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DOMESTIC VIOLENCE:

A MANUAL FOR PENNSYLVANIA PROSECUTORS

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Joint Task Force:
Pennsylvania District Attorneys Institute
and
Pennsylvania Coalition Against Domestic Violence

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**The Pennsylvania District Attorneys Institute is the non-profit
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INTRODUCTION

The Joint Task Force of the Pennsylvania District Attorneys Institute and the Pennsylvania Coalition Against Domestic Violence is pleased to present to Pennsylvania District Attorneys' Offices, "Domestic Violence" A Manual for Pennsylvania Prosecutors." This Manual is designed to offer practical and up-to-date guidance on the prosecution of domestic violence. It does not propose to exhaust all topics of law and procedure which apply generally to every criminal case. Rather, it purports to address issues that frequently arise in domestic violence cases.

It is each District Attorney who must ultimately determine the policies and procedures to be followed by his or her office in prosecuting domestic violence cases. This manual is presented to aid prosecutors in developing policies which facilitate the effective prosecution of domestic violence, and which are appropriate to their individual counties.

The Joint Task Force
Pennsylvania District Attorneys Institute/
Pennsylvania Coalition Against Domestic Violence

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CHAPTER I

OVERVIEW OF DOMESTIC VIOLENCE PROSECUTION

A. DOMESTIC VIOLENCE OVERVIEW

There has been a change in consciousness about domestic violence over the course of the last 15 years. Citizens of the Commonwealth no longer believe that domestic violence is inevitable and private. We recognize it is avoidable and criminal.

It has become clear that domestic violence is a serious social problem. Former Governor Richard Thornburgh recently asserted that violence is one of the greatest threats to "the first civil right of every American — the right to be free from fear in our homes, on our streets and in our communities" (*Thornburgh, 1991*). More than one-third of the homeless families in Pennsylvania have been dislocated because of domestic violence (*Coalition, 1989*). The Surgeon General identified violence against women by their partners as the most serious health problem for women in the United States, noting that domestic violence causes more injuries to women than automobile accidents, muggings, and rapes combined (*Koop, 1989*)*. The Pennsylvania Attorney General's Family Violence Task Force reported that "[i]njuries inflicted in domestic violence incidents are as serious as, or more serious than, injuries inflicted in 90% of all violent felonies" (*Task Force, 1989*). Data reveal that as many as one woman or child is killed in a domestic violence incident every three days in Pennsylvania (*Yupcavage, 1990*). Sixty-five percent of the victims of adult domestic homicide in Pennsylvania are women, and the ratio of two women for every one male fatality has remained fairly constant for the last decade (*PCADV, 1991*).

1. What is Domestic Violence?

Domestic violence involves a continuum of behaviors ranging from degrading remarks and cruel jokes to economic exploitation, punches and kicks, property destruction, false imprisonment, sexual abuse, suffocating actions, maiming assaults, and homicide. Not all forms of abuse are illegal. Domestic violence is an attempt to control the behavior or the emotional and intellectual life of the abused partner. It is a systematic domination of one partner by another, achieved by the creation of an atmosphere of extreme terror. Unchecked, domestic violence usually increases in frequency and severity (*Hart, et al. 1991*).

A chart frequently used with perpetrators to help them understand the parameters of domestic violence appears at the end of this article.

2. Who are the Victims and Perpetrators of Domestic Violence?

Research shows that the overwhelming majority of adult victims are women; as many as 95% of the victims are women (*Browne, 1987; Dobash & Dobash, 1979*).

*Throughout this manual, the victim is referred to in the feminine gender. This reflects the fact that in the overwhelming majority of domestic violence cases, the victim is female, and the offender male. However, the contents contained herein are intended to pertain equally to male victims, where applicable.

Battering occurs regardless of race, age, socioeconomic status, sexual orientation, mental or physical ability and religious background. Women can be beaten in any neighborhood in any town. Battered women are factory workers, nurses, lawyers, homemakers, police officers, and college students. They are grandmothers and they are teenagers. Batterers are unemployed workers, farmers, computer experts, car salesmen, university professors, truck drivers, psychiatrists and house painters. Battered women are like all other women. They are not psychologically impaired. Neither do they suffer from personality disorders. Their behavior does not distinguish them from other women. They cannot be identified by particular demographics. The only two consistent risk markers for women being battered are gender, and witnessing the abuse of their mothers by their fathers (*Hotaling & Sugarman, 1986*).

Batterers are not easily identifiable. They reflect the full range of demographic measures. They are not likely to suffer from severe mental disorders (*Saunders & Browne, 1990*). Although some are "negativistic" and "narcissistic," the majority do not meet the criteria for psychopathology (*Hamberger & Hastings, 1986*). Men who batter seem to have been more likely to have witnessed their fathers beating their mothers and to have been severely abused during childhood than men who do not use violence and terrorism in intimate relationships (*Saunders, 1988; Hotaling & Sugarman, 1986*).

Children are also the victims of domestic violence. Severe child abuse usually occurs in the context of domestic violence, and the onset of child abuse usually post-dates abuse of the mother (*Stark & Flitcraft, 1985*).

3. What do Prosecutors Need to Know About Domestic Violence?

Batterers use violence as a tool to achieve power and control over their partners and children (*Bowker et al., 1988; Hart, 1988; Ellis, 1987; Pence & Paymar, 1986; Schechter, 1982; Dobash & Dobash, 1979*).

Batterers believe they are entitled to the obedience, services, loyalty, and the exclusive intimacy of battered women. They fancy themselves entitled to the control of their mates and have learned they will not suffer adverse consequences if they employ violence as a tactic to achieve or sustain power over their female partners; most batterers view the subservience of women as right and good - in effect, normal (*Hart, 1988; Pence & Paymar, 1986; Dobash & Dobash, 1983; Rich, 1979*). The wife who disagrees with her battering husband or fails to defer to his preferences risks retaliatory violence (*Adams, 1988; Ptacek, 1988; Dobash & Dobash, 1983*). (*Hart, 1990, p. 319.*)

The risk of violent assaults on battered women increases when a woman challenges the batterer's control over her, when she takes action on her own behalf that may set back his interests, and when she acts in a way that clearly advises him that she contemplates a future life without him (*Ellis, 1987*).

Batterers often increase the severity of violence toward partners at the time of separation. Many people, including prosecutors, believe that battered women will be

safe once they separate from the batterer. They also believe that women are free to leave abusers at any time. However, leaving does not usually put an end to the violence. Batterers may, in fact, escalate their violence to coerce a battered woman into "reconciliation" or to retaliate for the battered woman's abandonment of the batterer. Men who believe they are entitled to an ongoing relationship with their partners, or that they "own" them, view their partners' departure as ultimate betrayal which justifies retaliation (Hart, 1990; Saunders & Browne, 1990; Dutton, 1988; Bernard et al., 1982).

Evidence of the gravity of separation violence is overwhelming. Up to 3/4 of domestic assaults reported to law enforcement agencies may be inflicted after separation of the couple (U.S. Dept. of Justice, 1983). One study revealed that 73% of the battered women seeking emergency medical services sustained injuries after leaving the batterer (Stark et al., 1981). Women are most likely to be murdered when attempting to report abuse or attempting to leave an abusive relationship (Browne, 1987; Sonkin et al., 1985). Furthermore, battered women are most likely to kill their abusing partners in circumstances where the batterer is seeking to compel reconciliation or is retaliating in response to her termination of the relationship (Casanave & Zahn, 1986; Bernard, et al., 1982).

Furthermore, homicide followed by suicide is most likely to occur within the family with the male partner first killing his female partner and sometimes other family members and then killing himself (Palmer & Humphrey, 1980; Wolfgang, 1958). As many as one-fifth to one-third of the men who kill their wives or female partners may then kill themselves (Rasche, 1988; Palmer & Humphrey, 1980). Data reveal that the offenders in murder-suicide spouse/partner killings did not commit the fatal assaults in response to aggressive actions by victims (Rasche, 1988; Wolfgang, 1956). Many of these homicide-suicide cases seem to be the desperate acts of batterers from whom battered women have separated (Hart, 1991a).

Because leaving may be dangerous does not mean that the battered woman should stay or that she is safer remaining with the batterer. Cohabiting with the batterer is highly dangerous, both as violence usually increases in frequency and severity over time, and as a batterer may engage in preemptive strikes, fearing abandonment or anticipating separation, even before the battered woman reaches such a decision (Hart, 1990; Browne, 1987; Walker, 1984). Many batterers who kill their female partners acknowledge that they did so because the woman stated that she no longer loved or trusted the violent partner (Hart, 1991a). Although leaving may pose additional hazards, ultimately a battered woman may best achieve safety and freedom apart from the batterer (Bowker, 1983).

Men who batter their wives/partners often endanger and abuse their children. Most children of battered women witness the violence of their fathers against their mothers, and some experience symptoms equivalent to those of children who have, themselves, been severely abused (Pagelow, 1989).

Those boys who witness their fathers' abuse of their mothers are more likely to inflict severe violence against intimates as adults, than those who grow up in homes free of abuse (Hotelling & Sugarman, 1986). Data suggest that girls who witness maternal abuse may tolerate abuse as adults more than girls who do not (Hotelling & Sugarman, 1986).

Between 50% and 70% of the men who batter their wives also abuse their children (Pagelow, 1989; Walker, 1982). The more grievous the abuse of the mother, the greater the likelihood that child abuse will be severe (Bowker, et al., 1988).

Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued dominance and control of the mother and children (Bowker, et al., 1988). Since...abuse by husbands and fathers is instrumental, directed at subjugating, controlling and isolating, when a woman has separated from her batterer and is seeking to establish autonomy and independence from him, his struggle to... dominate her may increase and he may turn to abuse and subjugation of the children as a tactic of... control of their mother (Stark & Flitcraft, 1988; Bowker, et al., 1988) (Hart, 1990, p. 322).

Battering men also use custodial interference as a tool to terrorize battered women or to retaliate for terminating the relationship (Hart, 1990). About 40 children are abducted by a parent each hour in this country. About half of parental abductions are short-term manipulations around custody orders; the other half involve concealing the whereabouts of the child for longer periods of time or taking the child out of state (Finkelhor, et al., 1990).

Battered women and their dependent children are often economically compelled back into relationships with batterers. Women and children suffer substantial economic loss upon separation and divorce in this country. One study discovered that the standard of living of women plunged 73% after divorce while that of divorcing men increased by 42% in the same time-frame (Weitzman, 1985). Many women who establish households independent of battering husbands/partners find themselves in poverty. The number of female-headed households living below the poverty line has nearly doubled since 1970. Two out of three adults living in poverty are women. A recent Philadelphia study discovered that 1/3 of all children are living below the poverty level; for black children, the poverty rate is a staggering 60% (Henninger, 1986).

In 1987, only 42.8% of all fathers ordered to pay child support fully complied with the court orders, while 21.4% made partial payment and 35.7% paid nothing. The average award was only \$2,710 per year per family (Bureau of Census, 1987). A 1986 Philadelphia divorce study found that men who batter are less likely to pay support than men who do not use violence towards their intimates (45% as compared to 76%), and batterers are less likely to fully comply with child support orders (28.3% as compared to 49%) (Kurz & Coughney, 1989).

Batterers universally destroy family property; telephones, televisions, cars, walls, children's favorite toys, and the clothing of battered women are frequently targeted by the batterer (Ganley, 1981; Fortune, 1981). The financial cost of this destruction is substantial, and although national data are not available, battered women seeking shelter in domestic violence programs in Pennsylvania report that the losses sustained through batterer property destruction prior to separation average \$10,000 per perpetrator (Hart, 1991b).

Battered women's service providers in Pennsylvania report that the costs of relocation for battered women displaced by domestic violence is a minimum of \$5,000 per relocation (Hart, 1991b).

Economic viability appears to be a critical factor in the decision-making of battered women considering separation from the batterer (Aguirre, 1985; Strube & Barbour, 1983). The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him (Gondolf, 1988; Okun, 1986).

The adverse consequences of domestic violence must be substantial for perpetrators to cease their acts of terrorism. Research demonstrates that men stop battering women partners to the extent that they perceive that penalties for further violence will be both certain and severe (Carmody & Williams, 1987; Jaffe, et al., 1986). It appears that most batterers engage in a cost/benefit analysis in electing to continue or terminate their violent assaults on wives or partners. In those jurisdictions where the courts and the criminal justice system respond to domestic violence as serious criminal conduct and impose sanctions accordingly, the cost/benefit balance tips in favor of desistance (Hart, 1990a; Task Force, 1989).

A leading study demonstrates that where police arrest perpetrators of domestic violence, rather than separating the couple or mediating between the victim and offender, the arrested perpetrators are significantly less likely to recidivate within six months, than those offenders with whom the police conciliate or take no action (Bozzi, 1986; Berk & Newton, 1985; Sherman & Berk, 1984).

Two similar investigations in Pennsylvania reveal that when police arrest or take formal action against perpetrators of domestic violence, the rate of recidivism is substantially less than when responding officers merely conciliate or separate the victim and offender (Gantz, 1991; Hose, 1991).

One study that measured the effectiveness of prosecution practice on reducing further assaults on victims found that merely accepting the charges and pursuing prosecution through the preliminary hearing served to substantially reduce the rate of recidivism through the period of time until six months after disposition (Goldsmith, 1991).

4. How Has the Law Traditionally Dealt with Domestic Violence?

Violence against wives has been a right exercised by husbands with impunity for centuries. This prerogative of men has been articulated in the precepts of religion, philosophy and law throughout the northern hemisphere. Physical violence against wives was deemed necessary for the "well-being" of women. It was couched in terms of corrective discipline and chastisement of erring wives (Davis, 1972). A medieval Christian scholar propagated *Rules of Marriage* in the late 15th Century. These specified:

When you see your wife commit an offense, don't rush at her with insults and violent blows.... Scold her sharply, bully and terrify her. And if this

doesn't work...take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body.... Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good (*Davidson, 1978, at p. 99*).

British common law later embraced, but limited, the husband's authority to assault wives by adopting the "rule of thumb" which permitted a man to beat his wife with a "rod not thicker than his thumb" (*Davidson, 1977*).

Jurists and legislators in the United States followed in the tradition of the European clergy and lawmakers and approved the use of men's violence against their wives.

In 1824 the Mississippi Supreme Court in *Bradley v. State* voiced approval of the husband's role as disciplinarian and stated its belief that the law should not disturb that role: Let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned (*Bradley v. State, 1 Miss. 156 (1824)*) (*U.S. Commission on Civil Rights, 1982*).

Not until 1871 did a court in this country rescind the legal right of men to beat their wives.

The privilege, ancient though it be, to beat [one's wife] with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law.... [I]n person, the wife is entitled to the same protection of the law that the husband can invoke for himself.... All stand upon the same footing before the law "as citizens of Alabama, possessing equal civil and political rights and public privileges" (*Fulgham v. State, 46 Ala. 146-47 (1871)*) (*U.S. Commission on Civil Rights, 1982*).

But the highest court of another state subsequently disagreed and endorsed a limited right of violence against wives:

If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive (*State v. Oliver, 70 N.C. 60, 61-62 (1874)*) (*U.S. Commission on Civil Rights, 1982*).

In 1882, Maryland was the first state to pass a law that made wife-beating a crime, punishable by 40 lashes or a year in jail (*Davidson, 1977*). Nonetheless, over the course of the ensuing century, men's use of violence went basically unfettered.

Furthermore, when women sought to protect themselves from the lethal assault of husbands or partners who battered them, they found that the law severely and

disparately penalized them (*Gillespie, 1989; Crocker, 1987; Jones, 1980*). Prosecutors and judges have resisted the self-defense claims of battered women by characterizing domestic assault as "love games"; by claiming that women enjoy the physical pain; by asserting that a battered woman's perception of danger was unreasonable because she had never defended herself previously; or by concluding that a battered woman's action could not be self-defense because she was familiar with guns and their usage (*Crocker, 1987, at 146, 147*). Only in the last ten years have attitudes deeply hostile to battered women begun to be identified as inimical to the justice function of the legal system (*Gillespie, 1989*).

5. What Legal Reforms Have Been Enacted in Pennsylvania?

It was not until 1976 that the citizens of the Commonwealth began to view the law as a potential tool for ending violence against women in intimate relationships. That year the legislature adopted the Protection From Abuse Act (*23 Pa. C.S. §§ 6101 et seq.*). It has twice been amended to expand the relief available to victims of domestic violence. The injunctive and compensatory relief available under the act has afforded vital protections to victims of domestic violence.

More recently, Pennsylvanians focused attention on the criminal justice system and its potential for safeguarding those jeopardized by family violence. In 1981, the Victim and Witness Intimidation Act was enacted, offering victims and witnesses of crime substantial protections against threats of reprisal and acts of intimidation resulting from their participation in the prosecution process (*18 Pa. C.S. §§ 4951 et seq.*). In 1984, parental kidnapping was elevated to a felonious offense (*18 Pa. C.S. § 2904*). In 1985, the legislature created the crime of spousal sexual assault, thus eliminating the defense of spousal immunity to the charge of rape within marriage (*18 Pa. C.S. § 3128*).

In 1986, the legislature passed the Probable Cause Arrest Statute in order to authorize law enforcement to arrest perpetrators of family violence who are believed to have committed the misdemeanors of simple assault, recklessly endangering another person, and involuntary manslaughter (*18 Pa. C.S. § 2711*). This statute greatly expanded the authority of law enforcement to intervene in domestic violence incidents. In 1988, police training on domestic violence became mandatory within the Commonwealth (*23 Pa. C.S. § 6105*). In 1990, it became a crime to conceal the whereabouts of a child from the child's parent or guardian (*18 Pa. C.S. § 2909*).

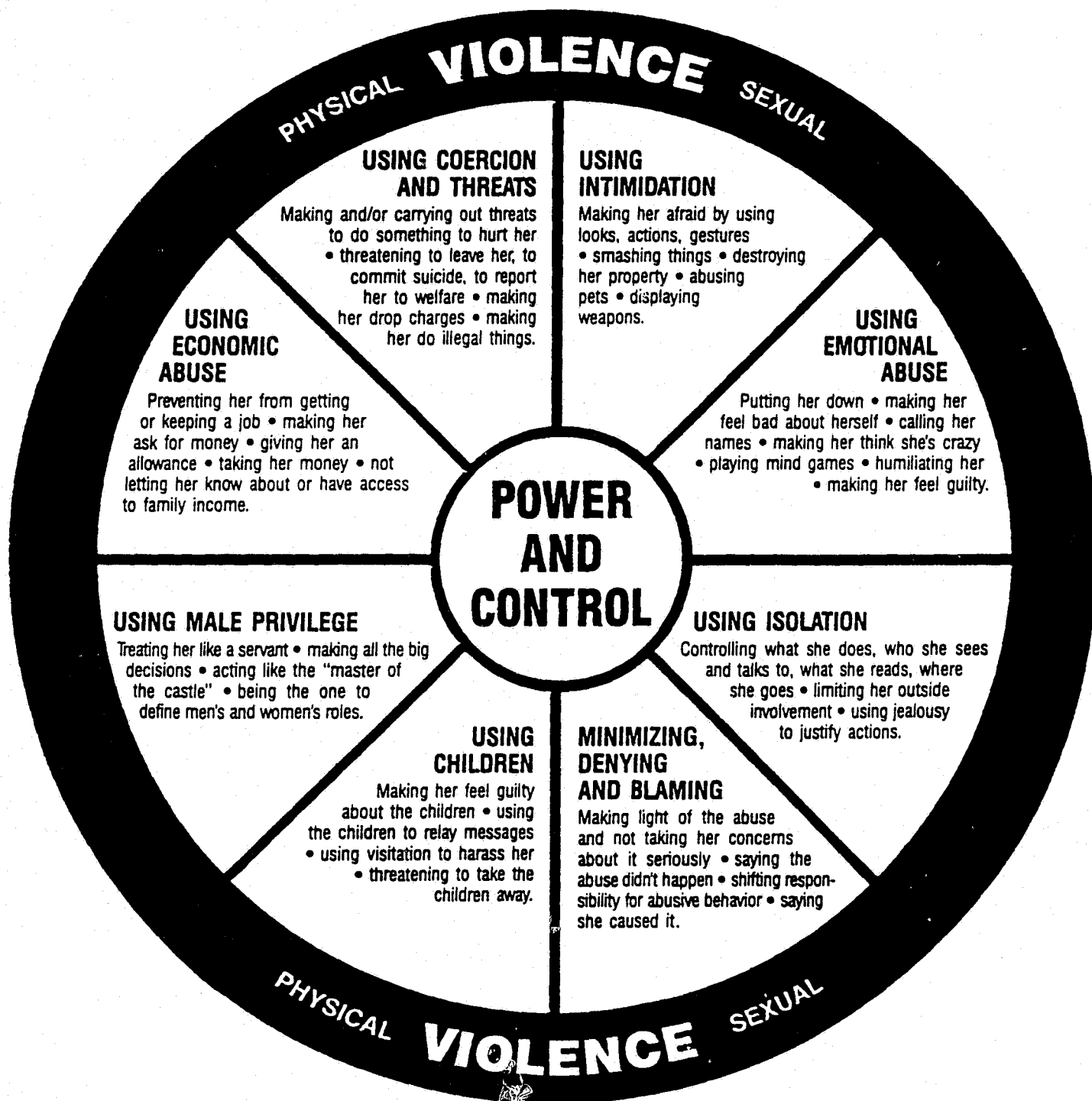
Beyond this, the Commonwealth's custody statute was modified in 1990 to require that courts consider the violent or abusive conduct of a parent in making an award of custody or visitation (*23 Pa. C.S. § 5303(a)*). The statute now precludes an award of custody or visitation in favor of a parent who has been convicted of enumerated crimes, until that parent is deemed by the court not to pose a continued threat of harm to the child (*23 Pa. C.S. § 5303(b)*).

Landmark appellate litigation has further strengthened the rights and protections available to battered persons in the Commonwealth, while substantially advancing the powers of the criminal justice system to intervene against domestic violence. (*See Chapter II of this Manual.*)

Policies and procedures targeting domestic violence have similarly been introduced throughout the criminal justice system. In 1981, the Philadelphia Police Department adopted a definitive directive on responding to domestic violence. The Attorney General's Task Force on Family Violence subsequently promulgated a model protocol for law enforcement response. This model is being used throughout the Commonwealth. As recently as June of 1991, the Pennsylvania State Police adopted a directive on responding to protection order violations. Several district attorneys' offices in Pennsylvania have instituted specialized prosecution of domestic violence. Furthermore, the courts in many jurisdictions have adopted local rules and developed specific procedures for both civil and criminal domestic violence cases.

6. Do These Legal Reforms Work?

Evaluation of the efficacy of these progressive legal changes has only begun. Preliminary data reveal that where the justice system coordinates its efforts so that magistrates, prosecutors, judges, probation and parole officers, sheriffs, victim-witness personnel, and battered women's advocates upgrade, clarify and coordinate their efforts, domestic violence can be reduced and victims protected (*Herrell & Hofford, 1990; Goolkasian, 1986a & b; Bowker, 1983; Lerman, 1981*). The National Institute of Justice published a report that strongly articulates the value of comprehensive civil protection orders, and vigilant enforcement thereof, in affording safety for battered women and children (*Finn & Colson, 1990*). Prosecution of domestic violence crimes has reduced the occurrence of further acts of violence and provided effective safeguards for victims. In jurisdictions where prosecution policies are sensitive to domestic violence crimes and victims are permitted to drop charges, but persevere through disposition, the recidivism of battering men is lower than 10% for a period of up to six months; the alliance built between the victim and the state in these circumstances apparently deters crime (*Goldsmith, 1991*). Finally, in those states where the laws have been changed to address domestic violence and where resources are made available to victims of domestic violence, the rate of homicides of husbands and male partners has decreased (*Browne & Williams, 1989*).



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B. ROLE OF THE PROSECUTOR

Domestic violence is a crime and should be treated accordingly. At the same time, however, domestic violence presents unique circumstances which must be recognized by prosecutors. Failure to recognize or understand these circumstances will likely lead to frustration in prosecuting domestic violence, and to ineffective prosecution efforts.

The prosecution of crimes arising from domestic violence will often require special handling both by the police and by the District Attorney's office. While the crimes charged are not necessarily different from those charged in other violent encounters, the relationship of the parties mandates a different approach by the prosecutor. Often the prosecutor is confronted with a reluctant and traumatized victim who has different concerns and needs from those of a victim in a non-domestic violence case. In particular, the victim of domestic violence often faces a very real risk of retaliation by the accused.

A one-size-fits-all approach to prosecution will simply not work when applied to crimes of domestic violence. Rather, effective prosecution requires the prosecutor to consider domestic violence in its totality, and to be prepared to assume leadership in the following roles.

1. Prosecutor

First and foremost, the prosecutor must be a prosecutor. That is to say, the prosecutor must assume responsibility for prosecuting crimes of domestic violence and for holding domestic violence defendants accountable for their criminal conduct. To effectively prosecute domestic violence, the prosecutor must understand the problem of domestic violence and its effect on its victims, and must develop policies and procedures for effective prosecution. He or she must also be knowledgeable of the statutory and case law relating to domestic violence. In particular, the prosecutor must be familiar with the measures which can be taken to provide protection for the victim throughout the criminal justice process. Although private counsel or the police may be involved, it is often the prosecutor who must initiate the legal procedures, such as special bail conditions or prosecutions for witness intimidation, to provide a victim protection during the prosecution process. It is also necessary that the prosecutor be properly trained in trial skills particular to these cases.

