

Protection Orders for Immigrant Victims of Sexual Assault^{1,2}

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Introduction

Sexual assault is the most underreported crime in the United States.³ Statistically speaking, most sexual assaults are committed by persons already known to the victim, including 18% by an intimate partner or

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² In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ Kelly O'Connell, *A New Tool for Safety: Introducing Washington's Sexual Assault Protection Order*, WASH. STATE BAR ASS'N NEWS (June 2006), available at <http://www.wsba.org/media/publications/barnews/june06-o%27connell.htm>.

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relative and 48% by a friend or acquaintance.⁴ Few victims and fewer immigrant victims report rape and sexual assault to authorities. In 2002, only 39% of rapes and sexual assaults were reported to law enforcement officials.⁵ When the offender was a friend or acquaintance, 61% of completed rapes, 71% of attempted rapes and 82% of sexual assaults were not reported.⁶ Even when police reports are filed, if the report results in no prosecution or conviction, the victim will be left unprotected.⁷ Victims of sexual assault are at an increased risk of being abused again⁸ and perpetrators of the crime have an increased likelihood of perpetrating again.⁹

According to a representative study of women living in the United States, 1 in 5 women has experienced an attempted or completed rape.¹⁰ Immigrant women in the United States account for more than 1 in 10 females.¹¹ Studies conducted in immigrant Latina and Asian communities have found that immigrant women have a higher rate of sexual assault than reported by US residents as a whole (30-50% versus 25%, respectively).¹² Immigrant victims of sexual assault need remedies outside of the criminal justice system. They need to be able to access civil legal relief requiring that the assailant has the burden of staying away from and not contacting the sexual assault victim.

When most people think about remedies for sexual assault victims, they think in terms of the criminal justice system. Unfortunately, it takes an average of 1 to 2 years for the criminal justice system to provide remedies for sexual assault victims, if the victim receives relief at all.¹³ Yet, sexual assault can have a very powerful effect on a victim's entire social and economic life. One incident of sexual assault can "destabilize a victim's housing, schooling, privacy, employment, immigration status and basic long-term financial welfare."¹⁴ Therefore, "instead of focusing our legal resources exclusively on the issue of criminal sanctions against the assailant, we need to concentrate our legal resources on stabilizing the physical, emotional, and financial welfare of the victim."¹⁵ In many cases, civil relief may be available to victims of sexual assault and may allow flexibility and creativity in helping victims. Civil law remedies may be preferable in some circumstances because they involve a lower burden of proof. In addition, depending on statutory and case law in the jurisdiction, a finding of guilt in a criminal trial may be sufficient to establish civil liability. Some of the advantages of civil remedies include:

- It can empower victims. There can be more control in civil cases, whereas in criminal cases, the victim is usually only a witness in the case.
- Recovery of monetary damages for the harm inflicted on victims both validates the victim's experience and reinforces the idea that perpetrators must be accountable for their actions.
- The case can be filed and completed more quickly.
- The hearing and file can be sealed if requested.

⁴ CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 2001, CHANGES 2000-01 WITH TRENDS 1993-2001 (Sept. 2002), available at www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf.

⁵ CALLIE MARIE RENNISON & MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2002 (Aug. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv02.pdf>.

⁶ CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (Aug. 2002), available at www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf.

⁷ Diana M. Elliott, Doris S. Mok & John Briere, *Adult Sexual Assault: Prevalence, Symptomatology, and Sex Differences in the General Population*, JOURNAL OF TRAUMATIC STRESS, VOL. 17, No. 3, PP. 203-211 (June 2004).

⁸ *Id.*

⁹ David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS, 73 (2002).

¹⁰ PATRICIA T. JADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (Nov. 2000).

¹¹ U.S. Census Bureau (2000).

¹² Anita Raj & Jay G. Silverman, *Violence Against Immigrant Women: The Roles of Immigrant Culture, Context, and Legal Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367 (2002).

¹³ Catherine A. Carroll, *Addressing the Civil Legal Needs of Sexual-Assault Victims*, WASH. STATE BAR ASS'N NEWS (Apr. 2004), available at <http://www.wcsap.org/legal/PDF/barnews2004.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

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This chapter will:

- (1) Discuss safety planning for sexual assault victims and practice considerations for their advocates and attorneys;
- (2) Provide an overview of civil protection orders;
- (3) Discuss the different types of civil protection orders available to victims of sexual assault, including sexual assault protection orders available in thirteen states and other civil protection orders available to family violence victims in all US jurisdictions;
- (4) Briefly discuss some options for creative bond and criminal release provisions that can be helpful to immigrant victims of sexual assault whose assailants are being criminally prosecuted;
- (5) Provide a detailed discussion of obtaining effective remedies through creative civil protection order provisions that will assist immigrant victims of sexual assault, and;
- (6) Discuss specific legal issues regarding civil protection orders for immigrant victims of sexual assault.

The first part of this chapter focuses on civil remedies available to sexual assault victims whose perpetrators are strangers or acquaintances. The second portion of this chapter discusses additional remedies and other forms of civil protection order relief available only when the relationship between the victim and the perpetrator is covered by state family violence protection order statutes. Family violence sexual assault victims can apply for either a domestic violence civil protection order or a sexual assault protection order and a criminal bond order as any combination in the order that would be most likely to promote safety. A victim of stranger or acquaintance sexual assault in most jurisdictions would not qualify for a family violence protection order and should explore the various types of other protection available to help sexual assault victims. Since sexual assault protection orders, where offered, are available to all victims this chapter discusses these remedies first. The second part of this chapter focuses on family violence protection orders.

It should be noted that while civil protection order remedies available in stranger and acquaintance sexual assault cases are discussed separately from sexual assault remedies in the family violence context, many of the issues for victims greatly overlap. Therefore, attorneys and advocates working with clients who are victims of sexual assault should read the chapter in its entirety. Many of the creative remedies described in detail in the family violence section of this chapter could also be included in a criminal court stay away order, bond order, sexual assault protection order or a general civil restraining order offering specialized help in a case of an immigrant victim.

For a discussion of other civil options for victims of sexual assault, including civil restraining orders, anti-harassment orders, stalking protection orders, university protection orders and protection orders for vulnerable populations and a more complete discussion of working with victims whose perpetrators are being criminally prosecuted we refer readers to four other manuals that should be read in conjunction with this manual.

- Susan H. Vickers, *Beyond the Criminal Justice System: Transforming Our Nation's Response to Rape*, Victim Rights Law Center (2003);
- Jessica E. Mindlin and Liani Jean Heh Reeves, *Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors*, The Center for Law and Public Policy On Sexual Violence (2005);
- Douglas E. Beloof, Jessica E. Mindlin, and Liani Jeah Heh Reeves, *A Criminal Justice Guide: Legal Remedies For Adult Victims of Sexual Violence*, The Center for Law and Public Policy On Sexual Violence (2005); and
- Lynn Hecht Schafran, *Understanding Sexual Violence: The Judge's Role in Stranger and Nonstranger Rape and Sexual Assault* (2005).

Safety Planning

For months or years following sexual assault, victims can have difficulty reestablishing a sense of safety.¹⁶ Recovering from sexual assault and feeling safe again can be even more difficult for an immigrant victim who is also struggling to adapt to a new country, culture and language. The perpetrator of sexual assault against an

¹⁶ SUSAN H. VICKERS, *BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE*, A Practical Guide to Representing Sexual Assault Victims, VICTIM RIGHTS LAW CENTER (JUNE 2003).

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immigrant victim may pose an ongoing threat to the victim.¹⁷ He may use threats of deportation or he may manipulate her fear of him following the first assault to keep her from seeking help from the civil or criminal justice systems. These threats and fears may also keep her from talking to anyone, including close friends, counselors or victim advocates, about the assault or attempted assault. For these reasons it is very important that every immigrant victim of sexual assault be offered comprehensive safety planning. This safety planning should include providing immigrant victims with an overview of the various criminal and civil protection order options that could be used to legally require the assailant to stay away from, have no further contact with or otherwise modify his behavior toward the sexual assault victim. It must also include providing immigrant victims with an overview of immigration relief that is available to them.

Careful safety planning is needed if the assailant knows:

- Where the victim lives,
- Where the victim works,
- Where the victim attends cultural and religious events and/or goes to worship
- Where the victim attends school,
- Where the victim frequents,
- What kind of car the victim drives/which public transportation locations the victim uses,
- If the assailant has access to a weapon,
- If the victim reports the assault,
- If the assailant has made a specific threat to harm the victim and/or their family (here and abroad), or
- If the assailant has threatened to have the victim deported.

Safety planning measures can include:

- Notifying neighbors and friends of the safety threat,
- Carrying a cellular phone to call 911 in the event of an emergency,
- Identifying safe places to stay or reside away from home,
- Informing the victim about the forms of immigration relief she may qualify for and the steps she may need to take to obtain immigration benefits¹⁸; and
- Seeking a restraining order from the civil or criminal courts.

Unlike the other safety measures listed, the purpose of a protection order is to place a legal burden on the assailant to have no further contact with the victim.¹⁹ If an order is obtained, the assailant could be penalized for just contacting the victim, even if no further criminal activity took place through the contact. Protection orders do not preclude the pursuit of other civil or criminal remedies and may create the security to pursue those remedies; however, such orders are not without risk.²⁰

Depending on jurisdiction, several types of civil protection orders and remedies exist to help immigrant victims of sexual assault. They include:

- Sexual Assault Protection Orders (SAPO);
- Civil Protection Orders (CPO) Issued Under the State Domestic Violence Statutes;
- General Civil Restraining or Anti-Harassment Orders;
- Stalking Orders;
- Orders that Protect Elderly, Disabled, or Other Especially Vulnerable Populations

¹⁷ *Id.*

¹⁸ For victims who qualify for a crime victim visa (U-visa) or a trafficking victim visa (T-visa) this can include a requirement that the victim cooperate or be willing to be helpful in a criminal investigation or prosecution. For more information on the U-visa, see Chapter 3 of *BREAKING BARRIERS*, [HTTP://NIWAPLIBRARY.WCL.AMERICAN.EDU/MANUAL/BREAKING-BARRIERS/](http://niwaplibrary.wcl.american.edu/manual/breaking-barriers/) and for more information on T-visas see Aimee Clark Todd et al., *Protecting Victims of Crime*, IMMIGRATION & NATIONALITY LAW HANDBOOK (AILA 2d ed. 2006).

¹⁹ VICKERS, *supra* note 16.

²⁰ *Id.*

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- College or University Stay Away Orders;
- Housing Stay Away or Vacate Orders;
- Civil Injunctive Relief for “Arms Length” Relationships;
- Special Conditions Bond for Family Violence.

An attorney or advocate should assess whether an order, and which type of order, may be appropriate for the particular needs of a client and the facts of the case.²¹ Depending on the type of relationship a victim has with the assailant, and other civil or criminal remedies she is seeking, the victim may qualify for one, some, all or none of the types of orders.²² It is important to assess which protection orders an immigrant victim qualifies for and compare which options are likely to be the most effective in promoting victim safety. When working with immigrant victims, the immigration options available to the victim and the evidentiary requirements of each option must be part of this assessment.

If a criminal case is pending, an immigrant victim could ask that the prosecutor include stay away orders and other protection relief as a condition of releasing the perpetrator from government custody in a rape, sexual assault or domestic violence criminal case.²³ Any criminal stay away or protection order issued in a criminal case will end if the criminal prosecution is dismissed, if the perpetrator is not convicted or when the perpetrator has completed serving any sentence imposed. For this reason, it is highly recommended that immigrant victims whose assailants are being criminally prosecuted not rely solely on the stay away orders issued in the criminal case for protection.

Advocates and attorneys working with victims in criminal cases should identify and pursue other civil protection order remedies that immigrant sexual assault victims also qualify for. If a victim can pursue multiple options, then it is particularly important to pay attention to the timing of filing of protection orders. For example, when a criminal case is being initiated against the perpetrator, timing the filing of the civil protection order action so that service can be accomplished while the assailant is still in court custody can offer additional protection to the victim at a time when the danger of retaliation is particularly high.²⁴

PRACTICE CONSIDERATIONS

Just because a state has a protection order tailored to sexual assault victims, does not mean that it is the best option for a particular victim. Advocates and attorneys need to address the benefits and risks of a protection order with a sexual assault victim before pursuing this avenue. The following will describe the risks and benefits involved with obtaining a protection order.

BENEFITS OF A PROTECTION ORDER

1. *Documentation Trail*

A protection order is often a very useful tool for immigrants when other court cases against the perpetrator may also be occurring, including a criminal case brought by the state or a civil tort action against the perpetrator. It documents abuse and provides evidence proving that the abuse occurred. This documentary evidence of abuse helps victims show a pattern of abuse that can be useful in subsequent legal actions. It can help a victim prove domestic violence in a future custody case. It can also provide immigrant victims with evidence of abuse to support their VAWA immigration case.

2. *Giving Back Control to the Victim*

Civil protection orders can be a middle ground for victims who do not want to or could not move forward with a criminal trial. It is important to a victim’s recovery from sexual assault, that the victim

²¹ *Id.*

²² *Id.*

²³ See discussion of creative use of bond and release orders in criminal cases with specific provisions to help immigrant victims, see Chapter 5.1 in *Breaking Barriers*, *supra* note **ERROR! BOOKMARK NOT DEFINED**. See also DOUGLAS E. BELOOF, JESSICA E. MINDLIN, & LIANI JEAN HEH REEVES, *A CRIMINAL JUSTICE GUIDE: LEGAL REMEDIES FOR ADULT VICTIMS OF SEXUAL VIOLENCE* (CTR. FOR LAW & PUB. POLICY ON SEXUAL VIOLENCE AT THE NATIONAL CRIME VICTIM LAW INSTITUTE) 28-29 (2005), available at www.ncvli.org.

²⁴ VICKERS, *supra* note 16.

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be given choices since a fundamental choice was violently taken away from her when she was assaulted. A protection order can be a tool that helps victims regain control over their lives. Also, a protection order allows a victim to tell her story, which often helps victims heal from the trauma they suffered.

3. *Speed and Efficiency*

Protection order hearings may be speedier and more victim-friendly than other avenues of accountability. They can be resolved in as quickly as two weeks instead of years as is common for a criminal prosecution.

4. *Potential for Perpetrator Accountability*

The process of ensuing a protection order can often involve the perpetrator admitting that he did some act that is leading to the issuance of the order. Alternatively, a judge in issuing the protection order is finding (after trial or based on the pleadings in the case) that some part or all of the sexual assault or alleged abuse occurred. This finding or admission can be important in holding the perpetrator accountable and may change the balance of power between the victim and the abuser. When the perpetrator is a non-citizen the issuance of a civil protection order will not affect the perpetrator's immigration status. However, certain actions, such as those that lead to a finding of contempt for violating the protection order, are deportable offenses.

RISKS OF A PROTECTION ORDER

1. *Confronting the Perpetrator*

Protection orders are not automatic. They require preparation of a petition, service of the petition on the perpetrator and a hearing with the presence and testimony of the victim. If the perpetrator contests the order, the victim will have to be in court with the perpetrator and describe what happened to her under oath. A victim, who is unwilling to come to court for a criminal trial, will have the same types of concerns for a civil protection order hearing. Having to be in the same room as the perpetrator is traumatic for most victims. If the case does not settle, both a civil protection order hearing and a criminal trial require cross-examination by the perpetrator or his attorney, which can further traumatize the victim. If the case goes to trial, perpetrators of crimes against immigrant women may try to raise the victim's immigration status at trial as an intimidation tactic and to undermine the victim's credibility. This is in addition to the other tactics that the perpetrator may use to impugn the credibility of the sexual assault victims and make it difficult for them to testify effectively at trial. For these reasons, sexual assault victims should additionally explore civil remedies outside of the protection order context. For example, if a woman was sexually assaulted by a neighbor in her apartment complex and did not want to have to confront her perpetrator in a protection order hearing—someone she might see everyday—she might choose to seek legal help in breaking her lease or helping the landlord evict the perpetrator.

2. *Impeachment of the Victim*

During the hearing for a protection order, the perpetrator and his attorney will have an opportunity to cross-examine the victim. The perpetrator and his lawyer will have the chance to listen to the victim's version of events. This allows one extra version of the victim's recitation of events to go on the public record, giving the defense attorney an additional tool for impeachment of the victim during the criminal trial. Impeachment in this context would consist of comparing the victim's testimony at a criminal trial to what was said under oath at the protection order hearing. Any discrepancies (for instance that the victim left her house at 10:30 a.m. instead of 10:15 a.m.) would be presented to the jury as evidence that the victim was lying.

This also gives the perpetrator an opportunity for "free discovery," the chance to find out information they might not otherwise have and to prepare a defense to a criminal or civil tort case based on this information. This is a real concern, which needs to be addressed with any client thinking about pursuing a protection order remedy. One strategy for avoiding the "free discovery" is to go forward with the civil case but bring up the minimum evidence necessary in order to succeed. Some states

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have addressed this issue in civil protection order cases by providing “use immunity” prohibiting the victim’s testimony in the protection order matter from being used in the criminal case.

Alternatively, the victim could choose to time the filing of her protection order case until after the criminal trial or request to trial the criminal case. There are, however, safety concerns that will need to be addressed with this approach. Before deciding to delay the civil protection order case, the victim will need to assure that any bond or pretrial order in the criminal case contains all of the remedies she needs from the civil protection order case including any remedies needed to protect the victim’s safety. This criminal court order can include any remedies that would be available as part of a civil protection order including custody, monetary relief and protections against immigration related abuse. In addition, if a victim chooses to pursue this strategy the advocate or attorney working with the victim must carefully track the progress of the criminal case. If the case is dismissed for any reason, the victim will need to assure that the protection order is obtained before that date.

Civil Protection Orders in General

Civil protection orders are victim initiated and controlled civil remedies that offer protection to victims of sexual assault including immigrant victims independent of whether or not a police report has ever been filed or a criminal prosecution against the perpetrator has been initiated. A victim can pursue the protection order even when she does not want to notify police or prosecutors about the sexual assault. Protection orders do not require criminal justice system intervention and can be useful in deterring further violence and enhancing safety for victims. When civil protection orders are appropriately drafted and consistently enforced, they can provide effective protection for victims of sexual assault and domestic violence. Additionally, victims can file for civil protection orders when there is a pending criminal case against the perpetrator or a criminal trial is underway.²⁵ Civil protection order options are very important for sexual assault victims because persons already known to the victim commit most sexual assault crimes.²⁶ Further, studies have found that when a victim knows her perpetrator, the sexual assault often goes unreported.²⁷ Having access to non-criminal justice system related remedies is particularly important for immigrant victims of sexual assault who are likely to be more reticent to report sexual assault, rape and domestic violence crime to police than other victims.²⁸

What Is A Protection Order?

A civil protection order is a court order prohibiting or restricting a person from harassing, threatening, and sometimes even contacting or approaching another specified person. In most jurisdictions, protection orders offer a wide array of relief that can provide vital protection against repeated violence for victims. Adding forms of relief beyond violence prevention provisions to a civil protection order can increase the effectiveness of violence prevention. It is important to note that protection orders do not guarantee an end to violence, and may not always deter a perpetrator. Advocates and attorneys should explain to their clients that a civil protection order is not for every victim. Safety must be the first and foremost consideration.

Since victims have more control over the protection-order process, they can choose when, whether, and how to enforce protection orders, taking into account the potential for the abuser’s deportation and whether that deportation might enhance danger to the victim and her family members. Protection orders can also provide crucial evidence of reoccurring abuse and therefore can help provide important evidence of battering or extreme cruelty for immigrants sexually abused by a U.S. citizen or a lawful permanent resident spouses or parents who qualify to apply for battered spouse waivers, self-petitions, or cancellation of removal applications

²⁵ JESSICA E. MINDLIN & LIANI JEAN HEH REEVES, RIGHTS AND REMEDIES: MEETING THE CIVIL LEGAL NEEDS OF SEXUAL VIOLENCE SURVIVORS (Ctr. for Law & Pub. Policy on Sexual Violence at the National Crime Victim Law Institute) (2005), available at www.ncvli.org.

