibility to educate the victim about what legal remedies for abuse are available. Hence, the statute requires police officers to provide the victim with written information about the remedies available to her under the law.

5.03. Arrest Powers of Police Officers Responding to Domestic Violence Calls.

**Alternative 1**

(A) A police officer shall make an arrest without a warrant if:

1. the officer has probable cause to believe that a misdemeanor or felony involving domestic violence, as defined in section 3.01, has been committed by the suspect in violation of a protection order or in violation of any criminal statute of this state; and

2. the suspect is present at the scene when the police arrive or the suspect can be located. Such arrest shall be made whether or not the offense was committed in the presence of the officer.\(^{176}\)

**Alternative 2**

(A) A police officer may make an arrest without a warrant if the officer has probable cause to believe:

1. that the suspect has committed a felony;

2. that the suspect has committed a misdemeanor involving domestic violence, as defined in section 3.01;

3. that the suspect has committed a misdemeanor and the officer

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\(^{176}\) See generally Or. Rev. Stat. §§ 133.055(2), 133.310(3) (1981) (providing that a police officer may make a warrantless arrest based on probable cause that a misdemeanor has been committed and that an officer must make a warrantless arrest if the officer has probable cause to believe that a protection order has been violated); WLDF AMENDMENTS, supra note 43, § 16-1006(d) (imposing on the officer a duty to arrest unless the complainant objects to the arrest).
has reason to believe that the suspect presents a continuing danger if he or she is not immediately arrested; or

(4) that the suspect has committed a misdemeanor in the presence of the officer.177

COMMENTARY: At present very few abuse calls lead to arrest.178 Police must arrest more wife abusers to inform communities that such conduct will not be tolerated. Without the exercise of police power on behalf of battered women, court orders become empty threats. Without immediate arrest, the likelihood of any successful criminal prosecution decreases.

Statutory changes are necessary in most states to allow police to make warrantless arrests for serious domestic assaults.179 Most police perceive criminal conduct in domestic cases as misdemeanors, and arrest laws frequently require that a warrant be obtained in order to make an arrest for a misdemeanor committed out of the officer’s presence.180 In addition, serious injuries often are not apparent to officers who arrive immediately after an assault; bruises may not appear for a few hours, and injuries may be internal or concealed by clothing.

Subsection (A) is presented in two versions. The first imposes upon police officers a duty to arrest in all domestic abuse cases in which probable cause is present. The section abolishes the in-presence requirement and allows arrest even if a protection order has not been issued. This provision clearly states the policy that arrest is the appropriate response when a crime of domestic violence is committed.

The second alternative, which retains the police officer’s discretionary authority to arrest, may be a necessary compromise in some states for two reasons. First, some legislators may be unwilling to make substantial changes in the arrest laws as they are currently written. Alternative 2 uses a structure similar to

178 In Cleveland, Ohio, during nine months in 1979, police made only 460 arrests in responding to domestic disturbance calls, despite a new law allowing warrantless arrests for misdemeanor spousal assault. See OHIO ATT’Y GEN., THE OHIO REPORT ON DOMESTIC VIOLENCE 1979, 71. The Attorney General’s report listed the number of arrests made, as well as the number of official reports filed (700). The report, however, did not list the number of disturbance calls made to the police, which for that period was estimated at 15,000. Interview with Grace Kilbane, Director of the Cleveland Witness/Victim Assistance Program, in Cleveland (Jan. 15, 1981).
180 For a more complete explanation of this issue, see id. at 59, 63–67
some existing statutory language on warrantless arrest and therefore does not dramatically alter the current law.\textsuperscript{181} Second, many state legislators may be unwilling to impose a duty to arrest on the police. The law is likely to be less effective if the language is permissive,\textsuperscript{182} but such language is preferable to retaining the in-presence requirement for misdemeanors.

It is not clear whether there is a meaningful distinction between permissive and mandatory language.\textsuperscript{183} If permissive statutory language is interpreted to impose a duty to arrest, victims of abuse may have a legal remedy against police departments whose officers fail to make the necessary arrests.