Domestic violence prosecutions often involve complex social, emotional and financial considerations not present in other cases. Because these considerations often have a direct impact on the prosecution, the prosecutor must be prepared to refer the victim to service providers which can offer her help with her concerns.

The prosecutor must, therefore, be familiar with local battered women's programs and other social service agencies in the community, as well as the services they provide. These agencies can provide valuable support services to victims of domestic violence. Such services are invaluable in helping victims of domestic violence cope with the aftermath of the violence and with the demands of prosecution. Additionally, these support agencies, in many cases, will facilitate communication between the prosecutor and the victim, so as to ensure the victim's continued cooperation as a witness.

2. **Educator**

As the chief law enforcement officer of his or her county, the District Attorney is in a unique position to educate other components of the justice system. Because police officers are most often the first to respond to domestic violence incidents, it is vital that they understand the importance of their role, and how it affects the entire prosecution process.

Prosecutors, through their working relationship with law enforcement officials, and by sponsoring seminars and workshops, can help to ensure effective law enforcement response to domestic violence. Specifically, officers should be educated on the following aspects of domestic violence:

- Understanding domestic violence and its effect on the victim
- The importance of prompt response, arrest and investigation of domestic violence
- The need for thorough evidence collection/corroboration of the victim's account
- The consequences of ineffective law enforcement response

The prosecutor, through his or her contact with the courts and corrections, is also in a position to educate these components. By making information on domestic violence issues available to these components, the prosecutor encourages well-informed and consistent results. In particular, prosecutors are often in the best position to inform district justices and judges on the need for bail conditions and sentences to both provide protection for the victim and family members, and hold the defendant accountable for his conduct.

As the chief law enforcement officer of his or her county, the District Attorney is in a unique position to effect change in the criminal justice system by assuming a leadership role. By working with the various components within the system, the District Attorney will facilitate the effective use of available resources. A coordinated response among law enforcement, prosecutors, the minor judiciary, courts, probation and corrections will also increase the effectiveness of the system's efforts to deal with and deter domestic violence.

3. **Advisor**

The District Attorney is often called upon to advise law enforcement in individual domestic violence cases regarding issues of arrest, charging, investigation, and seizure of weapons. Such advice may not only affect the viability of the prosecution but may potentially affect the safety of the parties involved, and others at risk. Accurate and responsible legal advice at these stages is, therefore, vital to a responsible investigation and subsequent prosecution. The prosecutor, when acting in an advisory capacity, should be familiar with recent case law relating thereto. See *Burns v. Reed*, 500 U.S. ___, 111 S.Ct. 1934, 114 L.Ed.2d 547 (May 30, 1991). (Prosecutor enjoys only qualified immunity for giving legal advice to the police.)

As discussed above, the prosecutor must recognize the issues and concerns which face victims of domestic violence, and must be prepared to advise the victim on available resources. Familiarity with community resources will enable the prosecutor to refer the victim for support and services which address the victim's needs.

The prosecutor must also be familiar with the facts and circumstances of each case and must be prepared to advise the court in issues affecting bail, protection orders, plea negotiations, and sentencing decisions.

In summary, the prosecutor is in a key position to effect positive change in the way the justice system responds to domestic violence. By developing an informed and responsive prosecution protocol, the prosecutor will set the standard for holding defendants of domestic violence accountable for their conduct. Furthermore, the prosecutor will encourage well-informed and consistent decision-making throughout the justice system by assuming a leadership role in educating and advising other key players in the justice system.

CHAPTER II

CASE LAW AND STATUTES

A. CRIMES AND PROOF ISSUES

1. Aggravated Assault/Simple Assault

a. Sufficiency of Evidence: Aggravated Assault

One punch causing broken nose insufficient for aggravated assault where no additional evidence that defendant intended to cause serious bodily injury. *Commonwealth v. Alexander*, 477 Pa. 190, 383 A.2d 887 (1978).

One punch causing broken nose *sufficient* for aggravated assault where accompanied by other conduct showing attempt to cause serious injury. (Defendant abducted victim and put her in fear of impending rape). *Commonwealth v. Kibe*, 258 Pa. Super. 353, 392 A.2d 831 (1981).

One punch broke victim's jaw in several places. Victim hospitalized four days and jaw wired for several weeks. Here, serious bodily injury *caused*, not merely attempted. Aggravated assault conviction sustained. *Commonwealth v. Davis*, 267 Pa. Super. 370, 406 A.2d 1087 (1979).

Elderly victim (76) severely beaten and stomped by defendant. Sufficient evidence of attempt to cause serious injury to sustain aggravated assault conviction. Fact that evidence was wholly circumstantial was no bar to conviction. (Trail of blood links defendant to victim's apartment. Defendant's ID. bracelet found in apartment.) *Commonwealth v. Stancil*, 233 Pa. Super. 15, 334 A.2d 675 (1975).

Evidence sufficient for aggravated assault even though victim, defendant's wife, testified that injuries were accidental. Other evidence, including victim's "excited utterance" to neighbor that defendant had beaten her, sufficient to sustain conviction. *Commonwealth v. Galloway*, 302 Pa. Super. 145, 448 A. 2d 568 (1982). (This case discussed further under ARSON.)

Mere pointing of unloaded firearm insufficient for aggravated assault or R.E.A.P., but sufficient for simple assault. *Commonwealth v. Gouse*, 287 Pa. Super. 120, 429 A.2d 1129 (1981).

Defendant's gun clicked several times in course of struggle with victim. Aggravated assault conviction upheld. *Commonwealth v. Chance*, 312 Pa. Super. 435, 458 A.2d 1371 (1983).

Evidence that defendant pointed rifle at victim and slashed at victim with a screwdriver was sufficient to support defendant's conviction for aggravated assault even though the defendant did not cause serious injury. *Commonwealth v. Eddowes*, 397 Pa. Super. 551, 580 A.2d 769 (1990).

b. Sufficiency of Evidence: Simple Assault

Defendant hit victim in face. Simple assault conviction upheld. Fact that victim suffered pain could be inferred even though no direct testimony. *Commonwealth v. Jorgenson*, 341 Pa. Super. 550, 492 A.2d 2 (1985), *rev'd on other grounds*, 512 Pa. 601, 517 A.2d 1287 (1986).

2. Arson

To prove arson, the Commonwealth must establish that 1) there was a fire; 2) fire was of incendiary origin; 3) defendant was guilty party. *Commonwealth v. Nasuti*, 385 Pa. 436, 123 A.2d 435 (1956); *Commonwealth v. Leslie*, 424 Pa. 331, 227 A.2d 900 (1967); *Commonwealth v. Hardcastle*, 519 Pa. 236, 546 A.2d 1101 (1988), *cert. denied*, 493 U.S. 1093 (1990).

Convictions for arson and risking catastrophe reversed; insufficient evidence that defendant set boyfriend's bed on fire. Defendant admitted squirting lighter fluid but said she did so only to escape boyfriend's violence. No evidence to prove that defendant actually ignited fire. *Commonwealth v. Scott*, ___ Pa. Super. ___, 597 A.2d 1220 (1991).

Proof of defendant's guilt may be established by circumstantial evidence. *Commonwealth v. Nasuti*, 385 Pa. 436, 123 A.2d 435 (1956).

Evidence sufficient for arson where defendant called neighbor, who was supposed to watch house, and told him he need not watch it any longer, then other neighbor saw defendant leave house and quickly drive away. Fifteen minutes later, house observed on fire. Fire Marshall testified that fire was incendiary. *Commonwealth v. Blough*, 369 Pa. Super. 230, 535 A.2d 134 (1987). (Per Kelly, J., with two judges concurring in result.)

Evidence, largely circumstantial, sufficient to sustain arson conviction. Defendant assaulted wife, who was then taken to hospital. Defendant next pulled fire alarm and dropped off family dog at his mother's house. When firemen arrived, defendant told firemen that wife and dog were inside house. Evidence admitted of defendant's previous threat to wife to burn down house. Fire Marshall testified fire was incendiary. *Commonwealth v. Galloway*, 302 Pa. Super. 145, 448 A.2d 568 (1982).

Evidence that defendant had threatened to burn down house both on day of fire and in past, and that defendant was seen standing in bedroom where fire started immediately prior to fire, sufficient for arson. *Commonwealth v. Colon*, 264 Pa. Super. 314, 399 A.2d 1068 (1979).

Arson conviction sustained on circumstantial evidence. Defendant threatened to burn down house and kill wife and children. Man resembling defendant seen

entering and leaving home at time of fire and returning to car identified as defendant's. Fire of incendiary origin. *Commonwealth v. Rainey*, 242 Pa. Super. 39, 363 A.2d 1148 (1976).

See also *Commonwealth v. Terry*, 462 Pa. 595, 342 A.2d 92 (1975), *appeal after remand*, 482 Pa. 564, 394 A.2d 466 (1978) a "domestic violence" arson discussed *infra.* under OTHER CRIMES, Section C.9 of this Chapter.

In prosecution for arson of building in which defendant's estranged wife was playing bingo, evidence that defendant pulled a knife on their son in wife's presence shortly after fire showed motive, and nature of domestic relationship. *Commonwealth v. John*, ___ Pa. Super. ___, 596 A.2d 834 (1991).

3. Burglary/Criminal Trespass

Defendant convicted of burglary and criminal trespass (*inter alia*) where he forcibly entered estranged wife's home in violation of Protection from Abuse Order. *Commonwealth v. Allen*, 506 Pa. 500, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985).

NOTE: In *Allen*, (discussed further at Section E of this Chapter), the burglarized home had never been occupied by the defendant, nor did he have any ownership interest in it. The question of whether an individual may burglarize, or trespass on, his "own home" if barred from the premises by a court order has not been decided in Pennsylvania. The courts of other states have held that the existence of such order negates "license or privilege" and may form a basis for a burglary or criminal trespass conviction. See, e.g., *State v. Herrin*, 453 N.E.2d 1104 (Ohio App. 1982); *Matthews v. State*, 709 S.W.2d 414 (Ky. 1986); *State v. Kilponen*, 737 P.2d 1024 (Wash. App. 1987); *State v. Schneider*, 673 P.2d 200 (Wash. App. 1983); *Ex Parte Davis*, 542 S.W. 2d 192 (Tex. Crim. App. 1976).

Criminal trespass is not a lesser included offense of burglary. *Commonwealth v. Carter*, 482 Pa. 274, 393 A.2d 660 (1978).

4. Causation

Conviction for third-degree murder sustained where victim was crushed to death beneath the wheels of passerby's car as she attempted to escape from assault by defendant. While tort theory of causation will not sustain criminal conviction, here defendant's actions were a direct and substantial cause of the victim's death. *Commonwealth v. Rementer*, ___ Pa. Super. ___, ___ A.2d ___ (1991).

5. Double Jeopardy

The recent case of *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), has raised concerns about separate proceedings for violations of the Protection From Abuse Act and criminal charges arising from the same incident. In *Grady v. Corbin*, the Supreme Court held that the double jeopardy clause bars a subsequent prosecution if the state, to establish an essential element of an offense charged in that prosecution, must prove conduct that constitutes an offense for which the defendant has already been prosecuted. In that case, a defendant pleaded guilty to traffic tickets charging drunk driving and a traffic offense prior to his indictment on vehicular homicide charges. Only if the conduct relied upon to prosecute the second charge is different from that already prosecuted, would double jeopardy *not* bar the prosecution.

Pennsylvania courts have followed *Grady v. Corbin, Id.*, in several cases in which the defendant was convicted of summary offenses arising out of the same incident for which most serious charges were later prosecuted. See *Commonwealth v. Kline*, ___ Pa. Super. ___, 592 A.2d 730 (1991).

The effect of *Grady v. Corbin, supra*, on proceedings involving violations of the PFA Act and criminal charges is unclear. The prosecutor should be cautious in proceeding with indirect criminal contempt charges when serious criminal contempt charges from the same incident will be prosecuted.

6. Failure To Act - Criminal Liability

Wife who failed to seek medical attention for husband suffering diabetic crisis not guilty of involuntary manslaughter. No duty to get medical help for spouse. *Commonwealth v. Konz*, 498 Pa. 639, 450 A.2d 638 (1982).

7. Intimidation of Witness/Victim

Actual use of threats is *not* a necessary element of crime of intimidation. Statute's purpose is to punish conduct designed to obstruct justice; intimidation may be accomplished by offering benefits to victim in return for victim not talking to police. (Here, evidence sufficient to show intimidation, despite absence of threats, where evidence showed defendant *intended* to intimidate victim by repeatedly contacting him once investigation had begun, giving him money and offering him meals.) *Commonwealth v. Brachbill*, 520 Pa. 533, 555 A.2d 82 (1989).

8. Kidnapping/Unlawful Restraint

a. Sufficiency of Evidence: Kidnapping

Concepts of "substantial distance" and "confinement for substantial period" cannot be limited to certain distance or exact time period. Here, victim was driven by defendant a distance of two miles to isolated wooded area. Distance

sufficient under circumstance to sustain conviction for kidnapping because victim moved to different environmental setting and removed from familiar surroundings. *Commonwealth v. Hughes*, 264 Pa. Super. 118, 399 A.2d 694 (1979).

Actual movement of victim not required. Defendant guilty of kidnapping where victims forced to lie on floor of their own home while defendant attempted to secure ransom. *Commonwealth v. Russell*, 225 Pa. Super. 133, 310 A.2d 296 (1973).

Victim confined in her apartment for one hour while defendant attempted to rape her. Here, confinement was incidental to sexual assault, hence, no kidnapping. One hour time period sufficient to go to jury on issue of "substantial period" but apartment not "place of isolation" within meaning of statute where apartment frequented by relatives, business contacts. *Commonwealth v. Hook*, 355 Pa. Super. 10, 512 A.2d 718 (1986).

Victim confined in basement of defendant's home for several hours, beaten and eventually shot by defendant. Basement was "place of isolation" in spite of fact that some of defendant's friends were present from time to time. Victim isolated from usual protections of society. *Commonwealth v. Mease*, 357 Pa. Super. 366, 516 A.2d 24 (1986), *appeal denied*, 515 Pa. 620, 531 A.2d 428. Cf. *Hook*, *supra*.

b. Sufficiency of Evidence: Unlawful Restraint

To sustain conviction for unlawful restraint, Commonwealth must prove that victim placed in actual danger of serious bodily injury. Defendant's placing of unloaded gun to victim's temple in course of sexual assault insufficient. *Commonwealth v. Schilling*, 228 Pa. Super. 359, 431 A.2d 1088 (1981).

Diminutive victim pulled, grabbed by neck and held down by defendant, 225 pound muscle-man. Defendant raped victim and threatened to kill her. Demurrer to unlawful restraint properly denied. *Commonwealth v. McBall*, 316 Pa. Super. 493, 463 A.2d 472 (1983).

9. Possessing Instruments of Crime (P.I.C.)

Firearm need not be operable to constitute "instrument of crime" within meaning of P.I.C. statute. *Commonwealth v. Dill*, 278 Pa. Super. 462, 420 A.2d 633 (1980).

Pocket knife is "commonly used for criminal purposes", may constitute "instrument of crime." *Commonwealth v. Allen*, 466 Pa. 474, 353 A.2d 452 (1976).

Ordinary kitchen knife qualifies as "instruments of crime" in ordinary (no-adapted) form: razor blade - *Commonwealth v. Rodriguez*, 316 Pa. Super. 203, 462 A.2d 1310 (1983); scissors - *Commonwealth v. Myers*, 376 Pa. Super. 41, 545 A.2d 309 (1988), *appeal denied*, 522 Pa. 588, 561 A.2d 741 (1989); hammer - *Commonwealth v. Rios*, 246 Pa. Super. 479, 371 A.2d 937 (1977).

10. Recklessly Endangering Another Person (R.E.A.P.)

Manner in which defendant grabbed victim around neck and pulled her into room sufficient to show he consciously disregarded risk of death or serious bodily for purposes of R.E.A.P. statute. *Commonwealth v. Sanders*, 339 Pa. Super. 373, 489 A.2d 207 (1985).

Defendant properly convicted of R.E.A.P. where he pointed a loaded gun at his wife's stomach and gun "went off," causing injury. Defendant did not know how gun operated and thus could not protect victim against being accidentally shot. *Commonwealth v. Rivera*, ___ Pa. Super. ___, 597 A.2d 690 (1991).

11. Spousal Sexual Assault

18 Pa. C.S. §3128, spousal sexual assault, tracks the language of the rape (section 3121), and I.D.S.I. (section 3123) statutes, except that spousal sexual assault must be reported within 90 days; there is no reporting requirement for rape or I.D.S.I.

Note that, if the assailant and victim are married but separated, either *de facto* or by court order, the parties would not be considered "married" under Section 3103, and the rape statute would, therefore, apply.

Spousal sexual assault statute does not violate right to equal protection or right of privacy of accused. Defendant argued that statute denied married person right to raise "implied consent" defense. Court held that abolition of "implied consent" simply places marital-rape defendant on same footing with one accused of non-marital rape. *Commonwealth v. Shoemaker*, 359 Pa. Super. 111, 518 A.2d 591 (1986), *alloc. denied*, 515 Pa. 605, 529 A.2d 1080 (1987).

a. Common Law Marriage

Defendant attempted to establish existence of common-law marriage as defense to charge of rape. Even where common-law marriage exists, however, rape charge is proper where parties living in separate residences. (See 18 Pa. C.S. §3103). Here, jury charge in common-law marriage, although incorrect, was harmless error where parties separated and where defendant failed to show constant co-habitation and general reputation for being married. *Commonwealth v. McLean*, 387 Pa. Super. 354, 564 A.2d 216 (1989).

12. Terroristic Threats

Threats made in heat of quarrel where there was no evidence that threats were seriously made or that defendant intended to carry them out insufficient to sustain conviction. *Commonwealth v. Sullivan*, 269 Pa. Super. 279, 409 A.2d 888 (1979); *Commonwealth v. Kidd*, 296 Pa. Super. 393, 442 A.2d 826 (1982).

Conviction for terroristic threats sustained where defendant pointed gun at victims and told them not to talk or he would shoot. Fact that gun unloaded or inoperative not dispositive; not necessary that defendant have the present ability to carry out threat. *Commonwealth v. Chance*, 312 Pa. Super. 435, 458 A.2d 1371 (1983).

Threat to extract vengeance *in futuro* was sufficient. *Commonwealth v. Ashford*, 268 Pa. Super. 225, 407 A.2d 1328 (1979).

13. Theft of "Community Property"

Husband convicted of robbery of wife because he took her car by force; defendant interfered with wife's property interest in car. *Commonwealth v. Mescall*, ___ Pa. Super. ___, 592 A.2d 687 (1991). See 18 Pa. C.S. Section 3901, defining "property of another".

B. PRIVILEGES

1. Confidential Communications

Several Pennsylvania statutes protect confidential communications:

- 42 Pa. C.S. §5943 - Confidential communications to clergy;

- 42 Pa. C.S. §5944 - Confidential communications to psychiatrists or licensed psychologists (Amended in 1989 to include psychiatrists: Confidential relations and communications "shall be on the same basis as those . . . between an attorney and client.");

- 42 Pa. C.S. §5945 - Confidential communications to school personnel;

- 42 Pa. C.S. §5945.1 - Confidential communications to sexual assault counselors (Amended in 1990 to prohibit disclosure of all information, oral or written, given by a sexual assault victim to the counselor. The statute also forbids disclosure of confidential communications during group counseling by any participant in the group.);

- 23 Pa. C.S. §6116 - Confidential communications to domestic violence counselors or advocates. (Part of Protection From Abuse Act)

Prior to the 1990 amendment to Section 5945.1, the privilege enumerated therein applied only to prevent a sexual assault counselor from being called as a witness, and not to written

materials in the possession of the counselor. Consequently, the cases held that the trial court must review records *in camera*, and permit inspection by the defense of statements by the victim relating to the facts of the offense. See *In the Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981); *Commonwealth v. Aultman*, 387 Pa. Super. 113, 563 A.2d 1210 (1989), *alloc. granted*, 575 A.2d 107 (1990); *Commonwealth v. Hyatt*, 401 Pa. Super. 14, 584 A.2d 956 (1990).

However, in *Commonwealth v. Lloyd*, 523 Pa. 427, 567 A.2d 1357 (1989), the Pennsylvania Supreme Court held that the Pennsylvania Constitution requires that defense counsel be permitted to inspect a victim's entire psychiatric medical record in an *in camera* proceeding. See also, *Commonwealth v. Miller*, 399 Pa. Super. 180, 582 A.2d 4 (1990) (Psychological report in Commonwealth's file must be disclosed).

Sections 5945.1 (sexual assault counselor) and 5944 (psychiatrists) were amended subsequent to the *Lloyd* decision. In *Commonwealth v. Miller*, ___ Pa. Super. ___, 593 A.2d 1308 (1991), the Superior Court, asked to review the trial court's order for the sexual assault counseling center to provide its records to the court, remanded the case for consideration of the effect of the amendment to Section 5945.1. The current state of the law and the effect of the statutory amendments are still unclear.

2. Physician's Duty to Report Injuries; Physician/Patient Privilege

A physician or other health care professional is required to report to the police any injuries inflicted by a deadly weapon or "in violation of any penal law of this Commonwealth", if a person is brought before him or her bearing such injuries. 18 Pa. C.S. §5106. The physician/patient privilege is inapplicable and indeed applies only in civil, not criminal, cases. See 42 Pa. C.S. §5929.

3. Rape Shield Law

The "Rape Shield Law," 18 Pa. C.S. §3104, prohibits evidence of the victim's past sexual conduct, including specific instances, reputation, and opinion evidence, except past sexual conduct with the defendant where consent is at issue. A defendant seeking to offer such evidence must file a written motion and offer of proof at the time of trial, and an *in camera* hearing may be held as to the relevance and admissibility of the proffered evidence. See 18 Pa. C.S. §3104(b).

The appellate courts have held, however, that the Rape Shield Law may not prevent admissibility of the victim's prior sexual conduct when it goes to the victim's bias or motive against the defendant, or when it serves to explain the objective signs of intercourse. *Commonwealth v. Black*, 337 Pa. Super. 548, 487 A.2d 396 (1985).

Rape Shield Law may not exclude evidence deemed by the court to be relevant to victim's bias or credibility. A hearing should be held to determine: (1) whether proposed evidence is relevant to show bias or attack credibility; (2) whether probative value outweighs prejudicial effect of evidence; (3) whether there are alternative means of proving bias or motive or challenging credibility.

Evidence which does not show bias against or hostility to defendant or which produces no motive to seek retribution against defendant may not be admissible. *Commonwealth v. Simmons*, 355 Pa. Super. 326, 513 A.2d 453 (1986) (Proposed testimony that victim did not reveal sexual assault by defendant until victim's mother questioned her about whether she was pregnant did not reveal bias or hostility against defendant.)

Evidence of prior nonconsensual sexual contact, as well as consensual sexual activity, is barred by the Rape Shield Law. *Commonwealth v. Johnson*, 389 Pa. Super. 184, 566 A.2d 1197 (1989), *alloc. granted*, 525 Pa. 643, 581 A.2d 569 (1990).

Evidence of other sexual conduct which is relevant to explain the presence of semen or other signs of intercourse is not barred by the Rape Shield Law. *Commonwealth v. Majorana*, 503 Pa. 602, 470 A.2d 80 (1983). A hearing should be held to determine admissibility, including balancing the probative value of the evidence against its prejudicial effect. *Commonwealth v. Jorgenson*, 512 Pa. 601, 517 A.2d 1287 (1986). Defendant must make a specific offer of proof. *Commonwealth v. Nieves*, 399 Pa. Super. 277, 582 A.2d 341 (1990). (No offer of proof, mere "fishing expedition" not permitted.) See also, *Commonwealth v. Johnson*, 389 Pa. Super. 184, 566 A.2d 1197 (1989), *alloc. granted*, 525 Pa. 643, 581 A.2d 569 (1990) (hearsay statement attributed to victim insufficient for admissibility.) However, the court cannot exclude relevant evidence simply because the court does not believe it. *Commonwealth v. Baronner*, 324 Pa. Super. 24, 471 A.2d 104 (1984).

Evidence of victim's reports concerning prior sexual assaults by others inadmissible under Rape Shield Law, where defendant presented no evidence that past allegations were false. *Commonwealth v. Boyles*, ___ Pa. Super. ___, 595 A.2d 1180 (1991).

4. Spousal Privilege/Incompetency

In 1989, Section 5913 of Title 42 (Spouses as witnesses against each other), was amended to eliminate incompetency. Section 5913, as amended, creates a waivable privilege not to testify against one's spouse, except that no privilege exists in proceedings for desertion and maintenance or in criminal proceedings for injury or violence involving husband and wife or their minor children or any minor children in their care of custody. The privilege does not exist in any criminal proceeding for murder, involuntary deviate sexual intercourse, or rape.

