

Appendix 8A

Training Memo—Use of No-Contact Orders in Domestic Violence Criminal Cases***Criminal No Contact Orders***¹

Criminal no contact orders generally are not issued at the request of the victim. Rather, the order is imposed *sua sponte* by the court or upon request of the prosecution. Such orders are viewed by both prosecution and courts as an appropriate tool to enhance victim safety in the criminal justice system's response to criminal domestic violence. The filing of criminal charges and the issuance of criminal no contact orders (NCOs) alone, however, do not keep victims safe. In fact, one study showed that 51% of defendants charged with domestic violence felonies were rearrested before their criminal cases were concluded.² Both prosecutors and judges should consider various factors, in addition to the wishes of a particular victim, when determining whether to impose or maintain a criminal no contact order prior to conviction and/or as a condition of release.

No contact orders can be a valid protective tool based on the fact that the defendant has been arrested for a crime which has threatened or caused bodily harm to the victim. However, such no contact provisions may not always increase a particular victim's safety and in some cases may impose a significant burden on the victim. Significantly, research has shown that, in some cases, a victim's separation from an abuser actually increases the risk of lethality. The decision by the prosecutor or the court to restrict contact between a batterer and his victim does not always achieve the system's goal of victim protection and safety.

The prosecutor's role as attorney representing the interests of the community and the judge's role in determining conditions and restrictions on the behavior of the defendant, may result in conflicts when the prosecutor's and judge's decisions about how to proceed with the case conflict with the victim's stated wishes. Some victims leave the abusive relationship, but then return; some victims do not want to end contact with the defendant but simply want the violence to end. Some victims object to no contact orders because of negative collateral consequences the order may impose on her. Other victims object to no contact orders out of fear of the defendant or due to actual threats and intimidation by the defendant. In some cases, victims have determined that no contact provisions may actually increase the violence to dangerous and deadly levels.

Actors in the criminal justice system must understand and evaluate the competing factors that make these decisions complicated and challenging. Although the victim is not a party and the prosecutor does not represent her, her wishes must be considered – along with other factors – when deciding to impose or maintain a criminal no contact order. In order to maximize victim safety and offender

¹ This training memo uses material and is adapted from Jennifer Long et al., Model Policy for Prosecutors and Judges on Imposing, Modifying and Lifting Criminal No Contact Orders, (Battered Women's Justice Project, February, 2010).

² L. NEWMARK, M. REMPEL, K. DIFFILY, AND K. KANE, SPECIALIZED FELONY DOMESTIC VIOLENCE COURT: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE, Final report for National Institute of Justice, grant number 97-WT-VX-0005. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice, October 2001 (NCJ 191861) and 2004 (NCJ 199723); available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=191861> and <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=199723>.

accountability, while minimizing the potential collateral consequences to a victim, prosecutors and judges must develop and implement a process to gather timely and accurate information about risk and lethality, a particular victim's wishes and motivations, and possible negative consequences in order to best determine when to impose or maintain a no contact order in the face of a victim's opposition.

Prosecutors and judges must recognize that “[w]omen are most at risk of violence after ending, or while trying to end, an abusive relationship.”³ In many situations, the imposition of criminal charges and no contact orders is viewed by batterers as a step towards separation. While criminal charges are pending, batterers often attempt to prevent victims from leaving the relationship, retaliate for her efforts to separate or force her to return to the relationship.⁴ According to one study, offenders who were subject to no contact orders were more likely to commit further abuse than offenders whose no contact orders or conditions of release permitted some contact with the victim.⁵ Because of the prevalence and real likelihood of “separation assault,” a victim's decision to maintain contact with her batterer may be a calculated strategy of resistance and survival. Thus, a victim's request to terminate or modify a no contact order, often viewed by the criminal justice system as a symptom of weakness or psychological impairment, may actually be a rational assessment of her danger.⁶ Moreover, the issuance of a no contact order over the victim's objection may have the effect of discouraging her participation in the criminal justice response and make it less likely that she will involve the criminal justice system in the future. This resulting reluctance is yet another way in which an unwanted no contact order may have the paradoxical effect of reducing victim safety.

Pretrial No Contact Orders

Generally, a no contact order will not be requested over the objection of the victim unless it appears that the objection is the result of intimidation or threats by the defendant or the available information indicates that there is a substantial risk of serious harm to the victim or her children. The potential for intimidation or serious risk is present in every domestic violence case. This undifferentiated potential should not be the basis for requesting a no contact order over the victim's objection. Rather, such requests should be based upon an evaluation of the information specific to the case at hand.

