

**FULL FAITH AND CREDIT:
ENCOURAGE TO ARREST**

STATE OF MONTANA

Pursuant to
an association between
THE MONTANA DEPARTMENT OF
JUSTICE AND THE MONTANA
COALITION AGAINST DOMESTIC
AND SEXUAL VIOLENCE

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About the Author

Eleanor J. Guerrero has been an attorney for approximately 25 years. She practiced in New York, New Jersey, Florida and Colorado before relocating to Montana. She served as one of fifty county prosecutors in Bergen County, New Jersey, a county of approximately one million residents. She headed the Environmental Crimes Squad dealing with the application of new federal laws to the enforcement of new state criminal laws against pollution. In one case, she obtained the highest county fine in its history. She was chosen by the Office of the Attorney General to attend a federal training course on how to teach professionals. She then served in the Domestic Violence Squad directing a group of detectives prosecuting all county violations. She conducted domestic violence police training for city and county law enforcement. Ms. Guerrero was a member of the steering committee for the international Lawyers Committee for Human Rights, N.Y.C., and provided representation in human rights cases as a volunteer attorney.

In 1995, Ms. Guerrero moved out West and was hired as the Southern Ute Tribal Prosecutor. The territory covered a checkerboard of state, Tribal and federal jurisdictions. Thereafter, she set up a private law practice in Durango, Colorado. For eight years her office handled state and federal cases and tribal police training for local tribes emphasizing domestic violence. She worked with teenagers in programs she created for Native American youth on art and culture. In 1997, she was designated by the local United States Attorney's office as keynote speaker for the Four Corners Conference on Family Violence. The conference included United States attorneys, tribal judges, prosecutors, advocates and police from Arizona, New Mexico, Utah and Colorado. Her courses are certified by the Federal Indian Police Academy. Ms. Guerrero is single and lives in Red Lodge, Montana.

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CHAPTER I. – BASIS.

STATISTICS

***90-95% of Domestic Violence victims are women. (Bureau of Justice Statistics Selected Findings: Violence Between Intimates (NCJ-149259), November, 1994).**

***70% of intimate partner homicide victims are women. (Bureau of Justice Statistics Selected Findings: Violence Between Intimates (NCJ-149259) November, 1994).**

***88% of victims of Domestic Violence fatalities had a documented history of physical abuse. (Florida Governor’s Task Force on Domestic and Sexual Violence, Fla. Mortality Review Project, 1997, pp46-48, tables 14-21).**

I. Historical Basis.

The United States Constitution is known as the “Supreme Law” of the land. The designation is due to the “Supremacy Clause” contained therein.

The Supremacy Clause is not limited to the Constitution, but any federal law, including the United States Code. (“U.S.C.”)

In 1994, in direct response to legislative review of the domestic violence situation nationally, the VAWA was passed and made a part of Title 18 of the United States Code. A major act is often passed when there is no law or insufficient law existing to deal with an urgent public need.

The Act was further amended in 2000, particularly in the area of custody as applied to interstate applications of custody orders.

A. Constitutional and Federal Statutory Law

1. The Supremacy Clause:

The United States Constitution sets forth in Article VI, Clause 2, the intent of the Founders that all federal law be superior to any state’s law and in the event of any conflict, federal law shall supersede such inconsistent state law. Likewise, should there be no law on the state level, applicable federal law shall apply. It states as follows:

“This constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

2. The VAWA cannot be enforced across jurisdictions without the application of Full Faith and Credit. Full Faith and Credit as set forth in 18 U.S.C. Section 2265, permits a victim with a valid protection order in one state, tribe, or United States territory, to leave and go anywhere in the country, to any U.S. tribe or U.S. territory

and still have that protective order enforced in that new jurisdiction with full force and effect. Full Faith and Credit is originally derived from the United States Constitution.

United States Constitution, Article IV states:

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect, thereof.

Section 2. The citizens of each state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”

Description of the Federal Act:

The Full Faith and Credit provisions of Title 18 deal with the enforcement of orders of protection in jurisdictions other than the place of issuance in the United States, U.S. tribes and territories. The Full Faith and Credit provision in the United States Constitution applies to public acts, records and judicial proceedings. It clearly provides Congress the basis to enact such laws for Protection Orders.

3A. Title 18 U.S.C. Section 2261-2266 (1994; Amended 2000) Primarily five sections of Title 18 deal with VAWA. They are:

- 18 U.S.C. 2261** (Interstate travel to commit domestic violence)
- 18 U.S.C. 2261A** (Interstate Stalking)
- 18 U.S.C. 2262** (Interstate violation of a protective order)
- 18 U.S.C. 2265** (Full Faith and Credit-terms, protection order; etc.)
- 18 U.S. C. 2266** (Full Faith and Credit-cont.d, some terms for federal laws)

Additional protection power is contained in the following federal law:

3B. Title U.S.C. Section 922 (Federal Gun Law as it relates to domestic violence)

FEDERAL LAWS:

18 U.S.C. Sections 2265 and 2266 set forth the law regarding Full Faith and Credit and the enforcement of foreign protection orders under VAWA. In 2000, VAWA was amended to clarify custody and support provisions. The other federal statutes deal with additional federal crimes relating to domestic violence.

Section 2265 states:

(a) **Full Faith and Credit.** Any protection order issued that is consistent with subsection (b) of this section by the court of the State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.”

(b) **Protection Order.** A protection order issued by a State or tribal court is consistent with this subsection if-

- (1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and
- (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person’s right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights.

(c) **Cross or Counter Petition.** A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if-

- (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
- (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and Registration.

(1) **Notification.** A State or Indian tribe according full faith and credit to an order by a court of another State or Indian tribe shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State or tribal jurisdiction unless requested to do so by the party protected under such order.

(e) **Tribal Court Jurisdiction.** For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.”

HIGHLIGHTS OF SECTION 2265:

1. The issuing court must have had jurisdiction over the parties and subject matter under the law of such state or Indian tribe.
2. Reasonable notice and opportunity to be heard must be given to the person against whom the order was sought such that the right to due process is protected.
3. In the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by the State or Tribal law...sufficient to protect the respondent's due process rights.
4. A protection order is an order from a “state”. Under this law, a state is defined as:
a state, tribe, territory or possession of the United States,
Puerto Rico, or the District of Columbia
5. Under 2265 (d)(2), a state or Indian tribe may NOT require registration or filing of the order in another jurisdiction.

18 U.S.C. Section 2266 Definitions, (regarding Section 2265) states:

(5) **Protection Order.** The term ‘protection order’ includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a *pendente lite* order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

(8) **State.** The term ‘State’ includes a State of the United States, the District of Columbia, and a commonwealth, territory or possession of the United States.

18 U.S.C. Section 2261. Interstate Domestic Violence

(a) Offenses:

(1) Travel or Conduct of Offender - A person who travels in interstate or foreign commerce or enters or leaves Indian country with the intent to kill, injure, harass, or intimidate a spouse or intimate partner, and who, in the course of or as a result of such travel, commits or attempts to commit a crime of violence against that spouse or intimate partner, shall be punished as provided in subsection (b).

(2) Causing Travel of Victim - A person who causes a spouse or intimate partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse or intimate partner, shall be punished as provided in subsection (b).

(b) Penalties: A person who violates this section or section 2261A shall be fined under this title, imprisoned--

- (1) For life or any term of years, if death of the victim results;
- (2) For not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
- (3) For not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
- (4) As provided for the applicable conduct under chapter 109A [18 U.S.C. Section 2241 et seq.] if the offense would constitute an offense under chapter 109A [18 U.S.C. Section 2241 et seq.] (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
- (5) For not more than 5 years, in any other case, or both fined and imprisoned.

“Intimate Partner” is defined in 18 U.S.C.A. Section 2266(7):

For purposes of sections other than 2261A (interstate stalking):

- Spouse or former spouse**
- Person who shares a child in common with abuser**
- Person who cohabits or has cohabited with abuser as a spouse**
- Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.**

18 U.S.C. Section 2261A. Interstate Stalking

Whoever -

- (1) travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family (as defined in section 115) of that person, or the spouse or intimate partner of that person; or
- (2) uses the mail or any facility of interstate or foreign commerce with the intent -
 - (A) to kill or injure a person in another State or tribal jurisdiction or within the special maritime or tribal jurisdiction of the United States; or
 - (B) to place a person in another State or tribal jurisdiction, or within a special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to-
 - (i) that person
 - (ii) a member of the immediate family (as defined in section 115) of that person; or
 - (iii) a spouse or intimate partner of that person; uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described clauses (I) through (iii); shall be punished as provided in section 2261(b).

Section 2266 (7), for purposes of Section 2261A, defines a “spouse or intimate partner” as:

- Spouse of former spouse of the target of the stalking
- Person who shares a child in common with the target of the stalking
- Person who cohabits or has cohabited as a spouse with the target
- Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred.

Stalking requires:

A pattern of conduct consisting of two or more acts evidencing a continuity of purpose.

- -

Section 2262. Interstate Violation of Protection Order

(a) Offenses.

- (1) Travel or Conduct of Offender. - A person who travels in interstate or foreign commerce, or enters or leaves Indian country, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection

against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) **Causing Travel of Victim.** - A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished, as provided in subsection (b).

There is no “intimate partner” requirement.

Section 2266. Definitions that apply:

In this chapter:

(1) **Bodily Injury.** - The term “bodily injury” means any act, except one done in self-defense, which results in physical injury or sexual abuse.

(2) **Course of Conduct.** - The term “course of conduct” means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose.

(3) **Enter or Leave Indian Country.** - The term “enter or leave Indian country” includes leaving the jurisdiction of one tribal government and entering the jurisdiction of another tribal government.

(4) **Indian Country.** - The term “Indian country” has the meaning stated in section 1151 of this title.

(5) **Protection Order.** - The term “protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to Full Faith and Credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint petition or motion filed by or on behalf of a person seeking protection.

(6) **Serious Bodily Injury.** - The term “serious bodily injury” has the meaning stated in section 2119(2).

(7) **Spouse or Intimate Partner.** - The term “spouse or intimate partner” includes-

(A) For purposes of -

- (i) Sections other than 2261A, a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
- (ii) Section 2261A, a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; and

(B) Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

(8) **State.** - The term “State” includes a State of the United States, the District of Columbia and a commonwealth, territory, or possession of the United States

(9) **Travel in Interstate or Foreign Commerce.** - The term “travel in interstate or foreign commerce” does not include travel from one State to another by an individual who is a member of an Indian tribe and who remains at all times in the territory of the Indian tribe of which the individual is a member.

The Federal Firearms Section under Title 18 designates a section that deals with VAWA and specifically the possession, use or trade in firearms by an individual who is subject to the restrictions of a valid protection order, has a past qualifying misdemeanor conviction or is currently violating the Act:

18 U.S.C. Section 922(g)

Paragraph (1): felon in possession of a firearm (Stalking offense).

Paragraph (8): makes it a federal violation to possess a firearm while subject to a protection order

Paragraph (9): makes it a federal violation to possess a firearm while convicted of a qualifying misdemeanor

Protected Parties under Federal law varies:

1. Under **18 U.S.C. Section 2261**, the law regarding interstate domestic violence, applies to a spouse or intimate partner.
2. Under **18 U.S.C. Section 2266(7)**, the interstate stalking law, however, the victim’s definition is broader. It applies to a spouse or former spouse, a person who shares a child in common with abuser, a person who cohabits or has cohabited with abuser as a spouse and any other person similarly situated to a spouse who is protected by the domestic or

family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

Protection orders may have various names depending on the court or jurisdiction and contain a range of language. Foreign orders may be called stalking orders, peace orders, stay away orders, restraining orders, protection orders, etc. Regardless of variation in the names of the orders they are enforceable if they meet the prerequisites for a valid order.

Under Federal Law, Full Faith and Credit pertains to civil and criminal orders. Each state law must be closely viewed for the extent of its adherence to federal law in its full faith and credit statutes. Montana has amended its statutes to be more in accordance with federal Full Faith and Credit laws as detailed below.

B. FEDERAL FIREARMS LAW:

THE GUN CONTROL ACT OF 1968, PUBLIC LAW 90-618
The Gun Control Act of 1968 is also known as the Brady Bill. In 1998, the interim provisions expired and were replaced by the permanent provisions of the Brady law. It contains innovative provisions such as a requirement that firearms purchasers be qualified at the time of sale by querying the National Instant Criminal Background Check System (NCIC). Section 922 now contains provisions for restrictions and federal offenses for perpetrators of domestic violence in regards to firearms possession and receipt.

TITLE 18, UNITED STATES CODE, CHAPTER 44 **TITLE I-STATE FIREARMS CONTROL ASSISTANCE**

SECTION 922. UNLAWFUL ACTS

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person-

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that-

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

- (B) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or, threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, **or possess** in or affecting commerce, any firearm or ammunition; **or to receive** any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

The above Gun Control Act of 1968, 18 U.S.C. Section 922 (g) (8) prohibits an abuser from possessing, shipping, transporting or receiving firearms subject to a qualifying FINAL order of protection. A qualifying order of protection has two sets of tests:

I. An order that:

- a. **was issued after a hearing which such person received actual notice and had an opportunity to participate.**
- b. **restrains such person from harassing, stalking, or threatening -an intimate partner of such person or -child of such intimate partner or person**
- c. **or engaging in other conduct that would place intimate partner in reasonable fear of bodily injury to the partner or child**

AND

II. An order that either:

- a. **by its terms explicitly prohibits the use, attempted use, or threatened use of force against intimate partner that would reasonably be expected to cause bodily injury, OR**
- b. **includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child.**

An “intimate partner” under Section 922(g)(8) is defined under 18 U.S.C. Section 921(32) as:

- Spouse or former spouse**
- Parent of a common child**
- An individual who cohabitates or has cohabited with the person**

Section 922(g)(8) has an exemption under Section 925(a)(1), that states:

that the provisions of 18 U.S.C. Section 922(g)(8) shall NOT apply with respect to the transportation, shipment, receipt, possession or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of the United States or any department or agency thereof or any state or any department agency or political subdivision thereof.

- Applies to the firearms that military and law enforcement personnel are authorized to carry in conjunction with their duties**
- BUT personal firearms are not exempt**

Section 922(g)(9) of the Brady Act is known as the Lautenberg Amendment.

Definition of a **Misdemeanor Crime of Domestic Violence under (Section 922(g)(9):**

A misdemeanor crime of domestic violence is an offense that:

- (1) is a misdemeanor under Federal or State law;
- (2) has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; and
- (3) was committed by a current or former spouse, parent or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

In order to find a conviction for a domestic violence misdemeanor offense, however, there must be:

1. representation of the person by counsel in the case or a knowing and intelligent waiver of the right to counsel in the case; **and**
2. in the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, there was either:
 - a. trial by jury, or
 - b. the person knowingly and intelligently waived his right to have the case tried by a jury, by guilty plea or otherwise.

Note: A person subject to the restrictions of this section pursuant to all of the terms and

conditions set forth above is defined as having a firearms “disability.”

Under Section 922(g)(9), the 1996 “Lautenberg Amendment”, there is NO exemption of firearms for official use for law enforcement or the military. The unique difference in the Lautenberg Amendment from other provisions of Section 922 is that the misdemeanor crime of domestic violence must have involved the use or attempted use of force or threatened use of a deadly weapon.

NOTE: A CONVICTION IS STILL VALID EVEN IF THERE HAS BEEN ANY OF THE FOLLOWING EVENTS AFTER CONVICTION:

1. Expungement
2. Setting aside
3. Pardon
4. Loss of civil rights restored (if the law of the jurisdiction in which the proceedings were held provides for the loss of civil rights upon conviction for such offense)

UNLESS:

the expungement, setting aside, pardon, or restoration of civil rights expressly provides that the person may ship, transport, possess, or receive firearms, and the person is not otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing firearms.

Effective date of the law: The Lautenberg Amendment is effective as of **September 30, 1996**. The prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the law’s effective date. The law is not considered “ex post facto” because it applies to the regulation of future conduct for the possession of firearms.

C. STATE LAW

Montana Statutory Law further supports this right of Full Faith and Credit allowing for state charges to be filed. There are some differences between state and federal law and they are noted. At least seventeen statutes are relevant to the enforcement of domestic violence laws and/or Full Faith and Credit. These statutes are listed below:

- M.C.A. 40-15-102** (Eligibility for order of protection)
- M.C.A. 40-15-201** (Temporary order of protection)
- M.C.A. 40-15-202** (No mutual restraining orders)
- M.C.A. 40-15-204** (Written orders of protection)
- M.C.A. 40-15-301** (Concurrent Courts Jurisdiction and Full Faith and Credit)
- M.C.A. 40-15-303** (Registration of orders)
- M.C.A. 40-15-402** (Definitions)
- M.C.A. 40-15-403** (Judicial enforcement of order)
- M.C.A. 40-15-404** (Non-judicial enforcement of an order)

M.C.A. 40-15-405	(Waiver of costs of filing protection order to victim)
M.C.A. 40-15-406	(Immunity for good faith enforcement foreign protection order)
M.C.A. 45-5-220	(Stalking-exemption-penalty)
M.C.A. 45-5-626	(Violation of order of protection)
M.C.A. 45-15-405	(Registration of foreign order)
M.C.A. 46-6-311	(Basis for arrest without warrant)
M.C.A. 46-6-602	(Notice of rights to victim of assault-Full Faith and Credit)
M.C.A. 46-6-603	(Partner, Family Member Assault; Seizure of Weapon)

Indirectly related through custody regulation:

U.C.C.J.& E. A. 40-4-211 (Jurisdiction-commencement of parenting proceedings)

Other laws dealing with Domestic Violence in Montana but not necessarily directly involved with Full Faith and Credit are set forth below:

M.C.A. 40-15-103	(Notice of rights when partner or family member assault is suspected)
M.C.A. 40-15-110	(Partner and family member assault intervention and treatment fund)
M.C.A. 40-15-201	(Temporary order of protection)
M.C.A. 40-15-202	(Order of protection, hearing evidence)
M.C.A. 40-15-203	(Attorney General to provide forms)
M.C.A. 40-15-204	(Written orders of protection)
M.C.A. 40-15-302	(Appeal to district court-order to remain in effect)
M.C.A. 40-15-303	(Registration of orders)

Under Montana law (**M.C.A.. 45-15-102**) the following crimes against the protected party make the petitioner eligible for an order of protection:

M.C.A. 45-5-201	(Assault)
M.C.A. 45-5-202	(Aggravated Assault)
M.C.A. 45-5-203	(Intimidation)
M.C.A. 45-5-206	(Partner or Family member assault)
M.C.A. 45-5-207	(Criminal endangerment)
M.C.A. 45-5-208	(Negligent endangerment)
M.C.A. 45-5-212	(Assault on a minor)
M.C.A. 45-5-213	(Assault with a weapon)
M.C.A. 45-5-301	(Unlawful restraint)
M.C.A. 45-5-302	(Kidnapping)
M.C.A. 45-5-303	(Aggravated kidnapping)
M.C.A. 45-6-103	(Arson)
M.C.A. 45-5-220	(Stalking)
M.C.A. 45-5-507	(Incest)
M.C.A. 45-5-502	(Sexual assault)
M.C.A. 45-5-503	(Sexual intercourse without consent)

Four statutes deal specifically with firearms in the State of Montana:

- M.C.A. 40-15-201** (Protection orders may prohibit firearms)
M.C.A. 40-5-206 (A conviction of a PFMA may prohibit firearm possession or use)
M.C.A. 40-6-603 (An officer responding to a PFMA may seize weapon used or threatened)
M.C.A. 45-5-626 (Violation of an order of protection; fines; sentences)

Text of statutes relating to Full Faith and Credit in Montana:

M.C.A. 40-15-102. Eligibility for order of protection

- (1) A person may file a petition for an order of protection if:
- (a) the petitioner is in reasonable apprehension of bodily injury by the petitioner's partner or family member as defined in 45-5-206; or
 - (b) the petitioner is a victim of one of the following offenses committed by a partner or family member:
 - (i) assault as defined in 45-5-201;
 - (ii) aggravated assault as defined in 45-5-202;
 - (iii) intimidation as defined in 45-5-203
 - (iv) partner or family member assault as defined in 45-5-206;
 - (v) criminal endangerment as defined in 45-5-203;
 - (vi) negligent endangerment as defined in 45-5-208;
 - (vii) assault on minor as defined in 45-5-212;
 - (viii) assault with a weapon as defined in 45-5-213;
 - (ix) unlawful restraint as defined in 45-5-301
 - (x) kidnapping as defined in 45-5-302
 - (xi) aggravated kidnapping as defined in 45-5-30; or
 - (xii) arson as defined in 45-6-103.
- (2) A victim of stalking as defined in 45-5-220, incest as defined in 45-5-507, sexual assault as defined in 45-5-502, or sexual intercourse without consent as defined in 45-5-503 is eligible for an order of protection against the offender regardless of the petitioner's relationship to the offender.
- (3) A parent, guardian ad litem, or other representative of the petitioner may file a petition for an order of protection on behalf of a minor petitioner against the petitioner's abuser. At its discretion, a court may appoint guardian ad litem for a minor petitioner.
- (4) A guardian must be appointed for a minor respondent when required by Rule 17(c), Montana Rules of Civil Procedure, or by 25-31-602. An order of protection is effective against a respondent regardless of the respondent's age.
- (5) A petitioner is eligible for an order of protection whether or not:
- (a) the petitioner reports the abuse to law enforcement;
 - (b) charges are filed; or
 - (c) the petitioner participates in a criminal prosecution.
- (6) If a petitioner is otherwise entitled to an order of protection, the length of time between the abusive incident and the petitioner's application for an order of protection is irrelevant.

M.C.A. 40-15-201. Temporary Order of Protection.

(1) A petitioner may seek a temporary order of protection from a court listed in 30-15-301. The petitioner shall file a sworn petition that states that the petitioner is in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in 40-15-102, and is in danger of harm if the court does not issue a temporary order of protection immediately.

(2) Upon a review of the petition and a finding that the petitioner is in danger of harm if the court does not act immediately, the court shall issue a temporary order of protection that grants the petitioner appropriate relief. The temporary order of protection may include any or all of the following orders:

(a) prohibiting the respondent from threatening to commit or committing acts of violence against the petitioner and any designated family member;

(b) 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;

(c) prohibiting the respondent from removing a child from the jurisdiction of the court;

(d) directing the respondent to stay 1,500 feet or other appropriate distance away from the petitioner, the petitioner's residence, the school or place of employment of the petitioner, or any specified place frequented by the petitioner and by any other designated family or household member;

(e) removing and excluding the respondent from the residence of the petitioner, regardless of ownership of the residence;

(f) prohibiting the respondent from possessing or using the firearm used in the assault;

(g) prohibiting the respondent from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life and, if so restrained requiring the respondent to notify the petitioner, through the court, of any proposed extraordinary expenditures made after the order is issued;

(h) directing the transfer of possession and use of the residence, an automobile, and other essential personal property, regardless of ownership of the residence, automobile, or essential personal property, and directing an appropriate law enforcement officer to accompany the petitioner to the residence to ensure that the petitioner safely obtains possession of the residence, automobile, or other essential personal property or to supervise the petitioner's or respondent's removal of essential personal property;

(i) directing the respondent to complete violence counseling, which may include alcohol or chemical dependency counseling or treatment, if appropriate;

(j) directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member.

(3) If the petitioner has fled the parties' residence, notice of the petitioner's new residence must be withheld, except by order of the court for good cause shown.

(4) The court may, without requiring prior notice to the respondent, issue an immediate temporary order of protection for up to 20 days if the court finds, on the basis

of the petitioner's sworn petition or other evidence, that harm may result to the petitioner if an order is not issued before the 20-day period for responding has elapsed.

M.C.A. 40-15-202. Order of protection - hearing - evidence.

(1) A hearing must be conducted within 20 days from the date that the court issues a temporary order of protection. The hearing date may be continued at the request of either party for good cause or by the court. If the hearing date is continued, the temporary order of protection must remain in effect until the court conducts a hearing. At the hearing, the court shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.

(2) The respondent may request an emergency hearing before the end of the 20-day period by filing an affidavit that demonstrates that the respondent has an urgent need for the emergency hearing. An emergency hearing must be set within 3 working days of the filing of the affidavit.

(3) The order of protection may not be made mutually effective by the court. The respondent may obtain an order of protection from the petitioner only by filing an application for an order of protection and following the procedure described in this chapter.

(4) (a) Except as provided in subsection (4)(b), evidence concerning a victim's sexual conduct is not admissible in a hearing under this section.

(b) Evidence of a victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease may be admitted in a hearing under this section only if that sexual conduct is at issue in the hearing.

(5) If a respondent proposes to offer evidence subject to subsection (4)(b), the trial judge shall order a separate hearing to determine whether the proposed evidence is admissible under subsection (4)(b).

M.C.A. 40-15-204. Written orders of protection.

(1) The court may, on the basis of the respondent's history of violence, the severity of the offense at issue, and the evidence presented at the hearing, determine that to avoid further injury or harm, the petitioner needs permanent protection. The court may order that the order of protection remain in effect permanently.

(2) In a dissolution proceeding, the district court may, upon request, issue either an order of protection for an appropriate period of time or a permanent order of protection.

(3) An order of protection may include all of the relief listed in 40-15-201, when appropriate.

(4) An order of protection may include restraining the respondent from any other named family member who is a minor. If this restriction is included, the respondent must be restrained from having contact with the minor for an appropriate time period as directed by the court or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or endangered by the environment of abuse.

(5) An order of protection issued under this section may continue for an appropriate time period as directed by the court or be made permanent under subsection (1), (2), or (4). The order may be terminated upon the petitioner's request that the order

be dismissed.