²⁶ RENNISEN, *supra* note 4.

²⁷ When the offender was a friend or acquaintance, 61% of completed rapes, 71% of attempted rapes, and 82% of sexual assaults were not reported. RENNISON, *supra* note 6.

²⁸ Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study of Latina Immigrant Women in the USA*, 7 INT’L J. POLICE SCI. & MGMT. 230, 231, 236-37 (2005); Leslye E. Orloff et al., *Battered Immigrant Women’s Willingness to Call the Police For Help and Police Response*, 13 UCLA WOMEN’S L.J. 43, 60-62 (2003).

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under the Violence Against Women Act (VAWA). Additionally, protection orders can also provide evidence for U and T visas for immigrant crime victims ineligible to obtain immigration relief under battered spouse waivers, self-petitions, and cancellation or removal.

Domestic Violence Protection Orders—An Option For Victims of Intimate Sexual Assault

Victims of sexual assault whose assailants are family members, intimate partners or other persons covered by the state domestic violence statute can seek family violence protection orders against their assailants in addition to or instead of the various forms of sexual assault protection orders and criminal bond orders will be discussed in this chapter.

Civil protection orders are available in all fifty states, Puerto Rico, the District of Columbia, Native America tribes, and all U.S territories²⁹ and are designed to protect battered individuals from their abusers.³⁰ The civil protection order aims to offer the victim protection from future abuse and can be crafted to uniquely address and counter abuse, power, and control in each particular relationship. When civil protection orders are appropriately drafted and consistently enforced, they can provide effective protection for victims of domestic violence.³¹ Most importantly, civil protection orders provide a victim-initiated and controlled justice response to domestic violence that does not require criminal justice system involvement. Civil protection orders are initiated by the victim, thus a victim can choose to pursue this justice-system remedy without reliance on the criminal courts. For example, a victim of domestic violence can obtain a civil protection order even if her abuser is not being criminally prosecuted for the abuse. Victims of domestic violence can obtain civil protection orders whether or not there is also a criminal prosecution of their abuser. Criminal prosecution of abusers is designed to hold abusers accountable for their behavior. Victim needs may or may not be addressed as part of the criminal case. Thus, it is recommended that victims, whose abusers were criminally prosecuted, also obtain civil protection orders.

Civil protection orders may be one of the most effective means to protect victims from further abuse, particularly when the orders are drafted to fit the specific needs of the victim. The most effective protection orders are obtained when a victim is represented by counsel or a trained domestic violence advocate.³² This allows the court to address the victim's particular needs, while generic protection orders may exclude specific provisions necessary to ensuring the victim's safety. Advocates or attorneys assisting battered immigrants need to understand how protection orders can positively affect the victim's ability to attain legal immigration status. They must listen to and respond to the fears and concerns of the victim and understand the manner in which abusers may be exerting power and control over immigrant victims.³³

Protection orders can effectively reduce domestic violence and offer protection and assistance to battered immigrant women, particularly because non-citizen abusers can be deported for a protection order violation. It is important to note, that although protection orders can enhance safety for significant numbers of victims 72%³⁴, in 28% of domestic violence cases, a protection order may have little effect in ending abuse and it remains difficult to confidently predict when victims fall into the group for which protection orders may not be effective in reducing future violence.³⁵ These particular cases have a high level of lethality and are extremely

²⁹ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993).

³⁰ *Id.* at 811.

³¹ *Id.* at 813.

³² PETER FINN & SARAH COLSON, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE AND ENFORCEMENT (U.S. DEP'T OF JUSTICE)(1990).

³³ See Chapter 1 of this Manual, *Dynamics of Sexual Assault Experienced by Immigrant Victims*, for an overview of power and control used against immigrant victims.

³⁴ SUSAN L. KEILLITZ ET AL., *CIVIL PROTECTION ORDERS: VICTIM'S VIEWS ON EFFECTIVENESS*, NAT. INST. OF JUSTICE, (Jan. 2008).

³⁵ See Jacqueline C. Campell, *Commentary on Websdale: Lethality Assessment Approaches: Reflections on Their Use and Ways Forward*, 11 VIOLENCE AGAINST WOMEN 1206 (Sept. 2005). Factors that can enhance the probability of lethality include unemployment, access to weapons, use of weapon in prior abusive incidents, threats with weapons, serious injury in prior abusive incidents, threats of suicide, drug or alcohol abuse, forced sex of female partner, control over immigration status and obsession/extreme jealousy/extreme dominance.

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dangerous for the victims and their families. In such situations, advocates and attorneys can play a key role in helping battered immigrants survive abuse by conducting safety planning, danger assessments and support for immigrant victims.

In most jurisdictions, protection orders offer a wide array of relief that can provide vital protection against repeated violence for victims, even those who are not ready to separate from their abusers. A civil protection order can be an effective tool to shift the balance of power between an abuser and a victim. Studies have demonstrated that in 72% of domestic violence cases, the issuance of a civil protection order decreased physical violence and made petitioners feel more secure.³⁶ Adding forms of relief beyond violence prevention provisions to a civil protection order can increase the effectiveness of violence prevention. It is important to note that protection orders do not guarantee an end to violence, and may not always deter an abuser. Advocates and attorneys should explain to their clients that a civil protection order is not for every victim. Safety must be the first and foremost consideration. Often a civil protection order is a crucial component of the victim's safety plan. However, in some situations, because violence escalates upon separation or immediately after separation from the abuser, a civil protection order may exacerbate the abuse.

There are two types of protection orders available to victims of abuse, an emergency or temporary protection order and a full protection order. A majority of states authorize the issuance of an emergency or temporary protection order after a hearing demonstrating the victim's immediate danger.³⁷ Generally these hearings are held ex parte, without the opposing party (abuser) being present. Such orders are short-term (typically last 14-30 days) and are temporary remedies until the court can schedule a full hearing.³⁸ A full protection order is of longer duration and is granted after a full hearing. Full protection orders typically last one to three years, however orders may be extended upon demonstrated need.³⁹ In the vast majority of states, victims can choose whether to obtain a temporary protection order or whether to initiate protection order proceedings by filing directly for a full protection order. Obtaining a temporary protection order first is usually the appropriate procedure when the victim and the abuser reside together at the time the victim seeks a protection order. This helps against immediate retaliation when the abuser is served with notice of the protection order proceedings. Temporary protection orders are also particularly useful as a means to remove the abuser from the family home, helping deter efforts to make extra copies of house keys and to take or destroy papers in the home. A full protection order is of longer duration and is granted after a full hearing. Full protection orders typically last one to three years, however orders may be extended upon demonstrated need.⁴⁰ In the vast majority of states, victims can choose whether to obtain a temporary protection order or whether to initiate protection order proceedings by filing directly for a full protection order.

Psychological Barriers to Accessing Civil Protection Orders

The psychological impact of physical, psychological, and sexual abuse can also interfere with a battered woman's ability to participate in a protection order hearing.⁴¹ The victim may appear angry and hostile, socially withdrawn and passive, highly anxious and disorganized, or numb and detached.⁴² While these are normal reactions to trauma, not all battered women will appear the same and many may exhibit a combination of these emotions. A battered woman's demeanor and oral testimony at a protection hearing may be strongly affected if she is encountering the batterer for the first time after being separated.⁴³ However, a victim with

³⁶ See FINN, *supra* note 31 at note 141.

³⁷ *Id.* at 1035.

³⁸ David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST.L.J. 1153, 1191-92 (1995).

³⁹ *Id.* at 1192; Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1859 (2002).

⁴⁰ *Id.*

⁴¹ Cf. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993) (stating that expert witnesses must understand the numerous ways that domestic violence victims will respond to violence); see also Margaret J. Hughes & Loring Jones, *Women, Domestic Violence, and Posttraumatic Stress Disorder (PTSD)*, 27 FAMILY THERAPY 125 (Jan. 2000); R.C. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCH GEN. PSYCHIATRY 1048 (1995).

⁴² Hughes, *supra* note 40, at 125-139; Kessler, *supra* note 40, at 1048.

⁴³ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH ED. (DSIM-IV-TR) (JULY 2000).

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support from family and friends may appear assertive, confident, and strong. Advocates should be aware of the many factors that impact a battered woman's psychological response to violence.⁴⁴

A civil protection order can help deter physical, sexual and psychological abuse and can help battered immigrants regain a sense of wellbeing. Yet, the psychological trauma of domestic violence, sexual assault and the power and control exerted by the abuser can often keep victims from obtaining a protection order and from reporting violations to the police.

Battered immigrant women face distinct psychological barriers regarding civil protection orders. Many immigrant women fear the legal system. Even women with legal immigration status often believe that reporting domestic violence will result in their deportation.⁴⁵ Battered immigrants are also less likely to call the police or turn to the courts for help.⁴⁶ Many were raised in countries where the judiciary was the arm of a repressive government, and where the persons who prevailed in court were the ones with the most influence, the strongest ties to the government, and the most economic resources.⁴⁷ Additionally, in many such legal systems, a man's word is inherently more credible than a woman's word.⁴⁸ Battered women who have learned not to expect justice from such legal systems find it difficult to believe that our system will function any differently, and thus feel isolated and alone.⁴⁹ Because of these fears it is likely that a battered woman's testimony at a protection order hearing will be affected.

Protection orders can be particularly effective for battered immigrants when the abuser is an immigrant. For example, non-citizen abusers may be more afraid of the repercussions from protection order violations (i.e., deportation) and therefore, may be more willing to comply with the provisions of the order. If the abuser is a non-citizen and is found guilty of violating a protection order, the abuser can be deported. For battered immigrant women, the complexities arising from reporting a violent act can be compounded by the fact that the report may trigger the deportation of a non-citizen abuser.⁵⁰ For some women, the deportation of their abusers can help them recover tremendously by allowing them to remove violence from their lives. For other women, the opposite is true. The abuser's deportation may create enhanced dangers related to economic survival, her ability to attain legal immigration status, and her safety and the safety of family members both here and abroad.⁵¹ Advocates for battered immigrant women should ascertain whether criminal prosecution, following an arrest for violating a protection order, will enhance or undermine an individual victim's safety. Different women will have completely different needs that must be met if the abuser is deported.⁵² By looking at the problem from different angles, advocates can help battered immigrant women make the best choices.

Advocates and attorneys should be aware of cultural restraints, which may inhibit the victim from leaving the abuser. Many victims choose not to separate themselves from their abusers. A battered immigrant, including those who have been sexually abused, may opt to live with her abuser, as long as the individual receives therapy and agrees to stop the abuse. Attorneys and advocates should view the victim's willingness to obtain a protection order, while she continues to reside with her abuser, as an important step towards building her self-esteem and taking action to protect herself and her children. A protection order without a stay-away provision should also be offered as an alternative if a victim suddenly wants to drop the protection order altogether. Many times, an abuser will promise to stop abusing the victim if she promises not to pursue the protection order. In this situation the protection order can serve as a deterrent to the abuser and shift the power balance to the victim.

⁴⁴ Martie P. Thompson et al., *Partner Violence, Social Support, and Distress Among Inner-City African American Women*, 28 AM. J. COMMUNITY PSYCHOLOGY 127 (2000).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ HOWARD DAVIDSON, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION* 19 (Aug. 1994).

⁴⁹ LESLYE E. ORLOFF AND RACHAEL LITTLE, *SOMEWHERE TO TURN: MAKING DOMESTIC VIOLENCE SERVICES ACCESSIBLE TO BATTERED IMMIGRANT WOMEN A "HOW TO" MANUAL FOR BATTERED WOMEN'S ADVOCATES AND SERVICE PROVIDERS* (Ayuda, Inc.) (May 1999), available at http://new.vawnet.org/Assoc_Files_VAWnet/BIW99toc.pdf.

⁵⁰ ANN BENSON & JOSEPH JUSTIN ROLLINS, *IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT: AN OVERVIEW FOR CRIMINAL DEFENDERS IN WASHINGTON STATE*, WASH. DEFENDER ASS'N, (2001).

⁵¹ See ORLOFF *supra* note 48, at 206 and 279.

⁵² Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women's Assessment of the Criminal Processing System's Responses*, 13 VIOLENCE AND VICTIMS 251 (Jan. 1998).

Obtaining a Protection Order

Protection orders are important for battered immigrants and sexual assault victims seeking to leave an abusive citizen or lawful permanent resident or immigrant visa holder, because the order will legally document evidence of violence for her immigration case.⁵³ Most state statutes recognize the relevance of past abusive acts and violence to provide a context to evaluate present fear and danger.⁵⁴ Hence, in most jurisdictions, protection order laws do not specify time limits after a violent incident has occurred within which a victim must file for a protection order.⁵⁵ Courts regularly consider the parties' history of violence as evidence of the need for a current protection order.⁵⁶ If the last incident or threat against a battered immigrant woman took place months before filing an application for a protection order, the advocate or attorney should help gather evidence of the history of abuse. The attorney should present this evidence to the court and demonstrate that additional protection is needed. Explaining that the victim may need this protection when filing for immigration relief separate from that of her abuser should serve to underscore the need for additional protection.

Despite statutory authority allowing courts to issue protection orders without regard to the date of the most recent incident of physical violence or criminal behavior, a few courts may not grant an order if the most recent threat or incident occurred several months prior to the filing of a civil protection order petition. Moreover, some courts also require before the issuance of the protection order a finding of family violence and that it is likely that violence will continue. When this occurs, advocates and attorneys working with battered immigrants who need protection orders should be prepared to demonstrate to the court the likelihood of future violence and the need to have future, ongoing protection. They should demonstrate the dynamic of power and control and how it may escalate if the case is denied for a lack of a recent incident of abuse. The battered immigrant may want to consider locating an attorney who can help with an appeal.

Who can obtain a protection order?

Any victim of family violence, including all immigrants, can obtain a protection order because protection orders are designed to deter criminal acts against intimate partners, spouses, or family members. Regardless of immigration status, all persons are entitled to this protection. To deny access to family court relief because of immigration status is a violation of Equal Protection and Due Process.⁵⁷ If protection orders were not available for all persons, then abusers would be free to abuse immigrants and escape the criminal ramifications of such action. No justice system official, including police, prosecutors, court staff or judges, should be asking victims about their immigration status or if they have a social security number when they call for help or seek a protection order.⁵⁸

State statutes vary on which relationships are covered under protection order laws. The relationships covered in protection order statutes include a broad range of family and household members who may have perpetuated acts of sexual assaults. Advocates and attorneys should determine if the relationship between the client and her abuser is covered by the state's protection order statute. The relationship between the parties generally included in state protection order statutes are defined as follows:⁵⁹

⁵³ See Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. 313 (1995).

⁵⁴ Klein, *supra* note 28, at 901.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 42 U.S.C.S. § 1981(a) (2006); See also *Plyer v. Doe*, 457 U.S. 202, 210-213 (1982).

⁵⁸ If such inquiries are being made in your jurisdiction, contact the National Immigrant Women's Advocacy Project for technical assistance: 4910 Massachusetts Ave NW – Suite 16, Lower Level – Washington, DC 20016; 202-274-4226; niwap@wcl.american.edu.

⁵⁹ Klein, *supra* note 28, at 814-46.

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- Current or previous spouses;
- Family members related by blood, marriage, or adoption (i.e., parents, minor children, adult children, aunts, uncles, siblings, grandparents, and in-laws);⁶⁰
- Current or previous household members regardless of their marriage or blood relation;
- Unmarried spouses of different genders who have lived as spouses or are currently living as spouses;
- Persons who have a child in common;
- Persons who were previously or are currently in a dating or intimate relationship;
- Persons who were previously or are currently in a same-sex relationship, regardless of whether they live or have lived together;
- Household members of an abuse victim that is stalked or harassed; and
- A few states allow protection orders to be extended to those that offer refuge to victims of domestic violence as well as to the victim's employers.

At least two state statutes specify that an adult may file for another adult who is unable to go to court.⁶¹ Most states allow an adult to file on behalf of an incompetent adult or a child.⁶² Some states allow certain teenage minors to petition for their own protection order.⁶³ Depending on the relationship of the parties, state statutes may provide different types of civil protection order remedies, and/or may require parties to litigate the case in a particular court. In some jurisdictions all protection order proceedings are brought in Family Court. While in others, protection orders are brought in front of magistrate judges. In these courts, there is an opportunity for De Nova in front of a family court judge, some states have a two-level system where, initially, the case goes to District court. However, a party that disagrees can bring the case De Nova in front of a family court judge. As discussed throughout this chapter, it is important to identify the process in your state and ask for the full range of remedies available. For example, in some jurisdictions, if the parties are intimate partners, have a child in common, or were previously intimate partners, the protection order is sought in Family Court. In some jurisdictions, Family and District courts are the same.

Parties do not need to separate in order for the victim to obtain a protection order. Many people believe that victims of domestic violence can easily leave an abusive home or relationship, but this is not necessarily true.⁶⁴ Violent relationships are often characterized by power disparities that make leaving very difficult, particularly for women with children.⁶⁵ Economic control is an important component of the abuser's system of maintaining control over the victim.⁶⁶ A woman who decides to leave her abuser faces great economic challenges regardless of her income level because she frequently has to leave behind her only financial resources or support.⁶⁷ Women also face social pressure to maintain their relationship. They may believe that society, the legal system, and their communities consider dissolution of their relationships undesirable. Victims courageous enough to take the first step in overcoming all these obstacles by seeking a protection order need to be able to access protection orders whether or not they are currently planning to separate from their abusers.

A battered immigrant woman may prefer to remain with the abuser because of religious or cultural reasons. In many cases, the victim's immigration status is linked to the abuser and she may just now have learned that she can apply for lawful permanent residence on her own through VAWA. In other cases, the immigrant victim's legal status may be tied to a spouse with a legal work visa. These immigrant victims may qualify to apply for immigration benefits under the VAWA 2000 crime victim visa provisions, but since this process can take some time, victims may want to continue living with their abusers until they can receive legal immigration status

⁶⁰ Relationships by blood or marriage include adoption and cover all family members of the victim's own family, the victim's spouse's family and extended family members.

⁶¹ Klein, *supra* note 28.

⁶² *Id.* at 846.

⁶³ *Id.* at 820-21.

⁶⁴ See Sarah M. Buel, *Fifty Obstacles to Leaving, Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999).

⁶⁵ See Ethan Brennan Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW & INEQ. 471, 477 (1997).

⁶⁶ Numerous victims are forced to go back to their abusers because of lack of money or housing. U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-8 (1998) (detailing evidence that desire for economic control underlies many brutal crimes against women).

⁶⁷ Leslye E. Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 616-19 (2001).

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through the U-visa process.⁶⁸ In cases in which battered immigrants plan to try to continuing living with their abuser, the protection order should require that the abuser attend an intervention program and refrain from assaulting, threatening, or harassing the victim. This type of protection order would not include an order that the abuser stay a minimum distance away from the victim, rather it emphasizes that the abuser cease harmful behavior. Some battered immigrants may prefer this sort of temporary arrangement until the DHS approves their self-petition, or victim of crime case (U-visa) and grants them work authorization, after which they may choose to try to leave their abusers. Once the victim separates from her abuser, her protection order may be modified to include a separation or “no contact” clause.⁶⁹

Grounds for Issuance of a Protection Order

Generally, state statutes condition issuance of a protection order on the existence of an underlying act of abuse which constitutes a criminal act, including: assault, battery, burglary, kidnapping, criminal trespassing, interference with child custody, sexual assault, rape, threats and attempts to do violence or bodily harm, interference with personal liberty, unlawful or forcible entry into a residence, child abuse, false imprisonment, stalking, and destruction of property.⁷⁰ Some states will issue protection orders based on emotional abuse and harassment that might not have directly caused physical harm to the victim.⁷¹

Jurisdiction⁷²

Courts have jurisdiction to issue protection orders generally in one of two locations: in the state where the acts of abuse or threats have occurred, or the state in which the victim is currently present.