Section 5914 protects confidential communications between spouses "except as otherwise provided in this subchapter." 42 Pa. C.S. Section 5914. In *Commonwealth v. Hancharik*, 388 Pa. Super. 337, 565 A.2d 782 (1989), *alloc. granted*, 525 Pa. 654, 582 A.2d 321 (1990), the Superior Court held that no privilege against disclosure of confidential communications exists in a prosecution for violence committed or threatened against defendant's spouse or minor child.

Spousal privilege not to testify did not apply in prosecution for arson of building in which wife was playing bingo. Evidence showed husband's anger at wife for going to play bingo, motive to set fire. Wife asserted privilege but was required to testify. *Commonwealth v. John*, ___ Pa. Super. ___, 596 A.2d 834 (1991).

Refusal To Testify: Court's exercise of discretion not to force wife to testify against husband not improper, despite appellate court's concern that a record be made to justify exercise of judicial discretion. Court's remark that "as it is insufficient for a criminal whose victim is not his spouse to avoid prosecution by recourse to therapeutic intervention, so perpetrators of domestic violence should not automatically be exempt from punishment because they have sought counselling." *Commonwealth v. Hatfield*, ___ Pa. Super. ___, 593 A.2d 1275, 1277 (1991)

C. EVIDENCE

1. Business Records - 42 Pa.C.S. §6108 *et seq.*

The Uniform Business Records as Evidence Act states as follows:

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness:

1. Testifies to its identity and the mode of its preparation; and
2. If it was made in the regular course of business or near the time of the act, condition or event; and
3. If, in the Court's opinion, the sources of information, method and time of preparation were such as to justify its admission.

Hospital Records - See "Hospital Records", Section C-7 of this Chapter.

2. Character Evidence

a. Character of Defendant

Evidence of defendant's good character may, in and of itself, create a reasonable doubt, and jury must be so instructed. *Commonwealth v. Neely*, 522 Pa. 236, 561 A.2d 1 (1989). Evidence of good character offered on behalf of defendant must be limited to his *general reputation* for the *particular trait or traits* of character involved in the commission of the crime charged. *Commonwealth v. Luther*, 317 Pa. 41, 463 A.2d 1073 (1983).

Testimony that defendant was never arrested is *not* character evidence warranting a jury instruction. *Commonwealth v. Rue*, 362 Pa. Super. 470, 524 A.2d 973 (1987) - Personal opinion, demonstrating no knowledge of defendant's reputation in the community does not amount to character evidence warranting a jury instruction. *Id.*

Witness must attest to victim's (or defendant's) general reputation in the community; he may *not* attest to the victim's (or defendant's) specific behavior. [See also *In the Interest of Lawrence J.*, 310 Pa. Super. 351, 456 A.2d 647 (1983).] *Commonwealth v. Berry*, 355 Pa. Super. 243, 513 A.2d 410 (1986).

Character witnesses may be cross-examined by using evidence of defendant's *prior convictions* but *not* prior arrests or *particular acts of misconduct*. *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981); *Commonwealth v. Farrior*, 312 Pa. Super. 408, 458 A.2d 1356 (1983).

Commonwealth may not impeach character witness with evidence of robbery committed contemporaneously with offenses being tried. *Commonwealth v. Nellom*, 388 Pa. Super. 314, 565 A.2d 770 (1989).

Evidence of good character offered by defendant must relate to a period *at or about the time the offense was committed*. *Commonwealth v. Luther*, 317 Pa. 41, 463 A.2d 1073 (1983). Similarly, conviction used to impeach a character witness must relate to the time period to which the witness testified as to good character. *Commonwealth v. Farrior*, 312 Pa. Super. 408, 458 A.2d 1356 (1983).

Cross-examination of character witnesses by the Commonwealth must be limited to the same traits (e.g., non-violence, peaceableness, quietness, good moral character, chastity, etc.) attested to by the witnesses. *Commonwealth v. Luther*, 317 Pa. 41, 463 A.2d 1073 (1983).

Commonwealth Rebuttal Evidence: Commonwealth may call its own witnesses on rebuttal to testify re: Defendant's *bad* reputation for traits raised by the defendant's character witnesses. *Commonwealth v. Scott*, 496 Pa. 188, 195, 436 A.2d 607, 611 (1981); *Commonwealth v. Stehly*, 350 Pa. Super. 311, 504 A.2d 854 (1986).

b. Character of Victim

Defendant's counsel may present witnesses to show victim's *bad* reputation for truth and veracity to impeach her credibility. *In The Interest of Lawrence, J.*, 310 Pa. Super. 351, 456 A.2d 647 (1983).

Where defendant claims self-defense, he may, under proper circumstances, introduce evidence of victim's prior convictions and arrests for acts of violence to corroborate his alleged knowledge of victim's violent propensities. *Commonwealth v. Horne*, 479 Pa. 496, 388 A.2d 1040 (1978).

3. *Corpus Delicti*

Before defendant's confession may be introduced at trial, Commonwealth must prove by independent evidence that a crime has occurred. Commonwealth must show: a) that a loss has occurred, and b) that this loss occurred through a criminal agency. *Commonwealth v. May*, 451 Pa. 31, 301 A.2d 368 (1973).

Threshold standard for determining admissibility of confession is different from ultimate test of whether confession may be considered as evidence of guilt by fact finder. In order to introduce a confession, Commonwealth need only show that injury was more consistent with criminality than with natural causes or accident. At the guilt-determining stage, however, jury must be instructed that it must find a *corpus delicti* beyond a reasonable doubt in order to consider confession as evidence of guilt. *Commonwealth v. Fried*, 382 Pa. Super. 156, 555 A.2d 119 (1989), *alloc. denied*, 522 Pa. 623, 564 A.2d 915 (1989).

NOTE: *Fried* specifically rejects the less-stringent formula of the Proposed Standard Jury Instructions, Sections 302A and 302B. (Jury must be satisfied beyond a reasonable doubt that the injury or loss *probably* resulted from a crime.) Unless or until *Fried* is overturned, jury should be instructed as per *Fried*.

In homicide case, medical examiner testified that child victim died by suffocation. Sufficient evidence of *corpus* to admit statement, although death consistent with both criminal and accidental causes. *Corpus delicti* may be established by circumstantial evidence alone. *Commonwealth v. Boykin*, 450 Pa. 25, 298 A.2d 258 (1972).

In arson/murder case, Fire Marshall concluded that fire was of incendiary origin and ruled out most common accidental causes of fire. Sufficient *corpus delicti* to admit statement, despite fact that Fire Marshall could not conclusively rule out possibility that fire caused by a carelessly tossed cigarette or match. *Commonwealth v. May*, 451 Pa. 31, 301 A.2d 368 (1973). Compare *Commonwealth v. Leslie*, 424 Pa. 331, 227 A.2d 900 (1967). (Insufficient evidence of *corpus* where Fire Marshall had only "mere suspicion" that fire not accidental.)

In infant homicide case, sufficient *corpus delicti* established where defendant/mother had exclusive custody and control of infant and where defendant's acts and statements indicated intent to divert suspicion away from herself. *Commonwealth v. Lettrich*, 346 Pa. 497, 31 A.2d 155 (1943).

In statutory rape case, doctor testified that injury to victim's vagina caused by object forcibly placed in it, but could not identify object nor rule out possibility that injury caused by accident. Sufficient evidence of *corpus delicti* to admit confession, in spite of victim's unconvincing testimony that injury was accidental. *Commonwealth v. Rhoades*, 225 Pa. Super. 208, 310 A.2d 406 (1973).

Not all statements of defendant, but only confessions, are subject to *corpus delicti* rule. Where defendant stated, prior to fire, that he was going to burn building down, this "statement" admissible without establishment of *corpus delicti*. *Commonwealth v. Jones*, 97 Pa. Super. 417 (1929). See also *Commonwealth v. Finnegan*, 280 Pa. Super. 584, 421 A.2d 1086 (1980).

Corpus for one crime can be corpus for another crime if crimes are closely related and arise from the same transaction.

- Corpus for theft: no independent corpus for burglary. Convictions for both affirmed. *Commonwealth v. Tessel*, 347 Pa. Super. 37, 500 A.2d 144 (1985);

- Corpus for possession of drugs: no independent corpus for possession with intent to deliver. Convictions for both affirmed. *Commonwealth v. DiSabatino*, 399 Pa. Super. 1, 581 A.2d 645 (1990), *alloc. denied*, ___ Pa. Super. ___, 592 A.2d 1297 (1991).

4. Excited Utterance

In order to qualify as an excited utterance, statement must be a "spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived. This declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties." *Allen v. Mack*, 345 Pa. 407, 28 A.2d 783 (1942); *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978); *Commonwealth v. Green*, 487 Pa. 322, 409 A.2d 371 (1979).

Statement may qualify as excited utterance even though made in response to a question. Lapse of 30 minutes between event and statement not so extreme as to preclude admission of statement. *Commonwealth v. Hess*, 270 Pa. Super. 501, 411 A.2d 830 (1979).

There is no requirement that an available declarant corroborate or remember a statement admitted as an excited utterance. *Commonwealth v. Hollihan*, 388 Pa. Super. 525, 566 A.2d 254 (1989), *alloc. denied*, ___ Pa. ___, 593 A.2d 838 (1991).

Victim's excited utterance 15 minutes after assault naming his assailant, corroborated by defendant's inculpatory statement to police, was sufficient to sustain conviction for aggravated assault, even though victim at trial stated he had no recollection of who assaulted him. *Commonwealth v. LaRosa*, 283 Pa. Super. 264, 423 A.2d 1247 (1980).

5. Eyewitness Testimony

Robbery conviction sustained based on testimony of police officer who saw incident. Victim did not testify. Court could infer "threat of bodily harm" from actions of defendant; not necessary for victim to testify as to her state of mind. *In Re Gonzales*, 266 Pa. Super. 468, 405 A.2d 529 (1979).

6. Hearsay:

See: Business Records – Ch. II, Section C-1
Excited Utterance – Ch. II, Section C-4
Hospital Records – Ch. II, Section C-7
Prior Consistent Statements – Ch. II, Section C-10
Prior Inconsistent Statements, Ch. II, Section C-12
Prior Testimony – Ch. II, Section C-13
Statements of Physical Condition – Ch. II, Section C-15

7. Hospital Records

The Uniform Business Records as Evidence Act, 42 Pa.C.S. §6108, permits admission of a business record if properly authenticated and if the record was made in the regular course of business at or near the time of the act, condition, or event.

The use of medical records as evidence is addressed under 42 Pa.C.S. §§6151-6159. Certified copies of hospital records may be sent under seal in response to a subpoena. No testimony is required to authenticate them.

A hospital report which satisfies the requirements of the Uniform Business Records as Evidence Act is admissible to show facts of hospitalization, symptoms, and treatment. *However, medical opinion contained in such reports and offered as expert testimony is not admissible unless the doctor who prepared the report is available for in-court cross-examination regarding the accuracy, reliability and veracity of his opinion.* *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978); *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A.2d 605 (1975); *Commonwealth v. McNaughton*, 252 Pa. Super. 302, 381 A.2d 929 (1977).

Medical records are admissible to show results of standard tests which detect:

- presence of alcohol in defendant's blood. *Commonwealth v. Karch*, 349 Pa. Super. 227, 502 A.2d 1359 (1986).
- presence of sperm in victim's vagina. *Commonwealth v. Saab*, 269 Pa. Super. 206, 409 A.2d 437 (1979).
- presence of gonorrhea. *Commonwealth v. Nieves*, 399 Pa. Super. 277, 582 A.2d 341 (1990).

8. Impeachment

See: Other Crimes – Ch. II, Section C-9
Prior Bad Acts – Ch. II, Section C-9
Prior Consistent Statements – Ch. II, Section C-10
Prior Convictions – Ch. II, Section C-11
Prior Inconsistent Statements – Ch. II, Section C-12
Prior Testimony – Ch. II, Section C-13
Suppressed Statements – Ch. II, Section C-16

9. Other Crimes/Prior Bad Acts

Evidence of other crimes is generally inadmissible. However, in a domestic violence prosecution, evidence of prior crimes may be admissible to show intent; malice; motive; absence of accident or mistake; identity of accused as perpetrator; and common plan or scheme. Evidence concerning the marital or domestic relationship, including prior threats, assaults, or quarrels may be relevant. Many of the following cases involve homicides, but should be applicable to any domestic violence crime.

Three prior acts of violence or threats within ten months. *Commonwealth v. Glass*, 486 Pa. 334, 405 A.2d 1236 (1979).

Nature of marital relationship, prior arrests of defendant for assaulting wife proper rebuttal to defendant's testimony of good relationship. *Commonwealth v. Petrakovich*, 459 Pa. 511, 329 A.2d 844 (1974).

Defendant's forgery of wife's signature on check admissible in homicide to show ill will, motive for defendant to kill wife. *Commonwealth v. Chism*, 480 Pa. 233, 389 A.2d 1041 (1978).

Prior assaults by defendant on his 84 year old aunt admissible even though some incidents more than ten years prior to homicide. *Commonwealth v. Odum*, 401 Pa. Super. 8, 584 A.2d 953 (1990).

May also be used where defendant testifies, to impeach credibility; where defendant uses reference to prior crimes to threaten or intimidate victim; and where other crimes are part of chain or sequence of events forming history or "natural development" of instant offense. *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835 (1989).

Where force or threat is element of instant offense, defendant's reference to prior crime admissible if used to threaten or intimidate victim. Here, defendant told victim in course of sexual assault that he had a prior rape conviction. *Commonwealth v. Claypool*, 508 Pa. 198, 495 A.2d 176 (1985).

Defendant claimed shooting accidental, but immediately after incident, got sawed-off shotgun and walked streets armed with gun and shells. Evidence of subsequent conduct admissible to negate claim of accident. *Commonwealth v. Styles*, 494 Pa. 524, 431 A.2d 978 (1981).

Evidence of defendant's past abuse of victim/wife admissible to show motive, ill will, and malice and to counter defendant's claim that shooting was accidental. *Commonwealth v. Ulatoski*, 472 Pa. 53, 371 A.2d 186 (1977).

In harassment case, evidence of prior acts of harassment admissible to prove intent and to show that instant incident was part of overall scheme of harassment. *Commonwealth v. Evans*, 299 Pa. Super. 529, 445 A.2d 1255 (1982).

Defendant charged with simple assault and R.E.A.P. on girlfriend. Complainant's testimony as to break-in at her apartment shortly before attack admissible as part of "continuing story" and also to show intent, lack of accident, common scheme. Defendant's testimony on cross-exam that he had hit complainant on prior occasions when she attacked him also admissible. *Commonwealth v. Showalter*, 231 Pa. Super. 278, 332 A.2d 456 (1974).

Hearsay evidence, by victim's sister, of defendant's prior beatings of victim/wife admissible to show motive, ill will, malice. *Commonwealth v. Gibson*, 363 Pa. Super. 466, 526 A.2d 438 (1987).

In rape prosecution, evidence of previous attempts to have sex with victim admissible to show defendant's intent, victim's lack of consent. *Commonwealth v. Rough*, 275 Pa. Super. 50, 418 A.2d 605 (1980).

Defendant charged with fatal fire-bombing of estranged girlfriend's home. Evidence of previous threats and previous fire at same location caused by defendant properly admitted to show motive, common plan, scheme or design, and identity of defendant as perpetrator. *Commonwealth v. Terry*, 462 Pa. 595, 342 A.2d 92 (1975).

Trial court did not err in admitting evidence that, shortly after setting fire to a building occupied by his wife, defendant, in wife's presence, threatened son with a knife. Evidence was relevant to show malice to son and wife and defendant's state of mind at time of crime. *Commonwealth v. Jolan*, ___ Pa. Super. ___, ___ A.2d ___ (1991).

Evidence of subsequent offense may be admitted where relevant to show defendant's intent or state of mind. *Commonwealth v. Green*, 351 Pa. Super. 170, 505 A.2d 321 (1986), *alloc. denied*, 513 Pa. 633, 520 A.2d 1384 (1987).

In homicide prosecution, evidence of defendant's past verbal, physical, financial and sexual abuse of victim was admissible to show prior course of conduct toward victim. *Commonwealth v. Badman*, 398 Pa. Super. 315, 580 A.2d 1367 (1990).

Defendant was charged with aggravated assault, etc., in shooting of his wife; convicted of R.E.A.P. only. Evidence of prior incidents of violence between defendant and wife properly admitted to show hostility toward victim and intent to shoot her. *Commonwealth v. Rivera*, ___ Pa. Super. ___, 597 A.2d 690 (1991).

10. Prior Consistent Statements

Prior consistent statements of witnesses are admissible to corroborate a witness who has been impeached as having a faulty memory, having recently fabricated the testimony, or having corrupt motive.

The admission of prior consistent statements is a matter left to the discretion of the trial judge, to be decided in light of the character and degree of impeachment. It is not necessary that the allegation of faulty memory or recent fabrication be explicit; it is enough that a serious attack on cross-examination enables the fact-finder to infer such an allegation. *Commonwealth v. Cain*, 358 Pa. Super. 198, 516 A.2d 1252 (1986).

Prior consistent statement is *not* admissible where declarant admits making a prior inconsistent statement. "No matter how many times the consistent story may have been told, the inconsistent one is not erased. An inquiry to ascertain which of the two different statements has been made more frequently by the witness would furnish no means by which the credit due his testimony could be satisfactorily determined." *Commonwealth v. Jubilee*, 403 Pa. Super. 589, 589 A.2d 1112 (1991).

Assertion on cross-examination that a witness is testifying in order to receive lenient treatment is a sufficient claim of corrupt motive so as to permit the introduction of prior consistent statements for purposes of rehabilitation. Prior consistent statements may be introduced during direct testimony or during rebuttal stage. *Commonwealth v. Mokluk*, 298 Pa. Super. 360, 444 A.2d 1214 (1982).

In sexual assault case, prior consistent statements of victim by way of "prompt complaint" are admissible under special rule that permits introduction of these statements in Commonwealth's case-in-chief. Such testimony must be limited to the fact that a complaint was made and to identify the occurrence complained of with the crime charged. *Commonwealth v. Rodriquez*, 343 Pa. Super. 486, 495 A.2d 569 (1985).

11. Prior Convictions

Evidence of prior convictions can be introduced to impeach the credibility of a witness if: (1) the conviction was for a *crimen falsi* offense; and (2) the conviction date or the date of the last date of confinement is within ten years of the trial date. *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). (Case modifies *Bighum-Roots* Test).

Convictions beyond ten years will be admissible only if the trial court determines that the value of the evidence substantially outweighs its prejudicial effect. See *Commonwealth v. Mistretta*, 364 Pa. Super. 332, 528 A.2d 184 (1987), in which convictions beyond ten years are discussed in light of the *Bighum-Roots* test.

Defendant who testifies at trial may be impeached ON REBUTTAL by prior convictions involving *crimen falsi* offenses. Defendant may *not* be impeached by prior convictions on cross-examination unless: (1) The defendant has introduced evidence of his good character; or (2) Defendant has testified against a co-defendant charged with the same offense. See 42 Pa.C.S. §5918; *Commonwealth v. Gray*, 297 Pa. Super. 123, 443 A.2d 330 (1982). A defendant may *not* be impeached by prior convictions unless he takes the stand. *Commonwealth v. Candia*, 286 Pa. Super. 282, 428 A.2d 993 (1981).

Convictions for *crimen falsi* arising *after* commission of, but before trial on, the present offense, are admissible to impeach. *Commonwealth v. Conard*, 206 Pa. Super. 33, 211 A.2d 14 (1965), *cert. denied*, 384 U.S. 920 (1966).

Authentication: The mere fact that the name of the defendant and the name of the criminal extract are identical is not, alone, sufficient evidence that the record is the defendant's. *Commonwealth v. Boyd*, 463 Pa. 343, 344 A.2d 864 (1975). The criminal extract may be authenticated by producing a witness from the previous trial or by the custodian of records (court clerk).

If the record is properly authenticated, *only the type, time and place of the crime and punishment received* may be admitted. *Commonwealth v. Jones*, 250 Pa. Super. 98, 378 A.2d 471 (1977).

Witness may not be impeached with prior conviction for non-*crimen falsi* offense. *Commonwealth v. Williams*, 524 Pa. 404, 573 A.2d 536 (1990).

Prior conviction for a *crimen falsi* crime based on a nolo contendere plea may be used to impeach the defendant's credibility. *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962), *cert. denied*, 371 U.S. 957 (1963).

Trial court may properly allow a defendant or other witness to be impeached with a crime involving dishonesty or false statement where the defendant was imprisoned for that crime within ten years of trial, whether last period of imprisonment was imposed at original sentencing or at parole/probation revocation. *Commonwealth v. Jackson*, 385 Pa. Super. 401, 561 A.2d 335 (1989), *aff'd on appeal*, 526 Pa. 294, 585 A.2d 1001 (1991).

Juvenile Record/Adjudications: Defendant was denied his right of confrontation when he was precluded from cross-examining prosecution witness to show that witness was on probation following an adjudication of delinquency. Defendant's right to attempt to show that witness' bias because of his probationary status outweighed state statutory policy of protecting the anonymity of juvenile offenders. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974).

Trial court's refusal to allow defense counsel to cross-examine juvenile Commonwealth witnesses re: juvenile adjudications to establish the witness' bias, held to be reversible error. Court relies on *Commonwealth v. Evans*, 511 Pa. 214, 512 A.2d 626 (1986) which held:

Whenever a prosecution witness may be biased in favor of the prosecution because of an outstanding criminal charge or because of a non-final criminal disposition against him within the *same* jurisdiction, that possible bias must be made known to the jury. Even if the prosecution has made no promises either on the present case or on other pending criminal matters, the witness may hope for favorable treatment from the prosecution if the witness presently testifies in a way that is helpful to the prosecution.

Commonwealth v. Cauto, 369 Pa. Super. 381, 535 A.2d 602 (1987), *alloc. denied*, 521 Pa. 601, 555 A.2d 112 (1988).

A victim's pending juvenile charges, even if brought after the crime and identification of the defendant by the victim, may be explored. *Commonwealth v. Borders*, 522 Pa. 161, 560 A.2d 758 (1989).

Trial counsel was ineffective in not seeking to cross-examine witness concerning present juvenile probation, but was *not* ineffective for failing to inquire about another witness whose juvenile probation had expired prior to his becoming a witness. *Commonwealth v. Murphy*, ___ Pa. ___, 591 A.2d 278 (1991).

The defense may cross-examine a prosecution witness about any pending criminal charge or "non-final criminal disposition" involving the same prosecuting authority. *Commonwealth v. Evans*, 511 Pa. 214, 512 A.2d 626 (1986). This may include a witness' probationary or parole status, *Commonwealth v. Walker*, 384 Pa. Super. 562, 559 A.2d 579 (1989).

See also, *Commonwealth v. Hill*, 523 Pa. 270, 566 A.2d 252 (1989), (witnesses awaiting sentence) and *Commonwealth v. Borders*, 522 Pa. 161, 560 A.2d 758 (1989) (open case/A.R.D./probation arising after witness made accusation against defendant).

12. Prior Inconsistent Statements

A party may impeach the credibility of an *adverse* witness by introducing evidence that the witness has made one or more statements inconsistent with his or her trial testimony. However, mere dissimilarities or omissions in prior statements even when the statements are the verbatim words of the victim, do not suffice as impeaching evidence; the dissimilarities or omissions *must be substantial enough to cast doubt on a witness' testimony* to be admissible as a prior inconsistent statement. *Commonwealth v. Bailey*, 322 Pa. Super. 249, 469 A.2d 604 (1983).

Written report which is only a *summary* of the words of the victim and *not verbatim* notes from the victim *cannot* be used by the defendant to impeach the victim on cross-examination. *Bailey, Id.*

Prior inconsistent statements of a non-party witness at trial can be used *not only* to impeach the credibility of the witness but *may be used as substantive evidence to prove the truth of the matters asserted therein* as long as the declarant is a witness at trial and available for cross-examination. *Brady* rule can be used for both defense and Commonwealth witnesses. You may impeach your own witness *without a showing of surprise* when the "interests of truth and justice seem to require it." *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986).

To use prior inconsistent statement as substantive evidence, declarant must testify and be available for cross examination. Introducing prior inconsistent statement, without calling declarant to testify but making declarant available for cross examination, necessitated new trial. *Commonwealth v. Sopota*, 403 Pa. Super. 1, 587 A.2d 805 (1991), *alloc. denied*, ___ Pa. ___, 598 A.2d 283 (1991).

An omission of a fact in victim's prior statement does not render it *inconsistent* for purpose of impeachment. *Commonwealth v. Rue*, 362 Pa. Super. 470, 524 A.2d 973 (1987).

13. Prior Testimony

Section 5917 of Title 42 Pa.C.S., provides for admission of prior testimony of a witness in any criminal proceeding before a court of record, if the defendant has been present and had an opportunity to cross examine, and the witness has become unavailable due to death; inability to be served with a subpoena; or incompetence. Similarly, a common law rule provides for admission of a witness' testimony at a preliminary hearing (not a court of record). *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 393 A.2d 306 (1978) (Held that Commonwealth may obtain recording of preliminary hearing from defense.)