(B) Determination of Probable Cause.

(1) Any clear and specific written statement by a person alleging the commission of domestic violence against that person or alleging that he or she witnessed an act of domestic violence against another constitutes probable cause for an officer to believe that the offense was committed and probable cause to believe that the suspect committed the offense.\textsuperscript{184}

(2) In the absence of such a statement, the officer shall consider the following factors in determining whether probable cause exists:

(a) whether a victim or a witness alleges that an incident of domestic violence occurred;

(b) whether there are visible injuries, torn clothing, disruption of physical surroundings, or other physical evidence of domestic violence; and

(c) whether the dispatcher indicated a report of imminent violence or violence in progress.\textsuperscript{185}

(3) The existence of any of the following circumstances shall not be considered in any determination of probable cause to believe that a crime was committed by a person alleged to have committed it:

(a) that the victim knows the accused;

(b) that the victim has not made efforts to obtain a divorce or a protection order or to flee the residence;

(c) that the officer believes that the victim will not pursue crim-


\textsuperscript{182} Woods (1979), supra note 160, at 28–29.

\textsuperscript{183} See generally A. M. Boylan & N. Taub, Adult Domestic Violence: Constitutional, Legislative and Equitable Issues 235 (1980) (discussing how permissive language has sometimes been interpreted so as to require affirmative action).

\textsuperscript{184} See OHIO REV. CODE ANN. § 2935.03(B) (Page 1982).

\textsuperscript{185} See generally WLDF AMENDMENTS, supra note 43, § 16-1006(e).
inal prosecution, or that the prosecutor will refuse to file charges based on the alleged incident;

(d) that the officer believes that reconciliation is preferable to arrest;

(e) that there are no witnesses to the incident;

(f) that the suspect is not in an agitated or argumentative state; or

(g) that the victim has called the police on previous occasions.\textsuperscript{186}

COMMENTARY: The states may define the scope of police power to arrest so long as the statute does not abolish the constitutional requirement of probable cause.\textsuperscript{187} In some jurisdictions, legislation or police directives specify the circumstances under which an officer might find probable cause.\textsuperscript{188} These directives may foster more uniform police conduct and may narrow the subjective judgment that is necessarily a part of any decision to take a suspect into custody.

Subsection (B)(1) is an adaptation of the definition of the probable cause requirement in the Ohio abuse law.\textsuperscript{189} It states that an officer may make an arrest based solely on the statement of the alleged victim that a crime has been committed against her by the alleged assailant or on the statement of a witness that a crime has been committed against someone else.\textsuperscript{190} Abusers frequently deny that any incident occurred, and police officers must decide which party, the victim or the assailant, is more credible. This section aids in that assessment.

It is possible that a few improper arrests would be made using these guidelines. In general, however, police will not make an arrest if they do not believe a crime has been committed, and it is unlikely that the victim's words would be the sole basis of that assessment.

Drafters should be cautious about including this provision in a law that uses mandatory arrest language; the combination of

\textsuperscript{186} See generally id. § 16-1006(f).

\textsuperscript{187} Probable cause means that the arresting officer must have "reasonably trustworthy information" in light of any "facts and circumstances" that would lead a reasonably cautious person to believe that an offense has been or is being committed. Draper v. United States, 358 U.S. 307, 318 (1959).

\textsuperscript{188} See N. Loving, A Guide For Police, supra note 160, at 163 app. (order resulting from consent agreement of Oakland Police Department).

\textsuperscript{189} See Ohio Rev. Code Ann. § 2935.03(B) (Page 1982).

\textsuperscript{190} According to a recent Supreme Court decision, the "totality of the circumstances" would in the end determine if the sole statement by the victim is sufficient to establish probable cause. See Illinois v. Gates, 103 S. Ct. 2317 (1983).
the two would impose a duty of arrest whenever a person signed a statement alleging that he or she or someone else had been abused.