Under the Violence Against Women Act of 1994,⁷³ federal law requires that each state, tribe, or territory give full faith and credit to another state’s protection order (including an emergency order) as long as due process requirements were met in the state where the order was issued. The full faith and credit provision of the Violence Against Women Act says that a valid protection order must be enforced throughout the United States. This means that if a victim receives a valid protection order, it is good in the community where it was issued as well as in all other jurisdictions or locations in the United States. These full faith and credit provisions apply to protection orders issued in all 50 states, Indian tribal lands, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, American Samoa, the Northern Mariana Islands, and Guam.⁷⁴

If a state, the District of Columbia, tribe, or a U.S. territory issues a protection order, and the order complies with federal requirements, it is entitled to full faith and credit if it is valid under the full faith and credit law. A protection order is valid if the issuing court had jurisdiction over the victim and the abuser and had authority to hear and decide the case, and the abuser was given notice and an opportunity to be heard.⁷⁵ Protection orders issued with due process are enforceable in any US jurisdiction. Victims should be able to call police in a neighboring state to have their protection orders enforced. Some jurisdictions require that a victim moving to a new jurisdiction follow specified steps to have her protection order recognized and enforced.⁷⁶

Although states are required to recognize another state’s protection order, some states have not enacted legislation implementing VAWA’s full faith and credit provisions. In these states, the police may not want to enforce an out-of-state protection order, despite the federal law requirement. State domestic violence programs and coalitions can be helpful in advocating with police to enforce protection orders issued in other states.

⁶⁸ Immigration and Nationality Act § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2006).

⁶⁹ For a more complete discussion of U-visa relief, please see Chapter 3, *Battered Immigrants and Immigrant Relief*, in *BREAKING BARRIERS*, *supra* note 1.

⁷⁰ Klein, *supra* note 28, at 849-50.

⁷¹ *Id.* at 866-73.

⁷² For a more detailed discussion on jurisdiction please refer to Chapter 8 of this Manual, *Sexual Assault Against Immigrant Children-Incent*. Specifically, review the section on Immigrant Status and Family Court Jurisdiction.

⁷³ 42 U.S.C. § 13981 (2006).

⁷⁴ *Ctr. on Full Faith & Credit & Pa. Coalition Against Domestic Violence, Increasing Your Safety: Full Faith and Credit for Protection Orders*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES, <http://www.vaw.umn.edu/FinalDocuments/survivorbrochure.asp> (last modified Sept. 15, 2003).

⁷⁵ *Id.*

⁷⁶ *Id.*

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If the victim is planning to move away from the original jurisdiction in which she obtained the protection order, contact the state domestic violence coalition or another domestic violence program in the new jurisdiction to verify what the procedures are in the different jurisdiction. These procedures need to be followed in order for the protection order to be enforced. For programs working with migrant worker victims of domestic violence, familiarity with VAWA full faith and credit provisions is essential. It is also useful for programs to develop relationships with other domestic violence and legal services agencies in the communities migrant workers come from or typically travel to for work. Find out if registration of the protection order is required, and if any fees are required. Recommend that the victim obtain a certified or court-issued official copy of the protection order at the completion of the protection order hearing. The victim should be instructed to carry the order with her and staple to it a copy of the statutory language of the VAWA full faith and credit provisions.

For victims being sexually abused or harassed by a family member, household member, intimate partner, or dating partner, civil protection orders are available in all fifty states, Puerto Rico, the District of Columbia, and all U.S. territories.⁷⁷ Many domestic violence protection order statutes offer protection in a range of relationships that include marriages, divorced couples, persons to whom the victim is related by blood, marriage or adoption, dating relationships, and persons with whom the victim is living or has lived within the past. If the assailant has a relationship with the victim that is covered by state domestic violence protection order statutes, then the sexual assault victim can seek a protection order under the state domestic violence protection order statutes. A sexual assault victim who qualifies for a domestic violence protection order may also qualify for, and should consider also, pursuing other protection orders she may qualify for including a sexual assault protection order and a stay away order in any pending criminal case. Sometimes, even if a victim has been assaulted by a family member or intimate partner she may choose the relief available under a specific sexual assault statute rather than a general civil protection order.

While a protection order can be obtained in connection with a criminal proceeding, family violence civil protection orders are generally unavailable to victims who are unrelated to their perpetrators. Sexual assault victims whose perpetrators are strangers, co-workers, employers, neighbors, or other acquaintances will have more limited civil protection order options. These include the following types of protection orders discussed earlier in this chapter: sexual assault protection orders, general civil restraining orders, or anti-harassment orders. Additionally, depending on the facts of the case, a victim may also qualify for an anti-stalking protection order, a college or university protection order, or a protection order specifically designed to protect vulnerable populations (e.g. elderly or disabled). Currently, only thirteen states have statutes that allow victims of sexual assault to obtain a protection order regardless of their relationship to their perpetrator.⁷⁸

Types of Civil Protection Orders

Victims of sexual assault may or may not have any prior relationship with their assailants. The civil protection order options for sexual assault victims will differ depending on whether she has a relationship with her assailant that is covered by state domestic violence laws or not.

1. Sexual Assault Protection Orders—An Option For Victims of Non-Intimate Sexual Assault

Sexual assault protection orders were developed based on recognition that sexual assault victims need a protection mechanism that is not dependent on the criminal justice system and is more attuned to the needs of sexual assault victims than general civil restraining orders and anti-harassment orders. Anti-harassment protection orders often require a “course of conduct” to be shown on the part of the assailant before the victim is eligible.⁷⁹ A “course of conduct” requires two or more contacts between the victim and the assailant.⁸⁰ Therefore, if the victim has only experienced one incident of sexual assault, an anti-harassment order would

⁷⁷ See Klein, *supra* note 79, at 810; see also Carroll, *supra* note 13.

⁷⁸ See Memorandum from Jodee LeRoux Regarding Protection Orders for Victims of Sexual Assault (Aug. 30, 2004).

⁷⁹ See Klein, *supra* note 79.

⁸⁰ *Id.*

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not be available.⁸¹ However, even if a victim has only experienced one incident of sexual assault, they may be in danger and safety measures, like a protection order, are necessary.

To address this issue some states have passed laws creating sexual assault protection orders. These are civil protection orders that sexual assault victims may obtain **regardless of their relationship** to the perpetrator. Sexual assault protection orders are often structured like civil protection orders. Violation of the order is a crime. Currently, thirteen states have statutes that allow victims of sexual assault to obtain a protection order regardless of their relationship to the perpetrator: California, Colorado, Florida, Illinois, Maine, Maryland, Minnesota, Montana, Oklahoma, South Dakota, Texas, Washington and Wisconsin. In three of those states, Illinois, Texas and Washington, the statute is specifically geared towards victims of sexual assault.⁸² Colorado, Florida, Montana, Oklahoma, and South Dakota have statutes that are directed at domestic violence, but victims of sexual assault, regardless of their relationship to the perpetrator, can also obtain a protection order.⁸³ In Maine, Minnesota, California, and Wisconsin, the state anti-harassment statutes have been crafted so as to offer protection to sexual assault victims.⁸⁴

In each of these states, “harassment” is defined to include one incident of sexual assault. For example, in Minnesota, the definition of harassment includes a single incident of physical or sexual assault or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.⁸⁵ In Maryland, a victim of assault in any degree, rape, false imprisonment, harassment, stalking, trespass or malicious destruction of property can obtain a “peace order” that provides the victim with protection for up to six months.⁸⁶ States that have statutes specifically written to offer protection to sexual assault victims (Illinois, Texas and Washington) provide the greatest protection. An example of a sexual assault protection order from Texas is included in the appendix to this chapter.

◇ **Grounds for Issuance of a Protection Order to a Sexual Assault Victim**

The thirteen states that provide protection orders to victims regardless of their relationship to the assailant require that the victim meet distinct eligibility requirements before a protection order may be obtained. In Illinois, any victim of non-consensual sexual conduct or non-consensual sexual penetration, including a single incident of non-consensual sexual conduct or non-consensual sexual penetration is eligible for protection.⁸⁷ In Texas, any victim of sexual assault or aggravated sexual assault can file for a protection order.⁸⁸

In Colorado, Florida, Montana, Oklahoma, and South Dakota, victims of sexual assault are eligible for protection orders under more general statutes that also address victims of domestic violence, stalking, and/or harassment.⁸⁹ In South Dakota, orders can be issued against any person against whom stalking or physical injury is alleged.⁹⁰ Florida’s statute specifically addresses domestic violence, but if a victim of sexual assault who has no intimate relationship with the assailant reports the sexual violence to a law enforcement agency and cooperates in any criminal proceeding against the assailant, the victim is eligible for a protection order.⁹¹ It does not matter whether criminal charges based on the sexual assault have been filed, reduced or dismissed.⁹²

⁸¹ *Id.*

⁸² 22 ILL. COMP. STAT. ANN. §§ 101-302 (West 2004); TEX. CRIM. PROC. CODE ANN. § 7A.01 (West 2004).

⁸³ COLO. REV. STAT. ANN. § 13-14-102 (West 2004); FLA. STAT. ANN. § 784.046 (West 2004); MONT. CODE ANN. § 40-15 (2004); OKLA. STAT. ANN. tit. 22, § 60 (West 2004); S.D. CODIFIED LAWS § 22-19A-17 (2004).

⁸⁴ CAL. CIV. PROC. CODE § 527.6 (West 2004); ME. REV. STAT. ANN. 5, §§ 4651 – 4659 (2004); MINN. STAT. ANN. § 609.748 (West 2007); WIS. STAT. ANN. § 813.125 (West 2004).

⁸⁵ MINN. STAT. ANN. § 609.748 (West 2007).

⁸⁶ MD. CODE ANN., CTS. & JUD. PROC. § 3-1501–3-1509 (2004).

⁸⁷ 22 ILL. COMP. STAT. ANN. §§ 101-302 (West 2004).

⁸⁸ TEX. CRIM. PROC. CODE ANN. § 7A.01 (West 2004).

⁸⁹ COLO. REV. STAT. ANN. § 13-14-102 (West 2004); FLA. STAT. ANN. § 784.046 (West 2004); MONT. CODE ANN. § 40-15 (2004); OKLA. STAT. ANN. tit. 22, § 60 (West 2004); S.D. CODIFIED LAWS §§ 22-19A-8-22-19A-17 (2004).

⁹⁰ S.D. CODIFIED LAWS §§ 22-19A-8-22-19A-17 (2004).

⁹¹ FLA. STAT. ANN. § 784.046 (West 2004).

⁹² *Id.*

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In Maine, Minnesota, California, and Wisconsin, protection orders are available for victims of “harassment.”⁹³ The definition of harassment is defined differently in each of the states, but all of the definitions include victims of sexual assault.⁹⁴ For example, in California “harassment” includes “unlawful violence” or a “credible threat of violence.”⁹⁵ The statute defines “unlawful violence” as any assault, battery or stalking.⁹⁶

◇ **Scope of Protection**

In all thirteen states, the assailant respondent can be ordered to stay away from the petitioner. A detailed discussion of how to craft detailed and effective stay away provisions in cases of immigrant victims is discussed below in the section of this chapter on family violence protection orders.

Apart from a general stay away provision, state statutes vary greatly in the types of remedies available. Some states, Montana, Maryland and Texas, provide a detailed list of potential relief courts can issue as remedies for victims of sexual assault that can include a catch-all provision authorizing the court to offer any form of relief it deems helpful or necessary to the safety of the victim or her family. For example, Montana’s statute includes the following provisions:

- prohibiting the respondent from threatening to commit or committing acts of violence against the petitioner and any designated family member;
- prohibiting the respondent from harassing, annoying, disturbing the peace of, telephoning, contacting, or otherwise communicating, directly or indirectly, with the petitioner, any named family member, any other victim of this offense, or a witness to the offense;
- directing the respondent to stay 1,500 feet or other appropriate distance away from petitioner, the petitioner’s residence, the school or place of employment of the petitioner, or any other specified place frequented by the petitioner and by any other designated family or household member;
- prohibiting the respondent from possessing or using the firearm used in the assault
- directing the respondent to complete violence counseling
- directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member.⁹⁷

Minnesota, on the other hand, has an extremely limited scope of available protections. The court can only order the respondent to cease or avoid harassment of another person or to have no contact with the person.⁹⁸

In the thirteen states that provide protection orders to sexual assault victims, regardless of their relationship to their perpetrators, not all of the statutes include a catch-all provision.⁹⁹ Catch-all provisions are particularly important for immigrant victims as they allow the court latitude to craft remedies specifically assigned to control perpetrator behavior and to improve each particular victim’s safety. Catch-all provisions may look different in each state’s statutes. In four states, Florida, Maine, Oklahoma and Illinois, the court may provide any relief that it deems proper. In Florida, the court may grant any relief it deems proper, including an injunction enjoining the respondent from committing any acts of violence or any other relief necessary to protect the petitioner.¹⁰⁰ In Maine, the court may grant any protection order remedy that is designed to bring about a cessation of harassment.¹⁰¹ In Oklahoma, a court can impose any conditions in the order it reasonably believes are necessary to bring about the cessation of the domestic abuse, stalking or harassment against the

⁹³ CAL. CIV. PROC. CODE § 527.6 (West 2004); ME. REV. STAT. ANN. 5, §§ 4651 – 4659 (2004); MINN. STAT. ANN. § 609.748 (West 2007); WIS. STAT. ANN. § 813.125 (West 2004).

⁹⁴ CAL. CIV. PROC. CODE § 527.6 (West 2004); ME. REV. STAT. ANN. 5, §§ 4651 – 4659 (2004); MINN. STAT. ANN. § 609.748 (West 2007); WIS. STAT. ANN. § 813.125 (West 2004).

⁹⁵ CAL. CIV. P. CODE ANN. § 527.6.

⁹⁶ *Id.*

⁹⁷ MONT. CODE ANN. § 40-15.

⁹⁸ MINN. STAT. ANN. § 609.748.

⁹⁹ California, Maryland, and Minnesota do not contain a catchall provision. The scopes of protection provided under these statutes are limited to stopping violence and/or harassment. See CAL. CIV. P. CODE ANN. § 527.6; MD. CODE ANN., CTS. JUD. PROC. §§ 3-1501-3-1509; MINN. STAT. ANN. § 609.748.

¹⁰⁰ FLA. STAT. ANN. § 784.046.

¹⁰¹ 5 ME. REV. STAT. ANN. §§ 4651-4659.

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victim or the victim's immediate family.¹⁰² In Illinois, the court can order any other injunctive relief that the court finds necessary and appropriate.¹⁰³

◇ **Obtaining a Sexual Assault Protection Order**

For victims of sexual assault without a qualifying relationship to the assailant under state family statutes, three types of sexual assault protection orders exist: emergency, temporary and full. These orders are described below.

SERVICE OF PROCESS

For immigrant victims and all sexual assault victims not in an intimate relationship with the perpetrator, service of process can be difficult. Victims will have to know the perpetrator's first and last name, their address, and their date of birth. Many victims do not know this information about the person who sexually assaulted them.¹⁰⁴ For advocates and attorneys working with victims it is important to work with the victim to obtain the information necessary to file the protection order. Advocates and attorneys also need to work with the immigrant victim on figuring out safe ways to serve the respondent. The victim may need to think of creative ways to accomplish service if she does not know the respondent well. If the respondent works, then service of process at work by police or a professional process server can improve safety. Generally, it is safest for a professional process server or the police to serve the perpetrator.

EX PARTE ORDERS

Sexual assault protection orders for victims of non-intimate partner sexual assault include temporary or *ex parte* orders available for non-intimate relationships. Temporary orders are available in all thirteen states: Colorado, Illinois, Maine, Maryland, Florida, Montana, Minnesota, Oklahoma, Texas, California, South Dakota, Washington and Wisconsin. Generally, there must be a showing of good cause. This could mean a showing of imminent harm, or reasonable proof of harassment.¹⁰⁵ Generally, a temporary order will be issued *ex parte* if the victim can show an immediate threat of future violence. These orders last between 7 to 14 days and/or until a full hearing can be scheduled.

In addition, in 4 of the 13 states, Colorado, Illinois, Maine and Maryland, a victim may be eligible for an emergency protection order. An emergency protection order is only available when the court is closed and the victim is in immediate danger. The victim can, following procedures set out in the statute, obtain a verbal order from either a judge or a commissioner over the telephone. This method should only be used in an emergency because the order is typically limited in scope and usually lasts only until the court's next business day. The victim should go to court the next business day to obtain either a temporary or a full protection order. For example, in Colorado, an emergency order may be issued if the judge finds an imminent danger in close proximity exists to the life or health of a person in the reasonably foreseeable future.¹⁰⁶ In Maryland, this type of order is called an interim peace order and is effective until the earlier of the following: 1) the temporary peace order hearing or 2) the end of the second business day the office of the clerk of the district court is open following the issuance of the interim order.¹⁰⁷

FULL PROTECTION ORDERS

In all of the thirteen states full protection orders are available. A hearing will be held to establish that respondent is given an opportunity to respond to the petitioner's allegations. Full orders usually last for one to two years unless they are modified or dismissed. The length of full orders fit within one of three categories:

¹⁰² OKLA. STAT. ANN. tit. 22, § 60.

¹⁰³ See *Id.* at note 81.

¹⁰⁴ SHANNON WALKER, WASH. COALITION OF SEXUAL ASSAULT PROGRAMS, SURVIVORS OF SEXUAL ASSAULT AND THEIR USE OF PROTECTION ORDERS (2002).

¹⁰⁵ See e.g. MINN STAT. § 609.748; COL. REV. STAT. ANN. § 13-14-102; CAL. CIV. PROC. CODE 527.6; WIS. STAT. § 813.125.

¹⁰⁶ COLO. REV. STAT. ANN. § 13-14-102.

¹⁰⁷ MD. CODE ANN., CTS. & JUD. PROC. § 3-1501-3-1509.

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- orders that do not expire unless modified or dismissed,
- orders that expire automatically after a certain period of time (with an option for the victim to take steps to extend the order), or
- orders that automatically expire after a certain length of time (with no possibility of extension).

In Colorado and Florida, full orders are permanent and are in effect until modification or dismissal by the court.¹⁰⁸ In Illinois, full orders are called plenary orders. A plenary order is valid for a certain period of time, not to exceed two years.¹⁰⁹ This period can be extended one or more times as necessary.¹¹⁰ In Montana, an order of protection may continue for an appropriate period of time or can be made permanent.¹¹¹ In Oklahoma, an order will remain in effect for a period not to exceed three years unless changed through a motion.¹¹² In California, an injunction lasts up to three years, but at any time within three months prior to expiration, the plaintiff may apply for renewal.¹¹³ In South Dakota, an order cannot exceed three years.¹¹⁴ In Wisconsin, an injunction must not exceed two years.¹¹⁵

2. Stalking Orders

All fifty states, the District of Columbia, the federal government, and at least ten Native American nations have established stalking as a crime.¹¹⁶ In order to be eligible for a stalking protection order, state law typically requires at least two or more unwanted contacts. Violation of a stalking order is a crime in every state. Sanctions vary widely and may range from up to 180-days in jail to a felony prison sentence for a repeat violation.¹¹⁷

The range of remedies available to a sexual violence victim who secures a stalking protection order may also be much broader than the remedies available through a domestic violence protection order or a sexual assault protection order.¹¹⁸ For example, in some jurisdictions a stalking victim may:

- request that the court order the perpetrator to refrain from contacting and/or coming within a certain distance of the sexual assault victim;
- ask the court to order the assailant to attend mental health counseling;
- ask the court to authorize punitive damages.¹¹⁹

3. General Civil Protection/Anti-Harassment Orders

An anti-harassment order is a civil protection order that prohibits unlawful harassment.¹²⁰ Victims of sexual assault who do not meet the relationship requirement under a domestic violence protection order often seek this type of protection order.¹²¹

To get an anti-harassment order a victim must be able to show that the person who assaulted them has engaged in unlawful harassment.¹²² Generally speaking, “unlawful harassment” means a knowing and willful course of conduct directed at the victim which seriously alarms, annoys, harasses, or is detrimental to the victim, and

¹⁰⁸ COLO. REV. STAT. ANN. § 13-14-102; FLA. STAT. ANN. § 784.046.