Unavailability due to loss of memory: Under the common law rule, the Commonwealth may introduce the prior testimony of a witness if the witness can no longer remember all or part of the events previously testified to. *Commonwealth v. Graves*, 484 Pa. 297, 398 A.2d 644 (1979); *Commonwealth v. Hook*, 364 Pa. Super. 447, 528 A.2d 241 (1987); *Commonwealth v. Von Smith*, 303 Pa. Super. 534, 450 A.2d 55 (1982). *But see, Commonwealth v. Crosland*, 397 Pa. Super. 622, 580 A.2d 804 (1990) - Prior testimony not permitted where witness refused to testify due to possible perjury and alleged that earlier testimony was false.

a. Preservation of Testimony

Rules of Criminal Procedure 9015 and 9015A provide for preservation of testimony by court stenographer and videotape recording of any witness who may be unavailable for trial.

b. Admission of Out-of-Court Statements

Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986) permits the admission of prior inconsistent statements as substantive evidence.

Note that the defendant's self-serving exculpatory statement (to police or anyone else) is not admissible. *Commonwealth v. Murphy*, 493 Pa. 35, 425 A.2d 352 (1981).

14. "Res Gestae" Statements

A witness' words, uttered while under the influence of a startling event, are admissible as excited utterances. *Commonwealth v. Banks*, 454 Pa. 401, 408-409, 311 A.2d 576, 580 (1973).

Response to question can be excited utterance where victim was shot 20 minutes earlier. *Commonwealth v. Cooley*, 465 Pa. 35, 348 A.2d 103 (1975).

Narrative can be excited utterance where victim told of attack one-half hour earlier, *Commonwealth v. Navarro*, 276 Pa. Super. 153, 419 A.2d 141 (1980), *aff'd*, 499 Pa. 279, 453 A.2d 308 (1982).

Elderly victim's report to police dispatcher and to nurse at hospital admissible as excited utterance or present sense impression, *Commonwealth v. Blackwell*, 343 Pa. Super. 201, 494 A.2d 426 (1985).

15. Statements of Physical Condition

Witness' prior statement to nurse was admissible as statement of physical condition for purpose of medical diagnosis or treatment. *Commonwealth v. Blackwell*, 343 Pa. Super. 201, 494 A.2d 426 (1985).

Statement of child victim to physician describing events giving rise to hospital visit was properly admitted; however, it was reversible error to permit physician to testify as to victim's identification of defendant as her assailant. *Commonwealth v. Sanford*, 397 Pa. Super. 581, 580 A.2d 784 (1990), *alloc. denied*, ___ Pa. ___, 588 A.2d 508 (1991).

16. Suppressed Statements

A defendant's voluntary statement, suppressed due to failure to advise of *Miranda* warnings, etc., may be used to impeach if defendant testifies. *Commonwealth v. Baxter*, 367 Pa. Super. 342, 532 A.2d 1177 (1977), *alloc. denied*, 518 Pa. 615, 541 A.2d 743 (1988); *Commonwealth v. Batson*, 396 Pa. Super. 513, 578 A.2d 1330 (1990), *alloc. denied*, ___ Pa. ___, 588 A.2d 912 (1991). See also *Michigan v. Harvey*, ___ U.S. ___, 110 S.Ct. 1176, 108 L.Ed. 2d 293 (1990).

D. MISCELLANEOUS PROCEDURAL ISSUES

1. Battered Woman Syndrome

Battered Woman testimony is usually presented by a defendant who is asserting a claim of self-defense. It should be noted, however, that such evidence may also be used in rebuttal, by the prosecution, to rebut defense assertions that the victim's conduct was unreasonable under the circumstances.

In prosecution for homicide where defendant claimed self-defense, jury should have been instructed regarding the impact of physical and psychological abuse on a battered person's fear of imminent death or serious bodily injury. Counsel ineffective for failing to request such instruction and also ineffective for failing to present expert testimony on the "Battered Woman Syndrome". *Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772 (1989) (Per Larsen, J., with two Justices joining and two concurring in separate opinion.)

But see, Commonwealth v. Dillon, ___ Pa. ___, 598 A.2d 963 (1991) - Where victim was drunkenly attacking and threatening to kill defendant, trial court committed reversible error by not allowing defendant's son to testify that husband became "mean and vicious" when drunk. Testimony was relevant both to establish defendant's state of mind by corroborating her alleged knowledge of husband's character while drunk, and to show that victim, rather than defendant, was more likely the aggressor. Two concurring opinions, totalling six votes, express view that expert testimony should be admissible to explain Battered Woman Syndrome.

Jury may consider history of abuse by husband in determining reasonableness of wife's use of deadly force, where, immediately prior to shooting, husband struck defendant, shoved her to ground and placed hands around her neck. *Commonwealth v. Watson*, 494 Pa. 467, 431 A.2d 949 (1981).

History of abuse not relevant or admissible where defendant set husband on fire while he was asleep. Self-defense not at issue because no evidence that defendant reasonably believed she was in imminent danger of death or serious bodily injury. *Commonwealth v. Grove*, 363 Pa. Super. 328, 526 A.2d 369 (1987), *alloc. denied*, 517 Pa. 630, 539 A.2d 810 (1987).

In child abuse case, where defendant convicted on Endangering Welfare of Child, counsel not ineffective for failing to present expert testimony on "Battered Woman Syndrome". Here defense is not self-defense but duress, and "Battered Woman Syndrome" not applicable to duress defense. *Commonwealth v. Ely*, 396 Pa. Super. 330, 578 A.2d 540 (1990).

NOTE: The term Battered Woman Syndrome was popularized by psychologist Lenore Walker in her book, *The Battered Woman*, New York: Harper and Row, 1979. The Battered Woman Syndrome is a descriptive phrase used to refer to typical

response patterns of women who are involved in abusive relationships. Many of these responses run counter to expectations of what is "normal" in a given situation. Some experts in this area attempt to explain why victims remain in abusive relationships in terms of a "learned helplessness" response. Others describe the Battered Woman Syndrome as a type of Post-Traumatic Stress Disorder.

In Pennsylvania, as in most states, the Battered Woman Syndrome is not recognized as a legal defense as such. The defendant must first succeed in raising a claim of self-defense in order to introduce evidence of past incidents of violence, or to present expert testimony on Battered Woman Syndrome. See *Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772 (1989). But see, *Commonwealth v. Dillon*, ___ Pa. ___, ___ A.2d ___ (1991).

If ruled admissible, the testimony of the expert may be used to rebut myths or misconceptions raised by the prosecution regarding victims of domestic violence. Expert testimony may also be used to support the reasonableness of the defendant's claim that she was in imminent fear of serious bodily injury.

Where the complaining witness is a victim of abuse, may the prosecution use Battered Woman Syndrome expert testimony on behalf of its witness? Although there are no cases specifically on this point, the likely response of the Pennsylvania appellate courts would be "no". In analogous cases dealing with child abuse and rape, our courts have held that psychological expert testimony presented on the complainant's behalf constitutes an improper attempt to bolster the witness' credibility and impinges on the function of the jury. *Commonwealth v. Gallagher*, 519 Pa. 291, 547 A.2d 355 (1988); *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986).

For cases in which the prosecution was permitted to introduce Battered Woman expert testimony, see *State of Washington v. Ciskie*, 110 Wash.2d 263, 751 P.2d 1165 (1988); *State v. Frost*, 242 NJ Super. 601, 577 A.2d 1282 (1990).

2. Elder Victims-Mandatory Sentences

42 Pa. C.S. §9717 provides for mandatory sentences for defendants under 60 years old who victimize persons over 60. The specified penalties are:

- 5-10 years for rape or I.D.S.I.;
- 2- 4 years for aggravated assault F-1 or F-2 (deadly weapon);
- 1- 2 years for theft by deception (but court has some discretion in sentencing for this offense).

Commonwealth need not notify of intention to invoke elder-victim mandatory in bills of information, but must give reasonable notice. One day's notice unreasonable under circumstances. *Commonwealth v. Rizzo*, 362 Pa. Super. 129, 523 A.2d 809 (1987).

3. Jury—Voir Dire

Purpose of voir dire is to assess qualifications of jurors to serve, including exposing fixed opinions, bias, or prejudice. Voir dire is not to be used as attempt to ascertain prospective juror's present impressions or attitudes. Trial court did not err in refusing to allow defense counsel to ask prospective juror questions such as: "Do you think a battered woman stays with her husband because she enjoys being beaten?" *Commonwealth v. Drew*, 500 Pa. 585, 459 A.2d 318 (1983).

4. Protective Orders - Crime Victims, Witnesses

18 Pa. C.S. §4954 authorizes the court to enter protective orders in favor of crime victims or witnesses. The court may order the defendant or other person acting on his behalf to have no contact with the victim or witness, to maintain a specified geographic distance, etc.

Sanctions for violations of these orders are set forth in 18 Pa. C.S.A. §4955. The violator may be arrested for witness intimidation or retaliation, have his bail revoked, or be found in contempt of court.

Because Section 4955 contains no provision for police to make warrantless arrests upon probable cause, these orders are more difficult to enforce than those issued under the Protection from Abuse Act.

Section 4955 does not spell out the penalties for contempt. See 42 Pa. C.S. §4136 (Rights of persons charged with certain indirect criminal contempts): maximum fine is \$100; maximum jail term is 15 days.

5. "Probable Cause Arrest" Statute

18 Pa. C.S. §2711 permits police to make warrantless, probable cause arrests for simple assault, R.E.A.P. or involuntary manslaughter occurring between spouses or cohabitants. There must be corroboration—signs of recent physical injury, etc.—before an arrest can be made.

The statute also provides for special conditions of bail in the nature of a "stay away" order to be imposed by the magistrate or bail commissioner.

Police are required to give victims information about domestic violence services in the community and rights under Protection from Abuse Act.

6. Reporting Domestic Violence

Reporting of domestic violence, as such, is not mandated by law. Physicians and other hospital personnel are, however, under a general duty to report to the police any injury caused by a deadly weapon or any injury caused by criminal means. 18 Pa. C.S. §5106.

Persons who report incidents of domestic violence to the police are immune from civil or criminal liability for making such reports, unless the reports were made in bad faith or with malicious purpose. 23 Pa. C.S. §6116.

7. Restitution

Defendant may be ordered to pay restitution to compensate sexual assault victim for psychological treatment necessitated by the defendant's criminal act, notwithstanding the fact that victim may have had pre-existing emotional problems. *Commonwealth v. Boyles*, ___ Pa. Super. ___, 595 A.2d 1180 (1991).

8. Witnesses

a. Competency - Psychiatric Exam

Court need not order investigation of witness' competency unless observation of witness raises doubts about competency. Mere fact that witness may have emotional or psychiatric problems does not render witness incompetent unless he or she is unable to give correct account of matters at issue. *Commonwealth v. Fulton*, 318 Pa. Super. 470, 465 A.2d 650 (1983).

b. Competency - Child Witnesses

Witnesses 14 years or older are presumed to be competent to testify. If a witness is under 14 years old, defense counsel may challenge his or her competency. There are three criteria for competency: 1) capacity to communicate, including the ability to understand questions and give meaningful answers; 2) capacity to observe and remember the event or events at issue; and 3) consciousness of the duty to speak the truth. The child need not understand terms like "oath" or "perjury", but must be aware of bad consequences if he/she tells a lie. *Commonwealth v. Mangello*, 250 Pa. Super. 202, 378 A.2d 897 (1977); *Commonwealth v. Penn*, 497 Pa. 232, 439 A.2d 1154 (1982), *cert. denied*, 456 U.S. 980.

c. Preservation of Testimony

Commonwealth has right to present testimony at preliminary hearing even where defendant elects to waive hearing. *Commonwealth v. Keck*, 148 Pa. 639, 24 A. 161 (1892), *cited with approval in Commonwealth v. Stasko*, 471 Pa. 373, 370 A.2d 350 (1977); *Commonwealth v. Jobe*, 91 Pa. Super. 110 (1927).

Also note: Pennsylvania Rule of Criminal Procedure 9015 authorizes the court, on petition of Commonwealth or defense, to take and preserve the testimony of a witness who may be unavailable for trial. "May be unavailable" includes situations where the witness may die, move out of the jurisdiction or become incompetent to testify.

Pennsylvania Rule of Criminal Procedure 9015A, effective July 1, 1989, spells out the procedure for preserving testimony via videotape.

d. Securing Attendance of Reluctant Witnesses

The Uniform Act to Secure the Attendance of Witnesses From Out of State in Criminal Proceedings - 42 Pa. C.S. §5961 *et seq.*, sets out the procedure for subpoenaing and securing attendance of an out-of-state witness who may be reluctant to return to testify. If the witness resides in a state that is a signatory to the Act, the prosecutor should contact the District Attorney in that jurisdiction, to whom the appropriate pleadings and other material should be sent. Travel expenses and witness fees must also be tendered.

e. Material Witness

Pennsylvania Rule of Criminal Procedure 4017 sets forth the procedure by which a witness may be required to post bail to secure his or her attendance, if it appears that the witness will not appear unless held in custody or on bail.

E. PROTECTION FROM ABUSE ACT

The Protection from Abuse Act, 23 Pa. C.S. §§6101 *et seq.*, provides a civil remedy for victims of domestic violence. Individuals who have been physically or sexually abused by a spouse, co-habitant, family member, or intimate partner, may seek an order of protection lasting up to one year; the parties need not reside or have resided together. Orders may be issued on behalf of adults and/or minor children.

Relief includes, but is not limited to, a court order restraining the defendant from further abuse and barring him/her from the residence of the victim, even if the house is owned or leased jointly by the defendant and victim.

Other relief may include the imposition of spousal or child support; the award of temporary custody of children; relinquishment of weapons involved in the abuse, and restitution to the victim for medical, legal and other expenses.

Police are authorized to make warrantless arrests for violations of these protection orders upon probable cause.

Violation of a Protection from Abuse Order constitutes indirect criminal contempt and is punishable by a maximum prison term of six months and/or a maximum fine of \$1,000. Criminal procedural rules and rights apply to these contempt proceedings, except that there is no right to a jury trial.

Adjudication of guilt for contempt under the Protection from Abuse Act constitutes criminal conviction for purposes of the Parole Act, 61 P.S. §331.21(1); the contemnor may be committed to prison as a parole violator. *Dunkelberger v. PA Board of Probation and Parole*, 593 A.2d 8 (Pa. Cwlth. Ct. 1991).

Provision of Protection from Abuse Act precluding jury trial on charge of contempt does not violate U.S. or Pennsylvania Constitution. *Eichenlaub v. Eichenlaub*, 340 Pa. Super. 552, 490 A.2d 918 (1985).

Contempt proceeding under Protection from Abuse Act is criminal in nature. The defendant is entitled to criminal procedural safeguards (i.e., notice of specific allegations, exclusion of inadmissible evidence). *Vito v. Vito*, 380 Pa. Super. 258, 551 A.2d 573 (1988).

Flat six-month sentence for violation of Protection from Abuse Order upheld as legal. Requirement of Sentencing Code, 42 Pa. C.S. §9756(B), that court impose minimum sentence of one-half the maximum does not apply to Protection from Abuse Act. *Wagner v. Wagner*, 387 Pa. Super. 246, 564 A.2d 162 (1989), *appeal denied*, 578 A.2d 415 (1990).

Consent agreement in civil proceeding under Protection from Abuse Act does not bar subsequent criminal prosecution for conduct alleged in abuse petition. *Commonwealth v. Smith*, 380 Pa. Super. 484, 552 A.2d 292 (1988).

Defendant broke into estranged wife's home in violation of Protection from Abuse Order and physically and sexually assaulted her. Prosecution for rape, burglary, criminal trespass and simple assault not barred by prior criminal contempt proceeding for violation of order. Neither compulsory joinder rule (18 Pa. C.S. §§109-112) nor constitutional Double Jeopardy bar separate prosecutions for contempt, or other offenses arising from same incident. *Commonwealth v. Allen*, 506 Pa. 500, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985).

CAVEAT: The U.S. Supreme Court case of *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), has called into question the continuing validity of *Commonwealth v. Allen*, 506 Pa. 500, 486 A.2d 363 (1984), *cert. denied*, 474 U.S. 842 (1985):

In *Grady*, the defendant pled guilty to reckless driving and other traffic offenses and was subsequently prosecuted on homicide charges arising from the same incident. The court held that the second prosecution was barred by Double Jeopardy, even though the *Blockburger* standard (whether the later-charged offense required proof of facts that the earlier offense does not) was met. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932).

The court went on to inquire, however, whether the prosecution, in order to prove an essential element of the later-charged offense, need prove *conduct* for which the defendant has already been prosecuted. *Grady v. Corbin*, 110 S.Ct. at 2093.

Had this second, "same conduct" test introduced by *Grady* been applied in *Allen*, it is likely that a different result would have been reached. (*Allen* does, however, make some strong legal, practical and policy arguments in favor of allowing separate proceedings for contempt and the related criminal charges.)

Trial judges in some Pennsylvania counties have taken the position that *Allen* has been overruled by *Grady*. There are no appellate decisions directly on point, however.

See also the discussion at Section A.5 of this Chapter, under *Double Jeopardy*.

CHAPTER III

THE PROSECUTION PROCESS

A. PRE-TRIAL PROCESS

1. Investigation

A team-building effort between prosecutors and police officers will have long lasting effects on the way in which domestic violence is handled in the criminal justice system. Despite the best efforts of a police officer in responding to domestic violence, the officer may view those efforts as a waste of time if such cases are treated as low priority or nuisance cases by the prosecutor. Conversely, a careless investigation has little chance of successful prosecution, despite the prosecutor's best efforts to piece together evidence which should have been collected and preserved at the time of the incident. A competent investigation will not only establish the necessary foundation for prosecution, but will serve to solidify a victim's confidence in a system in which she may have little faith at the outset. Victim confidence, in turn, will increase the likelihood that she will remain willing to testify against the defendant.

An ongoing working relationship between the domestic violence prosecutor and police officers who are most likely to investigate domestic violence is essential. Prosecutors who routinely ignore bad investigations, and instead attempt to conduct investigations themselves by interviewing witnesses and piecing together the circumstances of the incident long after the fact, build frustration into the job. Furthermore, by accepting incomplete or careless investigations, prosecutors set a low standard for subsequent investigations by police officers. Officers should understand, that like any other criminal conduct, domestic violence requires a competent investigation at the scene, as well as any follow-up investigation which may be necessary. Although changing attitudes and practices of law enforcement toward domestic violence can be a long and tiring process, both prosecutors and police officers will find that holding batterers accountable through successful prosecution, is worth the effort.

In many cases, police officers must be educated regarding the type of evidence which is admissible at trial to corroborate the testimony of the victim. Knowing how evidence can be used at trial will put the investigating officer on notice as to what to look for and how to preserve those observations.

While police interviewing techniques are beyond the scope of this Manual, it is important to note that the interview of the domestic violence victim requires not only skill but sensitivity. An insensitive police officer asking probing questions may immediately discourage a victim from cooperating and may, therefore, jeopardize prosecution.

The following investigative checklist identifies the information and evidence which should be collected by the investigating officer:

a. Investigative Checklist

(1) Interview of the Victim

(a) Current Incident

- Location and date of incident
- injuries/medical treatment
- weapons or objects used in violence
- witnesses to violence
- circumstances surrounding incident (both prior & subsequent to incident)
- involvement of alcohol and drugs
- incidents of forced sex?
- Statements made by the suspect prior to, during, and subsequent to the violence

(b) History of Violence

- circumstances of violence
- when it began
- injuries/medical treatment
- weapons or objects used
- witnesses
- involvement of alcohol or drugs
- Did the violence escalate over time?
- Has the suspect exhibited violence toward others, such as the children, or pets?

Note: If the violence has occurred as a continuing pattern, the investigator should consider filing additional charges if such incidents occurred within the statute of limitations.

(c) Victim's responses to violence

- reports to police
- reports to domestic violence hotline or shelter
- reports to friends or relatives
- Did she pursue protective order or other legal remedy?
- Were criminal charges brought?
- Has victim ever retaliated or defended herself?
- Other responses by victim to the violence (i.e. persuading suspect to seek help, etc.)

- (d) Obtain name, home and work addresses and phone numbers for victim.
Also, obtain a second, permanent address and phone number through which the victim may be reached, if necessary (such as parents or close friend).

NOTE: By obtaining a written or taped statement from the victim as soon as practicable under the circumstances, the officers have laid the groundwork for the prosecution to introduce prior statements at the subsequent trial of the matter. *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986), holds that once an individual takes the stand and recants, or substantially changes prior testimony or statements given to the police, the witness's former testimony or statement can be admitted as substantive evidence of the crime charged.

(2) Physical Observation of the Victim:

- Her demeanor and appearance
- Document and photograph any injuries: Injuries manifest themselves differently at various time intervals after impact, therefore follow-up photographs should be taken within several days after the incident.
- Body diagrams may be used by the police officer to document areas of force or injury

(3) Attempt to Interview the Suspect:

Whether or not the suspect chooses to make a statement, it is imperative, in every domestic violence investigation, that the investigating officer attempt to interview the suspect as soon as possible after the incident, upon providing the defendant with appropriate constitutional safeguards. A timely statement by the suspect, regardless of the content, will make it difficult for him to later adjust his version of events. Even minor deviations which appear in subsequent statements or testimony can be the basis of impeachment with prior inconsistent statements. Failure to interview the defendant will provide the defense with ammunition to bolster its claim that it is merely the victim's word against his, because no one bothered to get his side of the story.

(4) Witnesses

- eye witnesses to the incident, including friends; neighbors; family members, such as children of the victim and suspect; and medical personnel. Even if these witnesses did not see the actual act of violence, they may have information regarding circumstances immediately proceeding or following the act. (i.e. screaming, threats, the defendant coming or going.)
- Family, neighbors, friends who can provide background information regarding the defendant's past treatment of the victim, or the nature of the relationship of the victim and suspect. Such information may constitute "prior bad acts" or "other crimes evidence," which is admissible at trial under certain circumstances.

- Obtain names, addresses and phone numbers for all witnesses

(5) Weapons or objects which may have been used as weapons

(6) Clothing of the Victim, which may show evidence of force, injury or sexual contact

(7) Crime Scene Evidence

- Examine the scene of the crime and photograph:
 - signs of disturbance or impact
 - signs of forced entry, if applicable.
 - evidence of drugs or alcohol
 - any other physical evidence which pertains to the acts alleged.
- Officers must be careful to preserve all evidence as required for subsequent testing.

(8) Medical Evidence and Records

- Officers should have victims sign consent forms to authorize the release of all medical records pertaining to the current incident and any other past injuries caused by the suspect.
- Results of testing conducted by medical personnel to determine the nature, seriousness, and cause of the victim's injuries.

(9) Results of any evidence testing and the name of the person performing such test.

(10) Court Records of Protection From Abuse Proceedings and/or prior prosecutions against the suspect.

(11) 911 tape recordings of the emergency call, if applicable.

(12) Answering machine tapes containing relevant information, such as contacts or threats by the suspect toward the victim.

(13) Cards, letters or other correspondence written by the suspect to the victim containing information relevant to the incident or frame-of-mind of the suspect.

Prosecutors may want to consider providing a domestic violence investigative checklist, such as the one above, to all police departments in their jurisdiction. A uniform, comprehensive procedure for data collection will aid investigating officers in conducting a thorough investigation. It will also aid prosecutors in reviewing reports and in identifying specific areas requiring further investigation.

2. Arrest

Police officers should always arrest when probable cause exists to believe that a crime has been committed. A "pro-arrest" policy serves:

- To protect the victim and her family from any additional acts of violence committed by the defendant;
- To deter the defendant from committing continued acts of violence; and
- To develop community attitudes against domestic violence and thereby deter battering. Statutory law has expanded a police officer's legal authority to arrest in domestic violence cases. The following statutes define this authority:

a. Probable cause arrests: 18 Pa. C.S. § 2711

Section 2711 of the Crimes Code provides as follows:

(a) General rule.-A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702 (a)(3), (4) and (5) (relating to aggravated assault*) or 2705 (relating to recklessly endangering another person) against his spouse or other person with whom he resides or has formerly resided although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence.

b. Protection From Abuse Act

Under Section 6113 of the Protection From Abuse Act, 23 Pa. C.S. §6113, an arrest for violation of a protection order may be made without warrant upon probable cause, whether or not the violation is committed in the presence of the police officer. The existence of a protection order and its specific terms may be verified by the police officer by telephone or radio communication with the appropriate police department, county registry, or issuing authority. 18 Pa. C.S. §6113 (a). Information received from the victim or witness, if credible, constitutes probable cause.

Section 6113 also sets forth procedures for the seizure of weapons, post-arrest, and preliminary arraignment. The Protection From Abuse Act is set forth in its entirety in Appendix A of this Manual.

3. Charges

The charges filed in a domestic violence case should, as in any other criminal case, accurately reflect the facts and the severity of the crime. The fact that such violence occurs in a domestic setting should never be considered a mitigating factor. By holding

* Section 2702 was amended in 1990. Subsections (a) (3) (4) and (5) are now graded as second degree felonies.

domestic violence defendants less accountable than other violent offenders, law enforcement and prosecutors send the message to batterers and to society at large, that domestic violence is somehow less socially objectionable than other violence.