Subsection (B)(2) lists factors that would favor a finding of probable cause. Subsection (B)(3) lists factors that are not to be included in an officer's judgment about whether to make an arrest. It is adapted from consent judgments in lawsuits against the police departments of Oakland, California, and New York City. It is intended to negate the reasons most often offered by police officers to explain why arrests are avoided in domestic abuse cases.

5.04. Limitation of Liability.

Law enforcement agencies and officers shall not be liable for personal injuries or property damage that occurs in the course of any good-faith effort to protect a victim of domestic violence, including but not limited to action taken during the course of an arrest, an attempt to separate the parties or to enforce a court order, or action taken during the transportation of the victim to a shelter, hospital, or other authorized place.

COMMENTARY: This section is intended to encourage zealous enforcement of the law by police officers by shielding them to some extent from lawsuits by persons against whom the laws are enforced. Police have expressed concern that, as a result of implementing new domestic violence laws, they will be deluged with litigation brought by irate husbands. Under the Model Act, police are protected from civil liability for damages if the injury to the abuser resulted from a good-faith effort to enforce the law.

Many states have included similar language in their abuse laws to encourage police support for a proposed law that imposes new duties on police officers. This immunity clause, however, does not (and could not) prohibit suits for violations of the federal civil rights laws.

191 For the orders and guidelines issued by the two police departments as a result of the consent agreements, see N. LOVING, A GUIDE FOR POLICE, supra note 160, at 163-68 app. The agreements resulted from the following two cases: Scott v. Hart, No. C76-2395 (N.D. Cal. filed Nov. 9, 1979), and Bruno v. Codd, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), rev'd, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1978), aff'd, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979) (subsequent history of Bruno not affecting the consent agreement entered into by the police department).


Reporting and Data Collection by Law Enforcement Agencies.

(A) Law enforcement agencies shall maintain complete and systematic records of all protection orders in effect. The agencies shall use the records to inform dispatchers and law enforcement officers responding to domestic violence calls of the existence, terms, and effective dates of protection orders in effect as well as of prior incidents of domestic violence.195

(B) The state bureau of investigation shall develop a domestic violence offense report form that shall include but not be limited to the following information:

1. the names, addresses, ages, races, genders, occupations, and relationship of the parties, and whether the victim was pregnant at the time of the incident;
2. the time the complaint was received and the times the officer responded to the call and left the scene of the incident;
3. a detailed description of the incident that led to the call, including the nature and extent of the alleged acts of violence;
4. a detailed description of the injuries inflicted, including photographs of visible injuries;
5. the number and type of weapons involved;
6. the effective date and terms of any protection order in effect;
7. a summary of the victim’s account of the frequency and severity of prior incidents of abuse, calls to the police, and prior court action;
8. all action taken by the responding officers to protect the victim or to prevent subsequent violence;
9. if no arrest was made, the reason for failure to make an arrest;
10. a list of names, addresses, and statements of any witnesses to the abuse, including a summary of statements of witnesses to the incident; and
11. any other information necessary for a complete analysis of the incident.196

(C) Within ten days following a call concerning an incident of domestic violence, the police department shall forward a copy of the completed incident report to the prosecutor’s office.197

(D) The state bureau of investigation shall tabulate annually, by county

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and by metropolitan area, the data from domestic violence offense reports and shall present a report of such data to the governor, the state legislature, the administrative officer of the courts, and the state coalition of shelters for victims of domestic violence. The report shall include but not be limited to the following information:

1. the total number of domestic violence calls received, by category of classification;
2. the number of calls received broken down by the sex, age, relationship, and race of victims and of abusers;
3. the number of cases in which weapons were used or in which visible injuries were inflicted;
4. the number of cases in which the victim was pregnant at the time of abuse;
5. a breakdown of cases according to the number of times victims called the police or sought help in court;
6. the number of reports filed by police;
7. the number of arrests made;
8. the number of cases in which criminal charges were filed, and a breakdown of the types of charges filed;
9. the reasons commonly reported by police for failure to make arrests;
10. the number of cases in which police officers removed one party from the residence in lieu of arrest and the number of cases in which police officers provided victims with transportation to a hospital or shelter; and
11. the average amount of time between a call to the police department and the arrival of police officers at the scene of the incident. 198