Prosecutors will sometimes be faced with conflicting information on the victim's wishes (she may tell an advocate she is afraid and tell a bail or pretrial release screener she is not) or she may change her mind between the time of arrest and the first court appearance as she is trying to sort through all

³ M. R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); P. TJADEN & N. THOENNES, PREVALENCE, INCIDENCE AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, NCJ 172837. Washington, DC: U.S. Dept. of Justice (1998); P. TJADEN & N. THOENNES, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY. Washington, DC: U.S. Dept. of Justice, Nat'l Institute of Justice (2000).

⁴ See e.g., K. Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT'L INST. OF JUSTICE RESEARCH IN ACTION, U.S. Dept. of Justice, Washington, DC (October 1995); N. Cline et al., *Prosecuting Witness Tampering, Bail Jumping and Battering From Behind Bars*, ENHANCING RESPONSES TO DOMESTIC VIOLENCE: PROMISING PRACTICES FROM THE JUDICIAL OVERSIGHT DEMONSTRATION INITIATIVE, Vera Inst. of Justice (2006).

⁵ S. F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1520 (2008).

⁶ *Id.* at 1502.

her feelings and options during this time of crisis. Given this reality, it is critically important for prosecutors and pre-trial personnel to evaluate the risk and danger of each particular case. *See Practitioner's Guide to Risk and Danger in Domestic Violence Cases.*

For a number of reasons victims should not be required to be present in court to convey their objection to the initial issuance of the no contact order. Victims can make their objection known through communication with court personnel, i.e. prosecutor, pretrial release, or victim/witness staff etc. or advocates. Requiring the victim's presence in court can create an additional burden if she is forced to miss work, find transportation or arrange child care. Being placed in the position of addressing the court in the presence of the defendant may increase the risk of retaliation. Additionally, statements the victim may make on the record concerning the actions at issue or her level of fear could create potential problems for the criminal case.

For a substantial number of women who find themselves in abusive relationships, the ideal outcome is the elimination of the violence while maintaining the relationship. For a victim in this situation, modifying a no contact order to permit some contact between her and the batterer, or rescinding the no contact order entirely may be the most effective course of action. On the other hand, many victims ask prosecutors and judges to lift or modify no contact orders due to fear, because they have been threatened or intimidated by their abusers. In this situation, granting an abuser greater access to the victim could place her in greater danger. Defendants must not be given a reason to believe that intimidating the victim into appearing in court to request the order be lifted is sufficient or all victims who wish to have no contact with their former partners will be further endangered. It is important, therefore, that prosecutors and judges obtain accurate information to determine a victim's motivations in objecting to or seeking the termination or modification of a no contact order.

1. Absent any indications to the contrary, a criminal no contact order should be issued in each case. Contrary indications may arise from the context of the violence. For example, when the defendant in the current case appears to be a victim of ongoing, coercive violence who is accused of using illegal, resistive violence or when the defendant does not appear to have engaged in a pattern of ongoing coercion, intimidation or violence, the need for a no contact order should be carefully evaluated.
2. Consider each request to issue, modify or terminate a no contact order individually. Analyze the request using all available information and make each decision based upon the context and totality of the circumstances.
 - a. Determine whether the victim's request for contact is based on intimidation by or fear of defendant. Is there information that indicates or suggests the defendant is engaging in ongoing intimidation, coercion, or violence towards the victim and if so, is intimidation, coercion or threatened violence the basis for the request for contact? Sources for such information may include:
 - i. Police reports of the current offense
 - ii. Additional information obtained from officers/investigators
 - iii. 911 calls and Computer Aided Dispatch (C.A.D.) reports
 - iv. Jail calls

- v. Past police reports involving the same defendant
 - vi. Prior arrests and convictions of the same defendant
 - vii. Input from victim or victim advocate if the victim has given the advocate permission to share information to determine if the request for contact is based on intimidation or fear⁷
 - viii. Petitions for civil protection orders and any supporting documents
 - ix. Prior pre-sentence investigation reports
 - x. Any probation status and/or compliance
- b. Encourage the victim to meet with a community-based advocate prior to modifying or terminating the no contact order as a means of linking the victim with appropriate assistance and helping her assess the level of risk she may be facing.
- c. Consider input from the victim or, if the victim has given the advocate permission, information from the advocate to assist in determining: circumstances of the case; context and severity of the offense; and bail/pretrial release conditions most likely to ensure the safety of the victim, witnesses, their families and the public.
- i. Use all available sources of background information (as listed earlier) to understand the severity of the offense and danger that defendant poses to the victim.
 - ii. Do not require the advocate to provide testimony or information to the court about the victim or the case.
- d. The availability of a civil protection order should not be a factor in determining whether to request a criminal NCO. The decision to request a civil protective order is solely at the discretion of the victim and does not supplant the criminal no contact order.
3. In those cases in which the victim objects to the issuance of a no contact order, after evaluating the risk of serious harm to the victim and her children, the prosecutor should only request a no contact order when the prosecutor has a reasonable belief that failure to issue the order will result in serious injury to the victim and/or the children or it appears the objection is the result of intimidation or threats by the defendant. The potential for intimidation or risk is present in every domestic violence case. Unevaluated risk should not be the basis for requesting a no contact order over the victim's objection. Rather, such requests should be based on an evaluation of the information specific to the case at hand.