¹⁰⁹ 22 ILL. COMP. STAT. ANN. §§ 101-302 (West 2004).

¹¹⁰ *Id.*

¹¹¹ MONT. CODE ANN. § 40-15.

¹¹² OKLA. STAT. ANN. tit. 22, § 60.

¹¹³ CAL. CIV. P. CODE ANN. § 527.6.

¹¹⁴ S.D. CODIFIED LAWS §§ 22-19A-8—22-19A-17.

¹¹⁵ WIS. STAT. ANN. § 813.125.

¹¹⁶ See 18 U.S.C. § 2261A(1) for the federal crime of stalking.

¹¹⁷ BELOOF, *supra* note 23.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Protection Orders for Survivors of Sexual Assault, Stalking & Domestic Violence: Anti-Stalking Orders found at <http://www.wcsap.org/legal/ProtectionOrders.htm>.

¹²¹ *Id.*

¹²² *Id.*

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which also serves no legitimate or lawful purpose. “Course of conduct” means a series of acts over a period of time, however short, all with a similar purpose.¹²³ Sometimes it is difficult to show that there is a pattern if there was only one incident of sexual assault; however, a victim may still be eligible for such an order.¹²⁴

4. Orders that Protect Elderly, Disabled, or Other Especially Vulnerable Populations

Generally speaking, under the law, a vulnerable adult is someone over the age of sixty who has the functional, mental, or physical inability to care for him or herself.¹²⁵ Alternatively, this person may be found incapacitated, developmentally disabled, or admitted to a healthcare facility.¹²⁶ A vulnerable individual also includes someone receiving services from home health, hospice, or home care agencies or an individual provider.¹²⁷ Obtaining an order protecting elderly, disabled or vulnerable persons may not require a showing of physical violence because emotional or financial abuse may be enough.¹²⁸ Unlike domestic violence and sexual assault protection orders, a petition for an order to protect a disabled or elderly victim may be submitted to the court by a relative, neighbor, care provider, or other third party in some jurisdictions.¹²⁹ A sexual assault victim pursuing this order may receive relief that requires the perpetrator not to contact the victim and not to come within a specified distance of the victim.

5. Institutional Based Orders: College or University Stay Away Orders and Housing Stay Away or Vacate Orders

These orders are issued by employers, universities or housing authorities to provide protection to victims within the confines of the institution.¹³⁰ Sexual assault victims may receive the following relief through stay away orders:

- The perpetrator must remain a certain distance away from the sexual assault victim.
- The perpetrator may be assigned to different college/university classes and/or housing areas in order to minimize contact with the sexual assault victim.
- The perpetrator may be asked to leave the institution and/or housing neighborhood.
- Violation of a stay away order may result in criminal consequences.

6. Civil Injunctive Relief

Some jurisdictions grant a civil order requiring that an assailant refrain from committing certain acts if the victim has filed an underlying civil claim against the assailant.¹³¹ If a sexual assault victim fears for her physical safety and/or privacy, and the assailant is a neighbor, co-worker, classmate or has some other type of person with whom she has potential ongoing contact, civil injunctive relief is an important and innovative option to consider that may offer an appropriate remedy, especially if the victim is simply seeking a “no contact” order requiring the assailant to stop all contact with her.¹³² This type of order “is not likely to lead to irreparable harm to the assailant, and it may prevent irreparable harm to the victim.”¹³³ While civil injunctions lack the criminal consequences that most of the above orders have if violated, civil injunctions are court issued orders.¹³⁴ If the order is violated, then a victim can bring an action to enforce the order through civil or criminal contempt.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Protection Orders for Survivors of Sexual Assault, Stalking & Domestic Violence: Who is a Vulnerable Adult found at <http://www.wcsap.org/legal/ProtectionOrders.htm>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ BELOOF, *supra* note 23, at 28.

¹²⁹ *Id.* at 29.

¹³⁰ VICKERS, *supra* note 16, at 3-8.

¹³¹ *Id.* at 3-6.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

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This remedy can be used by sexual assault victims living in states that do not offer sexual assault protection orders, when the assailant is a stranger or an acquaintance and the victim does not have a relationship with the assailant that can qualify for a family violence protection order. Examples of relief available for the sexual assault victim:

- The perpetrator may not contact the sexual assault victim.
- The perpetrator may not come within a certain distance of the sexual assault victim.
- The perpetrator may be ordered to pay damages to the sexual assault victim for torts committed (i.e. intentional infliction of emotional distress, assault, etc).

7. A CRIMINAL COURT OPTION

Special Conditions Bond for Family Violence

If the perpetrator has been arrested, attorneys and advocates can also creatively use criminal bond orders or conditions of release to achieve protection relief similar to a protection order. Criminal bond orders might be the only possibility for some sexual assault victims who do not fall under the state family violence protection order statute, do not live in a state with a sexual assault protection order, or who live in a state where the sexual assault protection orders are restrictive in scope. Victims may first want to obtain creative criminal bond or conditions of release orders that protect them during the criminal case and then after the criminal case has concluded, they may choose to seek a sexual assault or civil protection order.

Creative bond orders are also a possible remedy for those who are unwilling to pursue a civil protection order. This approach protects against the victim's testimony in the civil case being used to impeach her in the criminal case. It also offers the victim added protection during the criminal case and gives her time to obtain civil orders that can provide ongoing protection when the orders in the criminal case end. The full range of protection provisions that would be helpful in a civil protection order can also be included in a criminal bond order. This type of creative remedy has been used by some criminal courts including an excellent example in Georgia. The criminal bond order utilized in Fulton County, Georgia is included in the appendix.

- The defendant shall have no contact directly or indirectly with the victim, victim's family, professional, personal, or close associates, by phone, mail, electronic methods, or a through third party, including at the victim's work place, place of worship, home or daycare. If defendant encounters victim, defendant must leave immediately, and must not come within 200 yards of the victim or her family.
- The defendant shall not possess any weapons or permits to maintain such arms. All certified officers have the authority to confiscate all weapons and permits and maintain in their possession until further order of the court. Defendant's failure to comply with said provision may subject Defendant to the federal offense punishable by up to ten years imprisonment 18 U.S.C. §§ 922 (g) (8), 924 (a) (2)
- Where the parties have children together, visitation orders can be included in a bond order requiring no visitation or no visitation until such time as defendant completes court ordered counseling, and/or supervised visitation.
- Defendant shall not remove the children from the court's jurisdiction and/or the United States absent a court order and shall relinquish the children's passports to the petitioner or the Court. Further, the Respondent or someone on Respondent's behalf shall not request a visitor's visa or other visa (or passport) for the child(ren) of the parties absent an order from the Court.
- Where the abuse was linked to the victim's immigration status, the Court includes the following provisions:
 - Defendant shall give petitioner access to, or copies of, any documents supporting victim's immigration status;
 - Defendant shall not withdraw any application for permanent residency filed on behalf of victim and shall take any and all action necessary to ensure that the victim's application for permanent residency is approved;

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- Defendant shall not contact DHS, any U.S. Consulate or Embassy including the Consulate and/or Embassy at the following location _____ about victim's immigration petition;
 - Defendant shall return to victim: the victim and children's work permits; identification cards; bank cards; religious documents; driver's licenses; social security cards; passports; alien registration receipt cards; alien registration cards; passport stamps; marriage license and copies of school records, leases, rent receipts, utility bills and income tax returns.
 - Defendant shall provide copies of Defendant's work permit, passport, certificate of naturalization or citizenship, alien registration card, alien registration receipt card or passport stamp, work permit, ID card, bank card, baptismal certificate, social security card and driver's license.
 - The Defendant shall provide any proof of a good faith marriage to victim, including family photos, papers, documentation or other objects relating to the marriage, copies of respondent's divorce certificates for any previous marriages and/or information about where such divorce decrees may be obtained as well as a copy of his birth certificate
 - The Respondent shall pay to the victim all costs associated with replacing documents destroyed, hidden, or claimed to be missing by the respondent including, but not limited to the Defendant's or the children's passports, social security cards, alien registration cards, work permits, bank cards, health insurance cards, or drivers' licenses.
 - The Respondent shall pay any and all fees associated with the petitioner and/or children's immigration case.
 - The Respondent shall sign a Freedom of Information Act form and give it to victim or Victim's attorney.
- The defendant is hereby ordered to pay the sum of _____ to the victim as restitution for the damage of property as follows _____.
 - The defendant is hereby ordered to pay the sum of _____ to the victim as support for the victim and/or minor children as follows _____.
 - The defendant shall not be entitled to the victim's telephone numbers and addresses or Victim's residence, place of employment, school or daycare. Defendant's attorney shall not provide such information to the Defendant.
 - Victim is entitled to notification of the defendant's release from incarceration and custodial authority shall be responsible for notifying victim pursuant to the guidelines set out by law.
 - The defendant shall screen for Drug Court eligibility and/or participation as required.
 - The defendant shall submit to drug and alcohol testing and/or treatment, including requests to breath, urine, and/or blood specimen for analysis for the possible presence of any substance prohibited or controlled by any law.
 - The defendant shall maintain full time employment, school or GED as directed.
 - The defendant shall report to the Probation Officer as directed, and the Probation Officer shall be able to visit the defendant's home.

These criminal bond orders should also include an enforceability clause, such as the following:

This Order is enforceable throughout the state of Georgia and all other forty-nine states, Indian territories, Puerto Rico, District of Colombia, and US jurisdictions. Violations can be punished under state and federal law, may be criminal and civil in nature, falling under the Violence Against Women Act, Parental Kidnapping Prevention Act, Uniform Child Custody Jurisdiction Act, and the International Child Abductions Remedies Act. Violations of this order may subject the defendant to serious sanctions, such as aggravated stalking, misdemeanors, jail and/or fine. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as codified at 8 U.S.C. § 1227 (a) (2)(E) makes a violation of this order a deportable offense.

Obtaining Effective Remedies—Creative Protection Order Provisions

To be most effective, protection orders should contain all the relief an immigrant woman needs to address the violence and fear of future abuse or sexual assault, including threats or attempts. Relief in the protection order should be as detailed as possible and should ensure that the individual needs of the victim are addressed. Gaps in relief sought in the protection order for lack of specificity may lead to further violence. Likewise, it may make the order difficult, and in some cases, impossible to enforce.

Protection orders can contain a wide range of remedies that can be used to address the specific needs of each victim and each immigrant victim. For example, certain protections are critical for most victims when the perpetrator and victim are in an intimate relationship and have children. The protection order should always contain provisions regarding custody. Advocates and attorneys should also consider naming the children explicitly as protected parties in their mother's protection order. Additionally, when women take steps to protect themselves against further abuse, abusers may retaliate against the victim's family members. Therefore, protection orders should include prohibitions against contact or harassment of the victim's family members. This is especially true for immigrant victims.

Other specific protections are critical when the victim and the perpetrator are co-workers, classmates, or otherwise are in regular contact. It is important to work with the immigrant woman to determine all the possible places of contact and what relief would be needed in the protection order to ensure her safety.

Creative Application of Traditional Provisions of Civil Protection Order Remedies

PROTECTION ORDERS FOR VICTIMS STAYING WITH THEIR ABUSERS

- *The respondent shall not assault, molest, harass, or in any manner threaten or physically abuse the petitioner and/or his/her child(ren).*

An order that *the respondent shall not assault, molest, harass, or in any manner threaten or physically abuse the petitioner and/or his child(ren)* can be included in a protection order issued to parties who continue to reside together.

If an immigrant victim chooses to live with her abuser, the protection order may include a “no further abuse” provision. The advocate or attorney should keep in mind that the immigrant victim does not need to leave her abuser in order for a protection order to be issued. Advocates and attorneys should interview victims and identify their fears, needs, and barriers to leaving their abusers. The advocate should be aware of cultural and religious traditions that might hinder the victim from seeking a protection order that requires separation. The victim may simply want a protection order that requires the abuser to receive counseling and refrain from violent behavior. When the parties have children, full contact protection orders that allow the parties to continue to live together can also contain provisions that award custody to the victim should the parties separate. Such orders can also require that child support payments begin while the parties still reside together, which can be helpful when the abuser has been denying the victim access to money she needs to buy food or other essential items for the household and the children. Obtaining an order that child support commence while the parties still reside together provides the victim the greater economic security of having this already in place, should she decide to separate from the abuser in the future. These types of protection orders are valid in all jurisdictions.

There are two important advantages to obtaining a protection order even when the parties plan to continue living together. First, if the order is violated, the respondent can be charged with a criminal offense and the police will respond seriously when called for help. Second, the protection order provides crucial evidence that will support the victim's VAWA or U-visa immigration cases. Immigrants need not leave their

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abusers to obtain VAWA immigration relief.¹³⁵ The following are examples of these types of protection order provisions:

- *The respondent shall not assault, molest, harass, or in any manner threaten or physically or sexually abuse the petitioner and/or his/her child(ren).*

This “no further abuse” clause is essential to every protection order. Enforcement through criminal or contempt prosecution is very difficult without this clause. The clause should be clearly worded so the abuser is aware of exactly what types of actions are prohibited. This provision allows immigrant victims to specifically request protections that are important to her safety and the safety of her family and household. It may also be important to include language to prohibit the respondent from communicating directly or indirectly with the immigrant victim and/or her family in a threatening or harassing manner. This behavior may also be known as “stalking.”¹³⁶ In addition, this provision can be specifically tailored to the respondent’s behavior against the immigrant victim, family, or household that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass. Some examples include: “the respondent shall not follow the immigrant victim nor send in any manner (including electronically) embarrassing materials to family, friends, or the employer.”¹³⁷

Civil protection orders can be helpful in preparing U-visa cases under VAWA.¹³⁸ They can provide crucial evidence of the crime and should be submitted as part of the request for U-visa relief. An immigrant victim will still need to provide certification from a government official that the immigrant victim is helpful or is likely to be helpful in the prosecution or investigation of a crime. Evidence of a civil sexual assault protection order can be a way to demonstrate the victim’s willingness to cooperate with law enforcement.

- *The respondent may not contact the petitioner and/or his children in any manner, either personally, by telephone, in writing, by computer communication, or through third parties.*

Abusers and perpetrators often find other ways to harass the victim after the issuance of a protection order. This may include threatening phone calls, e-mails, letters, sending unwanted deliveries to her home (i.e. flowers, pizza), and other forms of communication. While these activities are still attempts to intimidate and maintain power and control, the perpetrator may not be in violation of the specific provisions of the protection order. It is therefore important that the above clause be included in the protection order. To obtain evidence of violations of this provision, the victim can screen phone calls through an answering machine or caller ID. This will provide documentary evidence of the respondent’s attempt at communication. The victim should also keep copies of any written communication and take photos (with date stamps, if possible) of any things delivered to the house by the perpetrator. Any third party contact and/or communications (e.g., through his family members or co-workers) should also be documented.

- *The respondent shall pay for all medical expenses the petitioner incurred as a result of the respondent’s violence, including treatment of physical injuries, illness, and mental health treatment. The respondent shall pay for the repair of the door to the petitioner’s house and all costs associated with the changing of the petitioner’s lock, as well as any other damaged property due to the abuse.*

The protection order can include a provision that orders the perpetrator to provide other specific forms of monetary relief to the petitioner. Victims can receive court ordered reimbursement for economic losses, including repair of damaged property, medical costs, attorney’s fees, and court costs. By ordering the perpetrator to pay for medical expenses, the victim can receive needed medical treatment. Medical bills will not accumulate and there may be less need for the immigrant victim to become reliant on public benefits, thus

¹³⁵ See Chapter 10 of this Manual, *U-Visa Relief for Immigrant Victims of Sexual Assault*, for more information.

¹³⁶ Stalking is a series of actions that make someone feel afraid or in danger. Stalking is serious, often violent, and can escalate over time. Some behavior includes: following, repeated phone calls, damage to home, car, other property, sending unwanted gifts, letters, cards, using technology to track movements, and other actions that control, track, or frighten. For more information, please see the National Center for Victims of Crime, Stalking Resource Center at <http://www.ncvc.org>.

¹³⁷ See TEXAS ADVOCACY PROJECT, PRO SE SEXUAL ASSAULT PROTECTION ORDER PACK (Mar. 2005), available at [http://www.women-law.org/documents/Pro%20Se%20Protective%20Order%20Packet%20\(English\).pdf](http://www.women-law.org/documents/Pro%20Se%20Protective%20Order%20Packet%20(English).pdf).

¹³⁸ See Chapter 10 of this Manual, *U-Visa Relief for Immigrant Victims of Sexual Assault*, for more information.

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strengthening her immigration case. Orders should cover the costs of both emergency and long-term healthcare for treatment of injuries, contracted diseases, prenatal care, ongoing related women's health issues and mental healthcare treatment. All of these are essential to the immigrant sexual assault/domestic violence victims' recovery.

If the parties are married, the court can order that the abuser maintain the victim on his medical insurance. Payment of medical expenses and costs associated with damage to property is especially important for immigrants and their children. Ordering the abuser to pay for damage to property may help prevent the victim's eviction from her home. It can be difficult for immigrant women to find alternative housing, as they may have difficulty establishing employment history and landlords may discriminate against renting to immigrants or domestic violence victims.

- *The respondent shall stay 200 yards away from the petitioner's home, person, school, place of worship, workplace, day care provider, community center, and other specified locations.*

It is very important to **clearly define** where the respondent is forbidden to go. Include in the provision all locations frequented by the petitioner, including homes of relatives and friends, the petitioner's community center, workplace, place of worship, the petitioner's hairdresser and health care provider.

In preparation for the CPO hearing, advocates and attorneys should carefully review with the petitioner all of the various locations the perpetrator should be ordered to stay away from. In doing so, it is important not to reveal the exact location if respondent does not already have this information. The abuser can in these instances be ordered to stay away from an entire area of the city in which the victim lives. Problems can arise when the parties are working together and when both are active in the same place of worship, community establishment, or other cultural meeting place. One possible solution to this problem is to order that the perpetrator may only attend a place of worship, community event, or religious/cultural event at specified times that are different from those the victim will be attending. If they share the same workplace, advocates and attorneys with the immigrant sexual assault victim should work with the employer to ensure that the immigrant victim's safety is upheld and that precautions are made to prevent further abuse.¹³⁹ Good advocacy may be required to assure that the employer does not fire the victim and keep the abuser or sexual assault perpetrator as an employee. When the victim and the perpetrator do not work for the same employer it is also crucial to specify that the respondent must refrain from contacting the petitioner's workplace. An immigrant may only be able to work at a workplace that DHS has approved when granting her a work-related visa and she may lose her job because of the respondent's harassment. This could cause her to violate the terms of her legal immigration visa, making her more susceptible to deportation. When such an order is entered, the petitioner should provide a photograph of respondent and copies of the order to her employer, place of worship and other religious personnel, community personnel, or other related personnel so that they can help her enforce the order if needed.

If the petitioner is in hiding, the provision should not reveal her exact location, but merely state that the respondent is required to stay away from her person and her residence. It is also important to state that respondent is not allowed to locate or attempt to locate the petitioner either directly, or through third parties. The order may also specify a minimum distance that the respondent is required to stay away from the petitioner and from specified locations.