COMMENTARY: This is the most important data collection section included in the Model Act. Advocates, police officers, prosecutors, and courts may use the information generated by recordkeeping to prevent subsequent abuse. While the individual information may be useful in particular court proceedings, the tabulated data increase police accountability and aid in social policymaking on domestic violence. Moreover, the police department can implement most easily the statute's recordkeeping provision, since police officers have more contact with battered women than do members of any other official agency. The type of recordkeeping contemplated by the statute requires only mod-

198 See N.J. STAT. ANN. § 2C:25-8(c) (West 1982).
erate adaptations of the data collection systems existing in most police departments. \(^{199}\)

Subsection (A) requires each agency to keep current records of the protection orders in effect in their precinct and to provide the information to officers responding to calls. Such information is essential to the enforcement of protection orders. Police might otherwise refuse to enforce protection orders unless the victims have certified copies of the orders available. This section would prevent this practice.

Subsection (B) contemplates the development of a report form for domestic violence offenses. In some states, it may be possible to use the state's existing general report forms with only minor revisions. The domestic abuse reports, however, must be easily identifiable to facilitate the tabulation of data contemplated by this section.

The Model Act requires that the police department transmit copies of all incident reports in abuse cases to the prosecutor's office, regardless of whether an arrest was made. Prosecutors then may screen the reports and contact victims if an incident appears to warrant prosecution. This arrangement has been effective in some jurisdictions \(^{200}\) and responds to a common complaint of prosecutors that they cannot file charges in abuse cases because they are rarely notified of incidents.

The information to be compiled under subsection (D) is adapted from the system used in Ohio, where the state Attorney General's Office produces an annual report of all the tabulated data. This report provides information on how the law is being enforced and facilitates the comparison of institutional behavior in different cities. \(^{201}\)

5.06. Training of Police Officers.

(A) Law enforcement agencies shall establish an education and training program for police officers designed to acquaint them with:

1. the nature, extent, and causes of domestic violence;

2. the legal rights of and remedies available to victims of domestic violence;

\(^{199}\) Most police departments participate in the recordkeeping requirements imposed by the FBI Uniform Crime Reports. The Model Act would require adding only a few lines to the forms already in use.


\(^{201}\) See, e.g., OHIO ATT'Y GEN., supra note 178, at 70-71.
(3) the services and facilities available to victims and batterers;
(4) the legal duties imposed on police officers to make arrests and to offer protection and assistance; and
(5) techniques for handling incidents of domestic violence that minimize the likelihood of injury to the officer and promote the safety of the victim.202

(B) Training shall stress the enforcement of criminal law in domestic violence cases and the use of community resources. Law enforcement agencies and community organizations shall cooperate in all aspects of the training. Representatives of shelters or other community groups shall be invited to assist in planning and presentation of training.203

(C) Basic training completed by police officers prior to permanent appointment shall include no less than twenty hours of training in responding to domestic violence calls.204

(D) Advanced eight-hour in-service training programs for all veteran officers shall include sessions on responding to domestic violence calls. The primary purpose of these sessions will be to familiarize officers with this Act and any subsequent legislation on the protection of victims of domestic violence.205

COMMENTARY: This section reverses a longstanding tradition of providing limited or inappropriate training to recruits and veteran officers on the handling of domestic violence calls.206 The need for more extensive training is evident. Many departments report that about one-third of police time is spent responding to calls involving domestic abuse.207 More officers are injured responding to disturbance calls than any other type of call.208

The statute contemplates twenty hours of training for recruits and periodic in-service training for veterans. The statute is quite general but indicates specific subject areas that should be cov-