If a victim requests contact, consider the request, keeping in mind that, in some cases, a prolonged no contact order may result in hardship for the victim.

⁷ Prosecutors, victim/witness personnel and/or pretrial bail evaluators should ask the victim a number of questions in addition to the risk questions in the patrol report, adapted to the specific situation of the case, to uncover whether the expressed desire for contact arises out of fear of denying contact or some other need such as childcare, monetary support, desire for continuing contact between the defendant and children, etc.

- a. Obtain specific information about the victim and implications of the no contact order on the victim and her family.
 - b. Evaluate the case in context while considering the totality of circumstances, including victim opposition, economic impact, offender intimidation, victim fear, and danger posed by defendant.
 - c. Be sensitive to victim's reliance on defendant for child care, transportation or income and collaborate closely with advocates to fill gaps created by restrictions on contact with defendant in order to provide victim with necessary resources and assistance.
 - d. Consider whether the no contact order will affect the custody of the children.
 - e. Evaluate whether the victim suffers from any mental or physical impairment which affects judgment.
4. In those cases where the victim objects to the no contact order but the prosecution is inclined to request the order over the objection of the victim, consider adjusting the duration of the no contact order to provide for victim safety while reducing collateral burdens on the victim.

A short no contact order (10 - 30 days) may enable a victim to file for a civil protection order if she wishes, to locate alternative housing, and to make decisions about the charges and no contact order without influence from the defendant.

- a. Consider options that allow contact under limited conditions when the victim has requested contact and there is little evidence of coercion or intimidation. Limited conditions include prohibiting defendants from abusing, harassing, intimidating, retaliating against/tampering with or committing any other crimes or acts against any victim or witness in a criminal domestic violence case.
 - i. Contact should be limited and monitored; communication could be limited to email, letters or phone calls (subject to recording if possible) or to public places.
 - ii. Topics of communication could be limited, e.g., discussions about children through a parenting notebook or managing a family business.
 - iii. Prohibit assaultive, harassing, threatening and stalking behaviors and communication.
 - iv. Prohibit firearms possession.
 - v. Request random drug testing when chemical abuse is indicated.
 - vi. Request compliance with batterer treatment and/or alcohol treatment programs.
 - vii. Allow contact but exclude defendant from victim's residence.
5. Once an order is modified to allow contact or vacated, provide a process whereby the victim can request that it be reissued if the defendant resumes threatening or intimidating behavior or other circumstances arise that cause the victim to request reissuance. Do not require the victim to obtain a civil protective order in order to obtain needed court protection.

6. In some circumstances, terminating or modifying the no contact order may not be advisable, despite a victim's objections. An abuser may pressure the victim to seek termination of the no contact order, perhaps to test her loyalty to him, as well as to make it easier to gain access to the victim. Prosecutors must ask about intimidation tactics when obtaining a victim's input regarding the no contact order and the charges. It might be appropriate to ask if she has been threatened and if the batterer has contacted her directly or through a third party. Prosecutors also should actively look for evidence of threats and intimidation. Prison/jail call logs permit prosecutors to determine whether the abuser has called the victim while in custody, and if recordings of those calls are available, police or prosecutors should review the calls for possible evidence of intimidation. Prison visitor logs will show if the victim has visited the defendant in jail, thereby providing an opportunity for face-to-face intimidation. The following factors should be considered in assessing whether there is a reasonable likelihood that the defendant poses an increased risk of serious harm to the safety of the victim or children, suggesting that the no contact order should remain in place.