(6) An order of protection must include a section that indicates whether there are any other civil or criminal actions pending involving the parties, a brief description of the action, and the court in which the action is filed.

(7) An amendment to a temporary order of protection or to an order of protection is effective only after it has been served in writing on the opposing party.

(8) There is no cost to file a petition for an order of protection or for service on an order of protection whether served inside or outside the jurisdiction of the court issuing the order.

(9) Any temporary order of protection or order of protection must conspicuously bear the following: “Violation of this order is a criminal offense under 45-5-220 or 45-5-656 and may carry penalties of up to \$10,000 in fines and up to a 5-year jail sentence. This order is issued by the court, and the respondent is forbidden to do any act listed in the order, even if invited by the petitioner or another person. This order may be amended only by further order of this court or another court that assumes jurisdiction over this matter.”

M.C.A. 40-15-301. Jurisdiction and venue.

(1) District courts, justices’ courts, municipal courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-15-201.

(2) When a dissolution of marriage or parenting action involving the parties is pending in district court, a person may file a petition for an order of protection in a justice’s, municipal, or city court only if the district court judge assigned to that case is unavailable or if the petitioner, to escape further abuse, left the county where the abuse occurred. The petitioner shall provide a copy of relevant district court documents to the justice, municipal, or city court, along with the petition. The justice of the peace, municipal court judge, or city court judge shall immediately certify the pleadings to the original district court after signing an order of protection under this subsection. The district court shall conduct the hearing unless both parties and both courts agree that the hearing may be conducted in the court of limited jurisdiction. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, it shall conduct a hearing within 45 days of the receipt of the pleadings, unless the hearing is continued at the request of either party for good cause or by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts the hearing.

(3) If one of the parties to an order of protection files for dissolution of marriage or files a parenting action after the order of protection is filed but before the hearing is conducted, the hearing must be conducted in the court in which the order of protection was filed. Either party may appeal or remove the matter to the district court prior to or after the hearing. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, the district court shall conduct a hearing within 45 days of receipt of the pleadings. The hearing may be continued at the request of either party for good cause or by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts a hearing.

(4) An action brought under this chapter may be filed in the county where the petitioner currently or temporarily resides, the county where the respondent resides, or

the county where the abuse occurred. There is no minimum length or residency required to file a petition under this chapter.

(5) The right to petition for relief may not be denied because the petitioner has vacated the residence or household to avoid abuse.

(6) An order of protection issued under this section is effective throughout the state. Courts and law enforcement officials shall give full faith and credit to all orders of protection issued within the state.

(7) A certified copy of an order of protection from another state, along with proof of service, may be filed in a Montana court with jurisdiction over orders of protection in the county where the petitioner resides. If properly filed in Montana, an order of protection issued in another state must be enforced in the same manner as an order of protection issued in Montana.

M.C.A. 40-15-303 Registration of orders

- (1) The clerk of the court, justice of the peace, municipal court judge, or city court judge shall, within 24 hours of receiving proof of service or an order under 40-15-201, 40-15-204, or 40-15-301, mail a copy of the order or any extension, modification, or termination of the order, along with a copy of the proof of service, to the appropriate law enforcement agencies designated in the order.
- (2) Law enforcement agencies shall establish procedures, using an existing system for warrant verification, to ensure that peace officers at the scene of an alleged violation of an order of protection are informed of the existence and terms of the order.

M.C.A. 40-15-402. Definitions.

As used in this part, the following definitions apply:

- (1) “Foreign protection order” means a protection order issued by a court of another state.
- (2) “Issuing state” means the state whose court issues a protection order.
- (3) “Mutual foreign protection order” means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent.
- (4) “Protected individual” means an individual protected by a protection order.
- (5) “Protection order” means an injunction or other order issued by a court under the domestic violence, family violence **sexual assault, or stalking*** laws of the issuing state to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to another individual.

(6) “Respondent” means the individual against whom enforcement of a protection order is sought.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States, Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band that has jurisdiction to issue protection orders.

*recently added provisions (For full text, see Chapter XII. Forms, etc.)

M.C.A. 40-15-403. Judicial enforcement of order.

(1) A person authorized by the law of this state to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a court of this state. The court shall enforce the terms of the order, including terms that provide relief that a court of this state would lack power to provide but for this section. The court shall enforce the order, whether the order was obtained by independent action or in no other proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the court shall follow the procedures of this state for the enforcement of protection orders.

(2) A court of this state may not enforce a foreign protection order issued by a court of a state that does not recognize the standing of a protected individual to seek enforcement of the order.

(3) A court of this state shall enforce the provisions of a valid foreign protection order that govern custody and visiting if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state.

(4) A court of this state may not enforce under this part a provision of a foreign protection order with respect to support.

(5) A foreign protection order is valid if it:

(a) identifies the protected individual and the respondent

(b) is currently in effect;

(c) was issued by a court that had jurisdiction over the parties and subject matter under the law of the issuing state; and

(d) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the court issued the order or, in the case of an order ex parte, the respondent was given notice and had **an opportunity to be heard before the order was issued or had** * an opportunity to be heard within a reasonable time after the order was issued, consistent with the rights of the respondent to due process.

(6) A foreign protection order valid on its face is prima facie evidence of its validity.

(7) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

- (8) A court of this state may enforce provisions of a mutual foreign protection order that favors a respondent only if:
- (a) the respondent filed a written pleading seeking a protection order from the court of the issuing state; and
 - (b) the court of the issuing state made specific findings in favor of the respondent.

*recently added provisions (For full text, see Chapter XII. Forms, etc.)

M.C.A. 40-15-404 Nonjudicial enforcement of order:

(1) A law enforcement officer of this state, upon determining that there is probable cause to believe that a valid protection order exists and that the order has been violated, shall enforce the order as if it were an order of a court of this state. Presentation of a protection order that identifies both the protected individual and the respondent, and, on its face, is currently in effect, constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(2) If a foreign protection order is not presented, a law enforcement officer may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(3) If a law enforcement officer of this state determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent, and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(4) Registration of an order in this state is not required for the enforcement of a valid foreign protection order pursuant to this part.

M.C.A. 40-15-406. Immunity.

This state or local government agency or a law enforcement officer, prosecuting attorney, clerk of court, or any state or local government official acting in an official capacity is immune from civil liability for an act or omission arising out of the registration or enforcement of a foreign protection order or the detention or arrest of an alleged violator of a foreign protection order if the act or omission was done in good faith in an effort to comply with this part.

M.C.A. 45-5-220. Stalking -- exemption -- penalty.

(1) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:

- (a) following the stalked person; or
- (b) harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, device, or method.

(2) This section does not apply to a constitutionally protected activity.

(3) For the first offense, a person convicted of stalking shall be imprisoned in the county jail for a term not to exceed 1 year or fined an amount not to exceed \$1,000, or both. For a second or subsequent offense or for a first offense against a victim who was under the protection of a restraining order directed at the offender, the offender shall be imprisoned in the state prison for a term not to exceed 5 years or fined an amount not to exceed \$10,000, or both. A person convicted of stalking may be sentenced to pay all medical, counseling, and other costs incurred by or on behalf of the victim as a result of the offense.

(4) Upon presentation of credible evidence of violation of this section, an order may be granted, as set forth in Title 40, chapter 15, restraining a person from engaging in the activity described in subsection (1).

(5) For the purpose of determining the number of convictions under this section, "conviction" means:

- (a) a conviction, as defined in 45-2-101, in this state;
- (b) a conviction for a violation of a statute similar to this section in another state; or
- (c) a forfeiture of bail or collateral deposited to secure this defendant's appearance in court in this state or another state for a violation of a statute similar to this section, which forfeiture has not been vacated.

(6) Attempts by the accused person to contact or follow the stalked person after the accused person has been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie evidence that the accused person purposely or knowingly followed, harassed, threatened, or intimidated the stalked person.

M.C.A. 46-6-311 Basis for arrest without warrant-arrest of predominant aggressor.

(1) A peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require an immediate arrest.

(2)(a) The summoning of a peace officer to a place of residence by a partner or family member constitutes an exigent circumstance for making an arrest. Arrest is the preferred response in partner or family member assault cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim.

(b) When a peace officer responds to a partner or family member assault

complaint and if it appears that the parties were involved in mutual aggression, the officer shall evaluate the situation to determine who is the **predominant aggressor**. If, based on the officer's evaluation, the officer determines that one person is the **predominant aggressor**, the officer may arrest only the **predominant aggressor**. A determination of who the predominant aggressor is must be based on but is not limited to the following considerations, regardless of who was the first aggressor:

- (i) **the prior history of violence between the partners or family members, if information about the prior history is available to the officer;**
- (ii) **the relative severity of injuries received by each person;**
- (iii) **whether an act of or threat of violence was taken in self-defense;**
- (iv) **the relative sizes and apparent strength of each person;**
- (v) **the apparent fear or lack of fear between the partners or family members; and**
- (vi) **statements made by witnesses.**

M.C.A. 45-5-626. Violation of order of protection.

(1) A person commits the offense of violation of an order of protection if the person, with knowledge of the order, purposely or knowingly violates a provision of any order provided for in **40-4-121** or an order of protection under Title 40, chapter 15. It may be inferred that the defendant had knowledge of an order at the time of an offense if the defendant had been served with the order before the time of the offense. Service of the order is not required upon a showing that the defendant had knowledge of the order and its content.

(2) Only the respondent under an order of protection may be cited for a violation of the order. The petitioner who filed for an order of protection may not be cited for violation of that order of protection.

(3) An offender convicted of violation of an order of protection shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, for a first offense. Upon conviction for a second offense, an offender shall be fined not less than \$200 and not more than \$500 and be imprisoned in the county jail not less than 24 hours and not more than 6 months. Upon conviction for a third or subsequent offense, an offender shall be fined not less than \$500 and not more than \$2,000 and be imprisoned in the county jail or state prison for a term not less than 10 days and not more than 2 years.

M.C.A. 45-15-405. Registration of Order

- (1) Any individual may register a foreign protection order in this state. To register a foreign protection order, an individual shall:
- (a) present a certified copy of the order to the department of justice; or
 - (b) present a certified copy of the order to a clerk of any court or to any

local law enforcement agency and request that the order be registered with the department of justice.

- (2) Upon receipt of a foreign protection order, the department of justice shall register the order in accordance with this section. After the order is registered, the department of justice shall furnish to the individual registering the order a certified copy of the registered order.
- (3) The department of justice shall register an order upon presentation of a copy of a protection order that has been certified by the issuing state. A registered foreign protection order that is inaccurate or is not currently in effect must be corrected or removed from the registry in accordance with the law of this state.
- (4) An individual registering a foreign protection order shall file an affidavit by the protected individual stating that, to the best of the protected individual's knowledge, the order is currently in effect.
- (5) A foreign protection order registered under this part must be entered into the database of the national crime information center of the United States department of justice and may be entered in any existing state or other federal registry of protection orders, in accordance with applicable law.
- (6) A fee may not be charged for the registration of a foreign protection order.

M.C.A. 46-6-602 Notice of rights to victim in partner or family member assault.

Whenever a peace officer arrests a person for partner or family member assault, as defined in **45-5-206**, or responds to a call in which partner or family member assault is suspected, the officer, outside the presence of the offender, shall advise the victim of availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the following statement: "The city or county attorney's office can file criminal charges against an offender if the offender committed the offense of partner or family member assault."

In addition to the criminal charges filed by the state of Montana, you are entitled to the following civil remedies:

You may go to court and file a petition requesting any of the following orders for relief:

- (1) an order of protection that prohibits the offender from threatening to hurt you or hurting you;
- (2) an order of protection that directs the offender to leave your home and prohibits the offender from having any contact with you;
- (3) an order of protection that prevents the offender from transferring any property except in the usual course of business;
- (4) an order of protection that prohibits the offender from being within 1,500 feet or other appropriate distance of you, any named family member, and your worksite or other specified place;
- (5) an order of protection that gives you possession of necessary personal property;

(6) an order of protection that prohibits the offender from possessing or using the firearm used in the assault

M.C.A. 46-6-603. Partner or family member assault - seizure of weapon

(1) A peace officer that responds to a call relating to partner or family member assault shall seize the weapon used or threatened to be used in the alleged assault.

(2) The responding officer may, as appropriate:

- (a) take reasonable action necessary to provide for the safety of a victim and any other member of the household;
- (b) transport or arrange for the transportation of the victim and any other member of the household to a safe location; and
- (c) assist the victim and any other member of the household to remove necessary and personal items.

(3) a weapon seized under this section may not be returned to the offender until acquittal or until the return is ordered by the court.

[Uniform Child Custody Jurisdiction & Enforcement Act] 40-4-0211. Jurisdiction - commencement of parenting proceedings

(1) A court of this state competent to decide parenting matters has jurisdiction to make a parenting determination by initial or amended decree if:

(a) this state:

- (i) is the **home state** of the child at the time of commencement of the proceeding; or
 - (ii) had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of the child's removal or retention by any person and a parent or person acting as a parent continues to live in this state;
- or

(b) it is in the best interest of the child that the court of this state assume jurisdiction because:

- (i) the child and the parents or the child and at least one contest and have a **significant connection** with the state; and
- (ii) there is available in this state **substantial evidence** concerning the child's present or future care, protection, training, and personal relationships; or

(c) the child is physically present in this state and:

- (i) has been abandoned; or
- (ii) it is necessary in an **emergency** to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

- (d)
 - (i) no other state has jurisdiction under prerequisites substantially in accordance with subsection (1) (a), (1)(b), or (1)(c) or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine parenting of the child; and
 - (ii) it is in the child's best interest that the court assume jurisdiction.

(2) Except under the subsections (1)(c) and (1)(d), physical presence in this state of the child or of the child and one of the contestants is not alone sufficient to confer jurisdiction on a court of this state to make a parenting determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine parenting of the child.

(4) A parenting plan proceeding is commenced in the district court:

- (a) by a parent, by filing a petition:
 - (i) for dissolution or legal separation; or
 - (ii) for parenting in the country in which the child is permanently resident or found; or

(b) by a person other than the parent if the person has established a child-parent relationship with the child, by filing a petition for parenting in the country in which the child resides or is found.

(5) Notice of a parenting proceeding must be given to the child's parent, guardian, caretaker, those persons with whom the child is physically residing, and all other contestants, who may appear, be heard, and file a responsive pleading. The court, upon showing of good cause, may permit intervention of other interested parties.

(6) For purposes of subsection (4)(b), "child-parent relationship" means a relationship that exists or did exist, in whole or in part, preceding the filing of an action under this section, in such a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education and discipline and which relationship continues on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs.

D. ORDERS OF PROTECTION UNDER SECTION 2265

There is an effort underway, nationally, to coordinate Full Faith and Credit implementation and to have uniformity in the documentation that relates to domestic violence. This is a sensible undertaking, since the protection orders are the documents that would be taken across jurisdictional borders and will practically be reviewed by non-legal experts in emergency situations. To create a standard form would clarify, simplify

and expedite the review of these protection forms. Quick review and validation means increased safety for both officers and victims in emergency and non-emergency situations where the victim continues to be at risk.

A model form is attached (see Chapter XII: Forms, etc.) which was the original guide for Montana law. Some broader provisions have been added. The new provisions of **M.C.A. 40-15-403** added, “Had an opportunity to be heard before the order was issued” to include temporary orders of protection within Full Faith and Credit. **All protection orders should be clear, unambiguous, have the parties identified, have a clear place of execution for validation by an appropriate officer, have a clear date of effectiveness and, if there is a set expiration time, it should also be set forth.**

At the time of the protection order being issued, supportive information and contacts should be made available to the victim. At the very least, there should be a referral to a local office of advocacy or referral of local and national phone numbers for support and information. For purposes of Full Faith and Credit, the time of the issuance of the order of protection is a natural time to also provide the national and local numbers for Full Faith and Credit enforcement information since it is not known for sure how long a victim at present risk will stay within the jurisdiction.

The various sections herein outline recommended information to be provided by each level of administrative and enforcement contact and it may be repetitive. Until uniformity is obtained and it can be determined that each office will provide the proper information, it is too high a risk not to make available information from people within the legal system and chain of contact with the victim that could save lives. For this reason, it is advisable for all those in contact with the victim - the courts, the advocate, the prosecutor, the officer and the shelter representative - to inform the victim of contacts that may be of assistance, of her rights should she leave the jurisdiction to enforce her protection order, and to have her safety protected.

Definition:

18 U.S.C. Section 2266(5) states that a protection order:

Includes ANY injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including, ANY temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

THE ORDER IS PRESUMED VALID OR AUTHENTIC ON ITS FACE IF:

1. The order includes the names of the parties; and
2. The order is dated and does not show an expired date; and
3. The order contains the signature of a judicial officer; and

4. The order contains language prohibiting violence or acts of harassment or similar language.

THE ORDER DOES NOT REQUIRE:

1. The original order; or
2. An original signature; or
3. A raised seal or stamp of the issuing court; or
4. That the original order be registered in the enforcing (new) jurisdiction.

THE ORDER IS ENFORCEABLE IF

1. It appears valid (authentic) on its face; and
2. There is probable cause to believe that a violation of the order occurred in the enforcing jurisdiction.

Note: The order does not require that the opposing party have attended his hearing if he had notice that an order was issued and general knowledge of its contents. If, for example, the opposing party was served and there is a pending final hearing date but as of yet the party has not attended any hearing on the matter, Full Faith and Credit must be honored. This was confirmed in the new provisions of M.C.A. 40-15-403 which added “had an opportunity to be heard before the order was issued” to include temporary orders of protection within Full Faith and Credit.

* The terms of the Model Form are narrower than federal law. The model form was the original guide for Montana law and some broader provisions have been added. (See Chapter XII for the Montana order of protection cover sheet and related documents). The new provisions of M.C.A. 40-15-403 added “sexual assault and stalking” to the laws of an issuing state that would be included under Full Faith and Credit. Note that it does not broadly include all foreign criminal protection orders, bail instructions, etc. For this reason, federal law defining the broad terms of the order of protection should be reviewed and the Montana form used only as a guide by any other jurisdiction planning to create a new, or amend an old order of protection form.

All Jurisdictions Should Submit Their Orders Of Protection, Any Amendments Or Terminations Thereof, And Any Related Orders That Modify The Terms, For Submission To The FBI's National Crime Information Center (NCIC) For Uniform Protection, Nationwide. In Montana, This Is Accomplished, By Entering The Information Into The Statewide Criminal Justice Information Network ("CJIN") System.

NOTE: Should your jurisdiction not have CJIN access, meetings between your jurisdiction and a neighboring jurisdiction with CJIN can make arrangements for sharing the facilities and developing procedure whereby your orders are delivered regularly to the CJIN jurisdiction for entering and updating. This arrangement is crucial to protecting the freedom of members of your jurisdiction to travel and still be safe. It is crucial to enforcing Full Faith and Credit and is the first step in making sure the enforcing law enforcement officers are informed and in the best position to make arrests and press charges.

VERIFICATION: If the order does NOT appear authentic on its face, then verification can be accomplished by any ONE of the following methods:

- 1. Confirmation of the elements of an order in the NCIC Protection Order file.**
- 2. Confirmation with the issuing court or law enforcement.**
- 3. Review of the elements of an order in the state or local protection order registry of the issuing jurisdiction.**
- 4. Review of the elements of an order if previously filed or registered with authorities in the enforcing jurisdiction.**
- 5. Personal knowledge of the officer.**

What is NOT required:

- That the order or the signature of the issuing authority be original**
- That the order contain a raised seal or stamp of the issuing court**
- That the victim registers the order in the enforcing jurisdiction**

Types of Protection Orders under Section 2265:

1. EX PARTE.

This is an order that results from a petition filed by one party. It does not require the presence of the opposing party. It does have notice requirements. In the case of an ex parte temporary order of protection for Full Faith and Credit purposes it is sufficient if the party has notice of the order and its general terms and has an opportunity to attend a future hearing.

2. MUTUAL.

A Mutual protection order provides protection to both parties. It does not require mutual consent. For Full Faith and Credit purposes, a precaution against applying an order against both parties exists in the federal law under Section 2265(c). An order cannot be assumed to extend to both parties regardless of whether only one or both parties were

present at a hearing. Strict requirements must be met before any opposing party has the right of Full Faith and Credit. Full Faith and Credit does NOT apply to the other party if:

1. No cross petition, counter petition or complaint, cross complaint or other pleading on the matter was filed by the opposing party; or
2. A cross petition or counter petition WAS filed but the court did not make specific findings that EACH party was entitled to such an order.

If either of the above conditions exists, there is NO mutual restraining order that entitles the opposing party to Full Faith and Credit as well. If these requirements are met, and even if both parties do not consent, the judge may order a MUTUAL RESTRAINING ORDER. This is not necessarily the same as a CONSENT ORDER (described below), since both parties may not consent and the judge can still issue the order.

Note: Mutual restraining orders are not issued in Montana. There must be a separate filing of application for another party, especially the respondent, to be granted relief. **M.C.A. 40-15-202 (3)** states that orders cannot be made mutually effective. The reasoning behind this legislation is that a finding of restraint against a party also designates the victim. A mutual restraining order issued without regard to the specific facts or a consent order issued without clear understanding of the facts may appear in court to create a simple, peaceful resolution, but it could actually result in future harm. Many parties will consent to an order against each other to avoid displeasing a judge. Domestic violence is a continuing and escalating crime. If a mutual restraining order is inappropriately issued, the victim is harmed twice. The batterer immediately feels vindicated since he or she is not totally at fault and therefore feels empowered. Such orders might encourage violence and may possibly serve to escalate the violence. It sends the wrong message to the perpetrator. By enacting federal law to prohibit such assumptions, the legislature has acknowledged this serious risk.

NOTE: Unlike Montana orders, which can never be mutual, the mutual restraining orders that come in from out of state may be effective, but only under the exceptions outlined above: Officers, in particular, must guard against assuming a mutual protection order exists just because some relief is noted for the respondent or there are restrictions against the petitioner as well. Use the above guidelines that protect victims. If there is no designation that the respondent is also a counterclaimant or cross claimant, or some other action was filed by respondent, and the relief is not specific, do not enforce the order against the petitioner. Do enforce the order against the respondent.

Under Section 2266:

3. CRIMINAL PROTECTION ORDERS

Protection orders issued by criminal courts are entitled to Full Faith and Credit. Criminal protection orders include those found in pre-trial release orders, conditional release orders, or probation orders and separate, independent orders by criminal courts. (Montana has recently amended its law to provide for foreign orders of protection prohibiting sexual assault or stalking to be included as foreign orders of protection under Full Faith and Credit in addition to civil orders of protection. It is NOT specifically

authorizing any other criminal protection orders, bail instructions, probation restrictions, etc. that may contain other protection order terms. See statutes set forth above at length).

Under Section 2265(b)

4. CONSENT ORDERS

Under Section 2265(b) Both parties, instead of just the petitioner, shall be entitled to Full Faith and Credit, if the order is agreed to by both parties, AND

1. The court must have personal and subject matter jurisdiction
2. The respondent must have been given notice and opportunity to be heard.

5. TRIBAL ORDERS

Under **Section 2265 of Title 18 U.S.C.** tribal court protection orders are entitled to Full Faith and Credit. They must similarly satisfy the requirements for all protection orders under Section 2265(b) and they will be treated as if they had been issued by the enforcing state.

Under Full Faith and Credit:

ISSUING JURISDICTION determines:

1. whether an order should be issued
2. the parties to be protected
3. the terms and conditions (including all relief-even if it is not normally available in the enforcing jurisdiction)
4. duration of the order

ENFORCING JURISDICTION

1. determines how the order is to be enforced
2. sets arrest authority for responding officer
3. sets sanctions and penalties
4. determines charges for violation of an order

Orders may be invalid under Montana law and still remain valid under Full Faith and Credit order of protection requirements if from a foreign state. For example: if an enforcing state does not provide same sex protection, but receives a same sex order of protection, the enforcing state would still enforce the foreign order for the same sex partner with an order of protection valid under Full Faith and Credit law. Tribal Courts have full CIVIL jurisdiction to enforce foreign orders of protection. Such enforcement includes: civil contempt and punishment such as fines, banishment and community service.

CHAPTER II. PROCEDURE AND ENFORCEMENT: LAW ENFORCEMENT

BASIS: M.C.A. 40-15-406

A. KEEP THE PEACE: SAFETY OF VICTIMS, SAFETY OF OFFICER

More officers are injured in attending to domestic violence offenses than at any other scene. For this reason, officer safety is paramount. The initial assumption, due to the frequency of the calls or familiarity with the parties, is to underestimate the risk. Due to these statistics, it should be assumed that the scene of a domestic violence call may be just as, if not more, dangerous than any other call. When approaching the scene, the officer should be on guard. It should be assumed that due to the nature of the perpetrator, the invasion of the home territory by the officer's presence is more likely to be an issue. Although the report may not name any risk of weapons, it should be assumed that there are potential weapons always present in and around the home. Because of the nature of domestic violence it should also be assumed that any effort by the officer to investigate may prompt an extreme, illogical and potentially dangerous reaction from the offender or spouse at the scene.

Safety of the victim and any children (who may also be victims) are the next concern. The officer should immediately attempt to ascertain whether there has been an assault on the victim or any children in the home and whether medical attention is necessary. Once a valid protection order has been ascertained, the officer should next determine whether there has been a violation of the order and whether there has been a separate violation of Montana law.