Where a factual basis exists, and where there is some corroboration, charges should be filed. In determining the appropriate charges, the following factors should be considered: seriousness of the injuries and/or threats; use of a weapon; the defendant's history of violence toward the victim; and the potential lethality of the situation.

In filing charges in a case in which violations of a protection order are also at issue, consideration should be given to the implications of *Grady v. Crobin*, 495 U.S. 508, 110 S. ct. 2084, 109 L. Ed. 2d 548 (1990), a recent United States Supreme Court case which raises double jeopardy concerns. *Grady*, and its implications, is discussed further at Chapter II of this Manual, under "Double Jeopardy".

Where feasible, the District Attorney's Office should consider implementing procedures to review all police reports of domestic violence, including reports of incidents for which charges were not filed. Where a suspect's conduct and the evidence thereof constitute criminal behavior, and where the statute of limitations has not expired, the prosecutor should direct further investigation, if necessary, and the filing of charges.

4. Preliminary Arraignment and Bail

Preliminary arraignment, in general, is defined in Pa. Rule of Criminal Procedure 140. Where an arrest is made pursuant to Section 2711 of the Crimes Code, 18 Pa. C.S. §2711, a defendant must be afforded a preliminary arraignment by the proper issuing authority without delay, and may not be released from custody by the arresting officer prior to such arraignment. 18 Pa. C.S. §2711 (c) (1).

In setting bail, Section 2711 requires the issuing authority to determine whether the defendant poses a threat of danger to the victim. If such threat is found to exist, the issuing authority "shall require as a condition of bail that the defendant shall refrain from entering the residence or household of the victim and the victim's place of employment and shall refrain from committing any further criminal conduct against the victim and shall so notify the defendant thereof at the time the defendant is admitted to bail." Section 2711, which is set forth in its entirety in Appendix A of this Manual, also addresses the duration of this condition and the consequence of its violation.

a. Bail Considerations

Aside from the requirements of Section 2711, discussed above, the following guidelines should be taken into account in setting bail, and its conditions:

1. The severity of the criminal violation.
2. Degree of injury to victim.

3. History of domestic violence as documented by police reports and other convictions.
4. Whether the frequency and/or severity of violence appears to be escalating.
5. Threats of retaliation by the defendant toward the victim, children, or other family members.
6. Use or threatened use of a weapon.
7. Defendant's prior criminal history.
8. Danger posed to public, including threats to victim's family or co-workers.
9. Defendant's alleged use or possession of alcohol or a controlled substance.
10. Defendant's access to the victim.
11. Defendant's mental and physical health.
12. Defendant's threats of suicide.
13. Defendant's likelihood of appearing at subsequent court hearings.

Although bail is designed to insure the defendant's presence in court, as required, (Pa. Rule of Crim. P. 4004), the standards for setting bail include consideration of the nature of the offense and of the defendant's family relationships. *See* Pa. Rule Crim. P. 4004. It should be recognized that during the pre-disposition stage, the victim is vulnerable to manipulation, threats, or violence, both in retaliation for her initiation of criminal charges, or intended to dissuade her from testifying. In light of these considerations, bail conditions should routinely include a **no contact order**, directing the defendant to stay away from the residence of the victim, her employment, any school she attends, and all places that she frequents. Additionally, the propriety of ROR bail in domestic violence cases should be seriously evaluated. Finally, the bail in domestic violence cases should comport with that in other cases involving violence.

5. Post Arrest Procedure In Violations of Protection From Abuse Orders: Indirect Criminal Contempt

Section 6113 of the Protection From Abuse Act provides that:

Subsequent to an arrest, the defendant shall be taken by the police officer without unnecessary delay before the court in the judicial district where the contempt is alleged to have occurred. When that court is unavailable, the police officer shall convey the defendant to a district justice designated as appropriate by local rules of court or, in counties of the first

class, to the appropriate hearing officer...The defendant shall be afforded a preliminary arraignment without unnecessary delay. 23 Pa. C.S. §6113 (c) (d).

The court, at this proceeding must also set bail in an amount consistent with the guidelines set forth above in Section 4.a. Once again, the immediate protection of the victim must be a primary consideration.

6. Preliminary Hearing

The preliminary hearing is a pivotal point in the prosecution of domestic violence cases. Victims are often ambivalent; police officers are doubtful about the potential for successful prosecution; defendants are looking for an easy way out; and the district justice, in the midst of these forces, must determine the direction the case is to take.

Successful prosecution of domestic violence begins at the preliminary hearing, with the proper presentation of evidence and with full legal representation of the Commonwealth's interests by the prosecutor. By appearing at the preliminary hearing, the prosecutor assumes legal responsibility for the prosecution of the case. The victim is assured that she does not stand alone against the defendant and his attorney; the investigating officer is assured of the commitment of the District Attorney to prosecuting the case; the defendant is aware that the state is assuming control of the prosecution; and the district justice knows that the Commonwealth has an interest in the outcome of the proceedings.

In addition to presenting evidence to prove each element of the crimes charged, the prosecutor must be prepared to request amendment of the charges, when necessary, to more accurately reflect the evidence. The comment to Rule of Criminal Procedure 150 states that "a complaint...may be amended at any time so as to remedy any defect in form or content that is not prejudicial to the rights of the defendant". Prejudicial change has been defined as an amendment which alleges a different set of events, or in which the elements or the defenses to the amended crime are materially different from elements or defenses to the crime originally charged. *Commonwealth v. Thomas*, 278 Pa. Super. 39, 419 A. 2d 1344 (1980). The prosecutor must also be prepared to respond to defense arguments for bail modifications, and requests for reduction or dismissal of charges.

It is not unusual for the victim to begin expressing reluctance to proceed with prosecution at the preliminary hearing stage. The reasons for this reluctance may include fear of the proceedings; fear of losing financial security if the defendant is incarcerated; fear of reprisal from the defendant if she cooperates; and many other concerns. It is vital for the prosecutor to meet with the victim prior to the preliminary hearing and address the victim's concerns. Often, a simple explanation of the process may reduce her level of anxiety and restore her willingness to proceed.

It is also important, at this juncture, to enlist the assistance of a victim/witness advocate to provide ongoing emotional support for the victim. A working relationship between the prosecutor and the advocate will facilitate ongoing communication

throughout the case proceedings. Moreover, the support provided to the victim by the advocate will help to ensure the victim's continued cooperation.

There will be cases, regardless of the prosecutor's efforts, where the victim will refuse to testify at the preliminary hearing. The prosecutor must, at this point, consider the various options available. In many cases, the testimony of the arresting officer, medical personnel or other witnesses may be sufficient to establish a prima facie case. Photographs, medical records and evidence collected from the scene may also be presented. In other cases, however, the circumstances will be more complex. Section B, of this Chapter, Trial Tactics and Strategies, discusses considerations for proceeding without the victim; dismissal of charges; and compelling the victim to testify.

7. Negotiated Pleas

Plea negotiation should be approached in a manner consistent with the following goals of prosecuting domestic violence:

Goals of Prosecution

- To protect the victim from additional acts of violence committed by the defendant.
- To reduce the exposure to and/or possible injury of children from domestic violence.
- To deter the defendant from committing continued acts of violence in the community.
- To create a general deterrence to battering in the community.
- To vindicate society's interest in holding all criminals accountable.

Plea negotiating should not undermine these goals, nor should it be used merely to reduce a caseload or the court's calendar. Negotiating pleas in domestic violence cases as a matter of course depreciates the seriousness of the conduct involved, and in many instances is contrary to the goals of prosecution. Where the evidence is sufficient for prosecution, and where the victim remains willing to testify against the defendant, the prosecutor should proceed accordingly.

If, upon reviewing the facts of the case, the prosecutor determines that a negotiated plea is consistent with the goals of prosecution, the following factors should be considered.

- the seriousness of the offense, including the injuries attempted or inflicted
- the presence of children during the violence
- the risk that defendant poses to the victim and/or risk to children
- the risk of defendant to third parties
- the history of violence by the defendant against the victim
- the strength of the evidence
- the victim's wishes regarding prosecution

Consultation with the victim prior to or during plea negotiations is essential. In cases where the disposition reflects her wishes, or is a result of her reluctance to testify against the defendant, the victim's statement to this effect should be made part of the record. This will serve to protect the prosecutor in the event the disposition is later questioned.

Plea negotiations in domestic violence cases should not result in a disposition substantially different from dispositions in other cases involving violence. The sentencing guidelines should be considered and mandatory sentences should be imposed, where applicable.

There are also times when the circumstances of the case require full prosecution in spite of the victim's reluctance or refusal to cooperate. Such circumstances may include the defendant's history of violence against the victim and the continuing danger he poses to her, to their children, or to the community. Chapter III, Section B.2.b of this Manual discusses strategies for proceeding to trial without the victim's testimony. Section B.5 of Chapter III discusses a strategy for establishing a case using a witness who recants or changes her testimony.

B. TRIAL TACTICS AND STRATEGY

1. Establishing the Case Foundation

A thorough and conscientious investigation will not only build a strong foundation for the case, but will serve to reassure the victim that the system is capable of handling the case in a manner consistent with her best interests and protection. By developing and preserving corroborative evidence, the victim will be assured that all available evidence will be used in the prosecution of the case, and that she will have the support of that evidence. See Chapter III, Section A.1 for a detailed discussion of the investigation stage.

a. Law Enforcement Contact with Victim

In building a strong foundation for prosecution, a personal contact by the investigating officer, between the incident and the preliminary hearing, will serve several purposes. This contact, which can be made simply to obtain a signature or verify a statement, communicates to the victim that there is an ongoing commitment of law enforcement to the case. Furthermore, it will afford the officer the opportunity to detect any hesitation on the part of the victim and determine its cause. Early detection of possible problems will put the prosecutor on notice of difficulties in prosecution and, thus, in a better position to respond appropriately.

b. Prosecutor Contact with Victim

To ensure the continued cooperation of the victim, the assistance of a victim/witness advocate should be enlisted. (A list of domestic violence service providers is provided in Appendix D.) The advocate, by maintaining contact with

the victim and the prosecutor, will provide support to the victim and will facilitate communication between the prosecutor and the victim during the pre-trial process.

It is also important for the prosecutor to schedule a pre-trial meeting with the victim, at which time the prosecutor should obtain a detailed account of the incident in question from the victim. The prosecutor should also obtain a detailed account of the events leading up to the incident since it is common for a defendant to blame the victim for provoking the attack. This account should be compared with prior statements and accounts contained in the police report and presented at the preliminary hearing, for discrepancies or the need for clarification. *While note-taking may be desirable or even necessary when conducting this interview, it is important to note that even a prosecutor's handwritten notes may be discoverable by the defense if they contain a "substantially verbatim statement" of the witness. Commonwealth v. Contakos, 492 Pa. 465, 424 A.2d 1284 (1981).*

It should be remembered, during the prosecutor's interview of the victim, that memory fades with the passage of time. It is also not unusual for the victim to minimize the severity of the incident, in protection of the defendant and, as a way of coping with the psychological pain.

c. Interview of the Victim

The following are suggested areas to cover in interviewing victims in domestic violence cases. The questions should, of course, be adapted to each individual victim and case.

1. Milestones - What are the dates or approximate dates of important events in the relationship between victim and defendant, such as: first meeting; first "date"; engagement; marriage or beginning of cohabitation; birth of children; separation; divorce, etc. (It is useful to place these dates on a "time line" to which other details can be added as the interview develops.)
2. Development of relationship - What were the life circumstances of victim and defendant upon first meeting? How did the relationship develop (or deteriorate) over time?
3. History of violence - When and where did the first incident of violence occur? Was the victim injured, and if so, was medical treatment needed? Were weapons or other objects used in the incident? Did anyone (including children) witness the violence? What precipitated the incident and what was the aftermath? Have there been incidents of forced sex? Has the defendant been violent toward others besides the victim, including other family members? Has the suspect hurt or killed pets? Were alcohol and/or drugs involved? Did the violence escalate over time? Document subsequent incidents in the same way.

4. Responses to violence - For each violent episode noted above, what was the victim's response? Did the victim try to persuade the defendant to "seek help"? Did she report the violence to a friend or relative, a domestic violence hotline, the police? Did she leave or attempt to leave the home? Did she pursue a protection order or other legal remedy, such as filing for divorce? Were criminal charges brought and, if so, what was the outcome? Has victim ever physically retaliated or defended herself? What other strategies has the victim employed to cope with the violence and how did the defendant respond?

5. Current offense: What was going on in the days, weeks or months leading up to the incident that is the subject of the instant case? What motivated or triggered the violence? Were either victim or defendant drinking or taking drugs at or around the time of the incident? Have victim describe in detail the physical facts of the incident, as well as what she was thinking and feeling as the incident unfolded. Review all police reports, notes of prior testimony, statements of other witnesses, etc., and discuss all discrepancies between these accounts and what the witness now says occurred. Are there any witnesses or is there any corroborative evidence not indicated in the police paperwork?

6. Aftermath - What impact, physical and psychological, has the incident had on the victim? What has taken place between the date of the incident and today? Specifically, has the defendant initiated any contact with the victim in person, through telephone calls, letters, etc., and what was the nature of that contact? Has the victim called, written to, or visited the defendant, and if so, what was her purpose in doing so? Has he made any threats of retaliation because of the prosecution? How likely is he to follow through on the threats?

7. Defendant - Does defendant have a history of substance abuse or mental problems, including suicidal behavior? Does he have a history of abusing women with whom he has been involved? What is his explanation, rationalization or excuse for his violent behavior? What does the victim think will be his "story" at trial?

8. Victim - In obtaining the foregoing information, important facets of the victim's life will naturally come to light. It is usually not necessary to inquire specifically into the victim's "life story," and such inquiry may be seen as intrusive. If, however, there is any indication that victim's personal history (drug abuse, psychological problems, alleged child abuse, prior criminal convictions, etc.) may become an issue at trial, these areas must be explored.

9. Present circumstances: What are victim's thoughts, feelings, and concerns about the court case? Is she in fear for her safety, and, if so, what is the basis for her fears? If defendant is convicted, what are her feelings about sentencing? If he is acquitted, will she be in danger? If so, has she planned for this contingency?

In addition to the subject areas noted above, follow-up questions should always be asked, such as, "Why did you call the police?" or "Why did you wait three days before seeking medical help?"

2. Preparing The Case

It is paramount in any jury trial that the prosecutor properly prepare the case. Before walking into the courtroom, the prosecutor must know each element of each crime to be proved and how he or she will present evidence to meet the Commonwealth's burden of proof, with respect to each element.

In most domestic violence prosecutions, the bulk of the prosecution's evidence will be presented through the victim's testimony. Knowing the victim, and establishing a rapport with her prior to trial will facilitate a smooth progression of the case. It will also allow the prosecutor to monitor the level of the victim's cooperation and will enhance the opportunity to detect difficulties to be encountered at trial.

a. The Reluctant Witness

One of the most difficult and frustrating aspects in the prosecution of domestic violence cases is dealing with the reluctant or absent witness. In cases involving a reluctant witness, it is important to evaluate the reasons for this reluctance. During the preparation stage, the prosecutor may encounter many different reasons why the victim is unwilling or reluctant to testify against the defendant. It may be determined that the victim feels that she is in a position of potential danger from the perpetrator, and that her cooperation with the prosecution process will intensify that risk. This threat of danger may also extend to family members, such as young children or elderly parents of the victim. Whenever a threat of danger to the victim, her family members, or others is detected, the prosecutor must respond swiftly and forcefully. There are several tactics a prosecutor can take:

- Protective orders may be obtained under 18 P.S. §4954. A copy of a sample order is included in Appendix B. To obtain a protective order, the Commonwealth must produce substantial evidence that a victim has been intimidated or is reasonably likely to be intimidated. This evidence may include hearsay or the declaration of a prosecutor.
- The second remedy is the filing of an intimidation of witness or victim charge under 18 Pa. C.S. §4952. This sends a strong message to perpetrators that the prosecution will not tolerate the intimidation of victims or witnesses.
- In cases where a charge of intimidation or other charge is filed subsequent to the underlying charge, the prosecutor has legal basis to request the revocation of bail on the underlying charge, thereby detaining the defendant until trial and removing the danger to the victim.

Other reasons for victim reluctance may include a desire by the victim to reconcile with the defendant and preserve the family unit; a fear of losing financial security; a fear of being alone without a network of support and resources; a desire to avoid the embarrassment and humiliation of testifying publicly; or anxiety induced by the prosecution process and its rigors.

Victims should be encouraged to testify in cases where such testimony is essential to the goals of prosecution. These goals are set forth at Section A.7. of this Chapter. In securing victim cooperation, it may be beneficial to explain to the victim any options available to the prosecution or the judge at both the trial and sentencing stages. A better understanding of the system often helps to defuse concerns and clarify misunderstandings.

If a victim, despite encouragement, remains reluctant or refuses to testify, the prosecutor must decide how to proceed with the case. In weighing the options available for proceeding with the case, the prosecutor should again review the goals of prosecution set forth in Section A.7. of this Chapter. The progression of the case should be consistent with these goals.

b. Proceeding Without the Victim

A thorough investigation will, under some circumstances, build a case capable of proof even without the victim's testimony. If a witness cannot be located, or is legally unavailable due to death or loss of memory, prior testimony may be used. See Chapter II, Section C. 13 for a discussion of case law on using prior testimony. Additionally, the investigative checklist in Chapter III, Section A.1.a will assist the investigating officer in gathering the following evidence:

- Medical records. See Chapter II, Sections C.7 and C.15 for a discussion on the admissibility of medical records and statements as to physical condition.
- 911 tape recordings of the emergency call or answering machine tapes.

Note: Answering machine tapes and 911 recordings are exempt from the provisions of the Wiretap Act set forth in chapter 57 of the Crimes Code. Other recordings should be viewed with caution. See 18 Pa. C.S. §5705.

- Eye witnesses or witnesses who may have seen or heard something relating to the incident in question.
- Family members or friends who can testify regarding the defendant's treatment of the victim or other pertinent information.
- Child Witnesses: See *Commonwealth v. Hart*, 501 Pa. 174, 460 A.2d 745 (1983), for guidance in establishing the competency of a child to testify.
- Prior Bad Acts\ Other Crimes Evidence: See Chapter II, Section C.9, for a discussion on when this hearsay evidence is admissible.
- Photographs of the crime scene or of the victim's injuries.
- Demonstrative evidence, such as charts or diagrams of the scene, maps (e.g. in a kidnapping case, where the victim is moved to another location), etc.

- Physical evidence, such as the actual gun or knife used in the assault; the victim's bloody clothing, etc.
- Testing by a physician to determine the nature, seriousness, and cause of the victim's injuries.
- Testing by other experts such as fire marshall, questioned-documents examiner, or firearms examiner.
- Court records of Protection from Abuse proceedings, prior convictions of the defendant (where relevant and admissible), etc.
- Correspondence such as cards or letters sent by the defendant to the victim containing inculpatory material.

c. Dismissal of Charges

If, after evaluating the case in light of the victim's refusal to testify, the prosecutor elects not to proceed with prosecution, the prosecutor should obtain any necessary approval of his or her supervisor for the dismissal of charges. Furthermore, the prosecutor must present testimony by the victim, on the record, indicating that she is freely and voluntarily declining to testify against the defendant. This preservation of testimony will be extremely important in the event the victim is subjected to further harm by the defendant and questions are raised regarding the prior dismissal of prosecution.

d. Compelling the Victim to Testify

There may be cases in which the goals of prosecution require that the case proceed to trial and that the victim be compelled to testify, despite her unwillingness to do so. In such cases, the prosecutor may need to utilize procedures designed for compelling a witness to testify. See Pa. Rule of Criminal Procedure 4017 (Detention of witnesses) and 42 Pa. C.S. §5904 (Subpoena of witnesses). Caution should be exercised in pursuing this strategy. Section IX of the Prosecution Protocol, which is set forth in Chapter V of this Manual, offers the prosecutor guidance.

Strategies for proving the case where the victim changes her testimony or recants, are discussed in Section B.5 of this chapter.

e. Preparing the Victim to Testify

Victims should be advised that the jury will be instructed that they can consider not only what the witness says, but also, how she presents herself, in assessing her credibility. Rather than prescribing a dress code which may be uncomfortable and awkward, the prosecutor should encourage witnesses to dress neatly and cleanly, and to avoid scant or "abbreviated" clothing. Although it is sometimes difficult to discuss inappropriate courtroom dress with witnesses, the reality of the jury's scrutiny makes this an essential part of case preparation.

Victims should understand the purpose of direct and cross examination and should understand the importance of requesting clarification if a question is not clear. The prosecutor should also explain the meaning of objections and the overruling or sustaining thereof. Witnesses should be instructed to answer each question honestly and to refrain from rude or sarcastic answers.

A victim's demeanor will be closely scrutinized by the jury. The natural expression of emotions, such as sobbing and shaking, may serve to validate the victim's testimony in the eyes of the jury. On the other hand, expressions of anger may be interpreted as signs of vindictiveness and desire for revenge on the part of the victim. Victims showing signs of anger should be referred to counseling prior to trial to deal constructively with those feelings.

Perhaps the most difficult victim for a jury to understand and sympathize with is the victim who appears flat, unaffected or disinterested. In such cases, it may help to explain to the victim that the expression of natural emotions while testifying is acceptable and normal. Where, however, it is likely that the victim will appear emotionless, the prosecutor must be prepared to deal with the effect that emotionless or expressionless testimony will have on the jury. In many instances, this can be done effectively through the prosecutor's opening statement and closing argument. For example, a prosecutor in his or her opening statement, may wish to ask jurors not to judge the victim on the basis of their own pre-conceived or stereotypical expectations of victim behavior.

To the extent possible, any circumstances contributing to the victim's emotionless demeanor should be developed in the prosecutor's direct examination of the victim. Such circumstances may include multiple court appearances and interviews producing a numbing effect; a desire by the victim to block the events from her mind; or a victim's fear of humiliation associated with becoming emotional and breaking down publicly. In closing argument, the prosecutor must draw on these circumstances to aid the jury in understanding why a victim is able to relate such events devoid of emotion. In the absence of some explanation, a jury is likely to conclude that a victim simply did not "act like a victim", and therefore, was not telling the truth.

3. Jury Selection

Jury selection can, in many cases, be the determining factor in the trial. A case comprised of strong witnesses and corroborating evidence may not have a chance of surviving a jury which includes even one individual who has engaged in spousal abuse or who justifies it. Moreover, jurors subconsciously bring with them their emotions, beliefs, and prejudices. For many of them, it is unnatural or uncomfortable for them to sit in judgement of a fellow citizen. The prosecutor must, therefore, prepare jurors psychologically for this task through the voir dire process.

In addition to a physical observation of the jury panel, a review of available information concerning each juror's place of employment, residence, number of children, etc., will aid the prosecutor in asking questions that may reveal fixed opinions

or other reasons for disqualification. Questions regarding prospective jurors' present attitudes, or impressions not related directly to the issue of fairness, are generally not proper. See *Commonwealth v. Drew*, 500 Pa. 585, 459 A.2d 318 (1983).

Many veteran domestic violence prosecutors favor a balance of men and women on their juries. An all-female jury has been known to be particularly critical of a female victim and her behavior. On the other hand, an all-male jury has been known to be reluctant to put "one of their own" in jail. A balance of men and women on the jury will lend a balance of perspectives in the evaluation of the evidence.

When evaluating potential female jurors, the prosecutor should favor those who work outside the home; post high school education is also desirable, when possible. Separated or divorced female jurors may also bode well for the Commonwealth, as they may have some experience with domestic violence. Conversely, male jurors who are divorced or separated may harbor attitudes of resentment or revenge toward their ex-wife, which may be projected toward women in general. It should be acknowledged that a bitter divorce may cause a man to wish he had "put his foot down" or "taught his wife a lesson" to avoid his present position. Employed male jurors who are married and have children are recommended. Post high school education is also a desirable factor in most instances.

4. Opening Statement

The opening statement should be brief and should grab the jury's attention and interest. It should also leave the jury with the impression that the case is important and worthy of their time and consideration. An opening statement which merely recites a list of witnesses will not accomplish this. By outlining the facts and evidence of the case in a narrative "story" form, the prosecutor will involve the jury, on a more personal level, in the dynamics of the events in question. The narrative form will also put the facts of the case in context of real life more effectively than a recitation of trial evidence.

Regardless of the manner in which the opening statement is delivered, its primary purpose should be to tell the jury how the Commonwealth will prove its case. Many prosecutors accomplish this effectively by relating the facts in narrative form, then explaining how the evidence presented will prove each element of each offense. Strong witnesses should be named; weaker and less important witnesses should not be emphasized, except to the extent that their observations or information will tie other evidence together. Where the prosecutor is unsure of how a witness will testify on certain details, he or she should not attempt a detailed summary of that testimony in the opening statement. A general summary will serve to avoid objections from defense counsel when the witness fails to testify in a manner consistent with the prosecutor's proffer to the jury.