- *As of (date and time) the respondent shall turn over to the (local) police department any and all weapons that the respondent possesses or owns and all licenses that allow the respondent to possess or purchase weapons.*

This provision prohibits the respondent from possessing a weapon or firearm. It also revokes the respondent's weapons license. This will prohibit the respondent from purchasing or receiving a weapon during the duration of the protection order. To further prohibit the respondent from possessing a weapon, the provision can order the local police to search for and confiscate weapons during the vacate order, when they are called for assistance in enforcing the protection order, when they are ordered by the court, by the

¹³⁹ See Chapter 18 of this Manual, *Employment* of this Manual.

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victim's request, or they can be sent to the perpetrator's home specifically to confiscate weapons. The court should require the respondent to produce a receipt proving that the weapons were relinquished. Some jurisdictions may waive this requirement if the respondent is a police officer or in the armed forces. The advocate or attorney should ask the victim what, if any, weapons the perpetrator owns or were used against her. The order should include anything used, including knives and machetes. The advocate should also investigate the specific procedures used in their jurisdiction when weapons are confiscated so that the order issued contains all provisions necessary for the order to be enforceable.

- *The (local) Police Department or Sheriff shall assist the petitioner in enforcing this order and shall pay special attention to calls for assistance from petitioner and/or (petitioner's address).*

The protection order may provide a provision with instructions for law enforcement to assist with vacate orders, transport the petitioner to a shelter, accompany the petitioner home, serve process, or carry out orders regarding the abuser's or perpetrator's relinquishment of personal property or weapons. The protection order may also state that law enforcement officials monitor the victim's residence and respond quickly to future calls from the petitioner's residence. Again, the advocate should investigate exactly how local law enforcement want the order drafted to assure compliance with the order.

- *The respondent shall relinquish possession and/or use of the following personal property (list specifically itemizing property in question) as of (date and time).*

This provision is helpful if the perpetrator or abuser has some of the immigrant victim's belongings. If the immigrant victim and the perpetrator work together, the perpetrator may have taken some personal property. The perpetrator may have also taken things from the immigrant victim's home if he is an acquaintance or friend that would have had occasion to be at the immigrant victim's home. It is important to find out from the immigrant victim if the perpetrator has any personal property of the immigrant victim's. Prior to the hearing, the petitioner should make a list of the items that she wants returned to her. It may be possible, if the respondent is represented, for the belongings to be brought to the hearing. If this is not possible, then advocates and attorneys should make sure that plans are made with the petitioner regarding how she wants to recover her personal belongings and mention victim safety in doing so, arranging for an officer to stand by during the exchange.

This provision can also be utilized to gain possession of the family vehicle and particular documents for the victim. This is very important for immigrant victims who have left their home and need to retrieve documents she will need for any immigration case she has pending or that she may file.¹⁴⁰ The order should also include essential documents she will need for herself and the children for identification, health care, school, and child support, i.e. social security cards, birth certificates, medical insurance cards, vaccination records, copies of paystubs. The respondent can also be ordered to pay the cost that petitioner will incur to replace documents that he does not return. The attorney should know what the cost will be prior to the hearing so that the order can contain the exact amount to make payable on date certain in form, requested to a specific place on specific date and time. The list of property should include items that are irreplaceable and that have sentimental value to her so that the abuser will not be able to maintain power and control by taking or destroying these items, e.g., family photos and heirlooms. Abusers of immigrant victims may try to take control of or destroy items that have sentimental or cultural value to the victim. Further, when the immigrant victim needs the car for transportation to work, granting her use and possession of the car can be of particular importance. If the protection order has a vacate provision, the order can request that the respondent relinquish possession of all property except for personal belongings and other items listed in the order. The language should also specify that a police escort accompany either the abuser or immigrant victim back into the home to retrieve belongings.

- *The respondent shall vacate the residence at (location) immediately. The (local) police department shall accompany the victim and allow the respondent 15 minutes to collect his personal belongings. Personal belongings may include toiletries, clothes, one set of sheets, and pillowcases. The*

¹⁴⁰ For a full list of documents she may need for immigration case, see Chapter 3 of this Manual, *VAWA Confidentiality*, for evidence checklists.

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petitioner's permission is required to remove any other items not listed above. The police shall take all keys and garage openers from the respondent, test them to make sure they are the right ones, and then return them to the petitioner.

Vacate orders require that the respondent vacate the home shared with, owned by, or co-owned with the petitioner. Advocates and the attorney for petitioner should check with local law enforcement and follow language in the state statute and expand if possible. The order should also specify the exact manner in which the vacate provision should be carried out. It should establish time limits on the respondent and include additional provisions that prohibit him from reentering the home. It should also order the respondent to surrender all keys, to refrain from damaging the property or premises, and to refrain from tampering or interfering with utilities or mail service.

In cases involving immigrant women, it is important that vacate orders go into effect immediately. If perpetrators are given advance notice of a vacate order they may destroy, remove, or hide essential documents and evidence that the immigrant victim will need to win her sexual assault/domestic violence-related immigration case. When the victim has fled the family home and has sought a protection order to remove the abuser and return her and the children to the family home, there may be financial records in the home that the victim will want access to. When this is true, the vacate order can explicitly state that the perpetrator is not allowed to remove any financial records or other papers and/or computers from the home when he leaves. This way the victim can gain access to financial records in the home that could be useful to her in obtaining child support, spousal support, or an equitable distribution of property.

When an advocate or attorney helps a petitioner obtain a vacate order, it is important to also follow up with telephone and utility companies making needed changes in account numbers and asking that only persons with special, secure passwords be able to access the account information or make any changes in account service. Advocates and attorneys should consider including in the protection order (both in the temporary and final order) language that requires the respondent not to interfere with utility services and also including enforcement language (e.g., if respondent violates the provision, respondent is ordered to pay \$500 fine or up to six months in jail or both for each violation). Immigrant victims should immediately cut off the abuser's ability to make calls using telephone service either directly, using calling cards, making collect calls, or charging calls to her number. This will prevent the abuser from running up her telephone bill with international phone calls. It may inhibit his ability to harass or threaten her relatives abroad. Most importantly, it may help her prevent the phone company from cutting off her service for non-payment thereby cutting her off from an ability to call the police for help. If victims have a high phone bill balance left when the abuser vacates there are two possible options: he can be ordered to pay the phone bills or advocates and attorneys can obtain help, for example, from a local church or charitable organization, to pay her outstanding bill so that her phone with a new number can be reconnected. Advocates and attorneys may also want to consider negotiating with utility companies on the victim's behalf to structure a payment plan and maintain minimum service. Victims can also change their telephone number at no charge if they inform the utility company that it is due to harassment. Some companies will also allow a temporary change in number so that the respondent believes the number has been changed. In this way the victim will not need to change her contact information with the various locations of support.

- *The respondent shall participate in and successfully complete the following (treatment program).*

The protection order may require the respondent to attend a treatment program in addition to other provisions. These programs may be batterer intervention, substance abuse treatment, parenting classes, and/or mental health counseling. Only those batterer intervention programs that are certified as having a specific expertise in working with domestic violence and sexual assault abusers should be used. In cases of domestic violence and sexual assault, joint or family counseling is **not** appropriate and should not be ordered or agreed to by the victim. Research indicates that family counseling can actually increase danger to the victim. The batterer should only be ordered to attend programs without the victim's presence. If the batterer is a substance abuser, he should first attend a substance abuse program and, once he has completed this program, he should be ordered to attend a batterer's intervention program. Advocates and attorneys should be familiar with the range of treatment programs available and should also seek a signed authorization from the respondent, allowing counsel to obtain information from the treatment program regarding respondent's completion, or participation.

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It is important to note that in certain jurisdictions, it may be difficult for courts to enforce and/or monitor compliance. There are very few programs available for batterers, thus making it difficult to mandate participation and compliance.

If the respondent is not fluent in English, he should be ordered to attend a certified program in a language in which he is able to communicate. If there is no program in the respondent's language, he should be ordered to arrange for an accompanying interpreter for all sessions. In some jurisdictions, the abuser can be ordered to use a court certified interpreter that he pays for on a sliding scale. If there is no counseling in the respondent's native language, he will likely use this as an excuse not to attend. This specific issue must be addressed whenever the respondent's native language is not English. If alternate provisions are not listed in the order, it is likely that the respondent will not attend counseling sessions. Advocates for victims whose abusers are not English speaking should identify potential interpreters in advance whom the abuser could pay to interpret during treatment sessions. The order can also specify review dates that the respondent will be ordered to return to court with certificates of completion. The order can be enforced if the respondent does not attend and/or complete the program by the date certain.

- *Temporary custody of the minor child(ren) is awarded to the petitioner until further order of the court, or until the expiration date of this order.*

It is important to include a custody order (when allowed by statute) whenever children are involved in an abusive relationship. Research has found that approximately 70% of abusers also abuse their children, thus demonstrating that children can also be physically harmed by domestic violence.¹⁴¹ Even if children may not have been directly abused, studies have proven that children living in violent homes are negatively affected.¹⁴² After separation, the abuser may use children as a form of control over the victim. If legal custody is not specified in the protection order, an immigrant victim may be forced to negotiate child custody and visitation with the abuser, posing enhanced danger to the victim and the children.

It is essential that the protection order include a custody clause if the parties have minor children in common. Generally, immigrant women should resolve custody questions as part of the immediate relief they receive in their protection order. The abuser may also tell the victim that she will lose her children if she leaves him. In many Latin American countries for instance, the concept of "Abandonado el lugar" or "Abandonment of the home" exists. This legal concept holds that if one abandons the home, they lose everything, rights to custody and property included. A protection order without a custody clause could therefore cause the victim to mistakenly believe that she will lose legal custody over her children and may cause her to return to the abusive relationship.

If custody is not awarded in the protection order, it is more likely that the victim will return to the abuser. Few immigrant victims are aware of the U.S. laws regarding custody, particularly those that favor awarding custody to the non-abusive parent even when the abusive parent is a citizen and the non-abusive parent is not.¹⁴³ Immigrant victims often assume that as in their home country, U.S. courts will automatically assign custody to the male head of the household, or to the parent with the greater earning capacity. Misinformation often provided by the abuser combined with incorrect assumptions and fear that their abuser will cut them off from their children altogether make immigrant victims hesitant to seek child custody as part of their protection order or other family law case.

Advocates should explain the child custody process to the victim and that the best interests of the children are paramount and that domestic violence is a factor for the court to consider.¹⁴⁴ The best interest of the child standard is used by courts across the country in making child custody determinations.¹⁴⁵ Factors that courts consider in making best interest determination in the local jurisdiction could include the wishes of the child's parent or parents as to his or her custody; the wishes of the child as to his or her custodian; the interaction and

¹⁴¹ Bowker, Arbitell, & McFerron, *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, (Kersti Yilo & Michelle Bogard, eds., 1988).

¹⁴² See e.g., DAVIDSON, *supra* note 47.

¹⁴³ *Id.*

¹⁴⁴ *Battered Immigrants and Civil Protection Orders*, in BREAKING BARRIERS, *supra* note 1.

¹⁴⁵ *Id.*

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interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to his or her home, school and community; and the mental and physical health of all individuals involved, and who, if anyone, perpetrated domestic violence in the relationship.¹⁴⁶

Immigration status should not be used as a factor in custody cases. The court should be aware of the respondent's attempts to intimidate and threaten the victim with the loss of her children and possible deportation. If immigration issues are raised, the immigrant victim should find counsel to represent her. If she does not have counsel and does not have a way to address immigration issues in open court, then it is likely that she will return to her abuser.

In preparing an immigrant victim for any family court case at which custody could be contested, attorneys¹⁴⁷ and advocates should be prepared to put on evidence including the immigrant victim's testimony, testimony of other witnesses, and other evidence (e.g., photographs, police reports, school and medical reports) that demonstrate:

- The client is the primary caretaker of the children (have her testify about a typical day pre and post separation with the children and who is responsible for what childrearing tasks);
- Respondent is not the primary caretaker of the children (have her testify about respondent's typical day, e.g., respondent leaves the home for work and does not return until very late at night, etc.);
- How respondent interacts with the children, how he disciplines the children, etc.;
- The history of domestic violence and sexual assault and how it has affected the children (if the children have counselors, health care providers, schoolteachers, or advocates who can address this effect, they should be called as witnesses);
- Whether the children were abused directly or affected by witnessing the abuse;
- Who has been responsible for the children's health care, schooling, religious activities;
- How well the children are adjusted in their current school and community; and
- In a highly contested case, attorneys should consider having an expert witness testify about the effects of domestic violence on these children.

Depending on the age of the child(ren), attorneys can consider requesting the court to confer with the child(ren) in chambers.

Immigrant victims contemplating moving with the children to another, safer jurisdiction should advocate for no geographic restrictions and should consult a family lawyer who can advise them on how to best make such a move without the immigrant woman becoming subject to parental kidnapping charges. The Hague Convention,¹⁴⁸ the Federal Parental Kidnapping Prevention Act,¹⁴⁹ state parental kidnapping acts, and State Uniform Child jurisdiction and enforcement acts¹⁵⁰ can all be factors in this decision. It is very important that immigrant women who are considering moving with their children do so in a manner that does not violate these statutes. Criminal kidnapping charges that could result from violating these statutes could result in the non-citizen parent's deportation¹⁵¹ and/or loss of custody and visitation.¹⁵² One should also discuss a situation

¹⁴⁶ NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, MYTHS AND FACTS REGARDING DOMESTIC VIOLENCE AND CHILD CUSTODY DISPUTES (Aug. 1997); Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071 (1991); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states' custody statutes).

¹⁴⁷ While trained advocates can effectively help immigrant victims obtain culturally effective protection orders, attorney resources in your community should be particularly used in contested custody cases involving immigrant victims.

¹⁴⁸ Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10494 (Mar. 26, 1986).

¹⁴⁹ Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568 (1980) (codified in 28 U.S.C. § 1738A (1994)). The Act requires states to give full faith and credit to custody decisions of other states that conform with the Act.

¹⁵⁰ UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 115 (1988); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 257 (1997).

¹⁵¹ You may also contact the National Immigrant Women's Advocacy Project for technical assistance on these matters: 4910 Massachusetts Ave NW – Suite 16, Lower Level – Washington, DC 20016; 202-274-4226; niwap@wcl.american.edu.

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where the victim may not want to adjudicate paternity in the protection order. If not adjudicated, the respondent has no rights but the client also gets no child support. Be sure to talk the client about what she wants and whether she is willing to forego child support for this. Judges often encourage victims to receive child support in order to prevent the need for federal welfare in the future.

- *The respondent has rights of visitation with the minor child(ren) under the following conditions (requirements).*

If a custody clause is included in the protection order, a clause granting visitation to the respondent will generally be included as well. In 60% of cases respondents retain visitation rights and in only 11% of cases is the respondent required to have supervised visitation only.¹⁵³ The National Council of Juvenile and Family Court Judges recommends supervised visitation until the abuser has completed a domestic violence treatment and a substance abuse program. Supervised visitation can be arranged at a supervised visitation center or with an approved third party. If a supervised visitation center is not available, advocates should work with the victim to find third parties the victim feels ensure the safety of herself and her children. Possible third parties could be friends, family members, religious personnel, or social workers. If the petitioner does not wish to request supervised visitation, orders authorizing unsupervised visitation should clearly state all of the specifics of abuser's visitation rights. The provisions should specify when, where, and how visitation should take place.

If there is to be no contact between the abuser and the victim, the order should clearly state a drop off and pick up arrangement that will not require contact between the parties. Ambiguous and non-specific visitation provisions create situations in which the abuser can continue to have contact with the victim. More importantly, non-specific visitation clauses often allow the abuser to use the children to maintain power and control over the victim. A third party can be involved in picking up and dropping off the children. A third party's home can also be used as the site of the pick up and drop off. If this is not possible, the exchange of children should occur at a public place, such as a restaurant. In this situation, the victim should ensure that a third party accompanies her to the exchange location. This can offer her protection and ensure that she has a witness with her should there be problems with the abuser during the exchange of children. The victim can also exchange children at the local police precinct. This ensures her safety and provides police witnesses should problems arise such as the abuser's failure to return the children. The orders can also require that the abuser remain at the precinct for fifteen minutes after the victim drops off the children the respondent is prevented from following her.

The visitation provision can also order that the respondent not use drugs or alcohol during or in the 24 hours prior to the visitation. Visitation rights can be suspended if this provision is violated. Random drug tests can be required in order to monitor these provisions.

If the petitioner and/or children's safety cannot be ensured during visitation, the petitioner should ask that visitation be suspended until further court order. It is very difficult to convince the court to suspend an abuser's visitation rights or to require supervised visitation. When such relief is needed to protect the victim and the children, the victim will need to secure the assistance of counsel. The attorney should be ready to show why visitation is not feasible and argue that suspending visitation rights is in the child's best interest.

- *The respondent shall pay child support for (minor child) in the amount of (dollar amount), biweekly, weekly, or monthly and/or spousal support for the petitioner in the amount of (dollar amount), biweekly, weekly, or monthly¹⁵⁴.*

Protection orders for all immigrant women with minor children should also include child support awards and, if applicable, spousal maintenance awards. The state's child support guidelines should be used to determine the

¹⁵² See Chapter X of BREAKING BARRIERS, *supra* note 1; see also Catherine F. Klein, Leslye E. Orloff & Hema Sarangapani, *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 FAM. L.Q. 109 (2005).

¹⁵³ Susan L. Keilitz, Paula L. Hannaford & Hillery S. Efkeman, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence*, 20 ST. CT. J. 17 (1997).

¹⁵⁴ For more information on economic relief available to immigrant victims, see Chapter 4, Battered Immigrants' Access to Services, in BREAKING BARRIERS, *supra* note 1. [HTTP://NIWAPLIBRARY.WCL.AMERICAN.EDU/MANUAL/BREAKING-BARRIERS/](http://niwapllibrary.wcl.american.edu/manual/breaking-barriers/)

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amount of the award. It is important to ensure that the child support amount is paid through wage withholding, so the respondent cannot use child support payments to exert control over the victim. With wage withholding, the payments come directly from the abuser's paycheck and are paid by the abuser's employer directly to the victim through the court or a state disbursement unit.

Other creative arrangements can require the respondent to pay specific bills, rent, mortgage payments, health insurance, or spousal support. If health insurance is ordered, the respondent must be ordered to provide to the court by a specific date, evidence that the children have been included in his health insurance coverage or that respondent reimburse petitioner for the cost she incurs to cover the minor child on her policy. The abuser can be ordered to file income tax returns and to turn over to the victim all or a specified proportion (at least half) of the tax refund. The protection order can state that the petitioner, not the respondent, has the legal right to claim the children as dependents on income tax returns. This can be ordered even when the abuser is paying child support, since the costs associated with supporting the children are usually significantly more than the child support award.

Financial support is important for immigrant victims who do not have work authorization, who are undocumented, or who have pending VAWA self-petitions and are only able to receive limited public assistance. If immigrant victims do not have financial support, they may be more likely to return to the abuser. For immigrant victims, obtaining child support can also strengthen an immigrant victim's VAWA case, as it will demonstrate that she is a person of good moral character who has taken all possible steps to ensure that her children have financial support. In addition, obtaining a child support order can help her attain lawful permanent residency through VAWA, as the support order can be used to demonstrate sources of income that she is entitled to received now and in the future. This can help her demonstrate that she will be able to support herself and will not have to rely on public benefits.

Catch-All Provisions

Catch-all provisions can be used to obtain creatively culturally competent relief, for immigrant women. In virtually all jurisdictions, protection order statutes for intimate/familial relationships contain catch-all provisions. Most state sexual assault protection order statutes also include catchall provisions of various types. These provisions can be used to assist immigrant victims to obtain other relief. Through catchall provisions, protection orders can address areas of potential conflict. Creative use of catchall provisions can also address petitioner's cultural and/or immigration status related needs.