Montana gives specific direction to law enforcement to enforce foreign orders of protection by Full Faith and Credit:

M.C.A. 40-15-404. Nonjudicial enforcement of order states:

(1) A law enforcement officer of this state, upon determining that there is probable cause to believe that a valid foreign protection order exists, and that the order has been violated, shall enforce the order as if it were the order of a court of this state. Presentation of a protection order that identifies both the protected individual and the respondent and, on its face, is currently in effect constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(2) If a foreign protection order is not presented, a law enforcement officer of this state may consider other information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(3) If a law enforcement officer of this state determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent, and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(4) Registration or filing of an order in this state is not required for the enforcement of a valid foreign protection order pursuant to this part.

If the protection order is foreign, then there is specific protection for the officer. For purposes of full faith and credit, there is specific protection for an officer under **M.C.A. 40-15-406**, which provides immunity to an officer attending to a crime scene and attempting to enforce the law.

B. PROMOTING UNIFORMITY OF ENFORCEMENT

1. M.C.A. 40-15-303(2)

Law enforcement agencies shall establish procedures, using an existing system for warrant verification and the database of the national crime information center of the United States department of justice, to ensure that peace officers at the scene of an alleged violation of an order of protection are informed of the existence and terms of the order.”

2. Model Law Enforcement Policy: Main points:

I. Enforce a protection order even if party would not be eligible for said protection in this jurisdiction and the foreign order grants more relief than would be available in this jurisdiction.

II. Protection Orders from another state, tribe or U.S. territory will be enforced in Montana as if any valid court in the State of Montana issued them. Protection Orders from any state, tribe or the enforcing tribe will enforce U.S. territory as if the enforcing tribe issued them. All such out of jurisdiction orders are termed “foreign orders”.

III. Mutual protection orders are discouraged under this policy. Check any order designated “mutual” or appearing to be “mutual” to make sure it meets the requirements of having also been the result of a written pleading of the defendant/respondent AND to make sure the order makes specific findings that the defendant was entitled to the order; otherwise, it is only enforced for the benefit of the petitioner.

IV. An Emergency Situation is defined as one that requires immediate action by the police to protect the victim from violent behavior (including weapons), threats or violation of a no-contact order.

V. A Non-Emergency Situation is defined as a situation that does not involve violent behavior, threats or violation of a no-contact order such as a request for child support, changes in the order, etc.

* * * * *

VAWA has set forth a model emergency and non-emergency police response procedure for Full Faith and Credit and is referred to below. Again, it is important to note that basic police procedure should rule with additional considerations for the new laws concerning foreign orders being enforced:

RESPONDING OFFICER PROCEDURE IN AN EMERGENCY SITUATION:

A. Ensure the safety of the petitioner/holder of the Order. This means you presume the protection order is valid when presented. Validity of the order is secondary.

B. If the respondent/defendant (“defendant”) in the order committed a criminal offense under the criminal laws of this jurisdiction against the victim, and appears to have violated the foreign order:

- 1. ARREST THE DEFENDANT, SIGN THE CRIMINAL COMPLAINT FOR THE CRIME; AND**
- 2. CHARGE THE DEFENDANT WITH THE APPROPRIATE SANCTION FOR A VIOLATION OF THE FOREIGN PROTECTION ORDER IN THE ENFORCING JURISDICTION**
(Under Montana Law this would be **M.C.A. 45-5-626**)

C. If the defendant does not appear to have committed a crime, but appears in violation of the foreign protection order terms, the officer should determine whether the order appears to be facially valid.

- 1. IF THE ORDER APPEARS FACIALLY VALID, ARREST THE DEFENDANT FOR VIOLATING THE TERMS OF THIS ORDER IF THE CONDUCT IS AN ARRESTABLE OFFENSE IN THIS JURISDICTION. IF IT IS NOT AN ARRESTABLE OFFENSE, ADVISE THE VICTIM OF THE REMEDIES AVAILABLE IN THE JURISDICTION AND ASSIST THE VICTIM IN PURSUING THESE REMEDIES.**

- 2. AN ORDER IS FACIALLY VALID IF IT CONTAINS THE NAMES OF THE PARTIES AND HAS NOT EXPIRED.**

- 3. CHECK TO SEE IF THERE IS AN EXPIRATION DATE**

D. If the order appears to have been issued but notice or service cannot be determined, the officer must:

- 1. IMMEDIATELY NOTIFY THE DEFENDANT OF THE TERMS OF THE ORDER; AND**
- 2. INFORM THE DEFENDANT YOU WILL ENFORCE THE ORDER FOR SUBSEQUENT VIOLATIONS.**

3. DOCUMENT IN YOUR REPORT THAT THE DEFENDANT WAS NOTIFIED OF THE TERMS OF THE ORDER AND THAT ANY FUTURE CONTACT WITH THE VICTIM WOULD RESULT IN ARREST.

4. IF YOU HAVE PROBABLE CAUSE TO BELIEVE THE DEFENDANT COMMITTED A CRIME IN THIS JURISDICTION, ARREST THE DEFENDANT AS YOU WOULD ANY OFFENDER.

E. If you see an apparent defect in the order, which you reasonably question:

1. ARREST THE DEFENDANT IF A CRIMINAL OFFENSE IN THIS JURISDICTION HAS BEEN COMMITTED; AND/OR

2a. ADVISE VICTIM TO OBTAIN A PROTECTION ORDER HERE. EXPLAIN TO VICTIM THE NEW ORDER MUST THEN BE SERVED FOR IT TO BE VALID. IN AN EMERGENCY, HELP THE VICTIM OBTAIN A TEMPORARY ORDER. IF NECESSARY TO DETERMINE THE VALIDITY OF THE FOREIGN ORDER, CONTACT THE APPROPRIATE COURT OR LAW ENFORCEMENT AGENCY IN THE ISSUING JURISDICTION; AND/OR

2b. IF THE ORDER APPEARS VALID EXCEPT THAT YOU CANNOT SUBSTANTIATE SERVICE OR NOTICE AFTER A THOROUGH INVESTIGATION, SERVE THE RESPONDENT AND WARN AGAINST FUTURE VIOLATIONS. NOTIFY THE ISSUING JURISDICTION OF SERVICE.

3. IF THE ORDER APPEARS INVALID, DOCUMENT IN YOUR REPORT YOUR REASONS FOR CONCLUDING THE ORDER WAS NOT AUTHENTIC.

F. If the victim does not have a copy of the order, attempt to confirm its existence:

1. CONTACT THE COURT OR LAW ENFORCEMENT AGENCY IN THE ISSUING JURISDICTION; OR

2. CONTACT THE APPROPRIATE DOMESTIC VIOLENCE PROTECTION ORDER REGISTRY TO VERIFY THE ORDER; OR

3. ARREST THE DEFENDANT BASED UPON A STATEMENT OF THE VICTIM, SUPPORTED BY CORROBORATING CIRCUMSTANCES FOR A VALID ORDER AND PROBABLE CAUSE THAT THE DEFENDANT IS IN VIOLATION. ASK THE

VICTIM TO SIGN A CERTIFIED (SWORN) STATEMENT.

- 4. IF YOU LACK PROBABLE CAUSE TO ARREST AND CHARGE WITH A VIOLATION OF THE ORDER, EXPLAIN TO THE VICTIM THE PROCEDURE TO BE FOLLOWED IF VICTIM WANTS TO FILE CRIMINAL OR CIVIL CHARGES. DOCUMENT IN YOUR REPORT WHY YOU DID NOT ACT TO ENFORCE ORDER AND WHAT STEPS YOU DID TAKE.**

G. If you have probable cause to believe a defendant who is no longer at the scene, has:

- 1. VIOLATED A VALID ORDER, AND THIS VIOLATION IS AN ARRESTABLE OFFENSE HERE; AND/OR**
- 2. HAS COMMITTED AN ARRESTABLE CRIME,**
- 3. YOU SHOULD:**
 - a. NOTIFY OTHER OFFICERS ON DUTY OF THIS INFORMATION THROUGH A RADIO BROADCAST; AND**
 - b. SIGN A CRIMINAL COMPLAINT AGAINST DEFENDANT BEFORE THE END OF YOUR SHIFT AND HAVE THE WARRANT ENTERED INTO THE JURISDICTION'S CRIME INFORMATION CENTER (a. and b. in accordance with departmental procedure).**

IN A NON-EMERGENCY SITUATION:

A. Restraining Order Conditions: Refer the victim to the appropriate court to obtain appropriate relief in accordance with the foreign restraining order or order of protection.

- 1. IF THE VICTIM HAS MOVED INTO THIS JURISDICTION REFER THE VICTIM TO THE APPROPRIATE COURT FOR THE NEW JURISDICTION.**
- 2. IF THE VICTIM HAS ONLY TEMPORARILY MOVED TO THIS JURISDICTION, REFER THE VICTIM TO THE COURT WHERE VICTIM IS THEN RESIDING.**

B. Criminal law violations. Where the victim reports that the defendant committed a violation of the order that did not place the victim at risk of bodily harm:

- 1. YOU MAY ARREST AND CHARGE THE DEFENDANT WITH THE APPROPRIATE CRIMINAL CHARGES BASED UPON A STATEMENT BY THE VICTIM AND SUPPORTED BY CORROBORATING CIRCUMSTANCES THAT THE DEFENDANT HAS VIOLATED THE CRIMINAL LAWS OF THIS JURISDICTION. REQUEST THAT THE VICTIM SIGN A CERTIFIED STATEMENT TO THIS EFFECT.**

2. IF YOU CONCLUDE THAT THERE IS INSUFFICIENT PROBABLE CAUSE TO ARREST, EXPLAIN TO THE VICTIM THE PROCEDURE TO BE FOLLOWED IF THE VICTIM WANTS TO FILE CRIMINAL CHARGES AGAINST THE DEFENDANT.

C. Violations of Federal Law. **Title 18 U.S.C. 2261.** A person may be subject to federal prosecution for crossing state lines or tribal landlines and physically injuring a spouse or intimate partner.

A violation exists if you determine the defendant:

1. TRAVELED ACROSS A STATE LINE OR ENTERED OR LEFT INDIAN COUNTRY WITH THE INTENT TO INJURE, HARASS, OR INTIMIDATE THAT PERSON'S SPOUSE OR INTIMATE PARTNER, OR

2. CAUSED A SPOUSE OR INTIMATE PARTNER TO CROSS A STATE LINE OR ENTER OR LEAVE INDIAN COUNTRY BY FORCE, COERCION, DURESS, OR FRAUD AND, IN THE COURSE OF, OR AS A RESULT OF THAT CONDUCT, TO INTENTIONALLY COMMIT A CRIME OF VIOLENCE AND THEREBY CAUSED THE BODILY INJURY TO THE PERSON'S SPOUSE OR INTIMATE PARTNER.

NOTE: If a respondent forces a victim to cross state lines under false pretenses it can be fraud as well as a federal violation.

NOTE: If a respondent e-mails a victim from out of state it is considered crossing state lines for federal law purposes. Have the victim save, back up and print the e-mails. Notify the issuing state as well of violations. Get copies of any phone records. Federal law permits tapes as evidence so long as one party is aware of the taping.

D. Interstate violation of a protection order. **18 U.S.C. Section 2262.** A person may be subject to federal prosecution for crossing state lines or tribal landlines and violating a protection order.

A violation exists if you determine that a defendant who is the subject of a foreign order traveled across a state line or entered or left Indian country with the intent:

- 1. TO ENGAGE IN CONDUCT THAT VIOLATES A PORTION OF THE ORDER THAT INVOLVES PROTECTION AGAINST:**
 - a. credible threats of violence,
 - b. repeated harassment, or
 - c. bodily injury to the person or persons for whom the protection order was issued; or

2. WOULD VIOLATE THE ORDER IF THE CONDUCT OCCURRED IN THE JURISDICTION IN WHICH THE ORDER WAS ISSUED; AND

3. THE DEFENDANT ENGAGED IN THE CONDUCT.

E. Reporting Procedure for Paragraphs A and B above:

If you conclude that one of the above laws was violated, report this according to departmental procedure to the State Prosecutor's office, the County Prosecutor's office or the Department's legal advisor who will determine whether the case should be referred to the U.S. Attorney's Office or the local office of the FBI for appropriate action pursuant to **18 U.S.C. Section 2261 and 2262.**

F. Firearms Prohibition

A person subject to a protection order may be prohibited under Federal law, and in some cases under the restrictions imposed by the foreign protection order, from purchasing, receiving, or possessing firearms and ammunition.

1. The Federal law applies to final protection orders issued after reasonable notice and an opportunity to be heard have been provided to the defendant. The order needs to include a finding that the defendant represents a credible threat or language that restrains the defendant from harassing, stalking, threatening, or engaging in other conduct that would place an intimate partner or child of such intimate partner in reasonable fear of bodily injury.

A. DEFINITION OF INTIMATE PARTNER: THE SPOUSE OF A PERSON, A FORMER SPOUSE OF THE PERSON, AN INDIVIDUAL WHO IS A PARENT OF A CHILD OF A PERSON, AND AN INDIVIDUAL WHO COHABITATES OR HAS COHABITED WITH THE PERSON.

NOTE: DATING RELATIONSHIPS WHERE THE PARTIES HAVE NEVER RESIDED TOGETHER OR HAVE NO CHILDREN IN COMMON ARE NOT INCLUDED IN THE DEFINITION.

B. WHERE YOU REASONABLY BELIEVE THE DEFENDANT OF A VALID FOREIGN OFFER VIOLATES THIS FEDERAL PROVISION, YOU SHOULD, IF POSSIBLE, TAKE POSSESSION OF THE FIREARM AND NOTIFY THE DESIGNATED DEPARTMENTAL LEGAL ADVISOR OR YOUR SUPERVISOR WHO WILL DETERMINE WHAT ACTION, IF ANY, SHOULD BE TAKEN, AND WHETHER THE LOCAL OFFICE OF ALCOHOL, TOBACCO AND

FIREARMS (“ATF”) SHOULD BE NOTIFIED.

***Author’s note: seizures must be in accordance with your jurisdiction’s law.**

2. Some protection orders, temporary or final, issued by a foreign jurisdiction, may prohibit a person from purchasing, receiving or possessing firearms or firearms identification cards or permits to carry firearms. As responding officer:

A. YOU MUST ENFORCE THIS PROVISION OF THE ORDER AS IF IT WERE ORDERED BY A COURT OF THIS JURISDICTION.

B. YOU SHALL INFORM THE NAMED DEFENDANT THAT HE OR SHE CANNOT POSSESS ANY FIREARMS AND MUST SURRENDER THEM IMMEDIATELY TO THE OFFICER.

C. IF THE DEFENDANT REFUSES TO SURRENDER THE FIREARMS, YOU SHALL IMMEDIATELY CONTACT YOUR SUPERVISOR TO DETERMINE ACTION TO ENFORCE THE ORDER.

D. YOU SHALL SECURE THE FIREARMS IN THE DEPARTMENTAL EVIDENCE ROOM AND SHALL NOTIFY THE POLICE DEPARTMENT IN THE JURISDICTION WHERE THE COURT ORDER WAS FILED THAT YOUR DEPARTMENT HAS POSSESSION OF THE FIREARMS.

3. Immunity from civil liability:

A. STATE LAW PROVIDES THAT AN OFFICER SHALL NOT BE HELD LIABLE IN ANY CIVIL ACTION BROUGHT BY ANY PARTY FOR AN ARREST BASED UPON PROBABLE CAUSE WHEN THAT OFFICER IN GOOD FAITH ENFORCED A FOREIGN RESTRAINING ORDER OR PROTECTION ORDER.

B. UNDER THE QUALIFIED IMMUNITY DOCTRINE, YOU MAY ALSO ASSERT IMMUNITY TO FEDERAL ACTIONS BROUGHT UNDER 42 U.S.C. SECTION 1983.

NOTE: Immunity does not mean the officer should avoid action. It is the responsibility of the officer to do his or her job. An act of omission such as failure to arrest due to fear of false arrest should be outweighed by the likelihood that there is a crime to be charged. Failure to arrest does not prevent harm and may increase

liability. A domestic violence arrest will most likely prevent great harm and therefore, decrease liability. The purpose of Full Faith and Credit is to provide officers with more confidence to make arrests under the good faith protection of the law.

BASIC FACTS ABOUT FULL FAITH AND CREDIT ENFORCEMENT:

1. The officer must enforce the terms and conditions of the order as written.

Officers are not required to know the laws of the issuing jurisdiction. They must comply as well, with all laws, policies and procedures of their own jurisdiction concerning violation of orders of protection.

2. The filing of a foreign order in the new jurisdiction is not required.

3. A child custody order or any other order that may not be valid for any reason in its own state will be enforced out of state by Full Faith and Credit if it meets Full Faith and Credit requirements for the basic elements:

1. includes names of parties
2. is not expired
3. contains the signature of a judicial officer

(NOTE: support terms are up to the court to determine jurisdiction.)

4. Any foreign order must therefore:

- * be authentic on its face; and
- * have probable cause to believe that a violation of the order occurred in the enforcing jurisdiction.

Additionally:

NOTICE REQUIREMENTS for the respondent must be met. Notice can consist of respondent being served; OR having knowledge of the order and general knowledge of the contents AND respondent had opportunity to be heard or had opportunity to be heard within a reasonable time after order issued. If no notice can be confirmed serve party with a copy of the order and warn.

DO NOT ASSUME LACK OF NOTICE-investigate indirectly.

1. Check with CJIN
2. Check with National Criminal Investigation Center (“NCIC”) of the FBI.
3. Check with issuing jurisdiction.
4. Investigate parties.

5. Provide all relief set forth in the foreign order of protection even if such relief is not normally permitted under Montana law (18 U.S.C. Section 2265(d)(1).

6. Do not assume orders are mutual because it contains some general relief or warnings to both parties. Check the terms of the order to make sure it shows the respondent was a claimant (“counterclaimant” or “cross-claimant”) or it is NOT an order against the petitioner as well. Enforce the order against the respondent. Out of state mutual restraining orders can only be enforced if they meet all exceptions for Full Faith and Credit. A respondent’s own out of state order must also meet Full Faith and Credit tests.

SUMMARY:

- 1. Check for violations of all orders: custody, orders of protection, etc.**
- 2. Check for violations of all state laws, including violation of a foreign order of protection**
- 3. Check for gun violations-there is no need for a gun prohibition in a foreign order of protection so long as the valid order or qualifying misdemeanor conviction for domestic violence exists (refer to ATF). Seize gun if it is within your jurisdiction’s law**
- 4. Check for violations of other federal laws-kidnapping, etc.(refer to federal jurisdiction)**
- 5. If Petitioner says order exists but is not on hand, check Montana CJIN and NCIC database. Montana law allows electronic proof for Montana violations.**
- 6. If you are dealing with federal violations only, a criminal order of protection (including bail instructions, probation and parole restrictions) IS valid if it meets Full Faith and Credit tests. Under Montana law, only criminal Partner Family Member Assault or Stalking qualifies for a criminal violation of a protection order. Civil orders of protection are accorded Full Faith and Credit under Montana law.**
- 7. Interstate phone calls, interstate mail or e-mail do constitute interstate contact under Full Faith and Credit for federal law violations.**

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CASE REFERRALS:

A federal agency is required to present or adopt a state case. (Refer Interstate DV or Interstate stalking crimes to your local FBI. Refer firearms violations to your local ATF).

Include in any case file for referral:

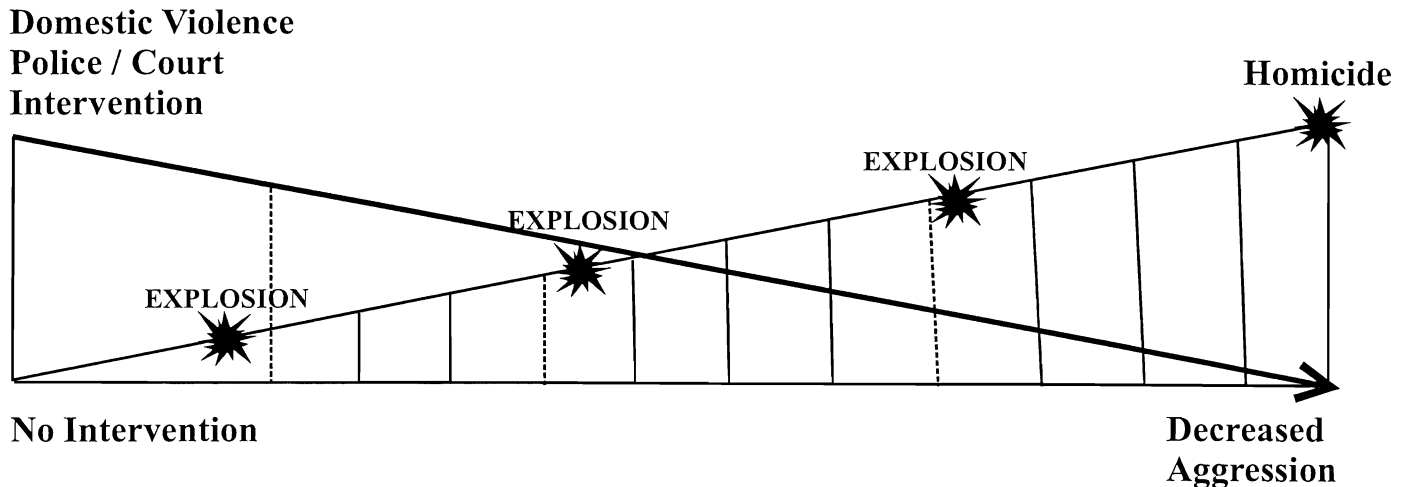
- 1.a prosecution memorandum setting forth facts and evidence supporting charges**
- 2.an IRCL form which is the investigative checklist**
- 3.the VALI form (Victim and Loss Information form)**
- 4. the Ninth Circuit requires law enforcement officers to keep their rough notes available for review.**

Checklist (SUMMARIZED-check list for details and full requirements):

- 1. Summary of facts.**
- 2. Elements. Check *Big Book of Elements*.**
- 3. Statements of the defendant: Rule 16(a)(1)(A). All statements of the subjects located in any agency file have been included in report. The rough notes are provided in a separate envelope.**
- 4. Lab Reports; Curriculum Vitae of Expert Witnesses: Rule 16 (a)(1)(D,E). All lab reports are included. Qualifications of experts included; any forensic tests included.**
- 5. Physical evidence: Rule 16(a)(1)(C). All evidence is inventoried in report (whether included or not) and all evidence capable of reproduction (tapes, etc.) included. All warrant applications, warrants and inventories included.**
- 6. Outstanding evidence: state missing items or that nothing is missing.**
- 7. Victim and Loss information: accompanies report.**
- 8. Agency Identification and Collateral File Search: other involved agencies listed; all collateral reports reviewed and noted in report; no other discoverable evidence.**
- 9. Other Acts Evidence: Rule 404(b). Evidence of other crimes showing intent, motive, association or method of operation-include in report or note none exists.**
- 10. Exculpatory Evidence: (re: *Brady and Giglio*). Include any exculpatory in report; state any benefits or promises given to witnesses in report and interview memorandum. State if no witnesses received any promise or benefit.**
- 11. Forfeiture: list whether there is forfeitable or non-forfeitable property involved.**
- 12. Two copies of the report to be forwarded to the U.S. Attorney in Billings.**

C. DOMESTIC VIOLENCE.

1. The Cycle of Violence



2. Nature of the Victim: The victim, depending upon how long the violence has progressed, exhibits traits that would appear abnormal to an outsider but would be normal as “survivor” traits. Literally, it is the behavior that has enabled the victim to co-exist under extreme, violent circumstances and deal best with the above cycle. In this artificial world, being submissive, acknowledging non-existent errors and flaws, accepting blame and not voicing an opinion even in the welfare of the children, are all traits that could serve to protect the family. **Because of the reality that all victims cannot be protected, many victims distrust the justice system that may have failed the victim OR victim’s friends, neighbors, etc. There is also the real risk of the victim being beaten for police response after they leave the scene. The victim may try to avoid this repercussion by exhibiting a lack of cooperation or even animosity towards the police. Police must be prepared for this behavior and understand its cause. This is why the victim may be the most hostile, vocal and even most violent person**

at the scene. It does not mean the victim was the predominant aggressor. Only a thorough investigation and understanding can determine the real perpetrator. For these reasons, TYPICAL Demeanor is NOT a reliable tool in DOMESTIC VIOLENCE SCENES and may prove deceptive.

3. Nature of the Batterer: According to Lundy Bancroft and Jay G. Silverman, (The Batterer as Parent, Sage Publications, Inc., Thousand Oaks, California [2002], pg. 5,7,15) there are major characteristics unique to the batterer in domestic violence. These qualities include a need for control, a sense of entitlement, and a need to manipulate the situation. For these reasons, there is a different “public personality” than the private one. The scene will be deceptive. The Batterer may react cooperatively and reasonably to an officer on the scene or he may feel his “controlled” space is violated and be very violent. Anticipating blame and punishment for the invasion of the police to this sanctum, the victim may actually be aggressive, hostile and uncooperative towards the police. Despite appearances, the victim needs help more than ever, as do the children. According to a National Institute of Justice Study; (Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey) most intimate partner victimizations are not reported to police. Only one-fifth of all rapes, one quarter of all physical assaults and one-half of all stalkings perpetrated by intimates were reported to police. According to the Department of Justice, Bureau of Justice Assistance, Family Violence: Interventions for the Justice System, 1993, “in homes where partner abuse occurs, children are 1500 times more likely to be abused”. The fears, hesitations and extreme reactions to threats are real and give further cause for officer caution.

4. Safety of the victim: Do standard police procedure to secure the scene as you would at any potentially violent scene. Do not underestimate a “domestic”, even if you’ve responded without incident or risk to yourself or the parties many times. The crimes will escalate.