202 See generally ALASKA STAT. § 18.65.510(a) (1981); WLDF AMENDMENTS, supra note 43, § 16-1006(i); N. LOVING, A GUIDE FOR POLICE, supra note 160, at 113–27.
206 For a discussion of traditional police policies in abuse cases, see Note, supra note 126, at 144–49.
208 In 1982, the FBI reported that 34% of officers assaulted while on duty were responding to “disturbance” calls. FBI, U.S. DEPT. OF JUSTICE, supra note 165, at 41. The homicide data in the same report breaks down disturbances into two categories, “domestic disturbances” and “other disturbances,” and found that of ninety-two officers killed, only seven, or eight percent of the total, were killed while responding to domestic disturbance calls. Id. at 17.
ered. The training should focus on law enforcement rather than on crisis intervention, which dominates much of current police training on abuse. The mediation approach involves teaching police officers communication skills that enable the officers to defuse a dispute. These skills are necessary to good police work, but the emphasis on interpersonal skills in domestic situations promotes the notion that the primary task in responding to an abuse call is to mediate rather than to protect the victim from abuse. Optimally, police trainers should focus on law enforcement rather than on mediation in training on responding to domestic violence.

Section 6.00. Diversion.

6.01. Definition. Diversion is a procedure that defers prosecution, conviction, or sentencing of a criminal defendant under this Act pending the defendant's voluntary completion of a program designed to prevent further violence or other criminal conduct. Successful completion of a diversion program will result in dismissal of criminal charges.

COMMENTARY: This section of the statute recommends a prosecutorial option that may be established either by statute or by internal policy in a prosecutor's office. Advocates for battered women disagree about the desirability of diversion. Some advocates believe that diversion sanctions the underenforcement of the criminal law. These advocates therefore prefer that criminal defendants in abuse cases be prosecuted and punished. Some offices that have established diversion programs, however, find that diversion can be effective in stopping violence. It is also argued that diversion is more responsive to the objectives of battered women who become criminal complainants, because the victim's primary goal in most criminal abuse cases is to stop the violence rather than to punish the offender. Abusers who participate in diversion programs are often more closely monitored than other defendants convicted of abuse charges, and the conditions of diversion are often tailored to the goal of stopping violence.

210 For an example of a lesson plan which encourages a strong law enforcement policy, see N. LOVING, SPOUSE ABUSE: A CURRICULUM GUIDE FOR POLICE TRAINERS (1981).
211 See generally U.S. COMM’N ON CIVIL RIGHTS, supra note 17, at 61–76.
212 L. LERMAN, supra note 4, at 110 (discussing the findings of statistical studies and of participants in an LEAA-sponsored conference on programs for men who batter).
Finally, diversion of defendants charged with domestic abuse may drastically reduce case attrition. According to most prosecutors, victim withdrawal from participation is the chief obstacle to successful prosecution.\textsuperscript{213} Diversion avoids this problem because the initial "disposition" of the case occurs immediately after charges are filed and because the abuser enters diversion voluntarily.

Diversion procedures place the suspect in a closely monitored counseling program in which the primary goal is to stop violence. The accused batterer enters the program without prior conviction; therefore, careful attention was given to the protection of participants' constitutional rights. The guidelines also provide for the protection of the victim through the issuance of a protection order during the period of diversion.

6.02. \textit{Eligibility Requirements.}

(A) The prosecuting attorney shall screen all cases involving allegations of domestic violence, as defined in section 3.01, to determine the defendant's eligibility to participate in a diversion program.

(B) The defendant may be diverted only if:

1. the defendant voluntarily agrees to participate in the program;
2. the victim consents to the defendant's participation in the diversion program during a consultation out of the defendant's presence;
3. a protection order is issued to prevent abuse during the period of diversion;
4. the defendant has not been convicted of any offense involving violence during the seven years preceding the current charge;
5. the defendant's record does not indicate that probation or parole has ever been revoked;
6. the defendant has not been diverted pursuant to this chapter within five years preceding the current charge; and
7. the defendant has not been diverted more than once before.\textsuperscript{214}

(C) If a defendant satisfies the conditions listed above, the district attorney's office shall assess whether the defendant is likely to complete the diversion program successfully.