Such provisions vary in their language, but a typical construction is: Granting any other appropriate relief sought by the plaintiff.¹⁵⁵ Another example is directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter.¹⁵⁶ Catchall provisions can be broadly interpreted and allow the courts to exercise discretion to order additional relief as necessary to prevent abuse. For example in *Powell vs. Powell*,¹⁵⁷ the District of Columbia Court of Appeals determined that the courts had the authority under the statute's catch-all provision to grant monetary relief in civil protection order proceedings, though the remedy was not specifically provided by statute.¹⁵⁸ The court broadly interpreted the District of Columbia's intrafamily offenses act and concluded that, "[W]hile it is true that monetary relief is not specifically mentioned...the plain intent of the legislature was an expansive reading of the Act, which we think must be accorded to the catchall provision as well."¹⁵⁹

In *Maldonado v. Maldonado*,¹⁶⁰ the court confirmed the wide range of relief provided by a catch-all provision and included provisions to assist the battered immigrant petitioner in the following way:

"[T] he husband shall relinquish possession and/or use of the wife's pocketbook, wallet, working permit, ID Card, bank card, Social Security card, passport and any other item of the children's

¹⁵⁵ 23 Pa. C.S. 16108.

¹⁵⁶ D.C. CODE § 16-1005.

¹⁵⁷ *Powell v. Powell*, 547 A.2d 973 (D.C. 1993)

¹⁵⁸ *Id.* at 975.

¹⁵⁹ *Id.*

¹⁶⁰ *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993).

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personal belongings, table, four chairs and dishes...the husband shall not withdraw the application for permanent residence that he had filed on behalf of the wife.¹⁶¹”

The following section will describe how catchall provisions can be creatively utilized to provide culturally appropriate help for immigrant victims and to bolster a victim’s access to immigration relief so that ultimately the victim can attain legal immigration status. With legal permanent resident immigration status, victims can live in the U.S. without fear of deportation; obtain legal work authorization and a social security number; access a greater range of public benefits; and travel to and from the United States.

Specific Protection Order Provisions That Assist Battered Immigrant Victims

It is important to screen an immigrant victim to determine her eligibility for immigration relief under the Violence Against Women Act (VAWA), the crime victim visa (U-visa) or other forms of immigration relief when assisting her in obtaining a protection order. The DHS requires that an immigrant victim prove that she has been a victim of battering or extreme cruelty (which includes physical, sexual, and some forms of emotional abuse) when applying for VAWA-related immigration relief. The protection order provides documentary proof that she has been a victim and she can submit a copy of the protection order to DHS as evidence. Provisions contained in the protection order can be used to help the immigrant client obtain evidence that she can then use to prove each of the required elements of her immigrant case. A protection order that uses the catchall provisions to address the client’s needs for evidence in her immigration case will likely reduce the client’s fear of deportation, as well as reduce the likelihood that she will actually be deported. When the evidence she obtains through the protection order helps her prove her domestic violence-related immigration case, it can also help her attain legal immigration status.

While in court, it is important that any immigrant victim seeking creative catchall relief demonstrate that the specific provisions sought are designed to help curb the violence. She should pay special attention to showing how the requested creative relief will help prevent future harassment to her or her children and/or will enhance her ability to flee her abuser and create a safe life for herself and her children.

Some judges may not be willing to incorporate these provisions into a protection order. If faced with this dilemma, advocates and attorneys must educate local judges on the importance of these provisions for protection orders to offer the most effective, culturally appropriate protection possible. Part of this training should provide an overview, with examples, of the imperfect role traditional protection order provisions play for immigrant victims. If judges in a particular jurisdiction have not ordered creative relief, advocates should insure that immigrants seeking such relief have legal representation. Counsel for immigrant victims seeking creative relief should demonstrate to the court, through evidence, why the relief sought would contribute to reducing the violence and harassment and the potential for future abuse. Immigrant victims needing creative protection order remedies should include evidence of immigration-related abuse in the petition for a protection order, if applicable. Then, if the protection order is issued by consent (the victim’s uncontested affidavit), there is evidence in the record.

Attorneys should request all the relief that a client needs as an immigrant victim. If for some reason, the judge denies such relief, the advocate or the attorney must state: “Objection, your Honor. Could you please state for the record why this relief is being denied?” This will create a record so an attorney can appeal the decision. (See discussion of appeals below.)

The following are examples of creative provisions that can be particularly helpful to battered immigrants:

- *The respondent shall give petitioner access to, or copies of, any documents related to or needed for petitioner’s immigration application.*

¹⁶¹ *Id.* at 41.

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If the immigrant's husband has filed her immigration papers for her, she may need these documents and copies of information he filed with DHS to support her own individual immigration case. Any immigration case that the perpetrator has filed on behalf of the victim or the children's behalf will contain information that can be used to prove his immigration status and to prove other aspects of her VAWA immigration case. Advocates should assist the petitioner in consulting with an immigration attorney¹⁶² to find out what the petitioner may qualify for and which specific documents will be necessary for the client's case. Connection between this relief and violence: Helping the petitioner access documents and papers she will need to attain legal immigration status without the abuser's knowledge or assistance will counter the perpetrator's threats of deportation and allow the client to obtain legal immigration status on her own. It will rob the abuser of the threat of deportation, an intimidation tool he has over the immigrant victim, and facilitates her ability to attain any legal immigration status for which she qualifies.

This provision can also be used if the perpetrator has had access to the immigrant victim's immigration application. The perpetrator may be an acquaintance that has used access to these documents as a tactic to instill fear in the immigrant victim and to further harass her. It is important to explore with the immigrant victim if there is any cause to believe that the perpetrator may have had access to these documents.

- *The respondent shall not withdraw an application for permanent residency that he has filed on the petitioner's behalf, and shall take any and all action to ensure that the petitioner's application for permanent residency is approved.*

Abusers who have filed immigration papers on behalf of the victim often use this fact as a means to control and threaten the victim with deportation. The abuser may threaten to withdraw the application if the victim leaves him or reports violence to local authorities. The abuser therefore can exert control and can use this power to further abuse and harass the victim. Protection orders can require abusers not to undermine their spouse's immigration case, and can prevent abusers from withdrawing applications, thus allowing the victim to obtain legal permanent residency. The amount of evidence required to obtain legal permanent residency through an application filed by a citizen or lawful permanent resident husband is substantially less than the burden of proof required for VAWA relief. Therefore, it is important in some cases to try to get the abuser to complete the petition that he has filed. Ordering the abuser not to withdraw the victim's petition may also prevent him from taking steps to have the petitioner deported before she can file for VAWA immigration relief.

- *The respondent shall not contact any government agency, including, but not limited to, the DHS, the (particular) Embassy, or the (particular) Consulate about the petitioner, absent permission from the court, a police employee, or a subpoena.*

In addition to contacting DHS to withdraw or jeopardize the petitioner's immigration case, the respondent may also attempt to interfere by contacting the U.S. Embassy and/or Consulate processing the case. Protection order provisions limiting the perpetrator's ability to contact DHS or other government agencies about the victim lessens the perpetrator's ability to interfere with the processing of her immigration case, thus lessening his ability to threaten her. Ordering the respondent not to contact DHS or the U.S. Consulate or Embassy about the victim's case can be particularly helpful to victims whose options for legal immigration status have been included in their spouse's immigration case. Further, many immigrant victims either have or are able to attain legal immigration status based on an immigration visa or immigration case initiated by the abuser. Ordering him to follow through on such a case, or not to withdraw her application based on a case he may have filed, can help many immigrant victims (e.g., derivative spouse's of work visas, asylees, workers for international organizations).

Once she has obtained a protection order and has informed DHS that her spouse is an abuser by filing a VAWA case (by providing DHS a copy of the protection order or any other means), VAWA confidentiality provisions preclude DHS from using unfavorable information provided by the abuser against the petitioner. This provision protects the victim from being harmed if the perpetrator continues abuse through the withdrawal of her immigration papers. This provision essentially lessens the amount of control that the abuser has over the victim and lessens his ability to abuse the victim through immigration-related abuse. It is important to note that

¹⁶² The immigration lawyer will know when and whether it is necessary to contact INS about the client's case.

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research has found that immigration-related abuse almost always occurs in relationships that are also physically and sexually abusive.¹⁶³ The existence of immigration-related abuse corroborates physical or sexual abuse or is a lethality factor that predicts the potential for escalation of the abuse in the relationship.¹⁶⁴ When there is immigration-related abuse in the relationship, it is advisable to seek the assistance of counsel for the protection order case. Counsel should present evidence to the court about the immigration-related abuse and demonstrate how the abuser uses these threats to control her. Counsel should also consider having a local immigration attorney testify as an expert witness about the petitioner's immigration options and to be available to answer any of the court's immigration-related questions. Creating a record connecting immigration-related threats and abuse would provide support in the record for the court to award the victim the immigration-related relief she seeks.

An order restricting an abuser's ability to communicate with government agencies about the victim can withstand any first amendment free speech challenges.¹⁶⁵ If a perpetrator contends that the protection order is restricting his ability to contact government officials concerning his wife and infringes on his free speech rights protected by the First Amendment, advocates can challenge the assertion in two ways. First, attorneys for the victim can assert that any threats an abuser makes to report a victim to immigration authorities constitutes non-speech elements of communication and are in essence, conduct that warrants no First Amendment protections.¹⁶⁶ Second, attorneys should assert that "no contact with government agencies provisions" were designed not as an effort to restrain speech, but rather, as a remedy for an abuser's past conduct.¹⁶⁷ Courts using a balancing test have consistently upheld restrictions on abusers' speech (threats, harassment, communication with victims) because these restrictions are narrowly crafted so as to restrict only speech that harms or can cause harm to the victim. If an abuser files an appeal or otherwise contests entry of such order, victims should obtain the assistance of counsel to oppose his motions and appeals to invalidate this or other protection order provisions on constitutional grounds. **Any attempts to make these arguments must be done with the assistance of an attorney.**

For immigrant victims not in an intimate relationship, this provision may be needed to prohibit the perpetrator from further harassment. The perpetrator may use the immigrant victim's immigration status to threaten or harm the immigrant victim and may be part of a course of conduct through which the perpetrator victimizes the immigrant woman.

- *The respondent shall pay any and all fees associated with the petitioner's and/or petitioner's children's immigration cases.*

This provision requires the abuser to pay immigration fees for the victim and her children, and ensures that financial burdens will not hinder her immigration application. In some cases, requesting fee waivers can delay the immigration case or cause an immigration official to question whether she is likely to become a public

¹⁶³ Giselle Aguilar Hass, Leslye E. Orloff & Mary Ann Dutton, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL RESPONSE 93 (2000).

¹⁶⁴ See generally Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000).

¹⁶⁵ A brief on this issue *Ruiz v. Carrasco*, see Appendix A Chapter 5.3, of BREAKING BARRIERS, [HTTP://NIWAPLIBRARY.WCL.AMERICAN.EDU/MANUAL/BREAKING-BARRIERS/](http://niwaplibrary.wcl.american.edu/manual/breaking-barriers/)

¹⁶⁶ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Supreme Court held that words threatening injury to a person, i.e., "fighting words," are not deserving of First Amendment protection, in that "their very utterance inflict injury or tend to incite an immediate breach of peace." *Id.* at 572. See also *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Supreme Court further stated that "It had never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed." *Id.* at 555-56 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 409, 502 (1949)).

¹⁶⁷ See *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988), where the Fourth Circuit held harassment is not protected speech. *Id.* at 243. See also *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1996), where the court assumed that threats to harm another person constitute conduct that the state may prohibit, rather than speech protected by the First Amendment. *Id.* at 43. See also *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) where the Supreme Court upheld an injunction prohibiting a course of unlawful conduct, not because of the content of speech, but rather as a remedy for prior unlawful conduct. *Id.* at 763 n.2.

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charge.¹⁶⁸ The connection here between relief and abuse is that in many cases but for the abuser's refusal to file, or the withdrawal of the petitioner's immigration case, she would have legal immigration status. He would have filed and paid the fees for filing an immigration case for her. Ordering the abuser to pay filing fees or other fees related to the victim's immigration case removes financial disincentives to her filing and helps assure that her case will be resolved quickly and successfully. Further, his payment of these costs enhances the likelihood that she will be granted lawful permanent residence without encountering public charge problems. Both domestic abuse and sexual assault perpetrators can be ordered to pay these costs. The case may be a VAWA self-petition or a U-visa. However, advocates and attorneys working with immigrant victims should carefully consider the importance of maintaining VAWA confidentiality in the case. If it is important that the abuser not know about the immigration case, then ordering him to pay for the costs of the case would risk confidentiality.

- *The respondent shall immediately relinquish possession and/or use of and transfer to the petitioner the following items:*

(A) Petitioner's Property

This should include items that the petitioner wants returned to her that are in the possession of the respondent, i.e. clothing, jewelry, and toys of the petitioner's children, as well as other personal items, such as family photos from the petitioner's home country, mementos from the petitioner's home country, personal religious items, pictures of the petitioner's children, gifts from family members, letters, books, the petitioner's pocketbook, and any other items of personal importance or sentimental value to the petitioner. If the parties are married, a court may order the return of items that are needed by the petitioner immediately and not return other items until dissolution of the marriage. Attorneys representing the victim should argue for and provide evidence to support granting victim control over times that needs and are of value that could be sold, lost, gifted to others or destroyed by the abuser to preserve them until the divorce has been final. This provision will prevent the batterer from inflicting emotional abuse through the destruction or sequestration of petitioner's or the children's property.

(B) Petitioner's Property (needed to prove or attain legal status)¹⁶⁹

This includes the petitioner's essential documents, such as the petitioner's work permit, ID card, social security card, border-crossing card, pay stubs, bank card, alien registration receipt card, passport, or passport stamp to prove permanent residency. If the immigrant victim is a lawful permanent resident or a non-immigrant visa holder with permission to work and live in the U.S, she will need these essential documents to prove her status and her ability to work legally. Connection between relief and violence: This helps the victim prove her legal status, as well as her right to work and reside in the U.S. and ultimately prove that she will not become a public charge. It prevents the abuser from withholding or destroying these essential documents, thereby making it harder for her to work. In the alternative, the petitioner should know the cost of replacing these documents and request that the respondent pay the amount it will cost her to replace them.

SAFETY NOTE: The provisions for delivery of these items should be drafted very carefully and with the involvement of the petitioner. If the items are larger items, plan for who will be allowed to be present to assist petitioner and that the respondent will not be present and that the law enforcement officer stand by during the process. Also, check ahead of time if there will be a cost involved with standby and/or rental of moving truck and request that respondent pay that amount.

The following documents should also be obtained through a protection order. They can be very important for immigrants attempting to gain immigration relief, especially if they are married to, or are the children of, abusive U.S citizens or lawful permanent residents. This provision can allow the

¹⁶⁸ Advocates and attorneys can also explore whether domestic violence organizations, faith-based organizations or other groups in your community have established programs designed to help battered immigrants pay the fees associated with filing immigration cases.

¹⁶⁹ For a detailed list of the documents that will be helpful to an immigrant victims filing a VAWA immigration case, see Chapter 3 of this Manual, *VAWA Confidentiality*.

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petitioner to obtain evidence needed to prove a VAWA, crime victim visa (U-visa), or other domestic violence/sexual assault-related immigration case.¹⁷⁰

*(1) Copies of Information or Documents About Respondent (VAWA related)*¹⁷¹

These items are essential for the victim's VAWA related case and may be needed to prove specific elements of the case, such as the respondent's immigration status. Examples of these documents include: the respondent's passport, work permit, certificate of naturalization or citizenship, alien registration card or passport stamp to prove permanent residency, bank card, ID card, Social Security card, abuser's baptismal certificate, birth certificate, military card, and copies of any documents the abuser may have filed with the DHS on the client's or the children's behalf. Connection between relief and violence: The immigrant victim must prove that her abuser is a lawful permanent resident or citizen in order to be granted immigration benefits under VAWA. If the abuser refuses to produce evidence of his immigration status, he can continue to control the victim's access to legal immigration.

*(2) Evidence of a Good Faith Marriage*¹⁷²

Evidence of a good faith marriage is a necessary aspect of a VAWA immigration case. Examples of evidence include: the parties' marriage license application, marriage certificate, wedding photos, joint bank accounts, income tax returns, deeds, correspondence addressed to both parties, photos from family trips or events, papers, documentation, or other objects relating to the marriage, copies of the respondent's divorce certificates from any previous marriages, and/or information about where such divorce decrees may be obtained. Connection between relief and violence: This provides essential evidence for a VAWA case and undermines the ability of her abuser to harm her immigration case by not withholding or destroying these documents.

*(3) Other Materials which the DHS needs to establish that the parties have resided together and that the petitioner currently resides in the United States, or that abuse against her occurred in the United States*¹⁷³

As part of the petitioner's VAWA case she must prove that for some period of time she resided with the abuser. She must also prove that she currently resides in the United States or that one or more incidents of abuse occurred in the United States.¹⁷⁴ She may need evidence that may be in the abuser's control to prove these facts. Examples of this type of evidence includes leases, rent receipts, children's school records, utility bills, cancelled mail addressed to either or both of the parties at the same addresses during the same time frame, and income tax returns. Connection between relief and violence: It lessens the ability of the abuser to control the victim and allows the petitioner to gather evidence for her immigration case.

The immigrant victim needs access to property, documents and information that may be in the abuser's control. This is true whether she remains in the family home and evicts him or if she or he leaves the family home. The process for obtaining the information under a protection order may be different depending on whether she leaves or removes the abuser from the home. If she leaves, her protection order should include a provision ordering that the police accompany her to the family home and stand by to ensure that the petitioner collects all items listed in the order in each of the categories discussed above. If the abuser refuses to turn over documents, the police can charge him with violation of the protection order. If he claims that he does not have listed items, the police should document that in a police report so that the victim can return to court to have her order modified to require the abuser to pay any costs associated with replacing the missing documents.

If the abuser will be evicted from the family home, the police should be ordered to:

¹⁷⁰ Review Evidence Checklist in Appendix of this chapter.

¹⁷¹ Refer to Chapter 3 of this Manual, *VAWA Confidentiality*, for a full list.

¹⁷² Refer to Chapter 3 of this Manual, *VAWA Confidentiality*, for a full list.

¹⁷³ Refer to Chapter 3 of this Manual, *VAWA Confidentiality*, for a full list.

¹⁷⁴ This is true unless her abuser is a member of the U.S. military or a U.S. government employee stationed abroad. INA Section 204(a)(1)(A)(v) and 204(a)(1)(B)(iv).

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- accompany the victim to the home;
- serve the abuser with the protection order or temporary protection order; and
- stand by while the respondent removes only those items that are his personal clothing, personal effects, and items that the protection order says he can remove.

It is best that the victim prepare a full list of what the respondent can take with him in advance, and ideally have it attached to or included in the protection order. If she has not included these items in the protection order, she can work with her advocate to prepare this list and present it to the police. It is not advisable to put the immigrant victim in the position of negotiating with the abuser in front of the police regarding which items the abuser can and cannot take. With any potentially disputed items and any items the abuser may claim are his, which the victim may need for her immigration case or for a custody case or child support case, use and possession of these items should be granted to the petitioner as part of her protection order.

If the immigrant victim is concerned that her abuser may try to destroy documents in his control that she may need for her immigration case and if she can show she is in imminent danger, she could either obtain a temporary protection order removing the abuser from the house and ordering him to stay away and then locate the documents or obtain an emergency order that allows the petitioner to leave the home with these items. If the documents that she needs cannot be located at the home, she can either ask that the abuser turn them over to her in open court, on a certain date, or ask that the abuser pays the cost of her securing duplicate documents as part of her full protection order, or as part of a modified protection order.

- *The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden or claimed to be missing by the respondent, including the petitioner's or the children's passports, alien registration cards, social security cards, birth certificates, bank cards, work authorization documents, driver's licenses, or papers in any immigration case filed on behalf of the petitioner or the children.*

By requiring the respondent to assume financial responsibility for destroyed documents, he is less likely to destroy essential documents. The destruction of documents can affect a woman's legal right to work, ability to establish her or her children's identity and right to legal immigration status. If the abuser does destroy or hide immigration documents or other documents or papers the victim may need for immigration or a child support case, the respondent should be ordered to pay for replacements so that the respondent's actions will not succeed in interfering with her immigration case.