In addition, there are steps to take that deal specifically with responding to a domestic violence call:

1. Separate the victim to a safe environment
2. Investigate in privacy, ideally without the victim in the line of eye contact of the offender. Ask about injuries even if not apparent.
3. Seek immediate medical help for victim-the responders can become witnesses.
4. At any time when serving an order of protection, check with the victim (or advocate) before serving-there may be a less contentious place to serve (outside work, etc.) that will not have repercussions of rage against the victim.

NOTE: Police Perspective: Frustration can arise from several sources in domestic violence cases such as a contentious or uncooperative victim; frequent 911 calls without filing charges; failures to appear in court; and failures to testify. It is important to be aware that most victims must try numerous times before gaining the courage to call, testify or leave. This is a reasonable fear since

the most dangerous time for a spouse in a domestic violence relationship is when she tries to leave or has just left. There are also threats against the children or threats of kidnapping that may cause the victim to have a realistic reluctance to prosecute. Sixty-five per cent of intimate homicide victims had physically separated from the perpetrator prior to their death. (American Bar Association Commission on Domestic Violence citing Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p.47, table 17).

5. Evidence without the victim: Police can help prosecutors who do decide to prosecute by obtaining sufficient evidence regardless of the victim's willingness to testify. It is not a police decision to prosecute although police should pass on information they know regarding the above risks so that the prosecutor can make an informed decision.

The FBI in its website (www.fbi.gov/publications/leb/1996) lists an article by George Wattendorf, J.D. entitled *Focus on Domestic Violence Prosecuting Cases Without Victim Cooperation*. Lieutenant Wattendorf serves as legal advisor to the Dover, New Hampshire, Police Department. His article lists evidence police can collect to help in cases without a willing victim witness:

1. Secure 911 Tape
2. Record excited statements by victim
3. Take photographs
4. Request a statement from the victim-if she won't or can't write due to trauma-transcribe the words yourself at scene
5. Interview offender
6. Interview witnesses
7. Secure medical records
 - have victim sign medical release at scene
 - get names of medical personnel, at scene and hospital for reports
8. Seize plain view evidence: possible weapon, blood stained, torn clothing, hair strands, etc.

**** DOMESTIC VIOLENCE RESPONSE FFC CHECKLIST ****

- 1. ENSURE THE SAFETY OF ALL PARTIES-STANDARD PROCEDURE**
- 2. SECURE AND PROTECT THE CRIME SCENE**
- 3. SEIZE FIREARMS SUBJECT TO STATE, FEDERAL, OR TRIBAL PROHIBITIONS (REFER FEDERAL CASES)**
- 4. IDENTIFY WHETHER AN ORDER OF PROTECTION HAS BEEN VIOLATED**
- 5. EVALUATE THE VALIDITY AND ENFORCEABILITY OF THE ORDER
CONSIDER:**
 - 1. Notification-respondent has notice of the order and its contents, OR was served, AND had opportunity to be heard before the order was issued or a reasonable time after the order was issued (ex: temporary order with future court appearance date). If no notice, serve with a copy of order.**
 - 2. Registration-NOT required for valid order; but if you serve, register CJIN**
 - 3. Tribal jurisdiction-enforce valid tribal orders if Full Faith and Credit requirements are met.**
 - 4. Child custody and support: enforce custody terms (not support) in order per State laws-petitioner must seek courts for support relief. Emergency power always exists for child's welfare.**
 - 5. Validity: Order valid on face if: names the parties, dated and not expired; generally contains language prohibiting violence, harassment or similar terms, and is signed by judicial officer. (Must in addition meet notice requirements of #1).**
 - 6. Verification: use other ways to confirm order if order not present or facts contradicted: call CJIN; call NCIC; investigate parties, issuing jurisdiction.**
- 6. ARREST FOR VIOLATION OF THE ORDER UNDER LAWS OF ENFORCING JURISDICTION**
- 7. ARREST FOR ANY OTHER CRIMINAL OFFENSE**
- 8. DETAIN FOR REFERRAL TO FEDERAL AUTHORITIES FOR FEDERAL VIOLATION-Make sure file is complete (see checklist; retain your rough notes).**

CHAPTER III: PROCEDURE AND ENFORCEMENT: JUDICIARY

STATISTICS

* **Nearly one in three women experience a serious assault by an intimate partner during an average 12-month period.** (American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996) p. 10).¹

* **Intimates perpetrate 28% of all annual violence against women.** (Bureau of Justice Statistics Special Report: *National Crime Victimization Survey, Violence Against Women* (NCJ-145325), January, 1994).²

* **15-50% of abused women report interference from their partner with education, training or work.** (Raphael and Tolman, *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare*, p.22 (1997)).

* **Each year an estimated 3.3 million children are exposed to violence by family members against their mothers or female caretakers.** (American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996), p. 11).¹

* **In homes where partner abuse occurs, children are 1,500 times more likely to be abused.** (Department of Justice, Bureau of Justice Assistance, *Family Violence: Interventions for the Justice System*, 1993).²

* **40-60% of men who abuse women also abuse children.** (American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996), p.80).

* **In one study, 27% of domestic homicide victims were children.** (Florida Governor's Task Force on Domestic and Sexual Violence, *Fla. Mortality Review Project*, (1997), p.47, table 11).

¹ Citation by the American Bar Association, Commission on Domestic Violence (See web site listing, Chapter XIV).

² Ibid.

A. FULL FAITH AND CREDIT:

Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded Full Faith and Credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

The protection order should be issued by the proper court of jurisdiction of the issuing jurisdiction:

M.C.A. 40-15-301. Jurisdiction and venue.

- “(1) District courts, justice’s courts, municipal courts and city courts have concurrent jurisdiction to hear and issue orders under 40-15-20
- (2) When a dissolution of marriage or parenting action involving the parties is pending in district court, a person may file a petition for an order of protection in a justice’s, municipal, or city court only if the district court judge assigned to that case is unavailable or if the petitioner, to escape further abuse, left the county where the abuse occurred...”

In Montana the proper court of jurisdiction may be the District Court, the Justice Court, Municipal or City Courts. For the third or subsequent offense, the District Court must hear the case since the penalty has left the level at which the limited jurisdiction court may hear the case. At this point a history is established, the prior court has a good background on the parties and may or may not have ordered investigations that are in the file. A limited jurisdiction court that has routinely handled these cases would therefore be more familiar than a district court hearing these cases occasionally or only after the second offense.

A district court would have no knowledge of the history except for any criminal record enclosed, case notes and the prior sentence unless probationary reports or other investigations were ordered. It is important that any court hearing domestic violence cases be familiar with the history of the parties. A district court hearing the case for the first time should not assume that because it is a “domestic” the offenses charged are not serious. The defendant has accumulated two prior convictions. If there are allegations, it is important that they be investigated. The risk involved is too great to assume that there is no danger despite warning signals. **Eighty-Eight % of victims of domestic violence fatalities had a documented history of physical abuse.** [Florida Governor’s Task Force on Domestic and Sexual Violence, Fla. Mortality Review Project, (1997), p. 46-48, tables 14-21)]. It is to the benefit of the community for a judge to be familiar with repetitive domestic violence crimes and how they are generally different from other non-partner assaults. Some warning signals are included in this section. Full Faith and Credit is only effective if the underlying Domestic Violence laws are strongly and effectively enforced. Liability will only be decreased and the risk of homicide lessened by making informed decisions. An alternative to making this extra effort to investigate (and thereby limit liability) is to handle these cases at the time of the first offense so this knowledge of the parties is not lost.

M.C.A. 40-15-403. Judicial enforcement of an order. Directs the court to enforce foreign orders with Full Faith and Credit. It states:

A person authorized by the law of this state to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a court of this state. The court shall enforce the terms of the order, including terms that provide relief that a court of this state would lack power to provide but for this section. **The court shall enforce the order, whether the order was obtained by independent action or in no other proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the court shall follow the procedures of this state for the enforcement of protection orders.**

(2) A court of this state may not enforce a foreign protection order issued by a court of a state that does not recognize the standing of a protected individual to seek enforcement of the order.

(3) A court of this state shall enforce the provisions of a valid foreign protection order that govern custody and visiting if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation in the issuing state.

(4) A court of this state may not enforce under this part a provision of a foreign protection order with respect to support.

(5) A foreign protection order is valid if it:

- (a) identifies the protected individual and the respondent
- (b) is currently in effect
- (c) was issued by a court that had jurisdiction over the parties and subject matter under the law of the issuing state; and
- (d) was issued after the respondent was given reasonable notice and had an opportunity to be heard before the court issued the order or, in the case of an order ex parte, the respondent was given notice and had **an opportunity to be heard before the order was issued or had*** an opportunity to be heard within a reasonable time after the order was issued, consistent with the rights of the respondent to due process.

(6) A foreign protection order valid on its face is prima facie evidence of its validity.

(7) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

(8) A court of this state may enforce provisions of a mutual foreign Protection order that favors a respondent only if:

- (a) the respondent filed a written pleading seeking a protection order from the court of the issuing state; and
- (b) the court of the issuing state made specific findings in favor of the respondent.

***recently added provisions (For full text, see Chapter XII.)**

PURPOSE: THE PURPOSE OF FULL FAITH AND CREDIT IS:

- 1. TO GIVE INTERSTATE RECOGNITION AND ENFORCEMENT OF THE VALID PROTECTION ORDERS ENTERED BY A COURT'S**

JURISDICTION (“ISSUING JURISDICTION”); AND

2. TO ENDORSE VALID PROTECTION ORDERS THAT MAY BE ENCOUNTERED FROM OTHER JURISDICTIONS (“ENFORCING JURISDICTION”).

B. REGISTRATION

Protection orders from foreign (issuing) jurisdictions do not require registration or filing in the enforcing jurisdiction prior to being enforced. This filing could actually endanger a victim if the enforcing jurisdiction requires a name and address of the victim to be recorded and the defendant is given notice or has access to the information.

A court may be both an issuing jurisdiction (for its own orders) and an enforcing jurisdiction (of orders from other counties, states, Tribes and territories).

C. DOMESTIC VIOLENCE SYNDROME

A section has been included regarding the domestic violence situation because the judiciary is among the few levels of oversight where educated and informed individuals in authority have the opportunity to view and detect the violent acts of a domestic dispute that may be heading towards a homicide or the abuse of children. The very position of this authority also creates the unique opportunity to stop the cycle of recurring violence and has been proven to do so.

Intervention by the court works. Knowledge of the domestic violence syndrome (which is unlike any other defendant’s behavior,) can also provide insight into custody cases where the abused children and spouse exhibit classic symptoms that would normally be overlooked outside of prosecution or held against the wrong spouse.

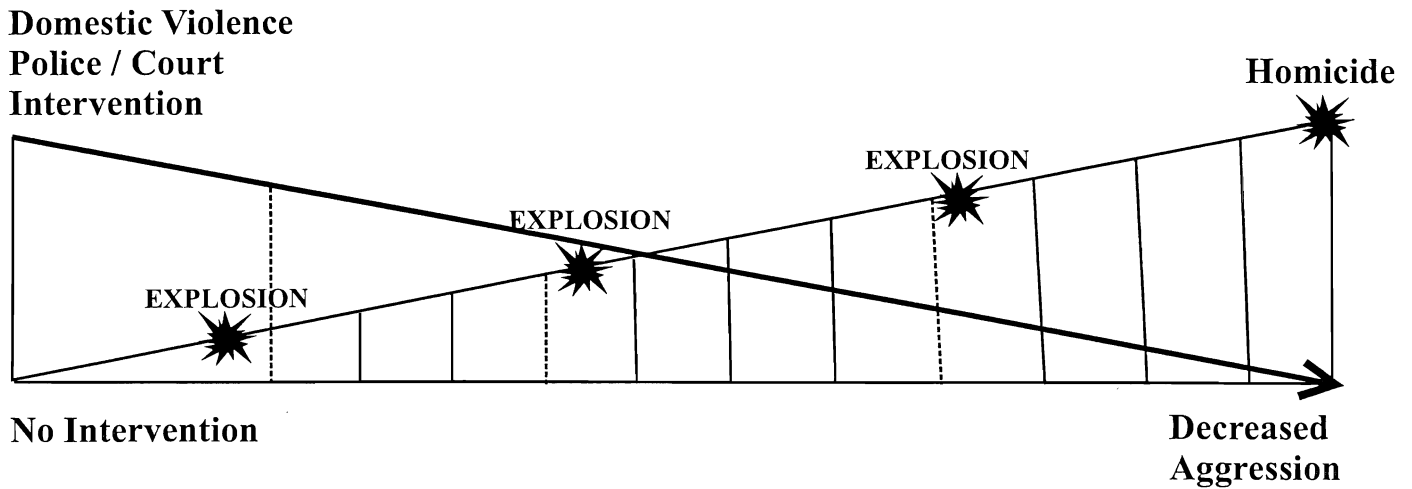
Knowledge of the symptoms can prompt a concerned judge to take the case one step further to order investigation, lethality assessment or other appropriate actions. In the event of any doubts, it is advisable to take this extra step, despite the extra time. It may very possibly prevent a homicide or child abuse.

In an intimate relationship in a domestic violence situation the date, partner or spouse who becomes the batterer (“batterer”) pushes a relationship of close and sudden intimacy. A batterer will encourage dependency and will start making more and more decisions about finances, parenting and especially the victim’s own life. It is a story of expanding power and control. The relationship is found in all ethnic, economic and social levels. No class is immune; it may just be better hidden since the wealthier may be afforded more privacy. The batterer will discourage a victim’s education or job and will find fault with the victim’s parenting. The batterer will undermine the relationship between the victim and the children. The batterer will find the victim more and more incompetent and may become verbally abusive. The abused victim will try anything to avoid fighting or violence. The victim will often submit to non-consensual sex, especially to avoid anger directed by the batterer at the children. Regardless of the efforts of the victim to mitigate the anger, the batterer experiences a tangible, build-up of tension that cannot be released through normal social means.

The tension culminates in an explosion of violence that may be totally illogical and unrelated to events. The batterer may blame the victim for the cause or may explode

without explanation directly on the victim stating that he or she is under pressure. The explosion is often consciously hidden from the public and the target is never any public figure. The batterer will not confront people in power over him or her (employer, etc.) Regardless of claims, there is **never** any justification for blaming the victim or the children for the batterer's actions. Statistically, each incidence will be followed by another and each time it will be worse.

1. The Cycle of Violence:



As soon as the tension is released, the batterer is calm. The batterer may be the most cooperative person at the scene when officers respond to a call. Conversely, the victim may appear confused, angry, disoriented and unable to articulate the facts, especially if the victim has received prior beatings and threats not to tell. The victim's fear may be couched in silence, fear, or even anger that the officer may trigger more beatings when he leaves the scene. The immediate impression, which may be reinforced by the batterer's calm detailing of his version of the facts, may be that the victim was confused or that she initiated the aggression. **Demeanor is not a reliable tool in domestic violence cases and often serves to confuse the investigation if the cycle of violence is not understood.**

In court, these same personalities may be present with a repressed (seemingly uncooperative) or agitated victim who is in fact, fearful and without hope in the system. The perpetrator may be calm and even charming. As stated in the statistics set forth earlier, the batterer is normally controlling in the areas of finances, the victim's education and work. Many batterers look at custody as an opportunity to continue this control after separation. They may hide finances or lie about assets. It is crucial that the court not reinforce this delusion by ignoring the victim's testimony or upholding the claims of the batterer because he or she makes a good appearance. The batterer has had substantial experience with this public face and words that totally discredit the partner. The batterer is used to being the party in control of money and decisions.

The characteristics of the domestic violence relationship set forth above are becoming more well known as shown in this excerpt from the New York State Model Domestic Violence Policy for Counties, January 1998, which states:

“Men who are abusive use emotional, psychological, economic, sexual, and physical abuse in order to control their intimate partners. Domestic violence does not result from individual personal or moral deficits, diseases, diminished intellect, addiction, mental illness, poverty, other person's behaviors, or external events. Abusers act from a set of attitudes and beliefs about how men and women should relate in intimate relationships. In general, abusers believe that they have a right to enforce their will on their female partners. This belief, rooted in sexism and misogyny, is supported and tolerated by the society in which we live, a society that has historically condoned the use of violence against women.”

2. Nature of the Batterer:

I. A great deal has been taught about the victim.

The courts have had to deal with the recurrence and expense of consecutive prosecutions all outlined in the cycle of violence and the domestic violence syndrome of the battered spouse or partner. The batterer was not the focus because it was assumed to be the responsibility of the victim to come forward and file charges. Experts are now changing that focus to prevent future incidents by understanding why batterers act violently. By studying what works to stop the batterer, it is hoped to reduce the burden upon the court as well as protect the family.

It has been discovered that the courts play an essential role.

Batterers use violence primarily because it is a learned behavior. It is often a multigenerational family, neighborhood or social situation where the behavior is not examined and is considered “the way it is”. It is viewed as cultural behavior.

Lundy Bancroft, author of **The Batterer as Parent**, [Thousand Oaks, California, Sage Publications, Inc. pg. 7,5,15 (2002)] cites several key attributes of the batterer as **self-entitlement, control** and **manipulation**. The social situation that fosters this belief does not see women and children as equal members of society. They have roles that are subservient to the batterer. The spouse is raised with a sense, whether in the most deprived or opulent home, that the family serves him. There is no priority for the children or for the well being of the family. The batterer does not look at the situation as privileged but as normal. The batterer humiliates the victim, controls the family and works to undermine the victim's relationship with the children. It is this sphere of control of the home that makes it so dangerous for police stepping into this defined territory.

Batterers usually learn two kinds of behavior, the public personality and the private personality. A controlling, violent individual in the home is often consciously very proficient in having a socially successful lifestyle. For this reason, the perpetrator will “clean up well” in court, is often articulate and even charming. The figure may be a very well liked and generous person in the community. The batterer may purposely seek public venues for limited involvement with his children. In the author’s personal experience batterers are respected teachers, principals, and neighbors.

Women are also misled by this public persona and the relinquishment of control and independence is often subtle and well manipulated. It may help explain why 70% of homicides are against women by men with whom they have a relationship (Bureau of Justice Statistics Special Report: National Crime Victimization Survey, Violence Against Women, 1994). After the public courting, it is only within the confines of the relationship that the manipulation becomes deadly.

In domestic violence situations, there is no substitute for a thorough investigation to reveal the true situation. The easiest means of controlling a spouse is through the children. Since many times these threats are acted upon, they have a strong repressive effect on the victim to deter her from coming forward, testifying or leaving. By being aware of the use of children and manipulation of the family situation, the court can be aware of warning signs in testimony, history and appearance and be prepared to order further investigations.

II. Batterers Tactics

Use of Children (During the relationship)

1. Battering him/her in front of the children
2. Threatening to hurt or kill partner in front of the children
3. Telling the children the victim is to blame for the violence or abuse.
4. Justifying the violence to the children
5. Telling the children that the victim is a bad parent
6. Using other relatives to speak badly about the victim to the child
7. Yelling at the victim when the children “misbehave”
8. Getting children to take the batterer’s side
9. Telling them that the victim is crazy, stupid and incompetent
10. Abusing or killing the family pets
11. Using children as confidants
12. Threatening to commit suicide
13. Withholding money for children’s needs
14. Physically abusing the children
15. Threatening to take children if he/she leaves
16. Driving recklessly with the children and/or victim in the car
17. Abusing drugs/alcohol in front of the children
18. Coming home intoxicated

Use of Children (after separation)

1. Asking children what he/she is doing

2. Asking who he/she is seeing
3. Blaming him/her for the separation
4. Blaming the victim for the relationship ending
5. Telling children they cannot be a family because of the victim
6. Talking about what he/she did “wrong”
7. Phoning constantly to talk to the children
8. Showing up unexpectedly to see the children
9. Criticizing his/her new partner
10. Assaulting his/her new partner
11. Withholding child support
12. Blaming her/him that he/she is not paying child support
13. Showering children with gifts during visitation
14. Undermining his/her rules for the children
15. Picking up the children at school without telling him/her
16. Keeping children longer for visitation than agreed to
17. Abducting the children
18. Threatening to take custody away from the victim if he/she does not reconcile with the batterer
19. Blaming him/her for their health/emotional problems
20. Telling the children their parent is an alcoholic, addict, or mentally ill
21. Making frequent court dates to change the parenting plan
22. Saying the other parent did not want the children
23. Physically abusing the children and telling them not to tell their father/mother
24. Abusing his/her new partner in front of the children
25. Changing visitation plans suddenly

Currently, Batterer Intervention Programs are being created that look at making the batterer examine his or her behavior and stop future abuse. Such a program is not based upon punishment, although the fear and reality of reprisals for failure to complete the program as directed by the court, is the single greatest assurance of the success of such programs. It makes the batterer take the program seriously. There is no intent to counsel the batterer. It is dedicated to the deterrence of future crimes. A Batterer Intervention Program strives to accomplish the following:

1. Identify what abusive behaviors are.
2. Hold the Batterer accountable for his/her behavior. He/she is no longer allowed to combine his past mistreatment with justified mistreatment of others.
3. He/she is made to observe the effect of such behavior upon partners, children and others.
4. Batterers are made aware of their violent beliefs and their actions and reasons for blaming others and denying responsibility.
5. The program teaches emotional skills including negotiation and fairness; non-threatening behavior and respect for others.
6. The program teaches how to stop controlling behavior.

3. Effect of Domestic Violence Upon Children

1. It is important to recognize that there are symptoms exhibited by children that have been subjected to domestic violence. The courts are uniquely situated to

observe signs and take action in the form of further investigation. **Only about one-seventh of all domestic assaults come to the attention of the police** [Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, (1997), p3.] Such indications are not the result of "parenting techniques" as a batterer may claim. **Children are the canaries in the coal mine.** By being aware of these symptoms the court may avoid awarding custody to the wrong person who would otherwise appear competent but is actually harmful to a child. It may save a child's life.

2. Children will react differently to the same experience of domestic violence:
 - a. if they are of different ages
 - b. depending upon how they have learned to survive
 - c. depending upon whether there are any supportive people. There may be relatives present but they may be ignorant, not want to get involved or be in denial.
 - d. depending upon their ability to seek and accept help from adults.
3. There are five areas in which a child may be affected by domestic abuse:
 1. Emotional
 2. Cognitive
 3. Behavioral (usually in opposite extremes)
 4. Social
 5. Physical

These areas are affected as follows:

I. Emotional

- a. feeling guilty for the abuse that continues
- b. grieving for family and personal loss
- c. confusion regarding conflicted feelings towards parents
- d. fearful of abandonment, expressing feelings about his/her injury or having only vague feelings of the future (fears, hopelessness)
- e. angry about the violence or chaos in their lives
- f. embarrassed about their home life

II. Cognitive

- a. feeling responsible for violence
- b. blaming others for their behavior
- c. believing it is acceptable to hit those they care about to get things, express themselves or feel powerful
- d. low self esteem due to powerlessness at home
- e. unable to ask for what they need or want
- f. unable to trust
- g. feeling anger is a bad feeling, that it means people get hurt
- h. rigid stereotypes of gender images: boy..girl..man..woman

III. Behavioral (may do both in extremes)

- a. acting out vs. withdrawing
- b. overachieving vs. underachieving
- c. refusing to go to school

- d. caretaking-more concern for others than self, acting like a parent should
- e. aggressive vs. passive
- f. rigid defenses: sarcastic; defensive; closed minded
- g. excessive attention seeking
- h. bedwetting/nightmares
- i. out of control; no limits; unable to focus, follow directions

IV. Social

- a. isolated from friends or relatives
- b. relationships stormy, end abruptly
- c. difficulty trusting
- d. poor conflict resolution, anger management skills
- e. may be passive with peers or bullies
- f. play becomes too rough

V. Physical

- a. somatic complaints (stomachaches, headaches)
- b. nervous, anxious, misdiagnosed as A.D.H.D. but short attention span
- c. tired, lethargic
- d. frequently ill
- e. poor personal hygiene
- f. regression in development tasks (bedwetting, thumb-sucking-depends upon age)
- g. desensitization to pain
- h. high risk play and activities
- i. self-abuse

POLICY: The courts should act to protect the safety and welfare of the children of either party.

D. CUSTODY PROVISIONS OF PROTECTION ORDERS UNDER FULL FAITH AND CREDIT

1. The VAWA appears to exclude custody and support provisions under Full Faith and Credit. **Montana law dealing with Full Faith and Credit refers to federal custody laws as set forth below.**
2. A custody provision in a civil protection order is entitled to Full Faith and Credit if it meets the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA).
3. Emergency jurisdiction may be confirmed in a non-issuing state only temporarily and to protect endangered children.
4. Generally, custody and visitation are covered in civil protection orders to protect children, avert retaliatory taking of children and enhance safety of children and battered parent.

NOTE: Support is not enforced for a spouse under Full Faith and Credit.

POSSIBLE SOLUTIONS: HOLDING THE BATTERER ACCOUNTABLE

A Batterer's Intervention Program alone has not been shown to effectively stop recidivism, especially if it is short term. In one study, six-twelve week psycho-intervention programs helped some batterers stop immediate physical violence but were inadequate in stopping abuse over time [American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p.85.]

The most effective results are derived from the court through its oversight capacity (with or without a batterer's program). By means of probation and hearings, the subsequent actions of the batterer can be closely monitored with strong sanctions for failure to comply. Combining strict accountability with long term batterer's programs would be the most likely program to be successful. In lieu of any effective programs, psychological evaluations can be ordered. The simplest step for improving the odds and immediately increasing the effectiveness of the court is to have strong oversight by the court and low tolerance for excuses and failures to comply. Strong court sanctions send the message that authority and control has changed and consequences exist. This approach will be the most effective in stopping domestic violence. The court can set the policy and make sure probation is trained and diligent.

E. TRAINING AND POLICY FOR DOMESTIC VIOLENCE AND CUSTODY.

A sample Model Policy is set forth below.