(D) Discretion to admit the defendant to the diversion program may be exercised if:

\textsuperscript{213} \textit{Id.} at 18.
\textsuperscript{214} See generally \textsc{Cal. Penal Code} §§ 1000.6–7 (West Supp. 1983).
(1) the defendant demonstrates motivation to stop battering; and
(2) other factors indicate the defendant would benefit from counseling. 215

(E) Discretion to pursue prosecution may be exercised if:

(1) the injury inflicted upon the victim is severe;
(2) the victim indicates an extensive history of previous incidents of domestic violence by the defendant; or
(3) the defendant has a significant criminal record.

(F) No admission of guilt shall be required as a condition of eligibility for diversion. 216

COMMENTARY: The eligibility requirements create a screening mechanism that will prevent diversion if the defendant or the victim does not consent or if the defendant's criminal record makes it likely that he would use diversion to avoid incarceration and would not participate seriously in the program. The eligibility criteria in subsection (B) are mandatory; a defendant who fails to satisfy any of the listed requirements may not be admitted to the program. The criteria in subsections (D) and (E), however, are intended to guide the prosecutor's discretion in determining who should be admitted to the diversion program.

6.03. Notice Requirements.

(A) If the district attorney concludes that the defendant is eligible for diversion, he or she shall notify the defendant's attorney (or the defendant) and the victim. Notice shall be given orally and in writing and shall include:

(1) a description of the purposes and procedures of the diversion program;
(2) a general explanation of the roles and activities of the court, the prosecuting attorney, and the counseling program in the diversion process and an explanation of the scope of the prosecutor's discretion in determining which defendants are eligible for diversion;
(3) notice that the court, at a hearing, may decide not to divert the defendant;
(4) a clear statement of the conditions of diversion; and

215 Cf. id. §§ 1000.6, 1000.8(a) (West Supp. 1983) (providing for the court to determine the eligibility of the defendant for diversion based on similar factors).
216 See id. § 1000.6(c) (West Supp. 1983).
(5) notice of the penalty for failing to meet the conditions of diversion.\textsuperscript{217}

(B) If the prosecuting attorney decides that the defendant is ineligible for diversion, the district attorney shall file a written statement with the court of the grounds upon which the determination is based and shall make copies of this statement available to the defendant, the victim, and the defendant's attorney.\textsuperscript{218}

**COMMENTARY:** No comment.

6.04. Consent. A defendant found eligible for diversion shall have an opportunity to consult with an attorney before entering into a diversion agreement. If the defendant agrees to participate in diversion, the defendant shall sign a written agreement under which he or she shall consent to the following terms:

(A) that he or she will abide by the conditions of diversion, including the restrictions imposed by the protection order, for a specified period;

(B) that he or she waives the right to a speedy trial; and

(C) that the agreement will toll any applicable civil or criminal statutes of limitation during the period of diversion.\textsuperscript{219} The agreement shall also be signed by the victim and by the district attorney or by his or her designee.

**COMMENTARY:** The notice and consent requirements would prevent diversion in any case in which the defendant was not fully aware of the conditions of diversion. Absent such elaborate notice, the defendant might view the conditions imposed as punishment without conviction, especially since a post-conviction sentence might be similar to the terms of diversion.\textsuperscript{220}

6.05. Admissions Procedure.

(A) Defendants shall be screened for diversion and eligible defendants shall be admitted to the program whenever possible within forty-eight hours after criminal charges are filed, or after the prosecutor identifies an abuse case.

(B) When a defendant is found eligible for and has consented to participation in diversion, the district attorney shall move for a continuance of the charges pending the defendant's completion of the diversion program. The district attorney shall request approval of a

\textsuperscript{217} See id. § 1000.7(a) (West Supp. 1983).

\textsuperscript{218} See id. § 1000.6(b) (West Supp. 1983).