The opening statement also affords the prosecutor the opportunity to address weaknesses in the Commonwealth's case. By addressing these weaknesses directly, the prosecutor is able to better control their initial effect on the jury, regardless of whether the desired effect is to downplay the significance of "negative" evidence, or prepare the

jury to better understand evidence which appears to be a weakness in the Commonwealth's case.

5. Presentation of Witnesses: Direct Examination

Although there are a number of theories advanced by experienced prosecutors on the order in which witnesses should be presented, virtually all prosecutors agree that the ideal presentation of the Commonwealth's case-in-chief begins and ends with a strong witness. This is based on well-established knowledge that a jury best remembers that which it hears first and last. Although this preferred tactic often must yield to other considerations, such as time limitations and the availability of witnesses, its importance cannot be ignored.

In most cases, it will be the victim who will be the most significant Commonwealth witness and, logically, the first witness to testify. By presenting the victim's testimony first, the prosecutor will also have an early opportunity to respond to inconsistent statements brought out by the defense through cross-examination of the victim. The use of prior consistent statements is discussed at Chapter II, Section C.10 of this Manual.

In the event of a reluctant witness who either recants or changes her testimony, the prosecutor must be prepared to introduce prior statements of the victim and to offer them as substantive evidence, under the authority of Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986). This is accomplished by establishing the victim's current version of events through her testimony and then establishing, through the admission of other statements into evidence, that the victim made prior inconsistent statements which the Commonwealth purports to be the true and accurate version of the events in question. The effect of this tactic is the impeachment of the prosecution's own witness. A thorough investigation which has produced corroborative evidence will make this case much easier to prove than a case comprised only of a battle of statements.

It is possible that the victim will refuse to testify by asserting her Fifth Amendment rights, on the basis that by testifying that she "lied" the first time, she would be subjecting herself to perjury charges. In cases where this right is raised, it must be raised outside of the presence of the jury. *Commonwealth v. Duval*, 453 Pa. 205, 307 A.2d 229 (1973). Where the court determines that the victim cannot be compelled to testify under these circumstances, the prosecutor may want to consider granting limited immunity to the victim for purposes of presenting testimony. This will allow the Commonwealth to compel the victim to testify. Unless a witness is deemed "unavailable", it is necessary for the victim to take the stand and testify in order to introduce prior statements. The use of prior testimony due to a witness' unavailability is discussed in Chapter II, Section C.13. *See also Commonwealth v. McGrogan*, 523 Pa. 614, 568 A.2d 924 (1989), which discusses the admissibility of a witness' preliminary hearing testimony based on his or her invocation of the Fifth Amendment.

Other possible witnesses include children or family members who may have witnessed the event in question or who have other information relevant to the event or related

incidents. Medical personnel, medical records, 911 evidence, and results of the on-scene investigation should be presented to corroborate the victim's testimony. Photographs of injuries and of the crime scene, as well as descriptions and documentation obtained from a thorough investigation, are also invaluable in strengthening the case.

6. Cross Examination

Effective cross examination is a skill which is developed through experience and which is, thus, beyond the scope of this Manual. The best cross examination is pointed and brief. Questions which ramble and appear to lack direction and purpose will quickly lose the jury's attention.

In preparing to conduct cross examination of the defendant, the prosecutor will want to review any prior statements of the defendant, which may be used to impeach his testimony at trial. In particular, the prosecutor should review prior statements, records, and reports for discrepancies relating to the anticipated defense.

a. Character Witnesses

Since character witnesses can rarely be cross examined effectively, one of the best tactics a prosecutor can use is to refrain from asking any questions at all of a character witness. This can signify, to the jury, that the weight of character testimony is insignificant in the scheme of things. Conversely, by attempting to cross examine a character witness and belaboring the effort, the prosecutor can unduly emphasize the value of that testimony in the jury's eyes. In the closing argument, the prosecutor should remind the jury that domestic violence is a crime which is usually committed in secrecy, and is not generally community knowledge.

Where character evidence is presented by the defendant, the prosecution is entitled to call rebuttal witnesses to testify that the defendant's character is poor. Rebuttal evidence is further discussed at Section 8. *See also* Chapter II, Section C.2.a.

7. Anticipating Defenses

a. The "Family Matter" Defense

Perhaps the most common defense strategy is the characterization of the crime as a "family matter" which is best worked out privately between the parties. At the same time, the defense will attempt to undermine the seriousness of the incident by characterizing it as a "misunderstanding" or an isolated "mistake" by the defendant. The prosecutor must counter this approach by focusing on the criminal nature of the defendant's actions. Cross examination can be utilized to develop the defendant's attitudes towards violence and abuse, and portray them as being unacceptable and outside of the community norm.

b. The "Inconsistent Actions" Defense

Another common defense is the defendant's portrayal of the victim's actions, both during and subsequent to the events in question, (i.e. continuing to live with the defendant or not seeking medical attention), as being unreasonable under the circumstances, and as inconsistent with victimization. The prosecutor should counter this defense by developing the circumstances of the victim's behavior and by allowing the victim to explain her actions during direct examination. The direct examination of other Commonwealth witnesses may also offer opportunity to develop the circumstances which led to the victim's actions.

c. Self-Defense

Self-defense is also a common defense in domestic violence cases, especially where there is any hint of mutuality in the violence. In rebutting a self-defense claim, the prosecutor should focus on the weakest link of the defendant's claim in light of the requirements to be met by a person raising this defense. See Section 505 of the Crimes Code, 18 Pa. C.S. §505.

d. Accident

A defense claim that the victim's injuries were accidental may be rebutted through evidence of the defendant's past intentional acts of violence against the victim. Expert medical testimony ruling out accidental causation may also be used, if available. Most physicians are not forensic experts, however, and will therefore be unable to render such an opinion. The county medical examiner does have expertise in determining not only causes of death but causes of injuries in living persons. Where circumstances warrant, the prosecutor should consider using the testimony of the treating physician and/or medical examiner.

8. Rebuttal

Rebuttal affords the prosecutor the opportunity to clarify any lingering misconceptions caused by the defense. It is also the appropriate time to introduce the defendant's prior criminal record of *crimen falsi* crimes. The admissibility of this evidence, which is usually presented through certified court records or a custodian of criminal records, is confined to offenses involving dishonesty or false statements which occurred within the past ten (10) years. *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). See also 42 Pa. C.S. §6106 (Certified exemplifications of records).

Rebuttal also affords the prosecution the opportunity to offer testimony to rebut evidence presented by the defendant as to his good character. *Commonwealth v. Stehly*, 350 Pa. Super 311, 504 A. 2d 854 (1986). This rebuttal testimony is subject to the same restrictions as other character evidence: it must relate to general reputation in the community, not the witness' personal opinion; it must be restricted to character traits raised by the defendant; and it may not concern remote times.

9. Closing Argument

The Closing Argument of the prosecutor should resolve issues and doubts for the jury by developing inferences and explaining discrepancies in a manner consistent with the prosecutor's theory of the case.

Specifically, the prosecutor should use this opportunity to explain to the jury why apparent weaknesses or discrepancies in the victim's testimony or actions are actually consistent with her victimization. For the prosecutor to draw these inferences for the jury, a factual, evidentiary basis must first be developed. In many cases, this may be accomplished by obtaining the victim's explanation of her actions, on direct examination, or by developing, through other evidence, the circumstances of the abuse.

In addition to resolving these issues, the argument must also outline the evidence and show the jury how the evidence proves each element of the offense. Furthermore, it must clearly show the jury why it is the Commonwealth's version of events they should believe, rather than the defendant's. Finally, the prosecutor's closing argument should convince the jury that the proper and just result in the case is a verdict of guilty.

C. POST-TRIAL ISSUES

1. Sentencing

The District Attorney's recommendation for sentencing should be based on the facts of the case, and should be commensurate with sentences for other violent crimes. At the same time, the issues and dynamics specific to domestic violence must be taken into account. The needs and desires of the victim and her family may warrant consideration of alternatives to incarceration. Often, however, the history, facts, and circumstances of the crime are such that a sentence in the standard range of the sentencing guidelines may not adequately reflect the lethality of the defendant's actions. Although the sentencing judge has the final decision as to the sentence imposed, the prosecutor should be prepared to address risk factors with the court. These factors include:

- prior criminal convictions
- prior history of domestic violence toward the victim
- involvement or presence of children
- history of domestic violence toward other victims
- history of violent behavior toward others
- prior treatment for domestic violence
- substance abuse

- viciousness and callousness
- use of a weapon
- vulnerability of the victim

The dynamics of domestic violence, and the impact it has on the victim and the family, require that the victim's concerns be considered in the imposition of sentence. Under the Victims Bill of Rights, as cited in 71 Pa. C.S. Section 180-9.3, victims have the right:

To have included in any pre-sentence report information concerning the effect that the crime committed by the defendant has had upon the victim, including any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources. 71 Pa. C.S. §180-9.3.

It is important to note, however, that sometimes the prosecutor will not agree with the victim's view of sentencing. The facts and circumstances of the case may, in the prosecutor's view, warrant a sentence that is inconsistent with the victim's wishes. In these cases the prosecutor must proceed with a recommendation commensurate with the crime, and with the goals of prosecution set forth above in Section A.7 of this Chapter.

It should be noted that Section 331.22 A of Title 61 Pa. C.S. requires the district attorney, immediately following defendant's sentence to a term of imprisonment, to notify the victim that she has the right to testify or present a statement to the parole board for the parole report. The victim is responsible for notifying the board of her intention to submit a letter or testify at the parole hearing, and must provide a current mailing address to the board. Whenever public notice is given that the defendant is eligible for parole, the parole board must also notify all victims who previously contacted the board to provide a statement. When a final decision is rendered in the prisoner's case, the victim shall be notified by the board of that decision.

Sentencing for Violations of Protection from Abuse Order

Under the Protection From Abuse Act a sentence for indirect criminal contempt may include imprisonment for up to six (6) months, and/or a fine not to exceed \$1,000, and any other relief set forth under the Act. 23 Pa. C.S. §6114.

2. Probation or Parole

In many instances, probation or parole may offer the structure necessary to hold the defendant accountable for his behavior, while offering the victim protection and a recourse for help if the violence resumes. Probation may be preferred by the victim over incarceration for various reasons: She may depend on the financial support from the defendant's income; she may want the defendant to obtain treatment which is available in the community; or she may want to attempt to preserve family unity.

To be effective, the period of probation and parole must be subject to explicit conditions designed to hold the defendant accountable and protect the victim. Provisions for treatment may be considered, in addition to other appropriate punishment, unless the defendant is a serious or repeat offender. Prosecutors, however, are cautioned not to mitigate the severity of domestic violence by seeking treatment in lieu of appropriate punishment. The probability of successful treatment should be realistically assessed in light of the circumstances of the case and, in particular, the risk factors enumerated in the proceeding section. Where treatment appears appropriate, prosecutors should seek sentences that mandate evaluation, case management and treatment of offenders by programs specifically designed to work with domestic violence perpetrators.

Other conditions of probation or parole may include counseling for drug or alcohol abuse and no-contact orders. Additionally, electronic monitoring has been reported to be particularly successful in domestic violence. Since the subject of electronic monitoring can be charged with the costs thereof, this can be both a relatively inexpensive and effective condition of probation and parole.

It is important to note that mediation and couples-counseling are *not* appropriate requirements for the defendant and the victim. The intervention must focus on the offender's abusive behavior and must not be improperly displaced on the victim. If the defendant fails to abide by any of the conditions of probation or parole, revocation proceedings should be ensued.

3. Restitution

Holding abusers accountable for their conduct includes requiring them to be financially responsible. In addition to fines and costs imposed by the court, abusers should provide restitution to the victim for all expenses resulting from the crime. The following losses should be considered for compensation:

- medical bills
- damaged property
- costs of counseling for victim and traumatized children
- replacement of locks
- transportation expenses to escape the violence
- motel or hotel lodging
- relocation and moving expenses
- costs of staying in a battered women's shelter

Prosecutors should vigorously pursue restitution in domestic violence cases in order to secure economic justice for victims of domestic violence. Very few of the losses suffered are otherwise compensable, since the scope of Crime Victim's Compensation, discussed below, is quite narrow.

Crime Victim's Compensation

Victims of domestic violence may qualify for indemnification for out-of-pocket expenses and medical expenses up to \$35,000 under the Crime Victims Compensation Act. See 71 Pa. C.S. §180-7 *et seq.*

Further information regarding the Crime Victim's Compensation Fund may be obtained through the Victim/Witness Coordinator of each county, or by contacting the Crime Victim's Compensation Board at (800) 233-2339 or (717) 783-5153.

CHAPTER IV

VICTIM ISSUES

Domestic violence victims are both similar to and strikingly different from other victims of violent crime. Thus, they require all the information, assistance, and input that facilitates the committed, informed participation of other victims and witnesses. Furthermore, they require enhanced protection and advocacy.

Battered women are often similar to other victims of violent crime in that they want perpetrators to stop their conduct, to pay dues for the crimes committed, and to compensate them for the losses sustained as a result of their criminal conduct. They are also similar to other crime victims in that they have interests in justice that may differ from the interests of the justice system. They may want privacy or anonymity in the prosecution process while the criminal justice system values public accountability. They may want speedy disposition while the justice system labors at a snail's pace. They may want input in decisions about plea negotiations and sentencing while the justice system concludes that this inclusiveness impedes the expeditious handling of criminal cases, unduly interferes with prosecutorial discretion, or intrudes upon the rights of defendants.

What is also true about battered women, as it is of other victims of violent crime, is that they are not all cut from the same cloth and do not all want the same outcomes. Battered women have varied interests in participation in the prosecution process and in its outcomes. There is no profile of a battered woman witness that fits all or most battered women.

A. BARRIERS TO VICTIM PARTICIPATION IN PROSECUTION.

While each battered woman's experience should be recognized as unique, there are many commonalities among battered women victim-witnesses. In particular, battered women frequently confront significant barriers to safe and effective participation as victim-witnesses in the criminal justice process.

1. Recidivism and Retaliation

Like other victims of violent crime, battered women fear retaliation. Fully 50% of all victims of violent crime report they are fearful that perpetrators will seek reprisal for their participation in prosecution. And like other victim-witnesses who are threatened by the perpetrator (or his agent) during the pendency of prosecution, they are twice as likely to resist participation in prosecution as those not threatened (*Davis et al.*, 1990).

The *National Crime Survey* from 1978 to 1982 showed that an estimated 32% of battered women were re-victimized within six months after the assault giving rise to criminal justice intervention, and that each woman was victimized an average of three times. In contrast, the 1982 NCS data on stranger violence showed that only 13% of the victims of stranger crimes were subsequently assaulted during a six month period. Unlike victims of domestic violence, victims of stranger crime were assaulted only once during that year (Langan and Innes, 1986).

There are many reasons why battered women appear to be at elevated risk for retaliatory violence. Most other victims of violent crime are not in a relationship with the defendant, and are not living with (or did not formerly reside with) the defendant. Most have not previously suffered attacks or sustained injury at the hands of the defendant. Most have not been held hostage by the defendant or have not experienced his terroristic threats, targeted graphically at the victim or members of her family. Most other victim-witnesses are not economically dependent upon the defendant during the pendency of prosecution and, potentially, thereafter. Most will not be compelled into continuing contact with the defendant during the criminal process and after disposition because of shared parenthood. Most other victims of crime are not integrally interconnected with the criminal assailant. Most other victims of crime are not at elevated risk of violent assault after intervention by the criminal justice system. However, battered women are most often killed when attempting to seek legal redress or when leaving an abusive relationship (*Browne, 1987; Sonkin et al., 1985*).

Prosecutors too often believe that battered women will be safer and less exposed to life jeopardizing violence once they are separated from the offender, and once prosecution has commenced. To the contrary, evidence of the gravity of violence inflicted after separation of the couple is substantial. Batterers may, in fact, escalate their violence to coerce a battered woman into "reconciliation," to retaliate for the battered woman's participation in the prosecution process, or to coerce her into seeking termination of the prosecution. If the batterer cannot "recapture" the battered woman as his ally, he may seek retribution for her desertion and for her disloyalty in exposing him to criminal consequences. Although not all batterers engage in escalated violence during the pendency of prosecution, as many as half threaten retaliatory violence (*Davis et al., 1990*), and at least 30% of batterers may inflict further assaults during the *pre-disposition* phase of prosecution (*Goldsmith, 1991*).

A battered woman who attempts to seek prosecution or civil protection orders, only to have the perpetrator escalate his violence, may be unwilling to face the risk that prosecution will further endanger, rather than protect her (*Family Violence, 1991*). Men who batter have kidnapped victims, or seriously injured and even killed battered women, to prevent their participation as witnesses (*Gwinn, 1991; Hart, 1985*).

Battered women may, thus, be much more concerned about preventing future violence than about vindicating the state's interest in penalizing the defendant for the crimes previously committed. This orientation of the battered woman toward future safety may create a tension with those prosecutors singularly focused on winning criminal convictions.

2. Victim-Blaming Attitudes

Unlike other victims of violent crime, battered women are often viewed by the prosecutor, judges, and jurors as responsible for the crimes committed against them, responsible either because battered women are believed to "provoke" the perpetrator into violence, or because they are believed to have the power to avoid the criminal

assault through accommodating the perpetrator's demands. Although most victims of violent crime are not seen by the prosecution as culpable for the crimes inflicted upon them, battered women frequently report that prosecutors appear to consider them "unworthy victims" who are clogging up the courts with unimportant family matters. Some prosecutors, therefore, impose barriers to a battered woman's use of the criminal justice system. These may include delayed charging, the requirement of substantial corroboration, or the imposition of fees upon the victim (*Ford, 1991*). The reluctance of prosecutors to vigorously proceed with domestic violence cases quickly erodes victim confidence in the prosecutor's alliance with the victim.

Even though prosecutors may eschew victim-blaming attitudes, the prosecution may be confounded by similar attitudes embraced by either the defendant or the battered woman, herself. Uniformly, the perpetrator of domestic violence blames the victim for his conduct, claiming that she provoked him so profoundly that his crimes are excusable, if not justifiable. Batterers often persuade battered women of the correctness of this perspective. Beyond this, the battered woman may also blame herself, feeling she should have been smarter and figured out a way to prevent the violence, or she should have been more courageous and found a way to safely leave the relationship. This self blame often results in the victim believing that it is not fair to prosecute the perpetrator.

3. Systemic Resistance to the Prosecution of Batterers

Unlike many victims of stranger assault, but like other victims who know their perpetrators, victims of domestic violence may be reluctant witnesses or may be assumed to be so (*Cannavale and Falcon, 1976*). There are many reasons for this. Many battered women who earnestly seek prosecution find substantial resistance to the appropriate charging of defendants. National data reveal that law enforcement officials routinely classify domestic assault as misdemeanors even though the criminal conduct has resulted in bodily injury as serious or more serious than 90% of all rapes, robberies, and aggravated assaults (*Langan and Innes, 1986*). When serious assaults are trivialized and charged as misdemeanors or cited as summary offenses, victims of domestic violence may conclude that the costs and risks of prosecution outweigh the potential consequences for assailants. Thus, battered women may lose interest in criminal prosecution.

Further, some battered women, initially committed to prosecution, become discouraged with the criminal process, due to delays (*Ford and Burke, 1987*), lack of witness protection (*Family Violence, 1991*), or prosecutor indifference or insensitivity (*McGuire, 1991; Hart, 1991*).

4. Victim Reluctance

As with other victims of crime, when battered women are poor, have few personal or financial resources or find participation in prosecution costly, they may be reluctant to proceed. Rural battered women may not have transportation and may find it impossible to arrange for multiple trips to the courthouse. Women with school age

children may have to find expensive and inconvenient childcare for all court appearances outside of school hours. Seriously injured battered women may find employers unwilling to accommodate court appearances after they have been considerate about many medical appointments. Those battered women who have resided in a rental unit leased from the defendant's parents may face eviction if they cooperate.

Although it is commonly believed that battered women withdraw cooperation because of decisions to reconcile with defendants, research reveals that this is not typically the reason for the request to terminate prosecution. (*Ford and Burke, 1987*) Some battered women seek to terminate prosecution because the initiation of charges has effected the changes sought in the defendant's behavior, leading victims to conclude that prosecution is no longer necessary to protect them from future abuse (*Ford, 1991*).

Other battered women, who have found that the best protection against domestic violence has been the protection offered by their community, may resist prosecution, if they conclude that the community will abandon them or withdraw critical support during the prosecution process. Women of religious, ethnic and communities of color sometimes identify community abandonment as an untenable, adverse consequence of cooperation with prosecution.

Battered women may also be reluctant to expose the father of their children to public accountability because of the attitudes of their children toward prosecution. Others are fearful that prosecution will wreak economic ruin on the family. Some battered women may oppose prosecution for political reasons, believing that the criminal justice system selectively penalizes men of color or other politically unpopular constituencies. Finally, some battered women believe that the exposure of batterers to the criminal justice system and its coercive controls will facilitate, rather than deter, future violence.

An understanding of victim reluctance is critical for informed decision-making by the prosecutor and the court during the prosecution process.

B. STRATEGIES TO FACILITATE VICTIM PARTICIPATION

Despite all these potential barriers to a battered woman's committed participation in prosecution, many battered women and prosecutors have found that these hurdles can be eliminated with careful attention to the particular requirements of each battered woman victim-witness. Various strategies have been embraced to facilitate the informed, protected, and committed participation of battered women in criminal prosecution.

1. Victim Rights and Services

One strategy adopted to enhance victim participation was the statutory articulation of victim rights. Pennsylvania's *Crime Victims Bill of Rights* specifies that victims of crime have the right:

- To have included in any pre-sentence report information concerning the effect that the crime committed by the defendant has had upon the victim, including any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources.
- To have restitution ordered as a condition of probation whenever feasible.
- Upon request of the victim of a feloniously assaultive crime, to be promptly informed by the district attorney whenever the assailant is to be released on parole, furlough, or any other form of supervised or unsupervised release from full incarceration. (*Section 479.3, Act 96 of 1984; 71 Pa. C.S. §180-9.3*)

Another strategy is the statutory mandate for victim-witness service funding. The Pennsylvania Commission on Crime and Delinquency is required to provide technical assistance, and to make grants to district attorneys and other criminal justice agencies to provide crime victims with notification and protection services which include:

- Information concerning financial assistance and other social services available as a result of being a victim of crime;
- Notification that a court proceeding to which they have been subpoenaed will not proceed as scheduled, in order to save the victim an unnecessary trip to court;
- Notification of the final disposition of the case;
- Protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts;
- A secure waiting area during court proceedings that does not require them to be in close proximity to defendants, and families and friends of defendants
- Procedures for the expedited return by law enforcement officials of personal property of victims which is held for prosecutorial purposes;
- Services related to the rights of victims;
- And other services as defined by PCCD. (*Section 479.4 of Act 96 of 1984; 71 Pa. C.S. §180-9.4.*)

These rights and services are helpful, but are often not sufficient to engage the cooperation of victims of domestic violence. Additional efforts that have encouraged the participation of battered women in criminal prosecution of perpetrators include:

2. Outreach.

District attorneys prioritizing the prosecution of domestic violence cases have undertaken outreach to domestic violence victims immediately after preliminary

arraignment in order to provide victims with notice about charges filed; information about bail and any special conditions thereon; information relating to victim intimidation orders under 18 Pa. C.S. §4954; and notice of the defendant's release from custody. Outreach initiates a dialogue and relationship early in the prosecution process. It enables the victim to consider civil legal remedies and human services options for protecting herself and her children during the pendency of prosecution.

Some prosecutors have instituted victim-witness clinics that provide childcare and are available at times convenient to victim-witnesses. At these seminars, victims learn about the criminal justice system, their role in it, and the likely dispositions upon conviction or a guilty plea. They learn how to craft victim impact statements and how to articulate the specific dangers they believe are posed by their assailants. They learn how to become more effective witnesses. Most significantly, they begin to network and bond with other victims, thereby gaining support and eliminating the isolation that domestic violence perpetrators use to dissuade battered women from participation.

3. Victim Protection

Since battered women are at elevated risk of violence during the pendency of prosecution, prosecutors should attend specifically to the safety requirements of victims. Procedures should be developed in each prosecutor's office to assess the potential lethality of defendants. The prosecutor might undertake a periodic review of victim safety with the battered woman and seek additional protections should they be required. Should a victim seek to maintain the confidentiality of an undisclosed address, the office should very carefully safeguard any contact information and delete any reference to an address on materials that are disclosed to the court and defense counsel. Beyond this, prosecutors should refer battered women to domestic violence programs so that they can carefully construct safety plans to minimize exposure to perpetrators and to engage the community in vigilance for the safety of battered women.

4. Victim Advocacy

Victim advocacy is a key component in the prosecution of domestic violence. Battered women who find themselves abruptly thrust into the legal system because of the violence of their partners are swamped with new information, are sometimes dislocated, and invariably are confronted with an increased need for family management in this acute crisis situation. It is critical that victims have an identified contact person within the district attorney's office who can provide support, as well as information and referral, to assist battered victims in effectively participating in the justice system. Victim assistance programs in the office of the district attorney most often provide technical assistance to victims by facilitating participation in the criminal justice system. For other critical issues such as emergency shelter, counseling, safety planning, crisis management and civil legal advocacy, battered victims should be referred to local domestic violence programs.