a. Severity and Context of Offense Alleged

i. Nature of violence/injury to victim

1. Strangulation
2. Burning
3. Permanent physical damage
4. Head injuries
5. Weapons involved

ii. Nature of threats

1. Threats of future injury or death (the more specific the threat, the greater the risk)
2. Threats to use a weapon
3. Threats of child abduction or denial of visitation rights
4. Threats made openly and in presence of others

iii. Child abuse or child injured during the incident

iv. Evidence of escalating violence

1. Use of weapon
2. Sexual abuse
3. Animal abuse
4. Property damage or threats of future property damage
5. Stalking

6. Hostage-taking
 7. Recency of any such conduct
 8. Victim's increased vulnerability due to age, disability, pregnancy
- b. Severity of Defendant's Other Conduct
 - i. Prior criminal history
 - ii. History of violence in prior relationships
 - iii. Other pending charges
 - iv. Previous DV charges dismissed
 - v. Previous DV contacts with police or prosecutor's office
 - vi. Other evidence of violence or threats to victim or others
 - c. Defendant's Proclivity to Respect Court Rules
 - i. Record of violation of court orders
 - ii. Record of failure to follow pretrial release or probation rules
 - iii. Previous participation in batterer treatment program
 - d. Other Background Factors of Defendant
 - i. Evidence of suicide threats
 - ii. Evidence of depression
 - iii. Evidence of paranoid thinking
 - iv. History of mental health or emotional problems
 - v. Substance abuse
 - vi. Availability of weapons
 - e. Situational Factors
 - i. Imminent break-up, separation or divorce initiated by victim
 - ii. Imminent change in child custody
 - iii. Imminent change in victim's residence
 - iv. Imminent change in victim's employment
 - v. Defendant's loss of employment
7. Victim presence in court. The prosecutor should not request terminating or modifying the no contact order to allow contact unless the prosecutor or victim/witness personnel or community

advocate has met personally with the victim or the victim is present in court and has requested a modification. Statements made in open court may be designed to protect or mollify the defendant. The best information about the victim's wishes and needs will be obtained by victim/witness staff, advocates, or the prosecutor in private.

8. Amendments in writing. All changes to existing no contact orders should be done in writing in clear, simple language to ensure certainty, fairness and predictability for all parties. All parties and the victim should receive a copy of any modifications to court orders and all modifications entered promptly into relevant state/local/federal databases.
9. When issuing a no contact order, generally the criminal court should not include terms addressing the defendant's contact with children. If the issue arises, the criminal court should order that any parenting or visitation access be determined in a separate proceeding by the family court. In limited circumstances it may be appropriate to include children in a no contact order if the children have experienced coercion and violence, are exposed to a substantial risk of harm by the defendant, or if there is an existing family court order that can be verified and due to the substantial risk of harm, the criminal court is ordering additional terms to enhance safety.

Probation No Contact Orders

In general, a probation no contact order should be recommended if requested by the victim or if there is a pretrial no contact order and the victim cannot be reached.

More problematic is the question of whether there should be a probation no contact order when the victim objects. Many of the same problems that arise from pretrial no contact order over the objection of the victim apply to probation no contact orders as well. As with pretrial no contact orders overriding the victim's wishes in this regard may have several undesirable effects. It undermines the victim's efforts to regain the autonomy necessary to protect herself and her children from harm in the long term and it undermines efforts to engage with the victim to promote victim safety and offender accountability. Such orders frequently result in substantial economic harm to the victim and victim's children. Additionally, no contact orders to which the victim objects are frequently difficult, and sometimes impossible, to enforce undermining both the victim's and the defendant's belief in the efficacy of the criminal justice system.

In general, the factors discussed above are relevant in deciding whether to issue a probation no contact order over the objection of the victim. However, in addition, there are several features which differentiate the probation no contact order from the pretrial no contact order. First, the longer duration of the probation no contact order exacerbates the undesirable consequences. Second, probation provides a number of mechanisms for promoting victim safety and controlling the defendant's behavior which are not available to the pretrial court. These include a broader range of available probation conditions, the ability to provide protection through probation violation sanctions before the conduct escalates to new violence, and the availability of treatment programs and probation monitoring. The decreased need and the increased undesirable effect of a probation no contact order over a victim's objection shifts the calculus away from issuing probation no contact orders over the objection of the victim.

- Probation no contact orders should rarely be issued over the victim's objections. Generally, probation no contact orders should only be issued over the victim's objection when the defendant has engaged in a pattern of coercive violence and intimidation and there is a high risk of serious harm to the victim or children.

- As with pretrial no contact orders, probation no contact orders should not be issued if the order will effectively change custody or if the defendant has experienced a pattern of ongoing coercive violence from the victim in the present case.
- In deciding whether to recommend a probation no contact order over the victim's objection, the probation officer shall review with his or her supervisor the decision to recommend a no contact or stay away order over the victim's objection.
- In considering whether to recommend a probation no contact or stay away order over the objection of the victim, it is important to consider the impact of a no contact order on the victim, including whether the order will result in the victim becoming homeless or not having child care.