The respondent's destruction of documents also has cultural ramifications as in many countries official documents are essential to functioning in normal society, and the respondent may feel that by destroying these documents he is exerting control over the victim. Many abusers and perpetrators may try to minimize in court the importance of document destruction. By downplaying these actions they hope to convince the judge that the document destruction is unimportant. Many judges who have not received training to understand the particular role that identity documents play in other countries may wrongly dismiss evidence about document destruction as irrelevant. The connection between document destruction and abuse: Ordering the perpetrator to replace destroyed, lost, or missing documents will further the victim's ability to work legally, and obtain public benefits and, in some states, a driver's license.

- *The respondent shall sign a document in open court in which he provides under oath, both orally on the official court record, and in writing, the following information: the state, city and country of his birth, and the hospital in which he was born. The respondent shall sign the state form required to obtain a copy of his birth certificate in open court.*

This allows the petitioner to obtain a copy of the respondent's birth certificate, which may be necessary to prove his citizenship for a VAWA self-petition immigration case. His birthplace information is provided in open court. Some statutes require a signature for release of birth certificate information. If so, obtain the form and during cross-examination of respondent ask him if he will sign it. If he will not, ask the court to order him to do so. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship makes it easier for her to proceed with her VAWA immigration case. Respondent's testimony, under oath, is also evidence that she can submit the VAWA immigration case.

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- *The respondent shall sign a prepared FOIA (Freedom of Information Act) DHS form with the results of this form to be sent the petitioner or the petitioner's attorney.*

A signed FOIA form can be used to obtain copies of a respondent's immigration case file and any case the respondent may have filed on behalf of the petitioner or the children. His immigration files may include the respondent's immigration case in which he obtained lawful permanent residency, the file in which he became a naturalized citizen, or the file that he completed on behalf of his abused spouse or children. This provision is useful if the respondent has been withholding information from the petitioner regarding the status of the immigration petition that he filed on her behalf and/or documentation of her legal status. The petitioner will be unable to access this information from DHS unless the respondent signs a FOIA form. A signed FOIA form can also be useful if the DHS has in its records information that is needed to prove that the respondent is a citizen or lawful permanent resident or needed to prove the respondent's prior divorces. (See Appendix for sample FOIA form). Connection between violence and relief: Lessens the batterer's control over the victim's immigration status, thus lessening his ability to abuse her.

- *The respondent shall turn over his A-number or a copy of his U.S. passport in open court along with a copy of documentation proving that he has provided the correct number.*

An essential requirement of a VAWA immigration case is providing proof of the abuser's immigration status. Foreign-born naturalized citizens and lawful permanent residents will have been assigned an "A-number" – an immigration case number – when they applied for lawful permanent residency. Obtaining this number is the most effective way for an immigrant victim to prove the immigration status of her abusive spouse or parent. Submitting the A-number as part of her VAWA immigration case allows the Department of Homeland Security to search its own records to verify that her abusive spouse is a naturalized citizen or lawful permanent resident. Similarly, obtaining a copy of a U.S. born citizen's passport provides evidence of citizenship that the victim will need for her VAWA immigration case. Connection between violence and relief: Granting the victim direct access to proof of the abuser's citizenship or lawful permanent residency status makes it easier for her to proceed with her VAWA immigration case.

- *The respondent shall under oath, sign a document in open court stating whether he has been previously married and identifying the jurisdiction in which each prior marriage was terminated, including the date each prior divorce or annulment order was issued. He shall also state whether or not he has copies of his divorce or annulment decree(s) and shall turn over to the petitioner copies of each decree.*

It is best if immigrant victims can include in their VAWA self-petitions evidence of the abuser's prior divorces. Immigrant victims who can prove that they went through a formal marriage ceremony with the abuser can file for VAWA relief even if the abuser was a bigamist. However, until the statutory change included in VAWA 2000 is incorporated in new DHS regulations, it may be easier to request that the abuser provide this information. This provision helps the petitioner safely obtain this information and gives the petitioner access to proof that will facilitate swifter approval of her VAWA self-petition.

- *The respondent shall not remove the children from the court's jurisdiction and/or the United States absent a court order, and shall relinquish the children's passports to the petitioner or the court.*

As a control tactic, abusers often threaten to abduct children and, in many cases, actually carry out these threats. In 1988, the Department of Justice estimated that parents or family members abducted 354,000 children in the United States.¹⁷⁵ It is suspected that 31.8% of these abducted children were taken out of the U.S.¹⁷⁶ If abusers manage to remove children to other countries, then it may be particularly difficult to trace or retrieve the children. If a provision designed to prevent removal of the children from the United States is included in the protection order, a copy of the order must be forwarded to the Office of Passport Services within the Bureau of Consular Affairs of the United States Department of State to prevent the issuance of

¹⁷⁵ LINDA K. GIRDNER, PH.D & PATRICIA M. HOFF, ESQ., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN 1 (1994).

¹⁷⁶ Klein, *supra* note 28, at 981.

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passports or duplicate passports for the children if the respondent attempts to obtain them.¹⁷⁷ The children should also be registered in the State Department's Children's Passport Alert Program that will notify the victim if the abuser tries to obtain another passport for the children.¹⁷⁸ Connection between violence and relief: The dangers of international child abduction are real. Too often courts and attorneys do not take these threats seriously. Anytime the abuser makes threats that he will take the children and/or that he will prevent the victim from seeing the children ever again, it is important to explore with the victim the likelihood of future international child kidnapping. Some of the questions to ask include the following:

1. Does the abuser have family members or friends living abroad?
2. Does the abuser have the financial means to travel abroad with the children?
3. Has he in fact taken trips abroad in the past to visit family living abroad?
4. Has the abuser himself lived abroad?
5. Is the abuser's country of origin a member and signatory to the Hague Convention?
6. Has the abuser made threats to kidnap or sequester the children or prevent her from seeing them?
7. Has the abuser recently lost or left his job here in the United States?
8. Is the abuser documented or have family members in the U.S. that are documented?

Obtaining a protection order containing provisions that require that the abuser not remove the children from the court's jurisdiction can help prevent international kidnapping. Orders restricting the respondent from kidnapping the petitioner's children, and/or requiring respondent to turn over the children's passports, lessen his ability to threaten and abuse the victim. This provision should be included in the protection order whenever the abusive relationship has included threats of parental kidnapping.

The order should also address the mechanics of how and to whom the passports should be turned over. They can be turned over, in open court, to the petitioner or it can be ordered that the passports be held by counsel for petitioner. The passports could also be turned into the court to be held in the court record and turned over by the court to the petitioner.

- *The respondent shall sign a statement that will also be signed by the petitioner and the judge informing a (particular) embassy or consulate that it should not issue a passport (in the case of dual national children) or for U.S. citizen children a visitors' visas or any other visa to the child(ren) of the parties absent an order of the court.*

This provision provides an additional mechanism to prevent possible international kidnapping. A copy of the protection order must be filed by the petitioner with any potentially relevant consulates, passport offices, embassies, and airlines to prevent the issuance of a visa and the removal of the parties' children from the United States. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive parent.

- *The respondent shall post a \$_____ bond that shall be forfeited if the respondent removes the children from the jurisdiction or from the country. The respondent shall purchase for the petitioner a full fair open unrestricted airline ticket to the respondent's country of origin and provide the ticket by ___ date to the petitioner.*

Both this provision and the previous one either separately or together can be included in a protection order to deter international child abduction. The bond should be set at a sufficient level to effectively serve as a deterrent to flight. Purchase of the airline ticket ensures that, should the children be abducted, the petitioner will have the means to travel to the abuser's home country in connection with legal actions to secure the return of her abducted children. Connection between relief and violence: In many cases, this provision has been very effective in preventing the removal of U.S. citizen children from the United States by their abusive father.

¹⁷⁷ For a more detailed discussion on the removal of children, see Chapter 6 of BREAKING BARRIERS, *supra* note 1.

¹⁷⁸ For more information on how to use the Children's Passport Alert Program, see Chapter 6 of BREAKING BARRIERS, *supra* note 1.

Specific Legal Issues Regarding Family Violence Civil Protection Orders

Trial Issues¹⁷⁹

SERVICE OF PROCESS

Most states require that notice of the protection order hearing and any *ex parte* order be served personally on the respondent by the local police, sheriff, or a process server hired by the petitioner. If petitioner does not know where respondent is, the attorney should find out if petitioner knows the location of respondent's parents, brothers, sisters, and other relatives or friends who may know the respondent's whereabouts. Petitioner may be able to file a motion for substituted service instead of personal service. Some states allow for service by publication if personal service is not possible.¹⁸⁰ If the immigrant victim will be arranging for service through a process server, she should consider having service carried out at the perpetrator's work place, where it may be safest. If the petitioner has obtained a temporary protection order removing the abuser from the family home, then that order should be served by the police on the respondent when they accompany her to the home.

STANDARD OF PROOF IN *EX PARTE* PROCEEDINGS

The standard of proof in *ex parte* proceedings is usually good cause, but may vary by state. Good cause can be proven through testimony and other evidence, which establishes that (1) the respondent abused the petitioner and (2) the petitioner's fear of future abuse is reasonable. Case law suggests that the petitioner must show that she is at risk of imminent harm¹⁸¹ and that she must show this by a preponderance of the evidence.¹⁸² In most, if not all jurisdictions, evidence of recent physical violence is sufficient proof of imminent harm.¹⁸³ Further case law illustrates that a broad range of acts, threats, or situations are sufficient to constitute imminent harm, including petitioner's fear that respondent would kidnap their children, the respondent's visitation violations, and an anonymous tip to the police that the perpetrator was going to kill the petitioner.¹⁸⁴

STANDARD OF PROOF IN FULL PROTECTION ORDER PROCEEDINGS

The standard of proof in full protection order hearings is generally a preponderance of the evidence, but this may vary by state.¹⁸⁵ This standard of proof can be established by showing that the petitioner has been the victim of recent abuse or harassment by the respondent. Some jurisdictions have removed the requirement of a recent act from their state's statute. In order to determine whether the standard of proof has been met, courts have acknowledged that past abuse is a factor that the court will consider. Thus, it is highly recommended that the petitioner include not only a listing of recent abuse but also an overview of the history of violence or course of conduct in her protection order petition. The petitioner should include as many specific incidents of violence and threats as she can remember with approximate dates. In some jurisdictions, it is a two-pronged test—the petitioner must prove a history of domestic violence and the likelihood of future violence. If the parties have children, there will undoubtedly be future contact between the parties. If petitioner is dependent on respondent by virtue of an immigration application, this may also be true.

A petitioner's testimony alone can meet the standard of proof for issuance of a protection order. Thus it is very important that advocates and attorneys working with immigrant victims carefully explain that her testimony *is* valid evidence in the United States legal system. The testimony of immigrant victims will be more credible if the victim's fears about the legal system are addressed, if she has correct information about the system and if she has had an opportunity to see how the judicial system protects battered women before she will need to testify in her case. In addition to the immigrant victim's testimony, attorneys and advocates should assist

¹⁷⁹ See Chapter 3 of this Manual, *VAWA Confidentiality*, for evidence checklist that can be useful in preparation for a protection order hearing.

¹⁸⁰ Klein, *supra* note 28, at 877-80.

¹⁸¹ *Id.* at 1036.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1043-48. Preponderance of the evidence is generally considered that the credibility scales tip toward believing the petitioner (51%).

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immigrant victims in gathering and presenting other evidence that will be helpful to the court. Examples include witnesses, photographs, police reports, and medical reports to corroborate the victim's testimony. Presenting these types of evidence will help victims obtain comprehensive remedies addressing their specific needs. These forms of corroborating evidence will also assist the petitioner in proving her case if the respondent contests the case, seeks custody of the children, or comes to court with an attorney.

PREPARATION

Advocates and attorneys should prepare immigrant victims thoroughly for the protection order hearing or any open legal proceeding, including a review of the court procedures, potential questions that will be asked, proper courtroom attire, and behavior. Before explaining how the U.S. legal system functions, ask immigrant clients about their expectations of the legal system and help them understand how our system differs from the legal system in their home countries. Immigrant victims are often unfamiliar with the U.S. legal system. Unless they are informed otherwise, they expect it to function much like the legal system in their country of origin. In their home country, oral testimony may not be valid evidence; judges may serve both the prosecutor and the judge and may not be impartial, and may even function by having the person with the most money and political connections win (this is usually the abuser).

When immigrant victims are being prepared to present testimony at the protection order trial, it is very important for attorneys and advocates to explain that testimony is valued evidence in the U.S, and that a woman's testimony has the same value as a man's. Failure to identify and address the immigrant victim's concerns or misinformation about our legal system could affect the quality of her testimony and ultimately her credibility. Reviewing these issues with a client may significantly improve the client's credibility as a witness, as she will be able to better understand the proceedings and therefore be more forthcoming with details of her abuse. The client will testify more effectively if she thinks the court will believe her, if she knows that in our system testimony is valid evidence, and if she knows that the respondent is an equal party and cannot bribe the judge or court officials. This will allow the client to understand the importance of a victim's personal testimony, and envision a court issuing a protection order crediting the victim's oral testimony. It may be helpful to take the immigrant victim to court in advance of her hearing to watch other cases in order to bolster her confidence in our system and make her a more credible witness. It is recommended that an attorney prepare the immigrant victim through mock trials, so that she is comfortable with the line of questioning, the role of the judge, opposing attorney, and various other key participants and witnesses in her case. To summarize: advocates and attorneys can do the following to help prepare immigrant clients for civil protection order hearings:

- ask clients about what they expect of the legal system;
- describe how the U.S. legal system works;
- describe the difference between the U.S. system and that in her country of origin;
- review procedures used in the local court;
- offer to take the client to court to see protection order proceedings in other cases;
- review the questions that may be asked should a hearing be necessary with the client;
- review the questions that the defense attorney and/or the judge may ask; and
- explain proper courtroom behavior and dress.

When preparing the client for her testimony in court, it is important to recognize the psychological impact of physical, mental, emotional, and sexual abuse that may interfere with the quality and credibility of her testimony. The victim may appear angry, hostile, withdrawn, passive, anxious, terrorized, or numb. Each of these presentations may be a "normal" reaction to trauma. An immigrant victim's demeanor and oral testimony in court may be strongly affected if the victim is encountering the batterer for the first time since the abuse or assault occurred. However, a victim with strong support from family, friends, and advocates will appear more assertive, strong, and competent as a witness.¹⁸⁶

¹⁸⁶ MARY DUTTON & GISELLE HAAS, AMERICAN BAR ASSOCIATION MANUAL ON VAWA CASES, (1999).

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It is also important to recognize the cultural factors that may restrict the client from discussing intimate abuse, especially in the presence of her perpetrator and other male strangers. Advocates and attorneys need to work through these issues beforehand, to ensure that the client gives a complete, accurate, and uninhibited account of her abuse. It may be the first time she has shared such intimate and traumatic details with anyone, so she may not be emotionally prepared to tell her “story” in a manner that can be used as testimony. Specifically, attorneys and advocates should explore whether the respondent ever forced the petitioner to engage in sexual relations against her will, and if so, how often. Often times, clients will believe that if they are married to their abusers it is not against the law to force her to have sex.

It is important to make sure that a professional interpreter is available if needed. Although the National Center for State Courts and the National Institute of Justice strongly recommend that all courts have interpreters assist limited English proficient protection order applicants when filing for a temporary and/or full protection order hearing, the court may not always provide interpreters, they may charge fees for interpreting services, or they may have interpreters who, while certified and free, are not trained in sexual assault and domestic violence issues. Interpreters from the petitioner’s family or tight-knit cultural community may not translate appropriately due to shame, embarrassment, or loyalty to the respondent. It is possible to find qualified interpreters through nonprofit organizations in the petitioner’s community, through a local university, or a domestic violence organization with bilingual staff. Interpretation should not only be available at the court hearing; it should also be available to lawyers/advocates who need interpretation to communicate with their clients. It is important to have interpreters trained in domestic violence issues and cost-effective (or free) professional interpreters throughout the advocacy process.¹⁸⁷

Attorneys and advocates should take steps in advance to address the interpretation needs of clients. Hiring bilingual staff is the best way to address this need for significant language minority population.¹⁸⁸ Paid staff could include part-time interpreters who have been trained on domestic violence issues. They can be on-call, and paid on an as needed hourly basis. Part-time interpreters may be recruited from local universities, religious groups, social services agencies, and immigrant rights groups. Other ideas include funds in the agency budget to hire interpreters from the Language Line, and other similar resources for languages spoken by immigrant victims who are isolated from others who speak their language. In the long run, the best and most cost-effective approach is for advocates and attorneys to urge local domestic violence coordinating councils to advocate for passage of an interpreter statute or court rule that requires state or local jurisdiction to establish an interpreter service that is provided by the court to all who need its services in criminal and family court. These services should be free to indigent clients and available on a sliding fee scale for other litigants with some means to pay.

OBTAINING A JURISDICTIONALLY SOUND PROTECTION ORDER

Advocates and/or attorneys should attempt to negotiate a consent order with the respondent or the respondent’s counsel (if represented). If the respondent does not agree to the provisions listed, the immigrant victim’s attorney should be prepared to litigate the case. As more and more immigrant victims seek protection orders, courts are seeing higher caseloads, and are seeking ways to dispose of these cases more quickly. In response, some jurisdictions have begun to encourage greater numbers “of consent” protection orders.

It is absolutely essential that immigrant victims understand the implications of accepting a consent protection that, on its face, states that it is being issued without any finding of abuse or admission by the respondent, as such orders can undermine the petitioner’s immigration case. Protection orders that explicitly state that the court is making no findings of abuse risk being found jurisdictionally unsound on appeal.¹⁸⁹

Subject matter jurisdiction in a civil protection order case under all state protection order statutes is conferred when an incident of sexual assault/domestic violence/harassment, as defined by the state statute, has occurred. Without any type of finding by the court that sexual assault/domestic violence/harassment has occurred, the

¹⁸⁷ For more information on language access and working with language interpreters, see Chapter 2 of this Manual, *Language Access, Confidentiality, Interviewing and Safety Planning*.

¹⁸⁸ ORLOFF *supra* at note 48.

¹⁸⁹ For a more complete discussion of this issue, see Chapter 15 of this Manual, *No Findings Protection Orders*.

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court lacks the authority to issue a protection order. Parties by consent cannot confer subject matter jurisdiction on a court that does not have it.¹⁹⁰ Subject matter jurisdiction is fundamental to the court's authority to issue a protection order.¹⁹¹ Thus, courts should not be issuing protection orders that on their face state that the order is being issued "without findings" and/or that the court is entering the order without making any finding as to abuse.