Model Policies in New York State (Governor Pataki's policy as cited in an excerpt from a Position Paper drafted by Rose Garrity, President, New York State Coalition Against Domestic Violence, November, 1999).

In January of 1998, Governor Pataki distributed *Model Domestic Violence Policy for Counties* that had been developed by the New York State Office for the Prevention of Domestic Violence in consultation with a specially convened task force and with extensive input from community-based professionals. The Governor said in the cover letter, "I strongly urge every county in this state to use this model policy as a tool in the development of policies that address domestic violence, ensuring the safety of victims and holding abusers accountable."

The policy asks courts, criminal justice agencies, and community corrections professionals to develop strategies for effectively sanctioning domestic violence offenders, saying:

All interventions should reinforce an offender's accountability for his behavior, and the court's intention that the offender stops the use of violence and coercion in his intimate relationships.

Appropriate graduated sanctions should be used in response to domestic violence offenses. For first offenses and at the misdemeanor level, courts should make effective use of supervised probation, day reporting, restitution, community service, (batterer's

intervention) and weekend jail. For cases involving physical injury, violations of orders of protection, repeat offenses, and/or failure to complete or termination from batterer's intervention programs, there should be a stronger response, including jail and electronic monitoring.

Where appropriate, condition of probation and parole should include "stay away" and "no contact" provisions. **Referrals to batterers programs should *only* be used in conjunction with criminal or Family Court sanction and supervision**, and there should be a clear mechanism in place for the program to regularly report to the court regarding the offender's participation and compliance with program rules.

Courts, in accordance with PL Section 60.35, must collect a mandatory surcharge and crime victim assistance fee at sentencing for a felony, misdemeanor, or violation level conviction.

Intervention programs for men who batter are not to be used as a mechanism for adjustment, diversion, or as an alternative to incarceration, if incarceration would otherwise be considered in sentencing. Courts, probation and other community corrections agencies should work with intervention programs for men who batter to develop mechanisms for regular reporting of program participation and compliance.

Batterers Intervention Programs (BIPs) are an *element* of a predictable and comprehensive court response to domestic violence, not a *substitute* for one. Criminal and Family Courts should work in conjunction with enforcement agencies, such as probation, and with batterers programs, to develop monitoring systems that are responsive to the needs of particular communities...Probation or local contractors who provide supervision services are best equipped to monitor compliance with the BIP.

Non-compliance should carry significant consequences, such as violation of probation. In situations in which participation in a batterers program has been mandated but is not part of a formal sentence, such as through a Family Court order of protection or pre-trial release, courts and BIPs should develop written protocols for monitoring compliance. In addition, mechanisms should be developed that allow the BIP to file the petition for a violation of the order of protection with the court in cases involving lack of compliance with the program, rather than require the victim to do so. BIPs need to be in regular communication with probation and designated court staff to ensure compliance with the program, and offenders should be informed that such communication will occur and that violations will be acted upon.

Courts should not order interventions such as substance abuse or mental health counseling for batterers *as a response to abusive conduct*, or in lieu of a criminal justice sanction, such as probation supervision. Of course, such referrals may be indicated as a response to a non-domestic violence-related issue, such as mental health or substance abuse problems. When battering is subsequently identified in a case unrelated to domestic violence, the policy of substance abuse professionals should be to inform the court of this assessment as a potential relapse issue. The court should then consider a modification of the court order to include other special conditions, such as an order of protection, or probation supervision.

How Does an Accountable and Safe Program Operate?

Domestic Violence is not a mental health issue. Offenders should only be ordered to batterer programs *as part of a criminal justice sanction* with accountability for

compliance built in to the program. (See Model Policy recommendations.) The role of a batterers program *as a sanction* must be clear to the provider.

Abusers sometimes refer themselves to programs. When they do so, it is often to convince their partners to stay with them or to return if they have already left. This is a powerful and effective manipulation that reinforces abused partners' desires and hopes that these programs will "fix" the abuser, somehow getting the violence to stop. Non-mandated participants, though required to adhere to the same attendance and other compliance requirements, have no consequences to face should they stop attending or are otherwise dismissed from the program. This often occurs *after* the victim has returned or otherwise changed the plan *in response to the batterer's participation*. Domestic Violence offenders use their voluntary participation in programs as "proof" that they are addressing the problem and do not need any other sanction or monitoring. This avoids accountability by those offenders and it can also reinforce the belief that the victim of abuse is the person resisting solutions.

Programs must operate only as a part of a coordinated system that works together to hold offenders accountable. The local battered women's program should be consulted and heeded in the development of the program, and should have an ongoing, paid consultation relationship with the batterer's program.

Once mandated to a program, the person is registered, much the way those convicted of DUI are mandated to attend drinking and driving courses. The Domestic Violence Classes for Men curriculum is the same information that domestic violence experts provide to criminal justice and other professionals seeking training. Domestic Violence Classes for Men participants meet once per week in a classroom for one and one-half hours. Two instructors provide on-going presentations, using videos, newspaper articles and other material. Instructors demonstrate a full spectrum of information about domestic violence as a societally supported manifestation of sexism and other systems of domination. Additional material includes the full range of efforts that are being made in coordinated, comprehensive community responses to end domestic violence in this country. The information taught is in accord with what we know as a result of more than twenty years of collective experience, research and analysis by the battered women's movement.

The court order determines the number of classes each man must attend; the recommended minimum attendance requirement is 26 weeks, and the ideal is 52 weeks. The program must practice strict monitoring of the men's adherence to attendance, payment, and other policy requirements. There must be a mechanism for reporting to the mandating source, with the understanding and agreement that dismissal from the program will result in additional sanctions.

Participants in batterer programs can be held accountable for being on time, paying all fees when due, attendance, respectful and non-disruptive behavior in the classroom, and compliance with the number of classes required. There is no way a participant's use of abusive tactics can be measured outside the classroom. It is important to know that participant's behavior in the classroom may have no relationship to his behavior with his partner. For these reasons, the program must recognize that it cannot know about or hold a man accountable for his behavior with his partner.

Batterer programs must take care to clarify to the community that participation in a batterer program is but one in a range of sanctions used in response to a man's appearance in court due to domestic violence. It should not necessarily provide hope for

any individual to change. It should provide satisfaction that the community has begun to take this crime seriously. Research has clearly shown that men seldom change their abusive tactics as a result of *any* programs. This is partly due to the fact that they are living in communities that have tacitly, historically and even legally allowed such behavior.

How May I Learn More About This Model?

Every spring and every fall, a two and one-half day national training institute is provided to present expertise, findings, and the most current thinking about how to best do batterer programs. This institute is co-sponsored by the NYS Office for the Prevention of Domestic Violence, the NYS Coalition Against Domestic Violence and the VCS Community Change Project (home of one of the projects). Its faculty is composed of staff that has combined experience in the battered women's movement of over one hundred years, over forty years of working with men who batter. Each institute hosts 50 to 100 participants from New York State as well as every other state in the United States and from other countries. As of October of 2001 fourteen of these institutes have been presented in New York State. Institutes have also been presented in California, Oregon and other areas of the country. Participants always include a mix of professionals from criminal justice organizations, batterer programs, battered women's services, addictions treatment programs, and health care and mental health fields.

Where Can I Find More Resources?

The end of this paper provides a short bibliography of references where further information may be found. Each of the five programs that have participated in developing and refining this model also provide professional consultation and training for professionals in their regions. The New York State Office for the Prevention of Domestic Violence provides information, referrals and materials for the use of organizations and others in the state that request assistance.

What Should Be Done About Other Batterer Programs?

Most communities have at least one program for those who batter that is cause for concern by battered women's advocates and the families they serve. These programs are well meaning attempts to fill a need that has been expressed by those wishing to address domestic violence by serving offenders. Many of these programs operate as mental health programs: they provide communication skills, anger management, counseling around issues in the backgrounds of the participating batterers, instruction in tactics such as time outs and other behaviors thought to help the abuser avoid hurting the partner. These programs give the community and the participants the idea that abusers are not fully responsible for their behavior choices, and that they do not know how to be non-abusive. They also often reinforce the belief that the victim shares in the responsibility for the abuser's behavior.

Another unfortunate result of many batterers' programs is that they cause the community and especially the criminal justice system to feel that the batterer program is adequately addressing the problem of domestic violence. As a result they then fail to provide appropriate and necessary sanctions and monitoring of offenders, even after they are convicted of crimes.

If all the communities were to study and comply with the New York State Model

Domestic Violence Policy for Counties by developing coordinated responses in every part of the system that deals with domestic violence *as the crime it is*, it would be clear that many existing batterer programs are inappropriate and even harmful.

There is no reason that any person who wishes mental health services should be denied them. However, mental health services are *not* an appropriate court mandate in response to domestic violence. Any person who asks for mental health service-or indicates he or she is already receiving same-should be encouraged to get therapy or to continue therapy on his or her own. *It should never be a substitute for court-mandated sanctions.*

Court mandates to chemical dependency treatment-separate from sanctions for domestic violence-are appropriate. Concurrent orders to a batterer program should begin after assurances from the chemical dependency treatment provider that the person is clean and sober enough to sit in class without disruption.

* * * * *

Note: Anger management programs DO NOT deter domestic violence and cannot substitute for batterer programs or counseling directed for this purpose. They do not make the batterer change controlling behavior or change feelings of entitlement. They do not make a person accountable. [Lundy Bancroft and Jay G. Silverman, The Batterer as Parent, Sage Publications, Inc., Thousand Oaks, Ca., (2002) p. 183.]

Any court considering setting a policy for domestic violence and using a guide such as the policy set forth above, should add Full Faith and Credit enforcement terms and stress that pre-registration of out of state orders is not required.

F. HOW JUDGES CAN HELP

I. It is imperative to uncover the facts to determine who is the victim. It is important to listen to the party that may be the most submissive, silent and inarticulate. It is important to be advised of the nature of ongoing abuse that creates a very passive, submissive and quiet victim that may mistakenly convey an impression that there was no crime committed or that the offense was not serious. Victims are afraid to talk.

II. Identify the abuse. The nature of the batterer is that the acts, no matter how heinous, are perceived as trivial in offense. The conduct is viewed as acceptable or beyond scrutiny. It is important to hold the crime up to the light, identify it and acknowledge it to the perpetrator as wrongful behavior. The impression of the judge as authority figure is crucial to breaking the batterer's perception of total control over his or her family and the abuse of the sanctity of the home that permits the reign of terror. The batterer must be shown limits to his or her authority and repercussions for violence against the family. **The effect of the judge speaking frankly and directly to the offender cannot be underestimated as one of the primary interventions that stop or decrease future violence.**

III. Do not blame the victim. The victim may be ineffective or unable to follow up correctly with the proper steps to correct the situation. It is symptomatic of being abused for a long period of time. Judges should take advantage of all resources to bring

comfort and safety to the victim. Help the victim or direct others to help the victim to take corrective steps within the court's control or referral. If the victim is acting uncooperative, submissively agreeable even to comments against her interest, it may be a survival tactic derived from extreme and real threats. Women separated from their husbands were 3 times more likely to be victimized by spouses than divorced women, and 25 times more likely to be victimized by spouses than married women [American Bar Association citing: Bureau of Justice Statistics Special Report: Violence Against Women: Estimates from the Redesigned Survey (NCJ-154348), August, 1995,p.4].

IV. Recognize that these acts are hard to stop, that they are repetitive and continuing. There is a need to intercede with the legal system to send a clear message to both parties. It is important to understand that most victims will not trust the system or their own ability to become safe until numerous times of attempted prosecution or a similar number of attempts to leave the situation. Eventually, if the system works properly, the victim may successfully attempt and succeed at leaving and/or testifying. It is crucial to understand the need for patience from the court and the need to build the trust of the victim. The victim needs to develop faith in the system and a belief that safety can be achieved. The truth is that many victims cannot be protected by the system. The most dangerous time for a victim is when the victim attempts to leave or has just left.

Note: 65% of intimate homicide victims had physically separated from the perpetrator prior to their death. (American Bar Association Commission on Domestic Violence citing Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p.47, table 17).

This is the time the court may be working with the couple in a custody case. Studies disagree whether there is even a criminal record to tip off a judge in the majority of domestic violence cases since so many abuses are unreported. It is only the vigilance of the court that may save a child from being forced to spend time with his abuser.

Prosecution is usually the first step of trying to separate. Six months after obtaining a protection order: 8% of victims reported post-order physical abuse; 26% reported respondent came to or called their home or workplace; 65% reported no further problems (CPO's the Benefits and Limitations for Victims of Domestic Violence, National Center for State Courts, Research Report, 1997). In one study, nearly half of the victims who obtained a protection order were reabused within two years. (Buzawa & Buzawa ed., *Do Arrests and Restraining Orders Work?*, p.10 (1996). 60% of women in one study reported acts of abuse after the entry of a protection order, and 30% reported acts of severe violence (Buzawa & Buzawa ed., *Do Arrests and Restraining Orders Work?* p.223 (1996).

A victim has been living in emotional extremes. It may take time for the individual to calm down or act coherently for his/her own good. A judge sensitive to this effect can take this into consideration in viewing only the batterer's perspective that the spouse is an incompetent parent. The nature of the crime has required the victim to be quiet, or even to take the side of the offender. It is not uncommon to find the victim is confused, agitated, or unable to give the facts fully. Much may be withheld for fear of reprisal. Again, the patience of the court in guiding, repeating information, explaining

rights and questioning the victim for details is very helpful. Frequently there are no attorneys present and the victim may have no understanding of his or her rights, or what elements are necessary to make a restraining order or a case. A common misunderstanding is that the victim feels safe within the presence of the judge and in an attempt to be brave, when asked if he/she is afraid of the offender, says no. The victim may in fact be in terror **outside of the courtroom**, and the court should question further.

Understanding the victim's need to come to his/her own sense of safety at her/his own pace is crucial. This may mean that cases get dismissed repeatedly until the victim feels safe enough to come forward and requires the same patience and respect for the victim. These fears are normal and valid for his/her situation, after suffering harm from an abusive relationship. It is also true that at times the system cannot successfully protect a victim.

V. Use your authority to maintain a sense of safety in the courtroom and the hallways. Never underestimate the potential for violence and threats to domestic violence witnesses, especially those who are the victims as well. Victims of domestic violence are very fearful and often subject to intimidation and manipulation by relatives and friends of both sides. Keep the courtroom controlled, and enforce every procedure and law to keep the courtroom calm. Bailiffs should be instructed to maintain this atmosphere in the courtroom and hallway during recess. Further acts of violence could also occur during this vulnerable time and could serve to silence a victim who has finally made it to the courthouse. The victim could flee and never return after recess if she feels her safety has been compromised or is subject to threats in the courthouse. **Give sanctions that must be upheld and fit the severity of the crime. There is a need to be a symbol to the batterer that his actions are wrong and have consequences.** One study showed that 80% of women with temporary protection orders said the order was somewhat or very helpful in sending the batterer a message that his actions were wrong. Less than 50% of the women thought the batterer believed he had to obey the order. (Buzawa & Buzawa ed., *Do Arrests and Restraining Orders Work?* p. 218 (1996).

VI. In custody cases, use this opportunity to view the children. See if they exhibit signs of abuse as set forth below. Order further tests, investigate thoroughly, obtain lethality assessments should any indications in the testimony, other evidence, history, or your observations warrant caution. **Fathers who batter mothers are TWO times more likely to seek sole physical custody of their children than are non-violent fathers** (American Bar Association citing: American Psychological Association, Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family (1996), p.40).

VII. Firearms cases: Do thorough investigations. Federal law prohibits firearms in cases where there has been a misdemeanor domestic violence offense or where there is an existing order of protection (See Above Chapter 1, Federal Firearms Law). The State of Montana has enacted laws to seize weapons. There are valid reasons for these laws that should supercede considerations of a person's history of hunting or the Montana history of gunmanship. Do not lightly downgrade or recommend the downgrading of offenses so they are not subject to these restrictions. Apply the law uniformly based upon the offense and the facts. **Your ability to perceive the seriousness of an offense, and**

evaluate objectively, can prevent homicides. A liability may be created when the potential for serious violence is overlooked. If the system-the advocate, the police, the prosecutor-“works” all the way up to the final decision, the system will “fail” if the court is not objective. The failure of a court to issue a decision based upon facts or the court’s refusal to accept a plea unless it is downgraded in order to retain gun ownership can result in serious harm or a homicide. Do not hesitate to prohibit gun possession in an order of protection if the facts so warrant.

VIII. Enforce Full Faith and Credit. Exhibit low tolerance for law enforcement that refuse to enforce Full Faith and Credit. Encourage training for court personnel.

Recommendations For Uniform Enforcement Of Protection Orders

A. Judges should issue orders that are legible, unambiguous, comprehensive and explicit. An issuing court’s order may always become an enforcing court’s order in another jurisdiction. Any errors or omissions may make the order invalid and put the victim at risk without an enforceable order in a foreign territory. Ideally, the petitioner should be given a certified copy. If such protection is given in a criminal order or bail instructions (not in domestic or family court) the petitioner should be advised that he/she might want to seek independent protection under a civil petition since this order would not necessarily be permanent and may not be enforceable in another jurisdiction like a civil order.

B. All orders should include:

1. Names of Parties
2. Address of Defendant (Do not include address of Plaintiff)
3. Specific Relief (be comprehensive):
Examples: do not approach within.... yards; cease harassment; no contact; temporary custody provisions; visitation provisions
(Here is the opportunity to also give clear notice to law enforcement that the defendant is not permitted to contact the petitioner for accessing child or making arrangements for visitation and to prohibit firearms) Example: “absolutely no contact. Any child visitation shall be arranged and conducted through a third party.”

NOTE: When making custody or visitation decisions, double check for existing orders of protection terms and maintain consistency of prohibited contact. Be aware that any change in such contact restrictions you set forth in parenting instructions for visitation/custody orders will amend the existing order of protection even if from another judge. Do not lightly amend, modify or change existing orders. Harassment often finds another outlet through permitted contact for setting up visitation that was prohibited by the original order of protection. NEVER issue a mutual order of protection.

4. Restrictions/relinquishment of firearms.
 - a. Give notice to the Respondent/Defendant and in the order state that the party may no longer possess a firearm or they will be in violation of federal law.
 - b. Order relinquishment of weapons. Do not refuse to issue a valid order of protection because it would affect firearms possession.

5. Specific directions to law enforcement (i.e.: firearms possession prohibited)
6. Effective dates; expiration dates
7. Name and contact information of Judge and Clerk
8. State registry number, if applicable

C. All valid Orders of Protection should be enforced throughout the 50 states, tribal lands and territories. Even if a foreign order does not meet the enforcing court’s jurisdiction, if it meets the Full Faith and Credit test, it should be enforced. If Montana law does not provide the same relief, the terms should still be enforced.

D. Foreign Mutual restraining orders should be reviewed closely under Full Faith and Credit and if they don’t meet the test, they should only be enforced against the respondent.

E. Foreign Custody provisions should be enforced in conjunction with all custody laws such as UCCJA, UCCJEA and the PKPA. For a child’s welfare the court can always take emergency action and refer non-emergency issues.

CHAPTER IV. PROCEDURE AND ENFORCEMENT: ATTORNEYS

(CITY, COUNTY, STATE AND TRIBAL ATTORNEYS)

How ATTORNEYS can help in enforcing Full Faith and Credit:

I. Let victims know when an order of protection is “not” an order of protection: Inform victims that under Full Faith and Credit law, a criminal or bail order with protection terms may not be enforceable out of state, nor in the State of Montana. The Model Code for Full Faith and Credit omits criminal laws although Federal law includes it. This is a flaw in the model, and Montana has adopted much of the model. Criminal orders of protection and bail orders are not normally permanent after the case is resolved. Victims should obtain a separate civil order of protection for full, permanent protection. (Note: Montana legislature has just

added sexual assault and stalking to areas of protection in addition to orders of family and domestic law (See Chapter XV Forms, etc. for a copy of this full text).

II. Make sure the orders issued are clear, unambiguous and fully deal with the issues. Advise the judge immediately of any omissions, errors or ambiguities. Improper orders will be difficult to enforce in the issuing jurisdiction, may be impossible to enforce in other jurisdictions and put the victim at risk. Discuss chronic failures to support domestic violence cases or failure to enforce Full Faith and Credit with judicial policy makers.

III. Make sure your police are educated on Full Faith and Credit law. Prosecute vigorously; support a strong arrest policy. Be aware of escalating danger and prosecute each subsequent misdemeanor. Subsequent (third or more) convictions bring escalating penalties in Montana law. A history of multiple convictions of misdemeanors has great significance to the FBI when exercising their discretion in taking case referrals of federal violations. Meet with local FBI and ATF to determine criteria for case referrals. Tribal BIA police accept direct referrals.

IV. Meet with appropriate staff in your jurisdiction to make sure a proper procedure is set up to forward all information registering orders to Federal, State and local registration systems. Make sure that they are aware of the need to include revisions and updates. Educate the court and related personnel who issue the amendments and custody orders changing the terms of protection orders about the need to forward these orders as well. Help make court personnel aware of the risks of copying the defendant on registrations of out of state orders of protection.

V. Meet with members of other jurisdictions in local and neighboring areas to set up uniform enforcement of each jurisdiction's orders. Discuss setting up procedure for sharing technology to make sure all orders are registered.

VI. Talk to your police about their knowledge of the history of the case. They may have responded numerous times or can refer you to another officer who has. It is important to know why a victim has refused to call, to appear or to testify. There may be legitimate risks (threats to harm or kidnap children) that must be considered by the prosecutor in making the discretionary decision to prosecute or in having the parties in a secure place at the time of trial. Talk with the advocate as well.

VII. Be objective, especially in cases that would result in the loss of firearms. The tendency to overlook or down plead a serious crime that would otherwise result in the loss of the right to bear firearms can result in liability and serious harm or a homicide. Do not downgrade domestic violence crimes that otherwise warrant the charges. Advocate strongly for these prohibitions in court to educate the court.

General suggestions for increased enforcement

I***If the attorney takes domestic violence crimes seriously, law enforcement officers will respond. Police personnel change constantly through attrition and new hires; police must be kept current on training and priorities. They should understand the cycle of violence, the need for intervention and the significant role of the officer as first contact with the victim. It is crucial that police (and prosecutors) understand the need to not exhibit frustration or judgment towards a victim so that a repeating offender does get reported. The majority of crimes go unreported. Advise them that it is typical of domestic violence for a victim to report crimes numerous times before leaving or before testifying. Inform them that they provide crucial support towards this goal even if the immediate incidents are not supported by testimony. Advise them that their intervention each time, de-escalates the violence. Make them aware of their direct contribution to family safety and stopping homicides regardless of the lack of immediate, tangible results. Warn police to never underestimate their own risk due to the call being another “domestic” with familiar parties. Advise police that they cannot “quick fix” this problem; it is a long-term effort of consistent police response.

Under Montana law, verification of an order does not require the physical presence of the document. Officers may prove service by: checking with statewide or national registry; checking NCIC’s P.O.F.; contacting the original jurisdiction court; or by calling the law enforcement agency located in issuing jurisdiction. Encourage officers to continue investigating if there is no document but the victim claims one exists.

*** Discuss the risks with the victim. Make the advocate, judge and probation aware of the need for a possible lethality assessment where the perpetrator appears dangerous to the children. Advise victim services to maintain and continue to update their knowledge with continuing training in the areas of lethality assessments, safety plans, and victim’s rights. Determine those rare cases where a prosecutor might choose to not go forward without the victim because prosecuting might result in a homicide or violent outcome to the victim. In any case, do not force the victim to testify and ignore his/her instincts. Educate and guide the victim, don’t judge.

*** Prosecuting attorneys should advise the victim of a need for a safety plan. Ask a victim when and where to serve defendant with a warrant or where to arrest him or her to avoid increasing his rage and therefore, increasing risk to police and the victim. Ask if he/she has firearms and where they are located. The advocate might also provide this information. The attorney should supply a list of referrals for victim’s services, the local advocate, women’s shelters, the domestic violence and Full Faith and Credit hotline, and advise her to contact the appropriate parties. If there are cards and brochures for such groups, they should be available in the office. Contact the advocate at the appropriate time. If the advocate is in-house, confidentiality issues would be less stringent than between a victim and outside advocate but care should be taken regarding the trust and risk the victim assumes by her disclosures. Be aware that at times, the attorney cannot protect the victim and this risk is real. Remember you are not responsible for the protection of the victim but you are charged with acting responsibly. Inform your police that their intervention saves lives, and that by responding without judgment, they decrease risk to the victim each time, regardless of outcome.

*** State prosecutors, county attorneys and United States Attorneys should meet

to work out protocol for referral of federal crimes and the burden of proof for Full Faith and Credit. For example, in cases where a valid foreign protection order is required, there should be proof of respondent's notice and opportunity for the hearing in the file. Another example is to routinely include a copy of the officer's "rough notes" used in making a case report for any case that might be referred to federal agents. Most importantly, the lead counsel sets an example of the standards needed for quality and complete case investigation and preparation. Attorneys should remain open to their police for questions, support and reminders regarding Full Faith and Credit enforcement.

CHAPTER V. PROCEDURE AND ENFORCEMENT: ADVOCATES

I. Basic Role

A. The basic role of the advocate is to help maintain the safety of the victim. In this regard, giving notice to a victim of his/her right to Full Faith and Credit and helping the victim to be best prepared are the priorities.