When battered women engage in legal proceedings, it is critical that they have support from family, friends and employers, so that their participation can be diligent and unclouded by anxieties that significant others may not approve of the prosecution. Therefore, domestic violence programs may seek to educate and engage those people most important to the victim, so that her investment in the process of prosecution is not confounded by their concerns, and so they can help her strategize for safe participation in the criminal justice system.

5. Specialized Prosecution

Specialization has improved the success of prosecution in domestic violence cases (*Fagan, 1988*). District attorneys might establish domestic violence units in large offices or create specialists in smaller offices in order to:

- enhance the relationship of the prosecution with the victim;
- better investigate and prepare a case against the perpetrator; and
- specifically tailor safeguards to protect the victim from further abuse.

Specialized prosecution enhances the expertise of those handling domestic violence cases and facilitates outcomes satisfactory both to the prosecution and victim witnesses.

In many jurisdictions in the Commonwealth, the victim of domestic violence must undertake prosecution at the preliminary hearing if the case is to proceed. Crime victims are uninformed prosecutors. Often they are incapable of presenting the evidence of the criminal conduct of the suspect, and invariably, they are intimidated by defense counsel and the perpetrator. Thus, many domestic crimes fall through the cracks and are dismissed. Although the success of prosecution at the preliminary hearing phase sometimes improves when police officers carry the burden, issues of victim safety are often ignored. If district attorneys are to upgrade efforts to prosecute domestic violence crimes, preliminary hearing prosecution is essential.

6. Timely Prosecution

Victims of crime are not entitled to timely prosecution under the current statutory scheme; however, research suggests that timeliness is essential to victim cooperation (*Ford & Burke, 1987*). Prosecutors should investigate domestic violence cases expeditiously and should not seek or acquiesce in procedural delay where there is no compelling reason. Domestic violence victims grow weary of prosecution if many lengthy appearances are required. Thus, the district attorney should only require victims to attend those proceedings where their testimony is critical to the case. Where feasible, the prosecutor should minimize the time victim-witnesses expend at any court appearance. In scheduling court proceedings where victim attendance is required, the prosecutor might inquire about significant demands on the time and resources of victims which may compete with court attendance; these should be accommodated whenever possible (*ABA, 1986*).

7. Victim Participation and Empowerment

District attorneys seeking to upgrade efforts in domestic violence prosecution often employ other victim-engaging strategies. Victim input in plea negotiations and dispositional alternatives is a strategy believed to enhance victim cooperation (*Family Violence, 1991; McGuire, 1991*). Some prosecutors have developed court schools in which they enable the victim to learn how to be an effective witness.

Many battered women report that prosecutors fail to adequately prepare for trial; sometimes it appears that the prosecutors are not even conversant with the documents in the prosecution file as trials are about to begin. Careful and periodic preparation, in which the victim is engaged, will facilitate successful prosecution and victim empowerment and investment in the process. As victims understand that they have a vital and respected role in the prosecution, reluctance may subside. Data suggest that the more domestic violence victims are invested in the prosecution process, the more likely they are to conclude that the cost of persistence will far outstrip the benefits of continued violence (*Goldsmith, 1991*).

C. OTHER VICTIM ISSUES

1. Limits on Victim Compulsion

Victims should not be penalized for their reluctance to participate in prosecution. Policies should be developed in each prosecutor's office that limit the use of compulsion in achieving victim participation. Victims of domestic violence should not be incarcerated for refusal to serve as victim-witnesses. Battered women should not be prosecuted for filing false police reports because they seek to terminate prosecution. Prosecution of victims should be limited to those circumstances where there is independent evidence of false swearing or perjury. While it is appropriate to routinely issue subpoenas to compel victim appearance at trial, bench warrants should not be issued routinely when victims fail to appear. Rather, continuances should be sought and investigation should be undertaken to ascertain the whereabouts of the victim and the reasons for her failure to appear. If reluctance is based on fear or intimidation, strategies should be employed to protect her from the dangers anticipated.

Prosecutors should be cognizant of the potential adverse ramifications of coercive process with victims of domestic violence. The repercussions of coercive process may be as far-ranging as the loss of custody, the loss of employment, the loss of reputation, eviction from leaseholds, and abandonment by significant support persons. All efforts should be made to gain the cooperation of domestic violence victims rather than to compel participation.

The interests of justice must seriously consider the interests of victims. Their interests in safety and their reputations as law-abiding citizens should not be compromised in pursuit of prosecution unless there are overriding reasons for subordinating victim interests.

On the other hand, consideration of issues facing victims may create a paradox. While victim participation in the prosecution process is essential, a district attorney's posture of Commonwealth-controlled prosecution may alleviate conflict or reluctance the victim is experiencing. It is common for batterers to exert pressure on the victim in an attempt to sabotage her cooperation in the prosecution process. A representation to the defendant, that the victim has no discretion in the prosecution process, may reduce this coercion. This posture may further enhance victim safety, by communicating to the defendant that victim intimidation, instead of effecting dismissal of the charges, will result in pre-trial incarceration and additional prosecution. It is important to recognize that prosecution solely controlled by the district attorney will not universally buttress victim investment or protect victims from retaliatory violence. In those instances where termination of the prosecution is critical to protect victims, the public posture should not preclude such prosecutorial discretion.

2. Restitution and Victim Compensation

Battered women in Pennsylvania have reported that neither restitution nor victim compensation has been realized in a timely fashion despite the substantial losses sustained as a consequence of domestic violence. Prosecutors might seek to institute a policy whereby victim restitution would precede the collection of other court costs and fines. Beyond this, they might request time tables that are tight and require significant payment at the front end rather than balloon payments at the end of the payment schedule.

As to crime victims' compensation awards, battered women have received few, even though they are eligible. Although many district attorneys' offices afford victims clerical assistance in the preparation of compensation claims, they do not proceed to advocate for the issuance of awards. Advocacy in this arena, during the pendency of prosecution, may encourage victims to invest more fully in the prosecution.

The Protection From Abuse Act permits the court to order payment for many losses that may not be compensable either through restitution or crime victims' compensation. Therefore, the office of the district attorney may alleviate some of the stress and burden imposed by the losses sustained by the victim if they direct domestic violence victims to the civil courts for economic awards as well as protection. Moreover, if there are losses that affect a victim's capacity to work, payment might be forthcoming from the Bureau of Vocational Rehabilitation. Particular attention to these economic matters renders a great service to victims and simultaneously enhances their investment in prosecution.

3. Post-Disposition Issues

Victims of crime have articulated concerns that prosecutors seem to lose interest once a conviction or plea has been achieved and the sentence imposed. The only statutory obligations of district attorneys after disposition are to provide notice of parole hearings, and the right to participate therein, to victims of feloniously assaultive crimes; notice of furloughs; notice of transfer to community facilities; and notice of discharge from incarceration. Actually, victims are only entitled to this information if they

request it from the district attorney and provide the Parole Board with current contact information. Crime victims may not appreciate the importance of providing the district attorney with this information, and few prosecutors have developed procedures that expedite timely notification. These procedures may be particularly crucial in domestic violence cases as domestic violence perpetrators frequently engage in further assaults after incarceration. It is also important that contact information be kept confidential so the perpetrators cannot access it to discover the whereabouts of battered women upon release.

Domestic violence programs have engaged in legal advocacy on behalf of crime victims in parole hearings. Where domestic violence victims believe that their safety is jeopardized by early parole of perpetrators, coordinated efforts by the office of the district attorney and the local domestic violence program, can provide the Parole Board with information essential for their informed decision-making, both as to whether parole should be granted and as to conditions that might be imposed on the parolee.

D. THE CHALLENGE TO PROSECUTION

Domestic violence victims are increasingly turning to the criminal justice system for assistance in ending the violence that jeopardizes their lives and well-being. They often are uninformed about the criminal justice process and naive about the power of prosecution to end the violence in their lives. For battered women to be effective, committed participants in the criminal justice system, care must be taken to minimize the barriers that have historically impeded empowered participation by battered women in the prosecution of domestic violence. The strategies outlined in this chapter have been utilized to engage and protect battered women as victim-witnesses and thus have greatly advanced the success of prosecution in this arena. While it may be impossible for every district attorney to engage in all of the activities suggested, it is believed that the adoption of a prosecutor protocol attentive to victim issues will greatly enhance justice-seeking in domestic violence cases.

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CHAPTER V

DOMESTIC VIOLENCE PROSECUTION PROTOCOL GUIDELINES

I. INTRODUCTION

A. PURPOSE OF PROTOCOL

The purpose of this protocol is to suggest a set of policies and procedures for the handling of domestic violence prosecutions in Pennsylvania. It is the hope of the Joint Task Force of the Pennsylvania Coalition Against Domestic Violence and the Pennsylvania District Attorneys Institute that these guidelines will be considered in fashioning an appropriate domestic violence protocol by every district attorney's office in the Commonwealth.

This protocol is based on the premise that domestic violence is criminal conduct. Prosecutors have the same responsibility to aggressively prosecute these cases as they do with any other violent crimes. The Commonwealth has a critical interest in reducing the number of incidents of domestic violence as such violence tends to escalate in severity and frequency and often leads to homicide.

The successful prosecution of domestic violence requires specialized techniques designed to protect the victim from retaliation by the offender, allay the victim's fears of the criminal justice system, and encourage her cooperation with the prosecution's efforts.*

Adherence to a protocol designed for domestic violence prosecution, such as the one set forth below, will help prosecutors to be more effective and ultimately increase the number of positive dispositions in domestic violence cases.

B. GOALS OF PROSECUTION

The goals of prosecution in domestic violence cases are:

1. To protect the victim from additional acts of violence committed by the defendant.
2. To reduce the exposure to and/or possible injury of children from domestic violence.
3. To deter the defendant from committing continued acts of violence in the community.
4. To create a general deterrence to battering in the community.
5. To vindicate society's interest in holding all criminals accountable.

*Throughout this Protocol, the victim is referred to in the feminine gender. This reflects the fact that in the overwhelming majority of domestic violence cases, the victim is female and the offender male. However, these policies are intended to apply equally to male victims where applicable.

C. DEFINITION OF DOMESTIC VIOLENCE

Domestic violence is defined by the relationship of the victim to the defendant, not by the crime committed. It includes any harmful physical contact, or threat thereof, occurring

between current or former family or household members, sexual or intimate partners, (including homosexual partners) or individuals who share biological parenthood.

Domestic violence generally represents a pattern of behavior rather than a single isolated incident. This pattern can take on many different forms, all of them involving physical violence or threats of physical violence. The violence may be accomplished with the use of hands, feet, weapons or other objects. Some examples of felonies committed in a domestic violence context include aggravated assault, kidnapping, rape, robbery, burglary, and criminal trespass. Some examples of misdemeanors commonly committed in a domestic violence context include simple assault, reckless endangerment, unlawful restraint, weapons offenses, harassment, and terroristic threats.

II. GENERAL PRINCIPLES

A. SPECIALIZATION

District attorneys should establish domestic violence units in large offices, or create specialists in smaller offices, in order to permit vertical prosecution and the enhancement of expertise on domestic violence cases. Training requirements should be established by each office to ensure that all prosecutors understand the issue of domestic violence and are familiar with appropriate resources and referrals in the community.

Prosecutors should provide victims with emotional support, information regarding the criminal justice system and referrals to social service and legal assistance organizations. Domestic violence unit staff, or the prosecutor specialist, should be available for ongoing training and consultation with other divisions and prosecutors in the office, and should serve as a source of education, training, and technical assistance for outside criminal justice agencies and community organizations. In order to effectively perform these functions, it is imperative that the district attorney's office establish and maintain a close working relationship with local battered women's programs.

B. EARLY AND CONSISTENT CONTACT WITH VICTIM

Perhaps the biggest single cause of case attrition in domestic violence cases is lack of communication between prosecutors and battered women. Victims are often inadequately informed about the process of prosecuting a charge and about how to protect themselves during the pendency of the case.

Early, consistent contact with victims and immediate referral to appropriate support services are critical to protecting a case. The prosecutor assigned to the case should keep the victim informed of all proceedings and should fully advise her on the alternatives available at each stage.

C. SPEEDY PROSECUTION

It is essential to the successful prosecution of domestic violence cases that trials occur as rapidly as possible. Victims are often more willing to cooperate immediately after the incident than later when the abuser may have had a chance to regain control over them. Therefore, the prosecutor should strenuously object to any unnecessary continuances.

D. WORKING WITH VICTIM ADVOCATES

District attorneys should ensure that prosecutors handling domestic violence cases work in close conjunction with victim advocates, either those employed by the D.A., those working for independent victim/witness agencies, or legal advocates from local battered women's programs. Working with an advocate who has an ongoing relationship with the victim greatly facilitates communication between the prosecutor and the victim, thus making it more likely that the victim will continue to cooperate in the case and will provide the prosecutor with information helpful to ensure her safety during the proceedings.

III. FILING CHARGES

In determining whether to file charges and which crimes to charge, the prosecutor must weigh and consider a number of different factors.

First, the prosecutor must review all facts of the case in light of the following:

- Seriousness of the injuries and/or threats
- Use of a weapon
- Defendant's history of violence as reported by the victim
- Potential lethality of situation

Where a factual basis exists and where there is some corroboration, however slight, charges should be filed. Corroboration may include:

- Medical records of the victim's injuries
- Witnesses who observed the assault or the injuries
- Witnesses who heard sounds indicating that an assault was taking place e.g., screams, furniture being thrown
- A 911 tape with statements by the victim, witnesses or the defendant
- Physical evidence e.g., weapons, broken furniture, torn clothing
- Admissions by the defendant
- A police report written at the time of the assault

- The existence of a timely complaint by the victim

When a basis for filing charges exists, the prosecutor must determine whether to charge a felony or misdemeanor. As domestic violence incidents often constitute felonies, the prosecutor should be careful to charge accordingly. The prosecutor should also consider charging former crimes against the same victim if they occurred with the applicable statute of limitations.

NOTE: If the defendant also violated an existing Protection From Abuse order, the prosecutor must be aware of potential double jeopardy problems when charging. *See Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

IV. PROCEDURE

A. PRIVATE CRIMINAL COMPLAINTS

Cases which come to the district attorney's office by private criminal complaint should be evaluated according to the criteria set forth in Section III of this Protocol.

B. ARREST CASES

Where the defendant has been arrested, the arresting officer or prosecutor should file charges on behalf of the victim. The defendant may be less likely to pressure the victim to "drop charges" if a law enforcement official is the affiant, and case preparation may be easier when the police are involved. Moreover, this practice sends a consistent message to both victims and abusers that domestic violence is a crime against the community and not a private dispute.

C. REVIEW OF INCIDENT REPORTS

The district attorney's office should consider establishing a mechanism whereby incident reports involving domestic violence which have not resulted in arrest are reviewed by the domestic violence unit/prosecutor specialist for the possible filing of charges.

D. REFUSAL TO PROSECUTE

If, after reviewing and weighing the factors set forth in Section III above, the prosecutor elects not to file charges, he or she shall:

- Keep a record of the case and the reasons why charges were not filed
- Explain clearly to the victim why filing is not appropriate at this time
- Refer the victim to appropriate social service and legal assistance organizations
- Inform the victim of options other than filing a criminal complaint, such as filing a petition for Protection From Abuse in Family Court.

V. INVESTIGATION AND EVIDENCE COLLECTION

Preparation of a domestic violence case for trial involves a thorough investigation which should include the following:

A. ASCERTAIN VICTIM'S WHEREABOUTS

Victims of domestic violence are often forced to move with little or no notice, due to attempts to hide from their abusers. In any given case, the victim's whereabouts should be constantly updated, including any shelters where she may be staying. When the victim is first contacted, the prosecutor should obtain the address and phone number of a close friend or relative as a contact person in the event the victim has to move suddenly.

B. DOCUMENT VICTIM'S INJURIES

The victim's injuries should be photographed at the first opportunity, medical releases should be signed, and all medical records obtained. Statements should be taken from witnesses who observed the injuries when fresh. Photographs of the injuries, taken a significant period of time after the assault, are also useful to show severity.

C. BUILD ON POLICE INVESTIGATION

Obtain and review any police reports immediately for accuracy and detail. Obtain the 911 tape, if one exists.

D. STATEMENTS OF EYEWITNESSES

Obtain statements from any witnesses to the incident itself, including those witnesses who heard screaming, crying, gun shots, etc. Do not overlook children who are in the home at the time of the incident; they should be interviewed as a matter of course.

E. GATHER PHYSICAL EVIDENCE

Question the victim closely about any physical evidence such as torn or bloody clothing or weapons used in the assault. Consider taking photographs of the scene, if helpful.

F. TRANSCRIPT FROM PROTECTION FROM ABUSE PROCEEDINGS

Find out if there was a Protection From Abuse hearing, and if so, order the transcript. It may contain admissions by the defendant, material for impeachment on cross-examination, or valuable descriptions of past incidents of abuse.

G. ASCERTAIN DEFENDANT'S CRIMINAL HISTORY AND/OR HISTORY OF DOMESTIC VIOLENCE

Whether or not the defendant has any prior convictions, he may have a lengthy history of acts of domestic violence against the present victim or other victims.

VI. PRE-TRIAL ISSUES

A. PRELIMINARY HEARING

It is critical that the prosecutor appear at the preliminary hearing. This is the victim's first appearance in the court room and it is important that she be well prepared and supported during the proceeding. By appearing at the preliminary hearing, the prosecutor will have an opportunity to add charges not previously filed (e.g., violation of a Protection From Abuse order), and to obtain a Section 4954 "stay away" order for the victim.

B. BAIL/CONDITIONS OF RELEASE

The prosecutor should make a vigorous bail argument and suggest conditions to be imposed by the court. These conditions should include a prohibition on any contact with the victim either in person or by telephone, including contact through a third party; an order barring the defendant from the victim's residence, school or place of employment; a prohibition on the defendant destroying or selling any of the victim's property; and any other conditions helpful to the victim's particular circumstances.

VII. PROTECTING THE VICTIM

The prosecutor, in conjunction with the victim advocate, should make every effort during the pendency of the case to protect the safety of the victim. These efforts should include but are not limited to the following:

A. CONFIDENTIALITY OF VICTIM'S ADDRESS

The prosecutor should zealously protect the confidentiality of the victim's address and telephone number when the victim is hiding from the defendant. Addresses and phone numbers should be blocked out of police reports, and all other discovery materials turned over to the defense. Prosecutors should also remember to tell victims that they do not have to give an address when asked to do so in court, so as to avoid inadvertent disclosure.

B. PERSONAL SERVICE OF SUBPOENAS

Any subpoenas going to the victim should be personally served upon her to avoid the possibility of the defendant intercepting them in the mail.

C. TRANSPORTATION TO COURT

The prosecutor should provide for safe transportation for the victim to and from court. This could include a police escort, use of separate entrances at the courthouse, and, if the defendant is being released following a court appearance, a direction to the court officers to hold the defendant for a period of time sufficient to allow the victim to leave safely.

D. DESIGNATED WAITING AREAS IN COURT

The prosecutor should ensure that the court has separate waiting facilities for victims so that they are not subject to harassment or intimidation by the defendant immediately prior to testifying.

E. STAYAWAY ORDERS

As noted above, the prosecutor should request protective orders for the victim under 18 Pa.C.S. §4954. The prosecutor should also advise the victim of the availability of Protection From Abuse orders from Family Court, and explain the relative merits of each type of protective order.

VIII. VICTIMS' RIGHTS

Prosecutors must be familiar with victims' statutory rights which are especially important in a domestic violence context. *See 71 Pa. C.S. § 180-9.3*. In addition, the prosecutor should consider responding to victims' needs as follows:

A. NOTIFICATION

The prosecutor should be responsible for notifying the victim of every development in her case, including but not limited to the following:

- Nature and type of charges filed
- Any release from custody
- Outcome of any court appearance at which the victim was not present
- Date, in advance, of any court hearing in which the victim may have an interest including bail hearing, sentencing, parole hearing

B. VICTIM INPUT

The prosecutor should actively seek victim input throughout the pendency of the case. In particular, victim impact statements should be utilized at sentencing, and the prosecutor should make sure that victims' opinions are solicited and considered by the Parole Board. *See 61 Pa.C.S. §331.1 et seq.*

C. CRIME VICTIM COMPENSATION

The prosecutor should notify the victim of the availability of crime victim compensation and make appropriate referrals for assistance in obtaining it. *See 71 Pa.C.S. §180-7 et seq.*

IX. RELUCTANT VICTIMS

Dismissal may be appropriate in cases where evidentiary problems due to the reluctance of the victim preclude the possibility of proving all elements of the crime. In situations where dismissal is being contemplated, the prosecutor should take the following steps:

A. FACE-TO-FACE MEETING WITH VICTIM

The prosecutor should meet with the victim in person to discuss her concerns. The prosecutor should explain that ultimate responsibility for dismissing a case lies with the Commonwealth, not with the victim, and that the prosecution can proceed without her cooperation. It is important that this message be communicated to the defendant as well, as it may relieve pressure he is applying to the victim to "drop charges". The prosecutor should also carefully explain sentencing alternatives, negotiated pleas, and provisions for the victim's protection during the pendency of the case.

If the victim is still reluctant, the prosecutor must decide whether to proceed without her cooperation, based on a weighing of the following factors:

- The defendant's prior criminal history
- The defendant's history of violence against this victim
- The severity of the offense
- The risk the defendant poses to third parties or the community at large
- The risk posed to the victim if the prosecution proceeds without her vs. the risks posed to her by dismissal

Prosecutors must keep in mind that the goal of the prosecution is to punish the offender, not the victim, and must be convinced that the interests of justice will truly be served by going forward without a victim's cooperation. If the decision to proceed is made, the victim should not be charged with contempt or assessed costs. Bench warrants for her failure to appear should be viewed as an extraordinary measure.

B. CONSULT WITH THE VICTIM'S ADVOCATE

After meeting with the victim and before moving to dismiss, the prosecutor should speak with the victim advocate to help determine whether the victim is in fact being intimidated or coerced. If this does appear to be the case, the prosecutor should examine whether the intimidation may be eliminated by bail revocation or stay-away orders during the course of trial.

C. VICTIM TO ADDRESS COURT

In cases where dismissal is warranted, the victim must testify at the hearing on the motion to dismiss, that she is freely and voluntarily declining to testify against the defendant. The taking of such testimony may be waived only under emergency circumstances.

D. CONSIDER REFUSING TO DISMISS UNTIL TIME OF TRIAL

In some instances, delaying dismissal until the trial gives the prosecution one last chance to persuade the victim to go forward. In addition, it ensures that the defendant appear in court so that the seriousness of the assault may be impressed upon him.

X. DISPOSITIONS

A. SENTENCING RECOMMENDATIONS

The prosecutor's sentencing recommendation should be commensurate with sentences for other violent crimes. In some cases, it may be argued that sentencing should be in the aggravated range of the sentencing guidelines due to the relationship between the victim and the defendant.

B. SENTENCING HEARING

The prosecutor should use this opportunity to have the victim testify about past violent incidents that were not admissible at trial, but are admissible at the sentencing stage. The offering of additional witnesses, including experts, should also be considered. The prosecutor should stress the pattern of assaultive behavior, along with violations of previous court orders, so that the court can evaluate future risk to the victim and sentence accordingly.

C. NEGOTIATED PLEAS

When negotiating a plea, the prosecutor should consider the following factors:

- The victim's wishes as to disposition
- The victim's cooperation or lack thereof
- The possibility of proceeding without the victim's cooperation
- The seriousness of the offense
- The defendant's criminal history/history of domestic violence
- The defendant's amenability to rehabilitation through treatment

D. ACCELERATED REHABILITATIVE DISPOSITION

Domestic violence cases should not be considered for ARD.

E. RESTITUTION

Where desired by the victim, the prosecutor should seek restitution for expenses resulting from the crime including shelter costs, medical costs, counseling, and replacement of destroyed property. The prosecutor should ask that payment be made prior to court costs via a specific payment timetable.

F. CONDITIONS OF RELEASE

Probation should be carefully monitored and conditioned upon strict compliance with conditions carefully tailored to protect the victim. A credible threat of incarceration must exist to ensure compliance. Conditions should be in the nature of those set forth above in Section VI-B, of this Protocol. Additionally, the victim may want to see the defendant participate in a drug or alcohol treatment program or batterer's counseling program. The prosecutor should also appear at probation violation hearings.

G. PAROLE HEARINGS

The prosecutor should notify the victim of parole hearings in a time frame which allows her to submit a statement to the Parole Board. This effort should be encouraged and facilitated by the district attorney's office.

XI. DATA COLLECTION

An important function of the domestic violence unit or prosecutor specialist within the District Attorney's office, should be to collect and disseminate data concerning the incidence of domestic violence. Within the office, repeat offenders should be readily identifiable. For release to other agencies and the public, statistics concerning the number of domestic violence prosecutions and their outcomes should be kept on an annual basis.