\textsuperscript{220} See L. Lerman, supra note 4, at 47–50.
consent agreement listing the terms of the diversion pursuant to section 6.06, and shall file a petition for a protection order on behalf of the victim. Whenever possible, such motion for continuance shall be made at a bond hearing or at arraignment, but may be made at any stage of the prosecution prior to sentencing.

(C) In ruling on the motion, the court shall determine whether the defendant knowingly has consented to participate and may review the factors used in determining eligibility.

(D) If the motion for continuance is granted, the court shall issue an order for diversion of the defendant which incorporates the terms of the consent agreement.

(E) If the court orders that the defendant be diverted and finds that the defendant is able to pay all or part of the costs of counseling, the court may order the county to pay for counseling or may refer the defendant to a program that provides counseling services without charge.

(F) If the court decides that the defendant should not be diverted, the proceedings shall continue as if no attempt to divert the defendant had been made.\(^\text{221}\)

Commentary: The procedures for admission are designed to ensure the defendant’s diversion as soon as possible after charges are filed. The effectiveness of diversion may be related to the amount of time that elapses between the filing of charges and the defendant’s entry into the diversion program.\(^\text{222}\) The trauma that abusers often experience immediately after an incident of abuse makes immediate action critical. If days or weeks pass, the program may not be effective.\(^\text{223}\)

6.06. Conditions of Diversion.

(A) Prosecution of criminal charges against a defendant may be deferred for the purposes of diverting the defendant pursuant to this chapter for not less than six months (unless the defendant violates the terms of diversion) nor longer than two years.\(^\text{224}\)

(B) The terms and conditions of diversion shall be designed on an individual basis to provide for the protection of the victim and other designated persons and to provide for the rehabilitation of the de-

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\(^{221}\) See CAL. PENAL CODE § 1000.8(a) (West Supp. 1983).

\(^{222}\) L. Lerman, supra note 4, at 94–95.

\(^{223}\) See id. at 110–11.

\(^{224}\) See CAL. PENAL CODE § 1000.8(c) (West Supp. 1983).
fendant through treatment and prohibition of any conduct that could lead to violence.\textsuperscript{225}

(C) Conditions of diversion shall include an order of counseling that is designed to stop the defendant's violent behavior and an order of protection for the victim that may include any of the relief available under section 4.05.

(D) In referring defendants to counseling, preference shall be given to programs or therapists who focus on terminating violent behavior through group counseling or who teach defendants skills for resolving conflict without using violence. The court shall not refer defendants to couples counseling or to family therapy with their victims.

COMMENTARY: The section on conditions of diversion contemplates that each participant in the program would make an individual contract with the staff of the program, specifying the terms of his participation. The defendant must agree to participate in an intensive program of counseling for at least six months. He must also agree to comply with the terms of a protection order and to refrain from violence during participation.

Some therapists consider six months of counseling to be the minimum amount of time necessary for counseling to have any lasting impact on an established pattern of violence.\textsuperscript{226} Specialized programs are preferred to family therapy because these programs make use of new techniques for working with batterers and stopping violent behavior. The statute also encourages the use of group counseling for batterers. One therapist experienced in this area of mental health has determined that an abuser must address his problem in a group or individual setting before engaging in counseling with other members of his family.\textsuperscript{227}

6.07. Discretion to Terminate.

(A) The district attorney or the administrator of the counseling program shall contact the victim at least monthly during the period of diversion so that the victim has an opportunity to report any violations of the diversion agreement by the defendant.

(B) If the prosecuting attorney or the court receives information from a counselor, the victim, or another source that the defendant has


\textsuperscript{226} L. Lerman, supra note 4, at 103.

\textsuperscript{227} See generally A. Ganley, supra note 71, at 68-70. A list of counseling programs that conduct group therapy for men who batter is available from the Center for Women Policy Studies, 2000 P St., N.W., Suite 508, Washington, D.C. 20036.
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violated a condition of diversion or is not benefiting from counseling, or if the defendant is convicted of any offense involving violence as prohibited by section 6.02, the district attorney may terminate diversion. Upon termination of diversion, the district attorney shall reinstitute criminal proceedings against the defendant; if the defendant is participating in post-conviction diversion, the court may proceed to sentence the defendant.²²⁸

(C) In cases in which diversion is terminated and prosecution resumed, charges may not be dismissed at the request of the victim absent unusual circumstances. Unusual circumstances might be found if failure to dismiss charges would increase the risk of harm to the victim and if law enforcement officials would be unable to protect the victim during prosecution.