B. In general, the victim/petitioner receiving an order of protection should be informed that there is a right to leave that jurisdiction and have the order of protection enforced due to Full Faith and Credit. The petitioner should receive the phone numbers for the national Full Faith and Credit support line and for the domestic violence hotline. If the petitioner knows where he/she might travel to, the appropriate phone numbers for that out of state jurisdiction should be given to the victim as well. The victim should be informed that there may be a need to educate the law enforcement personnel in the new jurisdiction of the right to have the order enforced and to not have it registered. The victim should be informed of the risk of registering and that it may result in harm if the perpetrator is ever

copied on this out of state registration. If the victim still wants to register or the clerk mistakenly insists, the victim should inform the clerk of the new court's jurisdiction of this risk.

C. An advocate should make sure anyone who obtains an order of protection receives a certified copy of the order and has many copies in her/his possession. Advocates should do their best to make sure clerks do not copy defendants on registrations of out of state orders of protection. Victims should be warned against agreeing to mutual restraining orders and advised of the risks of such agreement and safeguards of Full Faith and Credit law.

D. In criminal court, the advocate can inform the prosecutor of the victim's need to know about Full Faith and Credit after any criminal protection order issued. The advocate should explain that some states (including Montana) do not give Full Faith and Credit to all criminal protection orders (including bail instructions, temporary criminal protection orders, probation restrictions, etc.). The victim should be advised that a civil order of protection is her/his best, permanent protection and that it might be best to obtain a civil order of protection if none exists.

II. Informing The Court, Attorneys And Law Enforcement

A. In civil court, the advocate can assist a victim by informing the court and the victim's attorney of any domestic violence history in non-criminal cases such as custody courts. The advocate can inform the court that any order changing a spouse's contact provisions with the other spouse through custody or parenting orders could weaken or overrule an existing order of protection and put the victim at risk. The court should be informed that orders must be clear, comprehensive and unambiguous or it may cause problems should the victim leave the jurisdiction and try to get another court or police to enforce the order.

B. Advocates should help make the judges and clerks aware of the risk to the victim when copying the defendant on registration of out of state orders of protection. These orders are not required to be registered at all in order to be enforced under Full Faith and Credit. The advocate should keep the Full Faith and Credit numbers handy or provide copies for any enforcing party unfamiliar with the law. The advocate must be aware of confidentiality issues especially if the advocate is not located in the office of the prosecuting attorney. Even if there is an inside position, the advocate must be aware of the issue of risk to the victim by the disclosures made and should discuss these issues with the victim and the attorney. If there is consistent failure of police, judges or attorneys to enforce the law regarding domestic violence or Full Faith and Credit, the advocate should bring it to the attention of any oversight agency, an oversight group such as court watch, or make the governmental official or entity aware of these consistent omissions in enforcement and the potential liability.

C. Two major means of creating a protective environment in any

domestic violence case are the lethality assessment and the safety plan. While the advocate can generally provide or assist the petitioner in drawing up a safety plan, the advocate should bring up the possibility of a lethality assessment with the court, probation, the victim and the attorney. This role of the advocate may apply in either civil or criminal cases. Although confidentiality is always a consideration, the risk of a future violent crime is a priority consideration and the victim should be educated to the benefits to the children and the victim's own safety of such assessments after confiding in the advocate.

LETHALITY ASSESSMENT IN DOMESTIC VIOLENCE:

A lethality assessment serves many purposes. It may be used for determining contact with children in custody issues. In domestic violence, it serves the crucial purpose of defining whether the party is a lethal risk to a victim already harmed by that party. An advocate can use it to show a victim subtle abuse or to provide skills for protection. The court uses the assessment in determining the extent of permitted contacts or the total prohibition of contacts. It may determine that an intermediary is the only safe alternative for child contact issues between the parents or that child contact must be supervised.

The Arizona Coalition Against Domestic Violence web site (See Chapter XI) lists the characteristics that are generally examined and are set forth below. (Note: gender designations are a part of the text cited and do not reflect the opinion of the author or this grant)

1. Does he have a history of threats of attempted homicide or suicide? Has he discussed murder/suicide pacts with the victim?
2. Is he depressed? Are there particularly stressful life events going on: unemployment; poverty; death of a loved one; job changes? Does he have a history of mental illness?
3. Does he have weapons or access to weapons?
4. Is he obsessed with the victim? Does he feel that he cannot live without her? Is he socially isolated, and does he feel hopeless about a future without her?
5. Does he express rage about her leaving?
6. Is he involved with or addicted to drugs and/or alcohol?

7. Is he stalking her? Does he continually harass her? Will he refuse to leave her alone?
8. Is there an escalation in his threats and/or actual physical violence?
9. Does he have access to her? Does he know her location? Can he get to her?

Lethality assessments are an ongoing process. A score of “one or two” may apply or all nine characteristics may make a particular case dangerous. Some general premises are based on the grouping of characteristics with other levels of contact to determine further guidelines and are set forth below as listed by the Arizona Coalition Against Domestic Violence (See Chapter XI). The Coalition also lists excellent safety plans for spouse, children and small children):

DANGEROUS BEHAVIOR:

	Physical Abuse	Emotional and Verbal Abuse	Isolation and Control	Sexual Abuse
Potentially Dangerous	pinch, squeeze, push shove, slap, restrain, jerk, pull, shake, bite, pull hair	ignoring her feelings withholding approval as punishment	Jokes about role of women, denies victim her heritage history, religion	Looks at and makes jokes about women as sex objects, extreme jealousy minimizes her needs and feelings regarding sex, sexual criticism
Dangerous	shaking with bruises, hit, punch, kick, choking, objects, thrown, targeted or repeated hitting for punishment	threats of violence or retaliation; puts down ability as mother, wife, lover, worker; he threatens to take custody of or abuses children; threatens family or friends	isolation by not allowing her to have friends, repeated moves, economic dependence, he stays isolated and demands control of	forces victim to touch or look at genitals, withholds sex and affection, forces victim to to strip in front of others (maybe children), forces victim to have or

			environment	watch sex with others
Highly Dangerous	uses household objects as weapons; restraining victim and abuse; hitting her; broken bones; internal injury; medical treatment needed; use of knives, guns, or poisons for disabling or disfiguring	provokes following reactions in victim powerlessness, unpredictable consequences of actions, nervous breakdown, mental illness, situational depression, drug or alcohol addiction	hits, punches or kicks walls, not her, deprives her of food, sleep, medications, etc., abuses pets; incest or child abuse; threatens suicide	demands sex with threats; forces uncomfortable sex after physical sadism; sex for purpose of hurting using objects or weapons sexually
Lethal	Homicide	Suicide	Death	Murder

Many times when a victim won't leave a dangerous situation for his or her own safety, the person will leave once the risk extends to the child. The author drafted a Children's Bill of Rights and found it helpful when working with abused children to post it at locations where she was providing programs after hearing children whisper complaints about their home life that they did not feel they had a right to express. It is included in the hope that posting these rights in advocate offices and shelters may give children and parents something to think about and prompt positive discussions.

Children's Bill of Rights

1. I have the right to feel safe in my own home.
2. I have the right to be loved without earning it.
3. I have the right to know my mother and father are safe and that I do not have to protect them.
4. No one has the right to hit me, touch me inappropriately or call me names, especially stupid, useless or failure, including my parents.
5. I have the right to be treated with respect.
6. I have the right to be fed, have warm clothes and a peaceful place to sleep.
7. I have a right to live in happiness and peace and to learn and play as a child.

2. How To Apply Full Faith and Credit

The advocate may accompany the police, prosecutor, or court personnel or appear independently at all proceedings in approaching and assisting the victim and the family.

To simplify all the situations that may apply for the advocate in Full Faith and Credit, the advocate is referred to Chapter I, which sets forth the laws specifically

detailing the victim's rights. A simple outline has been given above. The most important service is to have an informed victim. Many jurisdictions may not yet be familiar with the application of federal law and new state laws that empower the right of a victim to travel and keep an order of protection valid. If the order is valid on its face, it is valid in any state and on any tribal reservation. An advocate can assist by informing the responding officers of the law as set forth in this manual for law enforcement procedure and orders of protection. Arrest is encouraged if a good faith review of the order shows it is valid and gives no reason to question notice and opportunity or service and an opportunity to be heard for the respondent. An officer shall be protected for good faith efforts to meet these tests at the scene. The legal procedure, on a tribal reservation, is for the officer to arrest independently on tribal charges, and refer any federal crimes to federal authorities. Regular tribal procedure should apply for arrest or detainment. If the perpetrator is non-tribal (not a member of any tribe) he can be charged civilly, if appropriate, or held for other jurisdictions.

The primary role is to protect the victim. The officer may need to be reminded that at the very least in a domestic disturbance the officer can always separate, investigate and escort the victim to a safe place. The officer should inform the victim of rights and if the order appears invalid, the officer should tell the victim there is a right to get a valid one if the facts warrant it. An advocate should always remind a petitioner that a criminal protection order (including bail and probation orders) is not like an order of protection that will be enforced as broadly and may be permanent. For example, many criminal orders of protection are only effective while the case is pending. If these restrictions are not set forth in any long term civil order they may end at the completion of the criminal case. In many criminal cases the victim should also obtain a civil order of even if criminal charges are filed. At the very least, the prosecutor should speak to Probation before the final hearing. Probation can recommend to the court that contact restrictions be set forth as a probation condition in the criminal order.

An advocate can remind a prosecutor of these loopholes in continuous protection.

Montana upholds all domestic and family court (civil) foreign orders that meet Full Faith and Credit tests. All foreign criminal orders of protection are not protected for Full Faith and Credit under Montana law except for the newly added orders regarding assault and stalking. Likewise, all orders that modify contact between the petitioner and respondent, even if inadvertently, (such as orders to change visitation arrangements) change the terms of an existing order of protection and may create dangerous gaps in protection.

CHAPTER VI. CUSTODY

Custody Provisions of Orders of Protection:

Custody provisions of orders of protection are entitled to Full Faith and Credit if they meet the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act. (PKPA).

-Emergency jurisdiction may be confirmed in a non-issuing state only temporarily to protect endangered children.

-Generally, custody and visitation are covered in orders of protection for the safety of the children. They are included to generally protect the children, avoid retaliatory takings of children and to ensure the safety of a battered parent.

-There is no general inclusion of custody and support provisions under Full Faith and Credit in the Violence Against Women Act. The above two Acts (UCCJA and PKPA) should therefore set the tests for enforcement of such provisions under Full Faith and Credit.

NOTE: A problem with Custody orders (and their modifications) is that they may inadvertently change, weaken or modify existing orders of protection. (Example: both former spouses may express frustration at setting up visitation through a third party. The judge, without knowledge of an existing order of protection or of the extreme history of

violence may issue a custody order stating that the parties can make arrangements by phone. This now modifies and weakens the existing order of protection. It permits telephone contact after a prior judge, who heard testimony and had more knowledge of the danger, prohibited such contact.) Conversely, if only an order of custody exists and it contains clear “no contact” provisions and it meets the “valid on its face” test, (See Order of Protection) the order may serve as an order of protection for a victim and should be given Full Faith and Credit.

A. DEFINITION:

“The term ‘protection order’ includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce or child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law).” (Amended 2000)

NOTE: Other federal laws that may apply under the above exception are unclear except for the Parental Kidnapping Protection Act (PKPA).

B. PKPA

1. The PKPA is a federal law that states the circumstances under which one state must honor and enforce a custody order from another state (called Full Faith and Credit).

2. PKPA was passed to resolve jurisdictional conflicts with UCCJA. It deals with the gaps in custody conflicts; deters interstate abductions; and promotes cooperation and information exchanges between states about interstate custody matters.

3. PKPA requires courts to give Full Faith and Credit to valid custody determinations issued by courts of other states. The PKPA ensures that only one state has preferred jurisdiction, and requires other states to enforce orders issued by courts in this state.

4. Like the UCCJA, PKPA has four bases for jurisdiction: home state, significant connection, emergency and last resort. PKPA gives the child’s home state a **JURISDICTIONAL PRIORITY**, which means that if two conflicting orders are issued, only the home state order is entitled to Full Faith and Credit. The PKPA also prohibits a court from exercising initial jurisdiction if a valid custody proceeding is already pending in another state.

a. Home state: The home state is the state in which the child lived with a parent, or a person acting as a parent, for at least 6 months right before the custody action is filed. Home state jurisdiction exists in the child’s current home state, or in a state that was the child’s home state within 6 months before the case began.

b. Significant connection: Under the PKPA, a state can only have significant connection jurisdiction if there is no home state. Then the child and at least one parent must have a significant connection with the state, and there must be substantial evidence

in the state concerning the child's life.

c. Emergency: The PKPA definition is narrower than the UCCJA definition. A court can exercise emergency jurisdiction if the child is physically present in the state and:

- the child has been abandoned, or
- it is necessary to protect the child because the child has been threatened or subjected to mistreatment or abuse

d. Last resort: This type of jurisdiction exists when no other state has home state, significant connection, emergency, or continuing jurisdiction.

The PKPA's jurisdictional hierarchy can affect the safety of victims of domestic violence.

Example: Victim flees with child to new state; defendant stays. Victim forced to litigate case in home state unless state declines jurisdiction based upon inconvenient forum.

Modification:

The PKPA gives continuing jurisdiction to the state that issued the initial custody determination consistent with the PKPA. A court of another state may only modify the initial custody order if:

1. it has jurisdiction
2. the court of the other state no longer has jurisdiction or declined to exercise it

Federal Parent Locator Service:

The PKPA allows the Federal Parent Locator Service (FPLS) to be used to locate an absent parent or child, so long as the information will be used to enforce a state or federal kidnapping law or to make or enforce a custody determination.

Recent amendments have clarified that the FPLS may not disclose information in domestic violence or child abuse cases, except to a court or court agent. The court must then determine whether disclosure could be harmful to the parent or child, and may not disclose the information if it could be harmful.

C. Full Faith and Credit for Custody Provisions of Protection Orders:

1. Full Faith and Credit means one state must enforce the protection order of another state or tribe.
2. Any order is covered that is issued to prevent violence, threatening acts, harassment, or contact including civil, criminal, temporary or ex parte orders.

It does not include support or child custody orders according to **18 U.S.C.**

Section 2266.

3. The law is unclear regarding the custody provision of a protection order.
4. Assuming custody orders are covered there must also be:
 1. personal jurisdiction over batterer
 2. subject matter jurisdiction over custody issue
 3. due process
5. If custody cannot apply, it may be enforced under other laws:
 1. PKPA:

2. state statute affording full faith and credit to protection orders

D. Uniform Child Custody Jurisdiction Act (UCCJA).

The UCCJA is a uniform law drafted by the National Conference of Commissioners on Uniform State Laws. Every state has enacted its own version of the UCCJA based on the uniform law, so the state statutes, for the most part, are very similar.

The UCCJA tells a state court when it can exercise jurisdiction over initial custody determinations. The UCCJA does not govern substantive custody law: it dictates which court should decide a custody case. It does not decide the case, nor set any court's procedure. Its purpose is to avoid jurisdictional conflict and relitigation of custody decisions issued by other states. The UCCJA also attempts to deter abductions and to promote interstate cooperation in custody matters.

Additional Domestic Violence Provisions:

A court with jurisdiction may decline to exercise it if it is an inconvenient forum and a court in another state is a more appropriate forum.

Although domestic violence is not specifically listed as a factor, courts may consider domestic violence when making inconvenient forum decisions.

Example: a victim and child flee to a refuge state. The abuser remains. The home state may decline to exercise jurisdiction based on inconvenient forum.

Unclean hands doctrine:

A court may also decline to exercise jurisdiction if a party has wrongfully taken the child from another state or engaged in similar misconduct. The "unclean hands doctrine" ensures that a party who commits objectionable acts may not gain a jurisdictional advantage.

Example: perpetrators of domestic violence frequently snatch children and take them to other states to "punish" the partner. The "unclean hands doctrine" permits courts to decline to exercise jurisdiction in such cases.

Information must be submitted to the court that may endanger a victim:

1. The child's present address
2. The places the child has lived the last five years
3. The names and addresses of the persons with whom the child has lived the last five years.
4. Information about other pending or completed custody cases involving the child
5. Information about other persons with custody or visitation claims

If the enforcing state court has jurisdiction over custody matters and:

-the order of protection contains custody or visitation provisions and complies with the PKPA and the issuing state's UCCJA or UCCJEA provisions, the court should enforce the protection order.

-the order of protection is silent on custody or visitation, the court should accept emergency jurisdiction if permitted by its state UCCJA/UCCJEA provisions and proceed pursuant to those provisions

-the order of protection contains custody or visitation provisions and complies with the PKPA and UCCJA/UCCJEA, and the petitioner seeks modification based on a change of circumstances, the court should accept emergency jurisdiction if permitted by its UCCJA/UCCJEA provisions and proceed pursuant to those provisions.

If the enforcing court does not have jurisdiction over custody matters, the judge should act to protect the children and refer the custody and visitation issues to the appropriate state court for disposition.

NOTE: Since the VAWA does not address military orders, state courts should develop agreements with local military installations concerning their enforcement of state court protection orders.

CHAPTER VII. TRIBAL LAW AND FULL FAITH AND CREDIT

A. INTRODUCTION:

Culturally, there is a growing perspective that Tribes are not so distant from their memories of 19th century efforts at genocide and retribution, and early 20th century disastrous experiments of assimilation. Those actions are not buried in the past or merely hinted at in history books. The memories are still alive and wounding each new generation. Many tribal members can recall personal stories of the boarding school days or those of their mothers, fathers and grandparents. They remember firsthand, or through stories, the shame of speaking their language, having long hair, of being unacceptable to white culture. The actions of the General Allotment Act of 1887 continued into the 1930's and beyond in trying to assimilate Indians into white culture but never as equals. Children who could not stand the conditions ran away and hid from boarding schools rather than be separated from their family and their identity. Most, however, endured the experience of enforced loss of identity.

From 1953 to 1968 many benefits were terminated, and again, Indians were left to fend for themselves in isolated communities with no capital, hard times and little aid. Unemployment and easy access to introduced substances on the reservation did little to help self esteem. There is a tendency to assume that because it has been many generations since those acts took place, these recent generations of "children's children" do not bear the scars. It is now realized that families do still bear scars through the self-images and expectations passed down by each generation.

Children are most vulnerable to these memories. They form their self image by mirroring the parents as well as by the way they are treated. They are greatly affected by actions and words, including the words that are not said. Low expectations, alienation, and feelings of low self-esteem do not occur in a vacuum. In working with native youth today, one sometimes hears the words that have been passed down: that they will never

be good enough, that they are not acceptable. Other words are missing: many children lack praise and the words of encouragement that all children need to hear. By listening to the young, you can hear the echoes of that history of horror through the centuries and how it may influence native youth in defining their first reflection of who they are.

The high level of alcohol and drug abuse among youth today may be reflective of society but the extremely high statistics on the reservations is likely to have been affected by the large-scale introduction of cheap and altered alcohol to a non-drinking culture a hundred years ago. There was an intent in the past, at the very least, to change the Native American, to attempt to make the people less or other than they were. As we know, harmful actions, words and thoughts are not extinct today. Bias and prejudice exist in an imperfect world for all people. Most significantly, however, are the images that are reflected in the words and actions that some families convey to their children. Families educated about their own cultural history can become aware of the past's continuing impact on their lives. Once aware of the power of their negative words and its great impression upon the young, it is hoped that parents will break the chain of this memory and consciously work to convey hope, opportunity and self-worth to their children.

Traditional Native culture is a means of restoring this self-image and that of the Tribe. In this respect, teaching respect for the family, and significantly, the status of the woman, is relearning original culture, where there was harmony and balance. Women were generally strongly supported in their right to live without violence in their lives. It is not a new story that needs to be told, but an old and healthy Tribal memory that needs to be recalled to replace the painful memories that were imposed.

STATISTICS

According to the National Coalition Against Domestic Violence:

*** The violent crime rate among American Indian females during the period of 1992-1996 was 98 per 1,000 females. This is more than double the rate of white females.**

*** Among American Indian victims of violence, 75 percent of the intimate victimizations and 25 percent of the family victimizations involved an offender of a different race. Indian victims of intimate and family violence are more likely than others to be injured and a greater number of their injuries will require hospital care.**

*** Approximately 75 percent of Native American female homicide victims are killed by someone they knew. This is significantly higher than the national average. Among all the women in the U.S., 65 percent of females were murdered by someone they knew.**

B. Legal limitations of Tribal Jurisdiction

1. Major Crimes Act 18 U.S.C. Section 1153 (1885)

Provides federal jurisdiction over "major crimes" in Indian country

2. P.L. 280 18 U.S.C. Section 1162 (1953).

P.L. 280 transferred federal criminal jurisdiction in Indian Country in Montana for only the Flathead Reservation.

3. Indian Civil Rights Act 25 U.S.C. Section 1302(7) (1968)

This Act limited sentencing in tribal courts to one year imprisonment, \$5,000 fine or both.

4. Oliphant v. Squamish 435 U.S. 191 (1978)

The U.S. Supreme Court held that tribal courts do NOT have jurisdiction over non-Indians who commit crimes in Indian country. Tribes still retain civil jurisdiction over non-Indians in many cases.

C.TRIBAL LAW AND FULL FAITH AND CREDIT

Under 18 U.S.C. Section 2265:

Protection orders issued by tribal courts are entitled to Full Faith and Credit. If they satisfy the jurisdictional and due process requirements of Section 2265(b) (valid order and notice), tribal orders must be treated as if they had been issued by a court in the enforcing state.

Under 18 U.S.C. Section 2265(d):

A state or Indian tribe may NOT require registration or filing of a protection order in their jurisdiction as a prerequisite to enforcement.

Under 18 U.S.C. Section 2265(e):

A tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclude violators from Indian lands and other effective mechanisms.

Under 18 U.S.C. Section 2265(a):

The tribes must give Full Faith and Credit to protection orders issued by other states, tribes and U.S. territories, provided the order meets due process requirements. The tribe must enforce all the terms of the protection order as if the order had been issued in the enforcing jurisdiction.

The VOWA 2002 declares that: “tribal courts shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.”

Under Full Faith and Credit there are full civil sanctions available to the tribes for violations of protection orders by Indians and non-Indians (non-members and whites). The tribes can create specific laws for violators. For qualified tribal members of any tribe they can create criminal laws within their jurisdiction.

The Indian Child Welfare Act (ICWA) should also be reviewed to see how it applies to Full Faith and Credit. Support for Full Faith and Credit of custody orders for Indian children of registered tribes is not clearly defined by the above

Federal laws.

There is a need for a Tribal Protection Code in each tribe so that Full Faith and Credit may be applied.

1. Full Faith and Credit **18 U.S.C. Section 2265 (2000)**
2. Establishing jurisdiction
3. Violation of a protection order can be a criminal violation or a civil infraction.

D. APPLICABLE SECTIONS OF MONTANA TRIBAL CODES:

1. Blackfeet Protection Order Code

Chapter 9: Domestic Abuse

Section 3: Mandatory arrest

Section 3(A): Protection Order Violation

Section 3(A)(2): Dual arrests permitted

Section 3(A)(3): Mandatory “cooling off” period of 48 hours jail without bail

Section 4: Habitual offenders (4th + offense) mandatory 365 day sentence

Section 8: If the situation so warrants, transfer of jurisdiction is possible to the U.S. Federal Court

Section 9: Act or omission immunity for law enforcement officers

Section 11: Reporting statistics

2. Confederated Salish and Kootenai Protection Order Code

-Who qualifies for a Temporary Protection Order Based upon Family/Partner Abuse (Domestic Abuse)

-3. Respondent: Must be a member of a Federally recognized Tribe.

Part 7: Offenses against the family

2-1-701. Domestic Abuse

2-1-701(9): 1st conviction is Class D “over which the Tribes have exclusive jurisdiction.”

2-1-701(10): 2nd conviction is Class D, “over which the Tribes have exclusive jurisdiction.”

2-1-701(11): 3rd + convictions are Class E, “over which the Tribes have concurrent jurisdiction with the State of Montana: (1/27/00)

2-1-917: Violation of a protection order.

2-1-917(4): Class D offense, exclusive jurisdiction except as provided by 2-1-701

Newly Amended Laws

Title II

Chapter 1. Tribal Offenses

2-1-113. Temporary orders of protection. (1) Whether or not the Tribal Prosecutor files a complaint charging the offense, a person may apply to the Tribal Court for an order of protection if the Prosecutor has reason to believe that a person is a victim of one of the following offenses committed by a person over whom the Tribal Court has jurisdiction:

abuse of an elderly or vulnerable person, assault, aggravated assault, intimidation, domestic abuse, criminal endangerment, negligent endangerment, unlawful restraint, kidnapping, aggravated kidnapping, arson, stalking, sexual assault, incest, or sexual intercourse without consent.

(2) The petition for a protective order against a suspected offender shall be accompanied by an affidavit of the alleged victim setting out facts constituting sufficient reason to believe that the suspected offender has committed one of the offenses listed in subsection (1).

(3) The petition may request an order of protection containing any or all of the following provisions for relief of the alleged victim:

(a) prohibiting the suspected offender from assaulting, threatening, abusing, harassing, following, stalking, or disturbing the peace of the alleged victim;

(b) directing the suspected offender to avoid any contact with the alleged victim by staying at least 500 yards from the person, residence, work place, or vehicle of the alleged victim and from the children of the alleged victim and the children's school or daycare facility;

(c) directing the suspected offender to avoid any contact with identified family members of the alleged victim or any identified witness to or other identified victim of the suspected offense;

(d) directing the suspected offender to refrain from taking, hiding, selling, transferring, or disposing of any property in which the alleged victim has an interest;

(e) directing the suspected offender from removing any children of the alleged victim from the jurisdiction of the Court, or

(f) granting temporary custody of children of the alleged victim solely to the alleged victim.

(4) Upon a finding that the alleged victim is in danger of harm if the Court does not act immediately, the Court shall issue a temporary order of protection granting some or all of the relief requested and such other relief as may be appropriate in the circumstances. The protective order shall not apply to contacts initiated by the petitioning alleged victim.