Such orders are dangerous for abuse victims for a number of reasons. First, an order without findings may undermine the ability of courts to have perpetrators turn over weapons. Second, it may limit a victims' access to immigration relief and public benefits if she is also a victim of domestic violence. Third, it allows the perpetrator to avoid accepting responsibility for his violent and abusive behavior, thereby undermining the protection order's effectiveness. This does not mean, however, that courts cannot issue protection orders by consent of the parties. The court can issue a valid jurisdictionally sound protection order in one of three ways:

1. *The perpetrator can admit facts sufficient to support the issuance of a protection order either in the process of consent negotiations or to the court.* Although the victim may have included numerous incidents of violence and harassment in her petition, the perpetrator need only be willing to admit one offense, however minor (e.g. a push, shove, or threat of violence) that qualifies under the state statute. Courts often successfully issue consent protection orders on this basis.
2. If the perpetrator is willing to consent to the issuance of a protection order with the remedies the victim is seeking but is unwilling to admit the assault, harassment, or abuse specifically, *the court can base subject matter jurisdiction on the uncontested affidavit of the petitioner.* The court should review the affidavit and determine whether it contains facts that constitute sexual assault/domestic violence/harassment under state law. If the facts in the petitioner's affidavit are sufficient to support the issuance of a protection order, the court can treat it as any other uncontested civil court action and grant the protection order based upon the uncontested affidavit of the petitioner that the court finds to be credible. In practice, any time the parties agree to relief, the court, after reviewing the petitioner's affidavit, can issue the consent protection order on the standard form that contains a reference to the statutory authority for issuance of protection orders. The petition must plead facts that would constitute an intra-family offense. That gives that court statutory authority to issue the protection order. When the court issues a consent protection order, the court should issue the order on the standard court form just as it would do after a hearing. The provisions of the protection order can be those agreed upon by the parties. Courts in jurisdictions across this country currently issue consent protection orders in this manner.
3. If the respondent is unwilling to admit any abuse and is unwilling to agree to the relief the petitioner is seeking, or is only willing to agree to the issuance of a protection order "without a finding," *the petitioner should ask the court for a hearing.* Issuance of a protection order without findings can be harmful to the immigrant victim for several reasons:
 - It can undermine her domestic violence or sexual assault-related immigration case;
 - It can be more difficult for the immigrant victim to be awarded custody of the parties' children;
 - It can allow the perpetrator to retain his firearms avoiding federal laws that require that abusers with protection orders be barred from purchasing fire arms and obtaining a fire arms license;
 - It can make it less likely in a divorce case for the immigrant victim to be able to retain the family home or to obtain an equitable distribution of the family assets;
 - It can make it difficult for the immigrant victim to access welfare benefits, particularly those who are lawful permanent residents; and
 - It allows the abuser to avoid accepting responsibility for his violence and can undermine the effectiveness of the order.

¹⁹⁰ Am. Policyholders Ins. Co. v. Nyacol Prod., Inc. 989 F.2d 1256 (1st Cir. 1993); Latin American Cas. Ins. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477 (11th Cir.1989); Bush v. U.S., 703 F.2d 491 (11th Cir. 1983).

¹⁹¹ See generally Billingsley v. CIR, 868 F.2d 1081 (9th Cir. 1989).

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Advocates and attorneys must encourage immigrant clients to object to these consent orders, and request a full protection-order hearing. If the judge refuses to hold the hearing, the petitioner should object and appeal the decision. If the judge holds the hearing but retaliates in some way against the petitioner for demanding this hearing, she should appeal. Particularly in a strongly contested situation, it is important that the immigrant victim be prepared to prove her case. The victim's ability to win a hearing and/or appeal will be much improved if she has come to court ready to testify and with some evidence corroborating at least one incident of abuse. By doing so, the petitioner should be able to successfully argue that courts do not have the jurisdiction to issue protection orders without a finding or admission of abuse.

It should be noted that the process of obtaining a consent protection order is a *negotiation*. If the respondent does not consent to the protection order, the petitioner should ask the judge to hold a hearing and issue an order at that hearing. In negotiations to determine if a consent protection order can be issued, advocates and attorneys working with immigrant victims should advise the client to litigate the case or sign the consent order based on the strength of the case, the court's willingness to grant specific provisions sought, the need for a judicial finding of domestic violence/sexual assault for future immigration, welfare, or custody cases, and the client's desire to testify and/or hold the perpetrator accountable. It is important to prioritize the client's safety, including how her safety will be enhanced by her ability to obtain immigration relief.

◇ Obtaining a protection order at trial. It is important when working with immigrant victims to come to court on the date of the protection order hearing prepared to litigate. Advocates and attorneys working with immigrant victims should help the petitioner prepare and provide testimony and evidence informing the court about:

- The history of violence in the relationship;
- Any of the petitioner's or the petitioner's children's injuries;
- The affect of violence on the petitioner and/or children, including threats to abduct and/or harm the children;
- How the abuse has affected the children, and the children's counseling needs;
- The petitioner's role in the care and custody of the parties' children;
- Evidence supporting the petitioner's request that the respondent's visitation be supervised;
- The respondent's use of control over the petitioner's access to her immigration status as a tool to maintain power over her and perpetuate violence and abuse, and any threats or actions taken to call DHS to report the petitioner, or other attempts to have her deported;
- Information about the respondent's financial status, employer, and earnings, so that the petitioner can be awarded support;
- A list of documents and items of which the victim needs to take possession, including documents that will help in the petitioner's immigration case;
- The respondent's possession of, threats about, or ability to obtain weapons;
- Threats against the petitioner and/or family members, both in the U.S. and abroad;
- The respondent's abuse of drugs and/or alcohol;
- Any history of mental illness of the respondent;
- The respondent's threats of suicide; and
- The criminal record of the respondent.

To prove that the immigrant victim is entitled to a protection order, to prove each of the facts listed above, and to prove that the immigrant victim is entitled to the relief she is requesting be included in her protection order, the immigrant victim will need to provide testimony to the court. Additionally, she should identify persons who witnessed the abuse, the effects of the abuse, including any injuries, and who would be willing to testify at the hearing on her behalf. Testimony is particularly helpful from persons who may have witnessed the violence itself, have seen the injuries that resulted from the abuse, or who may have arrived at the home while the violence was taking place or shortly thereafter (e.g., police). Law enforcement officials will be less subject to intimidation from the abuser than other witnesses, so it is particularly useful to have them as witnesses in cases in which the abuser has threatened other witnesses.

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There can be significant benefit to having potential witnesses arrive with the petitioner at the court. First, should the perpetrator be unwilling to consent to the issuance of the protection order, or should he contest relief she is seeking, the petitioner will be able to proceed directly to a hearing and will not have to worry about whether her witnesses will arrive on time. Second, the presence of the witnesses may encourage the abuser not to contest the issuance of the order containing the requested relief, because he may be less willing to have a hearing when he knows that there are witnesses ready to testify on the victim's behalf. This is particularly true when police officer witnesses come to court on the victim's behalf. Finally, witnesses can provide support to the victim who may be seeing her perpetrator for the first time since the last incident. Advocates should check the local court rules for issuance of witness subpoenas, to ensure that witnesses are present at the time of the hearing.

In addition to coming to court with witnesses, immigrant women's advocates and attorneys need to gather various forms of documentary evidence and be prepared to issue this evidence should there be a hearing. Examples of documentary evidence might include photographs of injuries and/or the crime scene; items torn, burned, or destroyed during the violence; transcripts or tapes of 911 calls; police records; and medical records.

OTHER ISSUES REGARDING PROTECTION ORDER TRIALS

◇ Right to a Jury. The respondent does not have a right to a jury in proceedings for the issuance or modification of protection orders.¹⁹²

◇ Right to Counsel. The respondent does not have a right to an appointed counsel at a court proceeding to issue or modify a protection order, even if custody is an issue.¹⁹³

◇ Double Jeopardy. Since issuance of a protection order is a civil matter, the perpetrator cannot raise the defense of double jeopardy to prevent the issuance or modification of a protection order. Criminal prosecution would never preclude the victim from filing for a protection order based on the same incident. Immigrant victims should always try to obtain a civil protection order, even if a stay-away order has been issued in a criminal case. This provides protection for the victim in case the prosecution dismisses or does not successfully obtain a conviction in the criminal case. When the criminal case ends, so does the protection of the criminal stay-away order, even if the victim needs continued protection. The civil protection order will continue to protect her from her abuser without regard to the outcome of the criminal case.

Protection Order Enforcement

Upon leaving the courthouse with a signed protection order, the advocate and/or attorney should explain enforcement procedures to the client, and make sure that she understands what actions she can take to enforce her order. Protection order violations are criminal offenses in all states. If a violation occurs, states can prosecute the respondent for criminal violation of the protection order.

When considering enforcing a civil protection order, victims should be informed that non-citizen abusers might be deported if convicted of violating protection orders.¹⁹⁴ Advocates and attorneys working with immigrants considering enforcing protection orders need to do a thorough safety assessment to determine whether she can safely enforce her protection order. Safety for some immigrant victims will be increased if the perpetrator is deported. For some other immigrant victims the danger to the victim and her family members could be worse if the abuser is deported. Further, if this is the first protection order violation and the victim experienced no

¹⁹² Klein, *supra* note 79, at 1070.

¹⁹³ *Id.*

¹⁹⁴ Section 237(a)(2)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(ii) (2006) ("Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible *threats of violence, repeated harassment, or bodily injury* to the person or persons for whom the protection order was issued is deportable.") (Emphasis added).

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substantial injury, she may wish to give the abuser the opportunity to seek treatment and comply with the order.

The immigrant victim should also be informed that there are two ways to enforce a protection order if the perpetrator violates it. First, she can call the police to have her order enforced. When police and state prosecutors enforce protection orders, the enforcement proceeding will be a criminal case brought by and controlled by the prosecutor. Second, the victim can also file a contempt action if the respondent violates the protection order. Victims may file civil or criminal contempt actions to enforce protection orders. The victim controls these actions. A civil contempt proceeding may be desirable when the provisions of the protection order the victim is seeking to enforce involve the abuser's compliance with these types of protection-order violations:

- failure to vacate the family home;
- failure to turn over documents, items, or articles that the court has ordered the abuser to place in the petitioner's possession;
- failure to pay child support, spousal support, rent, or mortgage payments or other payments;
- failure to turn over the children's passports;
- failure to provide the victim with a copy of the abuser's passport, birth certificate, or INS-issued "A" number; or
- failure to return children after visitation.

Generally, at the conclusion of a civil contempt proceeding, the abuser is given a specific time by which to pay the money or turn over the materials. If he fails to do so he is jailed until he complies. It is important to note that civil contempt proceedings for violation of the provisions of the protection order other than provisions that preclude violence, threats, attempts, harassment, and stalking, will not make the abuser deportable.

The immigrant victim may also enforce the order through the criminal contempt process. In a criminal contempt case, the victim brings charges for violation of the protection order against the abuser. This is a way to criminally enforce the order, potentially jailing the abuser as punishment for his protection order violations, in a case that the victim controls. It is important to recognize that a perpetrator who commits a crime against a victim in violation of a protection order may be subject to two types of actions in criminal court: (1) a criminal contempt action by the survivor, and (2) a criminal prosecution by the local prosecutor for the crime itself. The victim can bring her own criminal contempt action against the perpetrator, without prosecution for the underlying sexual assault/domestic violence/harassment/stalking crimes, so long as she seeks criminal contempt convictions for violation of the protection order only and not for commission of the underlying crime.¹⁹⁵ Criminal contempt can be charged for:

- any further abuse
- harassment
- threats
- stalking
- violation of the stay away/no contact provisions
- failure to turn over the children after visitation
- kidnapping or sequestering the children.

Convictions for violations of a protection order in a criminal contempt proceeding are deportable offenses for non-citizen perpetrators, as are criminal enforcement of the protection orders by police and prosecutors. Advocates and attorneys working with immigrant victims whose perpetrators are non-citizens should undertake

¹⁹⁵ Survivors who believe that a criminal prosecution against the perpetrator is possible therefore should carefully structure their enforcement actions to avoid the problem of double jeopardy. Double jeopardy occurs if the respondent is being simultaneously or subsequently prosecuted for the same exact crimes by both the court in the contempt case and the court in the criminal case. The petitioner can avoid a double jeopardy violation by filing a contempt action for the respondent's violation of the protection order, not his criminal actions that he committed when he also violated the protection order; *United States v. Dixon*, 509 U.S. 688 (1993), referred to and discussed in Klein, *supra* note 79, at 810.

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safety planning to determine whether the immigrant victim can safely cooperate in the prosecution of the perpetrator for criminal contempt or criminal prosecution for violation of the protection order.

Advocates should encourage the survivor to call the police if she is in danger, yet also support her decision not to call the police. This is particularly important if after lethality assessment and safety planning, she decides that her perpetrator's deportation actually enhances danger to her and her family members and/or may lead to attacks against herself, her children, or family members living in the United States or abroad.

There are important steps advocates and attorneys can encourage victims to take whether or not they are initially willing to use the justice system to enforce their protection orders. Attorneys working with immigrant victims must carefully explain to the victims the potential immigration consequences of enforcement. The following are steps clients can be encouraged to take whether or not they currently plan to enforce their protection orders:

- Calling the police to report violations even when the client is not asking the police to make an arrest or take other action. Most police departments have procedures for taking police reports of criminal activity after the fact and for handling cases in which they or the victim are not seeking an arrest. Filing of such reports in a timely manner relatively soon following an incident, or to document past unreported incidents when the victim has delayed in coming to the advocate or attorney for help, can document the domestic violence should there be future incidents of abuse or should the survivor in the future decide that she needs to enforce her protection order.
- Keep a journal or make notations on a calendar of all protection-order violations.
- Document the effect that protection order violations have had on themselves and on their children.
- Tell someone else: a friend, a co-worker, a therapist, a trusted family member, or a member of the clergy about ongoing abuse and protection order violations.
- Take photographs of injuries, destruction of property, unwanted gifts.
- Keep letters, e-mails, and phone messages.
- Report injuries to health professionals.

It is important to explain to immigrant clients that having this type of documentation may increase their protection in the future. Should violence and/or violations of the protection order increase, immigrant victims who have been helped to gather this documentation will be better able to enforce their protection orders. In addition, as mentioned above, these forms of documentation may be extremely helpful for the immigration relief available to the victim.

Modification of Protection Orders

If an immigrant victim wishes to amend any provisions of her protection order, she may file a motion to modify the order. Advocates and/or attorneys should inform her that she has the right to modify the order and support her in making that decision. She may wish to seek modification for a variety of reasons. She may not have received a form of relief in her original protection order that she now needs. For example, she may have wanted to continue living with her abuser originally, and now wishes to separate because there has been ongoing abuse or threats. In this case, she can choose to file a motion to modify her order based on continued abuse, ask the court to remove the abuser from the family home and grant her custody and child support, or she can file a motion for criminal contempt and modification of the order (see discussion of motions for contempt above in the section on enforcement).

On the other hand, she may have been separated from her abuser at the time she received her protection order and now wants to reunite with him. If she wants to reunite with her abuser, she may do so without being prosecuted for having violated her own protection order.¹⁹⁶ However, judges in contempt actions may be more

¹⁹⁶In all states, except Hawaii and Iowa, the protection order is between the court and the abuser, only the abuser may be prosecuted for protection order violations. Victims should not be prosecuted for aiding and abetting the abuser's violation of the court order, if the parties resume living together in violation of court orders. A sample amicus brief in the case of *Harrison v. Harrison*, articulating the legal arguments against enforcing protection orders against victims in see Appendix C, Chapter 5.3 in *BREAKING BARRIERS*, *supra* note 1. <http://niwaplibrary.wcl.american.edu/manual/breaking-barriers/>

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lenient in sentencing abusers when the victim and abuser have reunited after the protection order was issued. Generally, judges will be willing to enforce the protection order should future violence occur despite reunification, even when the protection order was not modified as the order was against the respondent not the petitioner. However, it may be more difficult should the victim want the abuser to move out and wish to enforce and modify the order to state “no contact” provisions without future violence or threats. If the petitioner wants to reunite or has reunited with her abuser, it is advised that she seek modification of her protection order. Advocates or an attorney should remind her that she can always come back for legal assistance or advocacy in reinstating the old provisions of her protection order, if the parties again separate. It is vital that attorneys and advocates work with her to develop or revise a safety plan that uniquely addresses her situation upon reconciliation with the abuser.

Another reason women often seek modification of their civil protection orders is that they want to give the abuser generous visitation time with the children because they believe he is a “good father.” This is especially true when the abuser has not physically hit or injured the children. Abusers will often times use their visitation time to inflict more abuse by manipulating the children, bad-mouthing the victim, or by trying to use the children to find out information about their mother. In these situations, a motion to modify may be essential to protect the safety of the victim and children.

The immigrant victim may need to modify because the perpetrator is using other ways to harass or intimidate the victim or her family that were not specifically listed in the protection order.

Advisories

When protection orders involve non-citizens as petitioner, respondent, or both, the issuance of a protection order can have certain benefits and/or consequences particular to non-citizen victims and respondents. Advocates and attorneys involved in coordinated community responses to domestic violence, in judicial training, in court systems advocacy, and/or in representation of battered immigrants seeking protection orders, should urge judges to provide critical information to both parties in all protection order cases. It is best if these advisories from the bench be given in all cases because the court, attorneys, and advocates can never know for sure whether one of the parties is an immigrant. If the courts are unwilling to do this in all cases, judges may be willing to do so in cases in which a party requests one or more of the advisories listed below, or in cases in which the court becomes aware that one or both of the parties is a non-citizen. When training judges, it is important to emphasize that it is not prudent for the court to seek out information about any party’s immigration status. The court can convey the needed information to all parties, and any particular party’s immigration status is not relevant to any family court or protection order proceeding.¹⁹⁷

There are four issues courts should address in advisories to the parties in all protection order cases:

1. Any person can seek and receive a protection order without regard to immigration status.
2. The issuance of a protection order has no immigration consequences for either party.
3. Issuance of a protection order may provide evidence that could be helpful to a petitioner in her immigration case; and
4. Violation of a protection order is a deportable offense.

When the court opens proceedings each day, along with advising courtroom attendees that the petitioners are to sit on one side of the courtroom and respondents on the other, the court should inform all parties that the issuance of a protection order does not have any immigration consequences. Further, the judge should state that any person who has been abused might seek and obtain a protection order without immigration consequences. The court may also wish to advise respondents at this time that any violation of a protection order is a deportable offense for any non-citizen. Courts should be urged to provide the information that the issuance of a protection order could help petitioner’s immigration case only upon issuing the protection order, so that providing this information is not perceived by the court as influencing the victim’s testimony should a hearing be necessary.

¹⁹⁷ See full discussion of immigration status and jurisdiction in Chapter 6 of *BREAKING BARRIERS*, *supra* note 1. <http://niwaplibrary.wcl.american.edu/manual/breaking-barriers/>

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◇ Recommended advisory at opening of protection order proceedings: “This court’s role in these proceedings is to issue orders of protection in cases in which the court believes that a domestic violence offense under the statutes of this state occurred. The court will issue such orders without regard to the immigration status of either the petitioner or the respondent. Further, the issuance of a protection order will not have negative immigration consequences for either party. However, violation of a protection order issued by this court can be a deportable offense for any respondent who is a non-citizen.”

◇ Advisory upon issuing the protection order: Additionally, before issuing a consent protection order, or after holding a hearing on the issuance of a protection order, and before issuing the order the court should issue the following advisory in open court to both parties on the record:

“The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as codified at 8 U.S.C. Sec. 1227(a)(2)(E)) makes a violation of this Order a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, violation of this Order may result in your being deported.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 also makes a conviction for a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment a deportable offense. If you are not a U.S. citizen, *which includes being a lawful permanent resident or other lawfully present non-citizen*, and you violate this order or are convicted for one of the above listed offenses, you may be deported.¹⁹⁸ Petitioners who have been awarded protection orders by the court should know that immigrant victims of domestic violence might be eligible to receive legal immigration status as victims of domestic violence. Any non-citizen who wants a referral to a battered women’s services agency that can advise her of her legal rights to immigration benefits and other services available for victims of domestic violence should ask the courtroom clerk for a brochure that will provide petitioners information about services available in our community to help victims of domestic violence.”

Conclusion

In terms of remedies, lawyers or advocates should know the specific scope of protections available in their state. A chart detailing each state’s statute is included in the appendix. They should see how those provisions overlap with traditional and creative provisions as outlined in the intimate relationships part of this chapter. Many of the provisions do overlap, and the discussion above will also be relevant to the non-intimate context. Attorney and advocates should consider traditional protection order provisions with any possible catchall provisions. Where a catchall provision does exist, attorneys should advocate for creative use of catchall provisions. Additionally, where a perpetrator does not fall under a typical state protection order, but is well known to the victim, lawyers and advocates should also consider protection order provisions used in intimate relationship situations.

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¹⁹⁸ Suggested Order for Protection Relief for Battered Immigrants. Centro Legal (3/16/98).

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