COMMENTARY: The statute requires the prosecution of the defendant to be resumed if the defendant violates the terms of diversion and the district attorney decides to terminate the program. The statute also prohibits dismissal of charges at the victim’s request in most cases. This prevents the defendant from avoiding the terms of diversion by persuading or coercing the victim to request dismissal of charges. The “unusual circumstances” exception is included because in some cases failure to dismiss charges may place the victim in great danger. If the law enforcement system is unable to protect the victim during prosecution, it must not compel her participation.

6.08. Successful Completion of the Diversion Program.

(A) On fulfillment of the terms and conditions of diversion, the court shall discharge the defendant and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction of a crime.²²⁹

(B) Two years after the discharge and dismissal under this section the defendant’s record of arrest or criminal charges may be expunged upon request, provided there has been no further arrest or conviction for any offense involving a violent act.²³⁰

(C) When a defendant’s record is expunged, the police department shall retain a nonpublic record of charges discharged or dismissed under this section. This record shall be furnished to a court, police agency, an attorney for a victim of domestic abuse, or prosecutor’s office upon request to show that a defendant in a civil or criminal action

²²⁹ See MICH. COMP. LAWS § 769.4a(3) (1979).
²³⁰ Cf. CAL. PENAL CODE § 1000.10 (West Supp. 1983) (providing for the expungement of arrest record upon the successful completion of a diversion program).
involving domestic violence previously completed the diversion program. ¹²³

COMMENTARY: This section provides for the expungement of records because avoidance of a criminal record is frequently a strong incentive for active participation in a diversion program. The statute requires that a private record be kept that will be available to law enforcement officials and attorneys handling subsequent domestic violence by the same individual.

6.09. Data Collection on Diversion of Criminal Defendants in Abuse Cases.

The prosecutor’s office or the prosecutor’s designee shall collect and retain the following data:

(A) the number of cases screened for diversion;

(B) the number of cases accepted into the diversion program;

(C) a breakdown of the criminal charges that had been filed against defendants accepted into the program;

(D) conditions imposed on diverted defendants;

(E) the number of successful completions;

(F) the number of unsuccessful terminations;

(G) the reasons for unsuccessful termination;

(H) the duration of defendants’ participation in the diversion program; and

(I) the disposition of criminal charges and sentences imposed on defendants rejected and on defendants unsuccessfully terminated.

COMMENTARY: The data collection provision is necessary in order to monitor the operation of the diversion program. Some programs have been very successful and have used the data collected in seeking funding for continued operation. ¹²³

6.10. Evidence.

(A) Consent to participate in diversion is not an admission of guilt and the consent may not be admitted in evidence in a trial except to rebut allegations that the statute of limitations has run or that the defendant’s right to a speedy trial has been denied. ¹²³


¹²³ See, e.g., L. Lerman, supra note 4, at 157–60 app. (reprinting data from the annual reports of the Miami Domestic Intervention Program).

(B) Communications between defendants, diversion program staff, and therapists who provide counseling for defendants, as well as communications between victims and advocacy staff, therapists, or others who assist victims in obtaining protection, shall be confidential, except that the court or the prosecutor may review information concerning violation of the terms of diversion. Statements made during diversion and records kept by the program shall be inadmissible in any court proceeding.

COMMENTARY: Because participation in diversion is not an admission of guilt, information obtained about the defendant's conduct during diversion should not be available in any prosecution. If the defendant is expected to be honest about his own violence, he must trust the confidentiality of a relationship with a therapist or other staff member with whom he has contact during diversion. The statute protects the confidential records created during diversion by prohibiting their use in court proceedings.