(5) Within 14 days from the date the Court issues a temporary protection order, a hearing must be conducted. At the hearing, the Court shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.

Expansion of the Scope of TPOs to Include any Alleged Victim of the Enumerated Tribal Offenses

2-1-511. (deleted) Elder abuse

Revision to Include any Vulnerable Person as a Victim of this Offense

2-1-701. Domestic abuse.

(1) A person commits the offense of domestic abuse if the person:

(a) knowingly or purposely causes bodily injury to a family member, or partner;

- (b) knowingly or purposely causes reasonable apprehension of bodily injury to a family member, or partner;
 - (c) negligently causes bodily injury with a weapon to a family member, or partner; or
 - (d) knowingly violates a protective order issued by the Tribal Court regarding a family member, or partner.
- (2) through (6) of prior text deleted
- (2) (renumbered) “Family member” means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships includes relationships created by adoption and remarriage, including stepchildren, stepparents, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.
- (3) (renumbered) “Partner” means spouses, former spouses, and persons who have been or are currently in a dating or ongoing intimate relationship.
- (4) (renumbered) For a first conviction for domestic abuse, the offense is classified as a Class D offense over which the Tribes have exclusive jurisdiction.
- (5) (renumbered) For a second conviction for domestic abuse, the offense is classified as a Class D offense over which the Tribes have exclusive jurisdiction.
- (6) (renumbered) For a third or subsequent conviction for domestic abuse, the offense is classified as a Class E offense over which the Tribes have concurrent jurisdiction with the State of Montana. **(Rev. 1-27-00.)**
Subsections 2-6 Moved to New Section 2-1-113 and Revised to Expand scope of TPOs.

3. Crow Protection Order Code (abridged-see Crow Law and Order Code, “CLOC”, for full Code) [PROPOSED]

CHAPTER 1

General Provisions

8C.1.04 Definitions

f. “Dating Relationship” means a social relationship of a romantic nature. In determining whether parties have a “dating relationship”, the Court shall consider:

1. The length of time the relationship has existed.
2. The nature of the relationship.
3. The frequency of interaction between the parties.

g. “Domestic violence” means any one of the following when occurring between family or household members:

1. Commission of an act that constitutes a crime under CLOC Title 8, as now or hereafter amended.
2. Commission of a crime listed under the Major Crimes Act, 18 U.S.C. section 8C53, as now or hereafter amended.

3. Physical harm, bodily injury, assault, sexual assault, property damage, or injury to household pets or the infliction of reasonable fear of physical harm, bodily injury, assault, sexual assault, property damage, or injury to household pets.

“Domestic Violence” also means:

4. Violation of a restraint provision contained in an order entered under this Title or of a comparable provision contained in an order accorded full faith and credit by the court under CLOC____, and of which the person had notice at the time of the alleged violation.

“Domestic violence” does not include acts of self-defense or in defense of another reasonably taken in response to acts of domestic violence.

h. **“Essential personal effects”** means those items necessary for a person’s immediate health, welfare, livelihood, such as clothing, cribs, bedding, medications, personal documents, personal hygiene items, and tools of trade.

i. **“Family or household members”** means any one of the following:

1. Spouses.
2. Former spouses.
3. Persons who have a child in common or who are expecting a child in common regardless of whether they have been married or have lived together at any time.
4. Persons eighteen years of age or older who are related by blood or marriage.
5. Persons eighteen years of age or older who are presently residing together or who have resided together in the past.
6. Persons sixteen years of age or older who have or have had a dating relationship.
7. Persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.
8. Physically or mentally disabled persons and their caregivers.
9. Elders sixty years of age or older and their caregivers.
1. **“Probable Cause”** means that a police officer, acting as a person with ordinary caution, has reasonable grounds to believe that the person to be arrested has committed a crime, based on all the facts known to the officer, including the officer’s personal observations, statements by parties involved in the incident, statements by witnesses, and any other reliable information.

CHAPTER 3

Criminal Offenses

Section 8C.3.01 Domestic Violence

A person is guilty of domestic violence if the person commits an act of domestic violence, as defined in CLOC____

The offenses shall be classified as follows:

a. CLOC 8C.1.04(e) (1) (CLOC Title 8):

Domestic violence as defined in subsection (1) of the CLOC8C.1.4 (e) shall be deemed of a class one degree higher than the lesser included offense in CLOC Title 8.

b. CLOC 8C.1.04(e) (2) (Major Crimes Act):

Domestic violence as defined in subsection (2) of the CLOC 8C.1.04 (e) is a Class AA offense.

c. CLOC 8C.1.4 (e) (3) (Physical harm, etc.):

Domestic violence as defined in subsection (3) of CLOC 8C.1.04 (e) is a Class A offense.

d. CLOC 8C.1.4 (e) (4) (Violation of order):

Domestic violence as defined in subsection (4) of CLOC 8C.1.04 (e) is a Class A offense.

Section 8C.3.02 Interfering With the Reporting of Domestic Violence

A person is guilty of interfering with the reporting of domestic violence if the person:

- a. commits an act of domestic violence, as defined in CLOC 8C.1.04 (e); and
- b. prevents or attempts to prevent the victim or a witness to such act of domestic violence from calling 98C emergency communications system, obtaining medical assistance, or making a report to any law enforcement official.

Interfering with the reporting of domestic violence is a Class B offense.

Section 8C.4.07 Criminal Complaint

- a. **Contents of Complaint:** A criminal complaint charging domestic violence under CLOC 8C.3.01, as defined in subsection (1) of CLOC 8C.1.04 (e), shall cite the lesser included offense under CLOC Title 8. A criminal complaint charging domestic violence under CLOC 8C.3.01, as defined in subsection (2) of the CLOC 8C.1.04 (e), shall specify the crime under the Major Crimes Act, 18 U.S.C. Section 8C53.

Section 8C.4.8C Emergency No-Contact Order

- a. **Procedure and Standard for Issuance:** The Court may issue an emergency no-contact order when a CPD officer or the Prosecutor states to the Court, in person or by telephone, and the Court finds probable cause to believe, that an act of domestic violence has occurred and that the victim, the victim's family or household members, or a witness to the act of domestic violence is in immediate danger of further acts of violence. The Court's oral order shall be reflected in a written order prepared and signed by the Court or by the CPD officer Prosecutor on behalf of the Court. The CPD or the Prosecutor shall serve copies of the order upon the alleged perpetrator and deliver a copy to the Court by the end of the next judicial day.

CHAPTER 5

Petition for an Order for Protection

Section 8C.5.02 Who May File

Any one of the following may file a petition under this Chapter:

- a. A victim on his or her own behalf.
- b. A family or household member on behalf of a minor victim, but a minor sixteen years of age or older may file a petition on his or her own behalf.
- c. A family or household member on behalf of a victim who is prevented from doing so by hospitalization, by physical or mental disability, or by fear.
- d. Social Services on behalf of the victim.
- e. Family and household members may jointly file a single petition.

CHAPTER 7

Duties of the Court

Section 8C.7.01 Availability of Judge

The Court shall insure that a judge is available twenty-four hours a day, seven days a week, to consider requests for emergency no-contact orders and temporary orders for protection.

Section 8C.7.03 Full Faith and Credit

- a. **Procedure for Request; Eligible Orders:** Any person who is or will be present on the Reservation and who is or will be present on the Reservation and who is entitled to protection under a no contact order, protection order, restraining order, stay-away order, anti-harassment order, or the like, entered by a duly authorized tribal or non-Tribal court in a civil or criminal proceeding arising out of an incident of domestic violence, may file a certified, authenticated, or exemplified copy of the order with the Court, along with a request that the Court accord the foreign order full faith and credit. No fee shall be charged for this procedure.
- b. **Standard for Granting Request; Effect:** A foreign order filed with the Court pursuant to subsection (a) shall be presumed valid. Unless the Court finds that the issuing court lacked jurisdiction, that the issuing court did not afford the restraining party due process, or that the foreign order conflicts with or duplicated the Court's own order, the Court shall enter an order recognizing the foreign order and according it full faith and credit. Thereafter, the foreign order shall be enforced as if it were an order of the Court.

CHAPTER 8

Duties of the CPD

When a CPD officer responds to a report of domestic violence, the officer shall do the following, as necessary and in the order appropriate to the circumstances:

(ABRIDGED SEE CLOC FOR FULL LANGUAGE)

- a. **Request Back-up**
- b. **Assure Safety**
- c. **Confiscate Weapons (according to standard law enforcement procedure)**
- d. **Arrest Alleged Perpetrator**
- e. **Request Emergency No-Contact Order**
- f. **Render Emergency First Aid and Obtain Medical Treatment**
- g. **Transport to Shelter**
- h. **Observe and Place Minor Children, Disabled Persons and Elders**
- i. **Remove Essential Personal Effects**
- j. **Inform Victim of Rights, Remedies, Services**
- k. **Collect Evidence**
- l. **Obtain Victim and Witness Statements**
- m. **Prepare Incident Report**

SEE CLOC, Section 8C.8.02 Arrest for Domestic Violence Under:

CLOC 8C.1.04 (e) for (1) (CLOC Title8), (2) (Major Crimes Act), or (3) (Physical harm, etc.) for:

1. **Mandatory Arrest Code and**
2. **48 hour rule for probable cause arrest outside of officer's presence.**

SEE CLOC, Section 8C.8.03 Arrest for Domestic Violence under CLOC 8C.1.04 (e) (4) (violation of order) for:

1. **Mandatory Arrest Code and**

2. 48 hour rule for probable cause arrest outside of officer's presence.

*** Other Relevant Portions of Code ***

8B-5-206 Partner or Family Assault

- (1) A person commits the offense of partner or family member assault if the person:
- (a) purposely or knowingly causes bodily injury to a partner or family member;
 - (b) negligently causes bodily injury to a partner or family member with a weapon; or
 - (c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

(2) For the purpose of this section, the following definitions apply:

(a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(b) "Partners" means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

(a) Partner or family member assault is a Class C offense for which the offender shall be imprisoned in the Crow Tribal Jail for any term not to exceed 6 months or be fined an amount not to exceed \$2500.00 payable to the Crow Tribal Court, or both.

(b) If there is a repeat occurrence, then the offense becomes a Class B offense for which the offender shall be imprisoned in the Crow Tribal Jail for any term not to exceed 9 months or be fined an amount not to exceed \$3750.00 payable to the Crow Tribal Court, or both.

(c) Upon a third conviction of same offender, partner or family member assault becomes a Class A offense for which the offender shall be imprisoned in the Crow Tribal Jail for any term not to exceed 1 year or be fined an amount not to exceed \$5000.00 payable to the Crow Tribal Court, or both.

(Optional)

(d) In addition to the punishment in 3(a), offenders must complete a counseling assessment.

8B-5-211. Stalking-exemption.

(1) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:

- (a) following the stalked person; or
- (b) harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, device, or method.

(2) This section does not apply to a constitutionally protected activity.

(3) Attempts by the accused person to contact or follow the stalked person after the accused person has been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie

evidence that the accused person purposely or knowingly followed, harassed, threatened, or intimidated the stalked person.

(a) A first offense of stalking is a Class C offense for which the offender shall be imprisoned in the Crow Tribal Jail for any term not to exceed 6 months or be fined an amount not to exceed \$2500.00 payable to the Crow Tribal Court, or both.

(b) A second offense of stalking is a Class A offense for which the offender shall be imprisoned in the Crow Tribal Jail for any term not to exceed 1 year or be fined an amount not to exceed \$5000.00 payable to the Crow Tribal Court, or both.

4. Fort Belknap Protection Order Code

Part XI: Family Protection Act

Section 4: No filing or service fees for petitioner.

Section 5(2)(E): “The court shall provide simplified forms and clerical assistance to help with the writing and filing of a petition under this section.”

Section 14(A): Protection Order registry required.

Section 15: Violation of an order for protection.

Section 15(B): Mandatory arrest and immunity for actions in good faith

Section 15(C): Contempt of court

Section 15(D): Bond up to \$10,000 for repeat offenders

Section 15(G): Peace officer immunity for omissions

Section 15(H): Firearms used in commission of protection order violation; court may prohibit possession for 3 years to life.

Section 21: Reservations and Statewide Application. “An order for protection granted under this section applies throughout the Reservation, and through the state of Montana, if recognized by a State Court.”

5. Fort Peck (Assiniboine-Sioux) Tribe Protection Order Code-EXCERPTS-see Tribal Code for full language.

Section 244: Severe physical domestic abuse.

Any person who intentionally causes bodily injury of any kind to a family member or household member commits the offense of severe physical domestic abuse, punishable as a felony, as per VII CCOJ 501(1). By evidence admissible to the Fort Peck Tribal Court, the impact upon the victim of domestic abuse of any cuts, bruises or scrapes, any broken bones any internal hemorrhaging of any kind, or evidence of head or/and brain trauma, shall be considered clear evidence of severe physical domestic abuse. For the purposes of this Section, “family member or household member” means a person, any person residing with the accused, and “residing” means residence in that domicile of a 24 hour period or more.

(1)The law enforcement officer(s) first arriving to a domestic abuse situation who finds probable cause and/or clear evidence of severe physical domestic abuse must make an arrest. Whenever possible, two or more law enforcement officers shall respond to a domestic abuse call, and if only one officer responds, an explanation in the written report

of the incident shall explain why two officers were not present. Those arrested and charged with domestic abuse shall not be released from custody except at arraignment as described in Section CCOJ 402.

(2) All domestic abuse calls shall be reported by law enforcement to the appropriate child and social services public agencies within twelve hours of responding to the call, and standard procedures shall include forwarding of a confidential written report from the responding police officer to the appropriate child and social services public agency within 48 hours.

(3) The law enforcement agents who report to the scene and the social service agents who interview the victim subsequent to and within 72 hours of the violence shall make a written report, and shall photograph this victim if he/she gives written consent. Such evidence shall, unless shown otherwise, be fully admissible to the Fort Peck Tribal Court. Evidence of treatment for such injuries may be used to substantiate their existence, but shall not be the sole criterion.

(4) (Sentencing-SEE TRIBAL CODE FOR FULL LANGUAGE)

Section 245 Domestic Abuse.

A person who attempts by physical menace to put a family member or household member in fear of serious bodily harm, or by physical menace causes another to harm himself/herself, is guilty of domestic abuse. For the purposes of this Section, "family member or household member" means a person residing with the accused, and "residing" means a residence in that domicile of one 24 hour period or more.

(1) (Sentencing-SEE TRIBAL CODE FOR FULL LANGUAGE)

(2) All domestic abuse calls shall be reported by law enforcement to the appropriate child and social service public agencies within twelve hours of responding to the call, and standard procedures shall include forwarding of a confidential written report from the responding police officer to the appropriate child and social service public agency within 48 hours. Whenever a law enforcement officer is called to the scene of a reported incident of domestic violence, but he/she does not make an arrest, is called to the scene of a reported incident of domestic violence, but he/she does not make an arrest, he/she shall file a written report with the Chief of Police setting forth the reason or reasons for his/her decisions.

(3) The provisions of Section 244(4)(A) through (C) shall apply with equal weight for a conviction of domestic abuse. (AS PER RESOLUTION NO 821-2002-8, DATED AUGUST 12, 2002.)

Section 246. Added punishment for offenses in conjunction with domestic abuse and severe physical domestic abuse.

Any of the following acts for which an abuser is proved by evidence properly admissible to the Fort Peck Tribal Court as having done at or very near to the same time as the abuse upon the family or household member for which the abuser was convicted shall be considered to have committed an additional offense, punishable as a felony, as per VII CCOJ 501(1), and the Court may order jail sentences to run concurrently with the jail sentence incurred by infractions of Sections 244 and 245 of this Title. "Very near to the same time" shall be defined as within 24 hours of the severe physical domestic abuse or domestic abuse. The acts are, but not limited to:

- (1) Arson;
- (2) Assault Offenses: Aggravated assault, Simple assault, and Intimidation;

- (3) Burglary, or Breaking and entering;
- (4) Destruction of personal or real property, Vandalism;
- (5) Homicide offenses: Murder, Non-negligent manslaughter, Negligent homicide, and Justifiable homicide;
- (6) Kidnapping, Abduction;
- (7) Sex Offenses: Forcible rape, Forcible sodomy, Sexual assault with an object, and Aggravated sexual assault of a child, and Stalking;
- (8) Theft and Conversion of personal property;
- (9) Carrying a concealed dangerous weapon, Unlawful discharge of firearms;
- (10) Abuse of a child, Neglect of a child, and Abandonment of a child;
- (11) Criminal trespass on real property.

(AS PER RESOLUTION NO.821-2002-8, DATED AUGUST 12, 2002.)

Section 247 Duties of law enforcement officer to victim or domestic or family violence; notice to victim upon law enforcement's arrival to domestic violence situation.

(a) Whenever a law enforcement officer reports to the scene of an incidence of domestic abuse, if the victim is present, the officer shall advise the victim of the availability of a battered persons/at risk shelter and the other child and family services in the community. Domestic abuse is defined in the first paragraphs of both Sections 244 and 245 of this Title. The law enforcement officer shall give the victim a copy of the following statement:

IF YOU ARE A VICTIM OF DOMESTIC ABUSE OR FEEL UNSAFE IN THIS HOUSE, YOU ARE STRONGLY ENCOURAGED TO REMOVE YOURSELF AND ANY PEOPLE DEPENDENT ON YOU FROM THE SOURCE OF DANGER, OR ELSE BE PERSISTENT IN MAKING SURE THE DANGER IS REMOVED FROM YOUR HOUSE. YOU MUST NOT ALLOW YOURSELF TO CONTINUE TO BE HARMED. YOU MAY ASK THE POLICE PERSON WHO GAVE YOU THIS TO TAKE YOU AND YOUR DEPENDANTS TO A DOMESTIC VIOLENCE SAFE HOUSE, TO THE FORT PECK CRISIS CENTER, OR THE POLICE STATION. ALLOWING YOURSELF AND ANY CHILDREN IN YOUR HOME TO CONTINUE BEING NEAR A SOURCE OF PHYSICAL AND EMOTIONAL DAMAGE IS NEGLIGENCE ON YOUR PART, AND IS BASIS FOR LEGAL ACTION TO BE BROUGHT AGAINST YOU BY TRIBAL AND STATE CHILD AND FAMILY PROTECTIVE SERVICES.

If you are a victim of domestic abuse you may ask the tribal prosecutor to file criminal charges against your abuser, but to effectively punish your abuser, you must cooperate with the Tribal Prosecutor by explaining to her/him the facts relevant to the abuse you received in this incident. You have the right to go to Court and file a petition requesting any of the following civil orders for relief, but you must go to the Wolf Point Tribal Court building to make them happen. Under Chapter 4, Title 8 of the Fort Peck Comprehensive Code of Justice (CCOJ) you can ask for:

(a) A temporary restraining order's (TRO) purpose is to force your abuser from being in your presence, but is only for a maximum of ten days, and can only be enforced if you inform the police when the abuser violates the restraining order, and sign an affidavit

which you must ensure the police deliver to the Tribal Court so that your abuser can be arrested. Violation of a temporary restraining order is punishable by jail of up to three months and a \$500 fine, following Title 7 CCOJ Sections 426(b) and 427. While the TRO is in effect, you should keep a copy of its Order with you at all times.

(b) After you have received a temporary restraining order against your abuser, the way to continue the restraint against your abuser after the expiration of the TRO is with a preliminary injunction as per Title 5, Section 653 CCOJ. A preliminary injunction can order the abuser to avoid contact with you and your family from the time the TRO expires until the abuser goes to trial, and the punishment for violation of the injunction is a jail sentence of up to three months and a \$500 fine, as per Title 7, CCOJ Section 426(b). This is what must happen to create an injunction:

- (1) At the hearing in creating the TRO, or while the TRO is in force, inform the judge or court clerk you will want an injunction hearing.
- 2) The Court Clerk for the Tribal Court will mail to you the date for the injunction hearing.
- 3) You must attend the injunction hearing and present to the Court the reasons why the injunction should be placed against your abuser. Your abuser may appear at this hearing and attempt to avoid having an injunction ordered, or to modify it.

(c.) If you have asked the prosecutor to bring charges, the Court Clerk will set a date for the criminal lawsuit against your abuser. You may attend the criminal proceedings against your abuser. The criminal public prosecutor should inform you of pretrial hearing and hearing time and dates, the status of litigation progress, and should accept your input as to whether your abuser should be trusted or deserve a probation, parole, or a reduced, mitigated jail sentence. Elective Civil Actions. You may file a complaint with the Fort Peck Tribal Court in Wolf Point against your abuser for the tortuous battery, if you were physically injured; or assault, if you were threatened and had the impression you were going to be hurt; and for the intentional infliction of emotional distress.

(b) For the temporary or permanent custody of your children, you may file a complaint in the Wolf Point, Fort Peck Tribal Court Under Section 304 or 304a of Title 10 CCOJ. Section 304 also provides that the Court may order child support payments to be made to the non-custodial parent.

Contacts:

Tribal Crisis Center, 7th and West Cascade: 653-1494

State of Montana Public Health and Human Services, Child and Family Services
324 Main, Wolf Point: 653-3520

Wolf Point Tribal Court, P.O. Box 2233, Wolf Point, MT 59201: 653-8285

Wolf Point Police non-emergency, 301 4th Ave S 652-1093

Poplar Police non-emergency, 408 2nd Ave W 766-3711

Tribal Police non-emergency, 4104 2nd Ave S. Wolf Point 653-2586

(b) Law enforcement with jurisdiction in the Fort Peck Reservation are expected to keep updated copies of this notice in their patrol vehicles, and to ensure the phone numbers and addresses are current and up to date.

© Law enforcement officers responding to calls alleging domestic or family violence shall use all reasonable means to protect the victim and prevent further violence, including but not limited to:

- (1) Confiscating any weapons involved in the alleged violence;

- (2) Transporting or arranging transport for the victim and dependents of the victim to a safe house/shelter; hospital, police station, or a friend or relatives' residence.
- (3) Assisting the victim and dependents in removing essential personal affects; one also VII CCOJ 402(7)

6. Northern Cheyenne PO Code

7-5-10 Domestic Abuse (1991)

- A. Any person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse.
- B. Definitions:
 - 1. "Domestic abuse" is defined as causing physical harm, bodily injury, assault or inflicting fear of imminent harm, bodily injury or assault.
 - 2. "Spouse" means a person with whom the victim is currently living or who has lived with the victim in the past, regardless of whether they are or were married, or, a person with whom the victim has a child in common, regardless of whether they were married or had lived together.
 - 3. "Family member" or "household member" means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant.
- C. Penalties
 Conviction of domestic abuse is Class A offense. A person convicted of a first offense for domestic abuse shall be jailed for not less than 30 days and fined not less than \$500.00. A person convicted a second time for domestic abuse shall be jailed for not less than 90 days and fined not less than \$1,000.00. A person convicted for the third or subsequent times shall be jailed for not less than 180 days and fined not less than \$2,000.00. Restitution to the victim shall be ordered by the Judge when appropriate. Twenty-five sessions of mandatory counseling shall be ordered by the Judge in all convictions. This mandatory counseling shall include education on violence and learning non-violent behavior. This counseling may be ordered for up to one year by the Judge with progress reports to be made no less than monthly. If alcohol or drugs were involved in the offense, a chemical dependency evaluation and complete cooperation with recommendations for treatment shall be ordered by the Judge.
- D. Other Provisions:
 - 1. Mandatory Arrest. A police officer shall immediately arrest, without having to obtain an arrest warrant, and take into custody any person whom the officer has probable cause to believe has committed the crime of domestic abuse. The victim need not sign a complaint. The officer shall make the arrest even though an arrest may be against the expressed wishes of the victim.

An officer, under this section, is not required to arrest both parties when he/she believes that parties have assaulted one another. The officer shall arrest the person whom he/she believes to have been the primary aggressor. In making this determination the officer shall make every reasonable effort to consider (1) the intent to protect the victims of domestic abuse under the section; (2) the comparative extent of injuries inflicted, or serious threat creating fear of physical injury; and (3) the history of domestic abuse between the persons involved.

2. Filing a complaint. The police officer making the arrest for domestic abuse shall sign the complaint and include a detailed report of the circumstance of the arrest and any available statements from witnesses or victims. The victim may be utilized in a prosecution as a witness, if the victim is willing. Otherwise, the arresting officer shall testify as a prime witness in the prosecution. Any spousal privilege not to testify as a husband and wife shall not apply in domestic abuse prosecution.
3. Victim's Rights. The victim of domestic abuse shall be informed by the arresting police officer of the local abode shelter, and shall see that the victim contact is made with that shelter; and shall inform the victim that a restraining order is available against the abuser, that an order can be obtained ordering the abuser from the household, school or business of the victim, that an order can be obtained awarding temporary custody of minor children to the victim, and that the abuser can be ordered to pay support to the victim and minor children regardless if the victim is male or female.
4. Reports. In cases where a police officer is called to a scene in which domestic abuse is suspected, but in the discretion of the police officer, no arrest is made by the officer, the officer shall write and file a written report explaining the reason for not making an arrest.
5. Holding Time and Bail. Any person arrested for domestic abuse shall be held without bail for not less than 24 hours or more than 36 hours for a mandatory cooling off period. No bail schedule shall be set until the time period expires. Bail put forth cannot be forfeited in lieu of court appearance. Appearance at court before a Judge is mandatory.
6. Education of Public Officials. All Judges, prosecutors, and police officers, shall be trained to implement this section with at least one eight hour initial session given by a domestic abuse specialist. In addition, all personnel shall have a minimum of four hours of

refresher and update training in domestic abuse each year.

Highlights:

Mandatory arrest

-not dual arrests; encourages primary aggressor investigation

Other Provisions: 5. Holding time and bail:

“Any person arrested for domestic abuse shall be held without bail for the period of not less than 24 hours or more than 36 hours mandatory cooling off period.”

7-5-10 Domestic Abuse (1991)

Other provisions: 6. Education of Public Officials

“All judges, prosecutors, and police officers, shall be trained to implement this section with at least one 8 hour initial session given by domestic abuse specialist in addition, all personnel shall have a minimum of 4 hours of refresher and update training and update training in domestic abuse each year.”

7. Rocky Boy’s Chippewa Cree Protection Order Code

Chapter 2, Section 202: Violation of certain orders for protection is a misdemeanor

Chapter 2, Section 205: Mandatory arrest for certain violations of orders for protection

Chapter 2, Section 205(5): “An order prohibiting the respondent from using or possessing a firearm or other weapon specified by the court.”

Chapter 2, Section 207: Authority of law enforcement officer to seize weapons

Note: Tribal criminal law is not enforceable against non-Indians. However, civil sanctions can apply and Tribes should consider laws that deal with this gap regarding domestic violence and Full Faith and Credit. Applicable sanctions include fines and banishment. Agreements with other jurisdictions may permit cross-deputation and there is already authority to detain and hold for other jurisdictions.

E. CONCERNS/STRATEGIES IN IMPLEMENTATION

Concerns:

- 1. Jurisdiction is often not clear regarding law enforcement entity response**
- 2. One protection order may not cover all jurisdictions**
- 3. There is no jurisdiction for criminal law enforcement by Tribes against non-Indians**

Strategy

- 1. Set up meetings with neighboring, shared or bordering jurisdictions to set procedure for response, and enforceability of respective protection orders, steps to coordinate, educate law enforcement or change responses.**
- 2. Petitioner may need to be advised to obtain multiple protection orders to immediately cover the checkerboard or shared jurisdictions.**

3. Tribes can enforce civil sanctions over non-Indians. They may need to create civil sanctions such as fines and banishment. Other ideas to pursue are garnishment of wages if employed on the reservation and attachment of vehicles.
4. Jurisdictions that checkerboard might consider cross-deputizing Tribal officers. Deputizing both Tribal and state officials might bring up sovereignty issues. For an excellent article explaining the jurisdiction issues see *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts* by Melissa L Tatum (90 Ky. L. J. 123) West, (002).
5. Develop model code for Full Faith and Credit.
6. Develop model order of protection for Full Faith and Credit.

Jerry Gardner, with the Tribal Law and Policy Institute, lists the following methods some tribes have developed to deal with practical problems and limitations of tribal law:

1. Police Power to Arrest and Hold for Another Jurisdiction.
2. Police Power to Arrest and Take to the Reservation Boundaries.
3. Exercise Power of Exclusion or Banishment.
4. Exercise Jurisdiction through Consent or Stipulation of Non-Indians.
5. De-Criminalize Certain Actions (or create Infractions Systems).
6. Prosecute through Civil Action.
7. Use Civil Forfeiture Laws.
8. Use Civil Contempt Power.

F. TRAINING TOOLS FOR TRIBES:

1. Model Tribal Domestic Violence Full Faith and Credit Ordinance
2. Drafting Tribal Domestic Violence Codes: Outline for Beginning the Project

Information is available from various sources for drafting a tribe's codes on domestic violence. I refer, herein, to an outline prepared by attorney Hallie White, Indian Nations Domestic Violence Law Program in Arizona. Another excellent model is set forth in the Kentucky Law Journal entitled, *PROPOSED MODEL CODE FOR USE BY MICHIGAN INDIAN TRIBES: ENFORCEMENT OF FOREIGN PROTECTION ORDERS* (90 Ky. L. J. 123).

SAMPLE OUTLINE

Getting Started:

I. If possible, get an endorsement:

1. Formal or informal
 - a. Tribal Council Resolution or support from key council members or chairman.
2. Support from Religious or Cultural leaders
3. Support from Chief of Police or Chief Judge

II. Financial Resources

Most codes can be written entirely by the community, tribal court advocates, and tribal lawyers. Law schools often have law students willing to provide free legal research

for the tribes. Funding may be available for an attorney or to fund a committee through the followings sources:

- DOJ VAWA/STOP grants
- State or local grants for protecting battered women or crime victims
- Contributions from casino or other tribal business
- Funding from tribe
- Grants from philanthropic agencies
- VAWA discretionary grants
- CLA and Rural Grants

III. Assemble the Players:

Think expansively and include community members when working to solve a community problem. A partial list of people/agencies who can be very useful in drafting codes includes:

- Domestic Violence Coalition Members
- Victims/Survivors
- Prosecutors
- Victim Witness/Advocates
- Law Enforcement
- Judges/Courts (including Clerks)
- Probation/Parole
- Defense Attorneys
- Council Members
- District/Chapter Leaders
- Shelters
- Food Bank
- Nearby Urban Indian Centers
- Churches
- Traditional Religious Leaders
- Community/Cultural Leaders
- Indian Health Services/Health Clinics
- Child Protective Services
- Housing Authority
- Social Services
- Elder Programs
- Schools/Daycare/Early Childhood Education
- Youth Council
- Legal Aid/Legal Services
- Local Businesses
- Casino/Tribal Businesses

Identify “facilitators” who will keep the process moving, will be responsible for finding a meeting room, will send notices of scheduled meetings, make copies of drafts and distribute them, etc. Don’t be afraid of inviting the “challenging people.” Expect some venting or frustration. Don’t be disappointed if the process “loses some steam” along the way. Oftentimes, a small core group will emerge that consistently appears at meetings and performs the bulk of the work.

Collateral Effects:

- Expanded education/outreach on DV beyond the core interest group
- Shared ownership of the problem and responsibility to solve it
- Establishes and maintains trust between groups that will carry over into other endeavors
- Resource sharing
- Instant DV Coalition

IV. Preamble

Most domestic violence or family violence codes begin with a paragraph of introduction explaining the reasons why the tribe has decided to adopt a domestic violence code. The preamble is the core philosophy behind the code. It can reflect policy, culture, and values. In the future, lawyers and judges may turn to the preamble to look for “legislative intent” if there is a question as to how to interpret the law. The following are two examples taken from tribal codes in Arizona:

Example one:

The people of the xxxxx Tribe recognize that domestic violence is a serious crime. The official response to cases of domestic violence shall stress the enforcement of laws to protect the victim and shall communicate the policy of the xxxxx Tribe that domestic violence presents a clear and present danger to the mental and physical well-being of the xxxxx people. It is also a policy of the xxxxx Tribe to assure the victim of domestic violence the maximum protection that the law and those that enforce it can provide and to hold the perpetrator accountable for his or her conduct.

Example two:

Domestic violence presents a clear and present danger to the mental and physical well being of the members and residents of the xxxxx Indian Community. This Chapter will promote the healing of families and the prosecution of those who commit acts of domestic violence, while helping to protect victims of domestic violence through special procedures.

It is the policy of the xxxxx Indian Community that violent behavior shall not be tolerated or excused, whether or not the abuser is intoxicated. The elders, adults and children of our Community are to be cherished and treated with respect.

V. Definition of Domestic Violence

In the most general terms, a domestic violence crime is proscribed or forbidden conduct plus some designated relationship between the parties.

Forbidden Conduct + Designated Relationship Between the Parties = Domestic Violence Crime

You must decide what type of conduct you want to proscribe and what types of relationships between the parties you want to cover in the code.

Relationships:

The “classic” definition of domestic violence uses an intimate partner model where there is some “intimate relationship” between the parties. However, many tribes have chosen to adopt a “family violence” or “kinship” model. Your group can discuss which

relationships you would like to cover under the code. Some ideas include:

- married or have been married (spouses or ex-spouses)
- persons who are living together or have in the past
- people who have or are engaged in a sexual or dating relationship (can include boyfriend/girlfriend and same sex relationships.
- people with a child in common or expecting a child together
- household members
- related by blood, marriage, or adoption according to the customs or traditions of the Tribe (Grandparents or other related elders, parents, children, in-laws, aunts and uncles, cousins and clan members, etc.).
- comadres/copadres

Proscribed or Forbidden Conduct.

There are two common approaches to defining forbidden or proscribed conduct.

Laundry List:

The first is to use a “laundry list” approach by naming each crime in your current criminal code that you want covered under the new statute. This is the most common approach. You simply pull out and list all of the crimes in your criminal code that you want to define as domestic or family violence. Some of the more common crimes are assault, battery, threats and intimidation, homicide, stalking, harassment, etc. Others that can be used include arson, burglary, trespass, cruelty to animals (when the animal belongs to the victim), etc. When using this approach it may become necessary to update the criminal code to include “new” crimes that may not exist in your current criminal code (elder abuse, stalking, etc.).

Discrete Definition:

Another approach is to create a new, discrete definition of the crime of domestic violence. Elements of this new crime generally include causing or attempting to cause physical harm or bodily injury, (intentionally or recklessly) placing another in fear of physical harm or bodily injury, and causing another to engage in involuntary sexual activity or contact. Some tribes have included “causing mental anguish” in their discrete definition.

VI. Punishment

When drafting the punishment provisions the group may want to discuss the following issues and the resources necessary to implement them:

- Mandatory incarceration for a domestic violence conviction?
- Mandatory counseling (i.e. batterer re-education, drug or substance abuse treatment, parenting classes, etc.) for a domestic violence conviction?
- Enhanced punishment for recidivists?
- Enhanced penalties for weapons involvement?
- Enhanced penalties for committing an act of domestic violence in the presence of a child or elder?
- Enhanced penalties for committing an act of domestic violence against a pregnant woman when the defendant knew or should have known she was

- pregnant?
- Enhanced penalties for committing an act of domestic violence against a child or elder?
 - Set aside the conviction for domestic violence after the defendant successfully completes probation and does not re-offend after a set period of time?
 - Diversion or deferred prosecution available?

Cumulative Punishment/“Stacking”

The Indian Civil Rights Act, 25 U.S.C.A. Section 1302(7), limits the tribal court’s criminal jurisdiction to sentences not exceeding one (1) year in jail and a fine of up to \$5,000. However, insertion of a “cumulative sentencing provision” can, in essence, punish the defendant twice for the same underlying conduct and double the sentences by stacking them. In order to accomplish this, the legislature must **specifically authorize** in the statute that prosecution and conviction for the same underlying act under another section of the tribe’s criminal code. See Missouri. Hunter, 459 U.S. 359 (1983).

Here’s an example:

Mr. X (a tribal member) stabs Ms. Y (his girlfriend and a member of a neighboring tribe) with a kitchen knife in their home on the reservation. She is hospitalized and suffers serious injuries. The U.S. Attorney declines to prosecute.

The tribal criminal code contains the following provisions:

assault: punishable by up to 1 year in jail plus a \$5,000 fine.

domestic violence: Ms. Y’s relationship to the defendant plus the underlying crime of assault meet the tribe’s definition for domestic violence. The maximum penalty for domestic violence is 1 year in jail and a fine of \$5,000. The code also states that **prosecution and conviction for an act of domestic violence shall not preclude prosecution and conviction for any other act listed in the tribe’s criminal code.**

RESULT: DEFENDANT SENTENCED TO 2 YEARS IN JAIL/FINE OF \$10,000
Weapons

Tribes may decide that crimes of domestic violence involving the use or threatened use of a weapon should be sentenced more severely than other acts of domestic violence. The code may prohibit anyone convicted of domestic violence or subject to an order of protection from possessing a firearm on the reservation. Some tribes prevent anyone convicted of domestic violence or subject to an order of protection from serving as a law enforcement officer or as an elected official for the tribe.

The code can authorize law enforcement officers to seize any weapons at the scene of the domestic violence incident found in plain view or found pursuant to a consent search authorized by the victim, defendant, or other household member. These seized weapons may then be subject to forfeiture proceedings by the tribe and destroyed.

Alternative Dispute Resolution/Restorative Justice

A member of your code drafting committee may raise the issue of inserting an “alternative dispute resolution” or “restorative justice” provision in the code. Examples of these in Indian country include Sentencing Circles and Peacemaker Courts. This may

become a hotly contested and/or controversial issue.

Many victim advocates take the position that alternative dispute resolution or restorative justice programs should never be used in domestic violence cases. They argue that these processes “revictimize the victim”, have a pro-marriage bias, cede too much power to the batterer and their family, and victims may be coerced into participation.

Advocates for restorative justice or alternative dispute resolution counter that these processes are ideal in tribal domestic violence cases. They argue that these processes enhance the victim’s autonomy, disrupt family and social supports for battering, are culturally relevant, avoid the legal focus on the victim leaving the abuser, etc. For an interesting discussion of these issues see Donna Coker, *Enhancing Autonomy for Batterer Women: Lessons From Navajo Peacemaking*, 47 UCLA Law Review.

VII. Investigation/Arrest

The code can mandate that an officer responding to a domestic violence call perform certain duties. It can also encourage officers to perform their duties while holding them harmless for good faith performance of those duties. Some provisions you may want to include are:

- +Mandatory arrest for crimes of domestic violence
- +Primary Aggressor provisions where the officer must make a determination in a “mutual combat” situation as to which “combatant” initiated and was primarily responsible for the violence and which party was acting in self-defense. Some believe that these provisions lessen the likelihood of police erroneously arresting the victim who was acting in self-defense. Others believe that it places too great a burden on law enforcement that may then be disinclined to make an arrest.
- +Mandatory information given to the victim as to the location of the nearest shelter, availability of orders of protection, etc.
- +Mandatory transport of the victim and children to a shelter, relative’s house, or to medical treatment.
- +Mandatory written report for all domestic violence calls regardless of whether an arrest was made.
- Police immunity for the good faith performance of their duties.

VII. Miscellaneous

Other provisions and policies the code-writing group may want to consider include:

-No Drop Policy for either judges or prosecutors. Some argue that such a “No Drop Policy” encourages “victimless” or “evidence based” prosecutions and is necessary because victims often ask for the charges to be dropped against their batterers, recant their previous statements, or refuse to testify against their abusers. Others argue that a No Drop Policy may result in convictions of victims erroneously arrested by police or that the policy further takes away from victims who may in their best position to assess the potential for lethality if their batterer is prosecuted.

-Creation of a Shelter or Victim Advocate Privilege so that communication between the victim and the advocate cannot be revealed unless the victim consents. This allows the victim to freely speak to and seek help from an advocate without the fear that she will later be “revictimized” because of information she provides.

- Input of convictions into NCIC
- Criminalize violations of orders of protection

VIII. Orders of Protection

When drafting an Order of Protection statute the group may want to consider and discuss the following issues:

- When is an Order available? When there is a preponderance of evidence that an act of domestic violence has occurred (within the last year?) or that an act of domestic violence is likely to occur, or both?
- Who may petition for an Order? The victim of Domestic Violence? Parent? Guardian? Advocate? Prosecutor? Some other 3rd party if victim is incapacitated?
- Valid upon issuance or service? (Due process and Full Faith and Credit issues)
- Full Faith and Credit or Comity?
- Remedies available: “standard” (no contact, etc.) vs. expansive orders (child custody, support, visitation, payment of joint debts, etc.)?
- Prohibition against mutual orders?
- Registration of Orders of Protection into NCIC? (Mandatory fill fields, Brady, 24 access to records, etc.).
- Immunity for law enforcement for good faith enforcement of a foreign order of protection?
- Standardized pre-printed forms for both Petitioner/Plaintiff and Respondent/Defendant?
- Standardized orders issued by the Court?
- Uniform tribal court certification cover sheet?
- Service of Process: personal service, certified mail, publication, posting, etc. If personal service, mandatory affidavit of service filed with the Court within a set period of time?
- Serve a “Notice to Respondent/Defendant” re: federal, state and tribal consequences for violation of the order to assist in prosecution if the order is violated later?
- Mandatory hearing set by court or set only at the request of Respondent/Defendant? (Brady Consequences).
- Orders of Protection issued against non-Indians? Non-Indian access to Orders of

Protection against an Indian partner?

-Confidential address/phone/location of victim provision?

-No cost assessed to Petitioner/Plaintiff on Orders of Protection? Costs assessed to Respondent/Defendant?

-Provision to allow law enforcement to accompany Petitioner/Plaintiff to recover possessions?

-Advocate can accompany Petitioner/Plaintiff to court and speak on his/her behalf?

-Shelter/Advocate privilege available?

-Respondent/Defendant a prohibited possessor once the Order is granted after hearing.

CHAPTER VIII. TRAINING TOOLS

A. Committee

Two committees should be formed. One committee should be persons in authority who can contribute knowledge and authority to set up policy along a chain of

command. They would approve and create the project. They could meet quarterly until the first group of actual first responders is up and running.

The second committee would be representative of the first responders, the actual “people in the trenches”. Such members could include prosecutors, advocates, police officers and social workers, among others. They would know the day-to-day operations and be able to pinpoint problems and ways to coordinate efforts and uniformity of response. This group should meet at least until a policy is in place and running. It could be reactivated should any major problems occur, a need for change arises or a deterioration in procedure brought on by unforeseen events occurs.

B. Sample Scene and actors

Through referral from training sources or the use of actual case examples in the experience of the trainers or training group, case scenario is a very effective means of teaching and integrating law and procedure. If actual experience is used, the group could then be open to contribution from the audience regarding related cases and how they resolved them or what problems occurred, for further discussion.

C. Question and Answers with Visual Aids

Group or panel setup: The changes in law and suggested policy could be posted with volunteers in the audience requested for their input or a panel of peers impaneled beforehand to discuss various laws and how they are to be applied on a step by step basis. There could be fictional examples and the members could be asked how they would view the law as being relevant and applied to their personal duties.

D. Personal experience narratives

1. Past victim’s personal stories. Benefits: provides firsthand knowledge of danger, fears and effectiveness to safety; provides ability for audience to learn more through questioning;
2. Judge, prosecutor, police officer, social services, or victim services recount personal cases. Benefits: provides firsthand knowledge of what responses work or don’t work and how to improve methods.

E. Expert training

1. Lecture
2. Workshops: sample laws; sample problems; discuss model laws
3. Combination with interaction
4. Combine training with other authorities in the chain of command: judges, prosecutors, police officers, etc.

CHAPTER IX. DEVELOPING POLICY AND UNIFORMITY

1. Develop a uniform cover sheet: State and Tribal. May serve as a model for regional uniformity or a national model.

2. Survey jurisdictions regarding computer technology capabilities in Full Faith and

Credit procedure:

- Short Term Goal: Define and determine needs re:**
- Setting up national (NCIC) and Montana registrations
 - Timely tracking of all protection orders, amendments and modifications
 - Setting up procedure for jurisdictions to obtain, share technology or forward information to a jurisdiction that can enter the information
3. **Set up Joint Training for relevant officials/professionals in Full Faith and Credit:**
 - Ex: district judges and federal judges
 - Ex: district judges and prosecutors
 4. **Develop Law Enforcement and Prosecutor Protocol for Full Faith and Credit**
 5. **Identify Possible Changes to Existing Laws-Civil and Criminal**
 - a. state laws
 - b. tribal laws
 6. **Identify Creative Alternatives for Dealing with Batterers**
 7. **List Full Faith and Credit Resources**
 8. **Serve As a Liaison.**
 - state and tribes for Full Faith and Credit.
 - other jurisdictions
 9. **Identify possible corporate partners to assist in the dispersion of information, education and training in Full Faith and Credit.**
 10. **Invite participation from the heads of each field of expertise to contribute information, ideas, and contacts to Full Faith and Credit effort.**

CHAPTER X. CONTACTS**National:**

National Center on Full Faith and Credit:
1 (800) 256-5882 ext.2 or (202) 265-0967 ext. 2

Tribal

American Indian Law Center, Albuquerque, NM (505) 277-5462
Indian Law Resource Center, 602 Ewing, Helena, MT 59601, 449-2006
Indian Nations Domestic Violence Law Program (520) 623-9465
Indian Law Resource Center, Washington, D.C. (202) 547-2800
Native American Rights Foundation (NARF), National Indian Law Library,
Denver, CO (303) 447-8760

Northern Plains Indian Law Center: Box 9003, UND, Grand Forks, ND 58202
(701) 777-2104 (www.law.und.nodak.edu/npilc/home.html)
Tribal Law and Policy Institute: (323) 650-5467 (www.tribal-institute.org/lists/tlpi.htm)

State/Local

Montana Coalition Against Domestic and Sexual Violence
P. O. Box 633
Helena, MT 59624
phone (406) 443-7794; (888) 404-7794
fax (406) 443-7818
www.mcadv.com

Eleanor J. Guerrero, Esq., e-mail: artbyeleanor@aol.com
Phone/fax: (406) 446-9102

State of Montana Department of Justice
Office of Victim Services and Restorative Justice
1712 9th Avenue
PO Box 201410
Helena, MT 59620-1410
Phone: (406) 444-3653
Fax: (406) 444-4303
www.doj.mt.gov

United States Attorney's Office – District of Montana
<http://www.usdoj.gov/usao/mt/>

OFFICE LOCATIONS

BILLINGS

2929 3rd Avenue N. Suite 400 Billings, MT 59101 * (406) 657-6101 - TTY (406) 657-6100

BUTTE

181 Federal Building Butte, MT 59701 * (406) 723-6611 - TTY (406) 782-5992

GREAT FALLS

119 1st Avenue N. Great Falls, MT 59401 * (406) 761-7715 - TTY (406) 761-3152

HELENA

901 Front St. Suite 1100 Helena, MT 59626 * (406) 761-7715 - TTY (406) 449-5711

MISSOULA

105 E. Pine St. Missoula, MT 59802 * (406) 542-8851 - TTY (406) 327-9945

Alcohol, Tobacco and Firearms - Montana Field Offices

<http://www.atf.gov/field/stpaul/mt.htm>

Billings I Field Office**Resident Agent in Charge**

2929 Third Avenue North

Room 528

Billings, Montana 59101

(406) 657-6886

Fax: (406) 657-6885

Helena I Field Office**Resident Agent in Charge**

10 W. 15th Street

Suite 2400

Helena, Montana 59626

(406) 441-1100

Fax:(406) 441-1104

Helena II Industry Operations Satellite Office**Inspector**

(406) 441-1100

Fax: (406) 441-1104

Area Supervisor

30 East Seventh Street

Suite 1840

St. Paul, Minnesota 55101

(651) 726-0220

Fax: (651) 726-0221

Missoula Satellite Office

2681 Palmer Street

Suite C

Missoula, MT 59808

(406) 721-2611

Fax (406) 721-4325

Federal Bureau of Investigation

<http://saltlakecity.fbi.gov/montana.htm>

Billings

Covering Big Horn, Carbon, Carter, Custer, Dawson, Fallon, Fergus, Golden Valley, Judith Basin, Musselshell, Park, Petroleum, Powder River, Prairie, Rosebud, Stillwater, Sweet Grass, Treasure, Wheatland, Wibaux and Yellowstone Counties

2929 3rd Avenue North, Room 205

Billings, Montana 59101

phone(406)248-8487 fax(406)248-9911

billings.su@fbi.gov

Bozeman

Covering Gallatin, Park, Madison and Beaverhead Counties

2413 W. Main Street, Suite 3

Bozeman, Montana 59718

phone(406) 994-0927 fax(406)994-0928

Browning

Covering Glacier and Toole Counties

531 SE Boundary P.O. Box 808

Browning, Montana 59417-0808

phone (406)338-3368 fax (406) 338-3476

browning.su@fbi.gov

Glasgow

Covering Daniels, Garfield, McCone, Richland, Roosevelt, Sheridan and Valley Counties

605 2nd Avenue South, Room 301

Glasgow, Montana 59230

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glasgow.su@fbi.gov

Great Falls

Covering Cascade, Chouteau, Pondera and Teton Counties

119 1st Avenue North, Room 201

Great Falls, Montana 59403

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greatfalls.su@fbi.gov

Havre

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111 West 11th Street, Suite 318

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301 South Park, Room 298

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phone(406)443-3617 fax(406)449-8657
helena.su@fbi.gov

Kalispell
Covering Flathead and Lincoln Counties
2nd Main Street, Room 203
Kalispell, Montana 59901
phone(406)755-5131 fax(406)755-5132
kalispell.su@fbi.gov

Missoula
Covering Deer Lodge, Granite, Lake, Mineral,
Missoula, Ravalli and Sanders Counties
119 West Front Street, Suite 305
Missoula, Montana 59802
phone(406)549-7696 fax(406)721-8371
missoula.su@fbi.gov

CHAPTER XI. REFERENCES

Arizona Coalition Against Domestic Violence 100 W. Camelback Road, Suite 109,
Phoenix, AZ 85013 (www.azcadv.org)
Bancroft, Lundy and Jay G. Silverman, The Batterer as Parent, Sage Publications, Inc.,
Thousand Oaks, CA (2002).
Montana Coalition Against Domestic and Sexual Violence, P.O. Box 633, Helena, MT
59624 (406) 443-7794

Additional Web Sites

American Bar Association: Commission on Domestic Violence

<http://www.abanet.org/domviol/internet.html>

Battered Women's Legal Advocacy Project, <http://www.bwlap.org>

National Coalition Against Domestic Violence, <http://www.ncadv.org>

National Center for Injury Prevention and Control: Intimate Partner and Sexual Violence Prevention, <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm>

Pennsylvania Coalition Against Domestic Violence, <http://www.pcadv.org>

Washington State Coalition Against Domestic Violence, <http://www.wscadv.org>

Wattendorf, J.D., George. "Focus on Domestic Violence"

<http://www.fbi.gov/publications/leb/1996/apr1964.txt>

CHAPTER XII. MODEL FORMS, ETC.