XII. LINKAGES

The domestic violence unit or the prosecutor specialist should work closely with law enforcement agencies who are dealing with the same offenders, and with local battered women's groups working with the same victims. Additionally, the district attorney's office should share information with child support enforcement officials regarding defendants' names and addresses, in order to locate those defendants who are also delinquent in child support obligations. The district attorney's office should also engage local battered women's advocates in a continual process of evaluation of its protocol and policies with regard to domestic violence prosecution.

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PROBABLE CAUSE ARREST STATUTE

18 Pa. C.S. § 2711

§2711. Probable cause arrests in domestic violence cases.

(a) **General rule.** - A police officer shall have the same right of arrest without a warrant as in felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault)*, or 2705 (relating to recklessly endangering another person) against his spouse or other person with whom he resides or has formerly resided although the offense did not take place in the presence of the police officer. A police officer may not arrest a person pursuant to this section without first observing recent physical injury to the victim or other corroborative evidence.

(b) **Seizure of weapons.** - The arresting police officer shall seize all weapons used by the defendant in the commission of the alleged offense.

(c) **Bail.** -

(1) A defendant arrested pursuant to this section shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. In no case shall the arresting officer release the defendant from custody rather than taking the defendant before the issuing authority.

(2) In determining whether to admit the defendant to bail, the issuing authority shall consider whether the defendant poses a threat of danger to the victim. If the issuing authority makes such a determination, it shall require as a condition of bail that the defendant shall refrain from entering the residence or household of the victim and the victim's place of employment and shall refrain from committing any further criminal conduct against the victim and shall so notify the defendant thereof at the time the defendant is admitted to bail. Such condition shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first. A violation of this condition may be punishable by the revocation of any form of pretrial release or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody or a modification of the terms of the bail. The defendant shall be provided a hearing on this matter.

(d) **Notice of rights.** -

Upon responding to a domestic violence case, the police officer shall, orally or in writing, notify the victim of the availability of a shelter, including its telephone number, or other services in the community. Said notice shall include the following statement: "If you are the victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse pursuant to 23 Pa. C.S. Ch. 61 (relating to protection from abuse), which could include the following:

- (1) An order restraining the abuser from further acts of abuse.
- (2) An order directing the abuser to leave your household.
- (3) An order preventing the abuser from entering your residence, school, business or place of employment.
- (4) An order awarding you or the other parent temporary custody of or temporary visitation with your child or children.
- (5) An order directing the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so."

(Effective 4/16/86.)

*Although aggravated assault, section 2702 (A) (3) (4) and (5), is also referenced in the statute, it is deleted here to acknowledge that §2702 was amended in 1990. Sections (3) (4) and (5) are now graded as felonies of the second degree.

INTERFERENCE WITH CUSTODY OF CHILDREN

18 Pa. C.S. § 2904

§ 2904. Interference with custody of children.

(a) **Offense defined.**—A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.

(b) **Defenses.**—It is a defense that:

(1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or

(2) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or

(3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.

(c) **Grading.**—The offense is a felony of the third degree unless:

(1) the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the safety of the child, or in reckless disregard of a likelihood of causing such alarm. In such cases, the offense shall be a felony of the second degree; or

(2) the actor acted with good cause for a period of time not in excess of 24 hours; and

(i) the victim child is the subject of a valid order of custody issued by a court of this Commonwealth;

(ii) the actor has been given either partial custody or visitation rights under said order; and

(iii) the actor is a resident of this Commonwealth and does not remove the child from the Commonwealth.

In such cases, the offense shall be a misdemeanor of the second degree.

(Effective 7/9/84.)

CONCEALMENT OF WHEREABOUTS OF A CHILD

18 Pa. C.S. § 2909

§2909. Concealments of whereabouts of a child.

(a) **Offense defined.**—A person who removes a child from the child's known place of residence with the intent to conceal the child's whereabouts from the child's parent or guardian, unless concealment is authorized by court order or is a reasonable response to domestic violence or child abuse, commits a felony of the third degree. For purposes of this subsection, the term "removes" includes personally removing the child from the child's known place of residence, causing the child to be removed from the child's known place of residence, preventing the child from returning or being returned to the child's known place of residence and, when the child's parent or guardian has a reasonable expectation that the person will return the child, failing to return the child to the child's known place of residence.

(b) **Application.**—A person may be convicted under subsection (a) if either of the following apply:

- (1) The acts that initiated the concealment occurred in this Commonwealth.
- (2) The offender or the parent or guardian from whom the child is being concealed resides in this Commonwealth.

(Effective 4/3/90.)

SPOUSAL SEXUAL ASSAULT

18 Pa. C.S. § 3128

§ 3128. Spousal sexual assault.

- (a) **Sexual Assault.**—A person commits a felony of the second degree when that person engages in sexual intercourse with that person's spouse:
 - (1) by forcible compulsion;
 - (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - (3) who is unconscious.
- (b) **Involuntary spousal deviate sexual intercourse.**—A person commits a felony of the second degree when that person engages in deviate sexual intercourse with that person's spouse:
 - (1) by forcible compulsion;
 - (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - (3) who is unconscious.
- (c) **Crime to be reported.**—The crime of spousal sexual assault shall be personally reported by the victim or her agent to a law enforcement agency having the requisite jurisdiction within 90 days of the commission of the offense.

VICTIM AND WITNESS INTIMIDATION ACT

18 Pa. C. S. §§ 4951-4955

§ 4951. Definitions.

The following words and phrases when used in this subchapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Victim." Any person against whom any crime as defined under the laws of this State or of any other state or of the United States is being or has been perpetrated or attempted.

"Witness." Any person having knowledge of the existence or nonexistence of facts or information relating to any crime, including but not limited to those who have reported facts or information to any law enforcement officer, prosecuting official, attorney representing a criminal defendant or judge, those who have been served with a subpoena issued under the authority of this State or any other state or of the United States, and those who have given written or oral testimony in any criminal matter; or who would be believed by any reasonable person to be an individual described in this definition.

§ 4952. Intimidation of witnesses or victims.

(a) **Offense defined.**—A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to:

- (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime.
- (2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.
- (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.
- (4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant.
- (5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence.
- (6) Absent himself from any proceeding or investigation to which he has been legally summoned.

(b) **Grading.**—The offense is a felony of the third degree if:

- (1) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.
- (2) The actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.

- (3) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim.
- (4) The actor solicits another to or accepts or agrees to accept any pecuniary or other benefit to intimidate a witness or victim.
- (5) The actor has suffered any prior conviction for any violation of this title or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this title if committed in this State.

Otherwise the offense is a misdemeanor of the second degree.

§ 4953. Retaliation against witness or victim

- (a) **Offense defined.**—A person commits an offense if he harms another by any unlawful act in retaliation for anything lawfully done in the capacity of witness or victim.
- (b) **Grading.**—The offense is a felony of the third degree if the retaliation is accomplished by any of the means specified in section 4952(b)(1) through (5) (relating to intimidation of witnesses or victims). Otherwise the offense is a misdemeanor of the second degree.

§ 4954. Protective orders.

Any court with jurisdiction over any criminal matter may, after a hearing and in its discretion, upon substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated, issue protective orders including but not limited to the following:

- (1) An order that a defendant not violate any provision of this subchapter.
- (2) An order that a person other than the defendant, including but not limited to a subpoenaed witness, not violate any provision of this subchapter.
- (3) An order that any person described in paragraph (1) or (2) maintain a prescribed geographic distance from any specified witness or victim.
- (4) An order that any person described in paragraph (1) or (2) have no communication whatsoever with any specified witness or victim, except through an attorney under such reasonable restrictions as the court may impose.

§ 4955. Violation of orders.

Any person violating any order made pursuant to section 4954 (relating to protective orders) may be punished in any of the following ways:

- (1) For any substantive offense described in this subchapter, where such violation of an order is a violation of any provision of this subchapter.
- (2) As a contempt of the court making such order. No finding of contempt shall be a bar to prosecution for a substantive offense under section 4952 (relating to intimidation of witnesses or victims) or 4953 (relating to retaliation against witness or victim), but:
 - (i) any person so held in contempt shall be entitled to credit for any punishment imposed therein against any sentence imposed on conviction of said substantive offense; and
 - (ii) any conviction or acquittal for any substantive offense under this title shall be a bar to subsequent punishment for contempt arising out of the same act.

(3) By revocation of any form of pretrial release, or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody. Revocation may, after hearing and on substantial evidence, in the sound discretion of the court, be made whether the violation of order complained of has been committed by the defendant personally or was caused or encouraged to have been committed by the defendant.

(Effective 2/2/81.)

PROTECTION FROM ABUSE ACT

23 Pa.C.S. §§ 6101-6117

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

- 6101. Short title of chapter.
- 6102. Definitions.
- 6103. Effect of departure to avoid abuse.
- 6104. Registration of order.
- 6105. Responsibilities of local law enforcement agencies.
- 6106. Commencement of proceedings.
- 6107. Hearings.
- 6108. Relief.
- 6109. Service of orders.
- 6110. Emergency relief by minor judiciary.
- 6111. Domestic violence counselor/advocate.
- 6112. Disclosure of addresses.
- 6113. Arrest for violation of order.
- 6114. Contempt for violation of order or agreement.
- 6115. Reporting abuse and immunity.
- 6116. Confidentiality.
- 6117. Procedure and other remedies.

§ 6101. Short title of chapter.

This chapter shall be known and may be cited as the Protection From Abuse Act.

§ 6102. Definitions.

- (a) **General rule.**—The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Abuse." The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, spousal sexual assault or involuntary deviate sexual intercourse with or without a deadly weapon.
- (2) Placing by physical menace another in fear of imminent serious bodily injury.
- (3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).
- (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

"Adult." An individual who is 18 years of age or older.

"Confidential communications." Information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship and in confidence by a means which, insofar as the victim is aware,

discloses the information to no third person other than to those who are present to further the interest of the victim in the consultation or assistance, to those who are coparticipants in the counseling service or to those to whom disclosure is reasonably necessary for the transmission of the information or an accomplishment of the purpose for which the domestic violence counselor or advocate is consulted. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports or working papers given or made in the course of the relationship.

"Domestic violence counselor/advocate." An individual who is engaged in a domestic violence program, who provides services to victims of domestic violence, who has undergone 40 hours of training and who is under the control of a direct services supervisor of a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence.

"Domestic violence program." A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims which include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation, information and referral; and victim assistance.

"Family or household members." Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.

"Hearing Officer." A district justice, judge of the Philadelphia Municipal Court, bail commissioner appointed under 42 Pa.C.S. § 1123 (relating to jurisdiction and venue) and master appointed under 42 Pa.C.S. § 1126 (relating to masters).

"Minor." An individual who is not an adult.

"Victim." A person who is physically or sexually abused by a family or household member.

- (b) **Other terms.**—Terms not otherwise defined in this chapter shall have the meaning given to them in 18 Pa.C.S. (relating to crimes and offenses).

§ 6103. Effect of departure to avoid abuse.

The court shall have jurisdiction over all proceedings under this chapter. The right of plaintiff to relief under this chapter shall not be affected by plaintiff leaving the residence or household to avoid further abuse.

§ 6104. Registration of order.

- (a) **Registry.**—The prothonotary shall maintain a registry in which it shall enter certified copies of orders entered by courts from other jurisdictions in this Commonwealth pursuant to this chapter.
- (b) **Registration of order in any county.**—A plaintiff who obtains a valid order under this chapter may register that order in any county within this Commonwealth where the plaintiff believes enforcement may be necessary. A court shall recognize and enforce a valid order under this chapter which has been issued by another court but properly registered with a county within the judicial district of the court where enforcement is sought.

- (c) **Certified copy.**—A valid order under this chapter may be registered by the plaintiff in a county other than the issuing county by obtaining a certified copy of the order of the issuing court endorsed by the prothonotary of that court and presenting that certified order to the prothonotary where the order is to be registered.
- (d) **Proof of registration.**—Upon receipt of a certified order for registration, the prothonotary shall provide the plaintiff with a copy bearing the proof of registration to be filed with the appropriate law enforcement agency.

§ 6105. Responsibilities of local law enforcement agencies.

The police department of each municipal corporation shall insure that all its officers and employees are familiar with the provisions of this chapter. Instruction concerning protection from abuse shall be made a part of the training curriculum for all trainee officers.

§ 6106. Commencement of proceeding.

- (a) **General rule.**—An adult or an emancipated minor may seek relief under this chapter for that person or any parent, adult household member or guardian ad litem may seek relief under this chapter on behalf of minor children, or a guardian of the person of an adult who has been declared incompetent under 20 Pa.C.S. Ch. 51 Subch. B (relating to appointment of guardian) may seek relief on behalf of the incompetent adult, by filing a petition with the court alleging abuse by the defendant.
- (b) **Affidavit of insufficient funds for fees.**—If the plaintiff files an affidavit stating that plaintiff does not have funds available to pay the fees for filing and service, the petition shall be filed and service shall be made without payment of fees, and leave of court to proceed in forma pauperis shall not be required.
- (c) **Determination of indigency.**—When the petition is filed without payment of fees, the court shall determine at the hearing on the petition whether the plaintiff is able to pay the costs of filing and service. If the plaintiff is unable to pay the costs of filing and service, the court may waive the payment of costs or, if the plaintiff prevails in the action, assign them to the defendant. This subsection and subsection (b) apply to courts of common pleas and hearing officers.
- (d) **Court to adopt means of service.**—The court shall adopt a means of prompt and effective service in those instances where the plaintiff avers that service cannot be safely effected by an adult individual other than a law enforcement officer or where the court so orders.
- (e) **Service by sheriff.**—If the plaintiff files an affidavit stating that the plaintiff does not have funds available to pay the costs of filing and service or if the court so orders, the sheriff or other designated agency or individual shall serve the petition and order without prepayment of costs.
- (f) **Service of petition and orders.**—The petition and orders shall be served upon the defendant, and orders shall be served upon the police departments with appropriate jurisdiction to enforce the orders. Orders shall be promptly served on the police. Failure to serve shall not stay the effect of a valid order.
- (g) **Assistance and advice to plaintiff.**—The courts and hearing officers shall:
 - (1) Provide simplified forms and clerical assistance in English and Spanish to help with the writing and filing of the petition for a protection order for an individual not represented by counsel.

- (2) Advise a plaintiff not represented by counsel of the right to file an affidavit stating that the plaintiff does not have funds available to pay the costs of filing and service and assist with the writing and filing of the affidavit.

§ 6107. Hearings.

- (a) **General Rule.**—Within ten days of the filing of a petition under this chapter, a hearing shall be held before the court, at which the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The court shall advise the defendant of the right to be represented by counsel.
- (b) **Temporary orders.**—If a plaintiff petitions for a temporary order for protection from abuse and alleges immediate and present danger of abuse to the plaintiff or minor children, the court shall conduct an ex-parte proceeding. The court may enter such a temporary order as it deems necessary to protect the plaintiff or minor children when it finds they are in immediate and present danger of abuse.
- (c) **Continued hearings.**—If a hearing under subsection (a) is continued, the court may make or extend such temporary orders under subsection (b) as it deems necessary.
- (d) **Costs.**—If the plaintiff prevails, the court shall assign costs to the defendant unless the parties agree otherwise. If the defendant is indigent, costs shall be waived.

§ 6108. Relief.

- (a) **General rule.**—The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:
 - (1) Directing the defendant to refrain from abusing the plaintiff or minor children.
 - (2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff when the residence or household is jointly owned or leased by the parties, is owned or leased by the entireties or is owned or leased solely by the plaintiff.
 - (3) When the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff or, by consent agreement, allowing the defendant to provide suitable, alternate housing.
 - (4) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children. A defendant shall not be granted custody or partial custody where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant abused the minor children of the parties or where the defendant has been convicted of violating 18 Pa.C.S. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order. If a plaintiff petitions for a temporary order under section 6107(b) (related to hearings) and the defendant has partial, shared or full custody of the minor children of the parties by order of court or written agreement of the parties, the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under section 6107(a). Nothing in this paragraph shall bar either party from filing a

petition for custody under 23 Pa.C.S. Ch. 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure. The court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.

- (5) After a hearing in accordance with Section 6107(a), directing the defendant to pay financial support to those persons the defendant has a duty to support. The support order shall be temporary, and any beneficiary of the order must file a complaint for support under the provisions of Chapters 43 (relating to support matters generally) and 45 (relating to reciprocal enforcement of support orders) within two weeks of the date of the issuance of the protection order. If a complaint for support is not filed, that portion of the protection order requiring the defendant to pay support is void. When there is a subsequent ruling on a complaint for support, the portion of the protection order requiring the defendant to pay support expires.
- (6) Prohibiting the defendant from having any contact with the plaintiff, including, but not limited to, restraining the defendant from entering the place of employment or business or school of the plaintiff and from harassing the plaintiff or plaintiff's relatives or minor children.
- (7) Ordering the defendant to temporarily relinquish to the sheriff the defendant's weapons which have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children. The court's order shall provide for the return of the weapons to the defendant subject to such restrictions and conditions as the court shall deem appropriate to protect the plaintiff or minor children from further abuse through the use of weapons.
- (8) Directing the defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, including medical, dental, relocation and moving expenses; counseling; loss of earnings or support; and other out-of-pocket losses for injuries sustained. In addition to out-of-pocket losses, the court may direct the defendant to pay reasonable attorneys fees.
- (b) **Duration and amendment of order or agreement.**—A protection order or approved consent agreement shall be for a fixed period of time not to exceed one year. The court may amend its order or agreement at any time upon subsequent petition filed by either party.
- (c) **Title to real property unaffected.**—No order or agreement under this chapter shall in any manner affect title to any real property.

§ 6109. Service of orders.

- (a) **Issuance.**—A copy of an order under this chapter shall be issued to the plaintiff, the defendant and the police department with appropriate jurisdiction to enforce the order or agreement in accordance with the provisions of this chapter or as ordered by the court or hearing officer.
- (b) **Placement in county registry.**—Upon receipt of an order, the police department shall immediately place the order in a county registry of protection orders. The police department shall assure that the registry is current at all times and that orders are removed upon expiration thereof.

§ 6110. Emergency relief by minor judiciary.

- (a) **General rule.**—When, in counties with less than four judges, the court is unavailable during the business day by reason of duties outside the county, illness or vacation, and when, in counties with at least four judges, the court deems itself unavailable from the close of business at the end of each day to the resumption of business the next morning or from the end of the business week to the beginning of the business week, a petition may be filed before a hearing officer who may grant relief in accordance with section 6108(a)(1) and (2) or (1) and (3) (relating to relief) if the hearing officer deems it necessary to protect the plaintiff or minor children from abuse upon good cause shown in an ex-parte proceeding. Immediate and present danger of abuse to the plaintiff or minor children shall constitute good cause for purposes of this section.
- (b) **Expiration of order.**—An order issued under subsection (a) shall expire as of the resumption of business of the court at the beginning of the next business day, at which time the court shall schedule hearings on protection orders entered by hearing officers under subsection (a) and shall review and continue in effect protection orders that are necessary to protect the plaintiff or minor children from abuse until the hearing, at which time the plaintiff may seek a temporary order from the court.
- (c) **Certification of order to court.**—An emergency order issued under this section and any documentation in support thereof shall be immediately certified to the court. The certification to the court shall have the effect of commencing proceedings under section 6106 (relating to commencement of proceedings) and invoking the other provisions of this chapter. If it is not already alleged in a petition for an emergency order, the plaintiff shall file a verified statement setting forth the abuse of defendant at least five days prior to the hearing. Service of the verified statement shall be made subject to section 6106.
- (d) **Instructions regarding the commencement of proceedings.**—Upon issuance of an emergency order, the hearing officer shall provide the plaintiff instructions regarding the commencement of proceedings in the court of common pleas at the beginning of the next business day and regarding the procedures for initiating a contempt charge should the defendant violate the emergency order. The hearing officer shall also advise the plaintiff of the existence of programs for victims of domestic violence in the county or in nearby counties and inform the plaintiff of the availability of legal assistance without cost if the plaintiff is unable to pay for them.

§ 6111. Domestic violence counselor/advocate.

A domestic violence counselor/advocate may accompany a party to a hearing under this chapter.

§ 6112. Disclosure of addresses.

During the course of a proceeding under this chapter, the court or hearing officer may consider whether the plaintiff or plaintiff's family is endangered by disclosure of the permanent or temporary address of the plaintiff or minor children. Neither in the pleadings nor during proceedings or hearings under this chapter shall the court or hearing officer require disclosure of the address of a domestic violence program.

§ 6113. Arrest for violation of order.

- (a) **General rule.**—An arrest for violation of an order issued pursuant to this chapter may

be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer. The police officer may verify, if necessary, the existence of a protection order by telephone or radio communication with the appropriate police department, county registry or issuing authority.

- (b) **Seizure of weapons.**—Subsequent to an arrest, the police officer shall seize all weapons used or threatened to be used during the violation of the protection order or during prior incidents of abuse. As soon as it is reasonably possible, the arresting officer shall deliver the confiscated weapons to the office of the sheriff. The sheriff shall maintain possession of the weapons until the court issues an order specifying the weapons to be relinquished and the persons to whom the weapons shall be relinquished.
- (c) **Procedure following arrest.**—Subsequent to an arrest, the defendant shall be taken by the police officer without unnecessary delay before the court in the judicial district where the contempt is alleged to have occurred. When that court is unavailable, the police officer shall convey the defendant to a district justice designated as appropriate by local rules of court or, in counties of the first class, to the appropriate hearing officer.
- (d) **Preliminary arraignment.**—The defendant shall be afforded a preliminary arraignment without unnecessary delay.
- (e) **Other emergency powers unaffected.**—This section shall not be construed to in any way limit any of the other powers for emergency relief provided in this chapter.
- (f) **Hearing.**—A hearing on a charge or allegation of indirect criminal contempt shall not preclude a hearing on other criminal charges underlying the contempt, nor shall a hearing on other criminal charges preclude a hearing on a charge of indirect criminal contempt.
- (g) **Notice.**—Notice shall be given to the defendant, in orders issued pursuant to section 6108 (relating to relief), of the possible ramifications of resumption of residence in the family domicile contrary to court order. Resumption of co-residence on the part of the plaintiff and defendant shall not nullify the provisions of the court order directing the defendant to refrain from abusing the plaintiff or minor children.

§ 6114. Contempt for violation of order or agreement.

- (a) **General rule.**—Upon violation of a protection order issued under this chapter or a court approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish him in accordance with law.
- (b) **Trial and punishment.**—A sentence for contempt under this chapter may include imprisonment up to six months or a fine not to exceed \$1,000, or both, and may include other relief set forth in this chapter. The defendant shall not have a right to a jury trial on such a charge; however, the defendant shall be entitled to counsel.

§ 6115. Reporting abuse and immunity.

- (a) **Reporting.**—A person having reasonable cause to believe that a person is being abused may report the information to the local police department.
- (b) **Contents of report.**—The report should contain the name and address of the abused person, information regarding the nature and extent of the abuse and information which the reporter believes may be helpful to prevent further abuse.

- (c) **Immunity.**—A person who makes a report shall be immune from a civil or criminal liability on account of the report unless the person acted in bad faith or with malicious purpose.

§ 6116. Confidentiality.

Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim. Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute; or a local mandatory reporting ordinance.

§ 6117. Procedure and other remedies.

Unless otherwise indicated in this chapter, a proceeding under this chapter shall be in accordance with applicable general rules and shall be in addition to any other available civil or criminal remedies.

(Effective 3/17/91)

**CONTEMPT FOR NONCOMPLIANCE
WITH VISITATION
OR PARTIAL CUSTODY ORDER**

23 Pa. C.S. § 4346

§4346. Contempt for noncompliance with visitation of partial custody order.

(a) **General rule.**—A party who willfully fails to comply with any visitation or partial custody order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

- (1) Imprisonment for a period not to exceed six months.
- (2) A fine not to exceed \$500.
- (3) Probation for a period not to exceed six months.

(b) **Condition for release.**—An order committing a person to jail under this section shall specify the condition which, when fulfilled, will result in the release of the obligor.

(Effective 1/29/86.)

CUSTODY

23 Pa. C.S. § 5303

§ 5303. Award of custody, partial custody or visitation.

(a) **General rule.**—In making an order for custody, partial custody or visitation to either parent, the court shall consider, among other factors, which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child. In addition, the court shall consider each parent and adult household member's present and past violent or abusive conduct which may include, but is not limited to, abusive conduct as defined under the act of October 7, 1976 (P.L. 1090, No. 218), known as the Protection From Abuse Act.

(b) **Consideration of criminal conviction.**—If a parent has been convicted of or has pleaded guilty or no contest to an offense as set forth below, the court shall consider such criminal conduct and shall determine that the parent does not pose a threat of harm to the child before making an order of custody, partial custody or visitation to that parent:

- (1) 18 Pa. C.S. Ch. 25 (relating to criminal homicide);
- (2) 18 Pa. C.S. § 2901 (relating to kidnapping);
- (3) 18 Pa. C.S. § 2902 (relating to unlawful restraint);
- (4) 18 Pa. C.S. § 3121 (relating to rape);
- (5) 18 Pa. C.S. § 3122 (relating to statutory rape);
- (6) 18 Pa. C.S. § 3123 (relating to involuntary deviate sexual intercourse);
- (7) 18 Pa. C.S. § 3126 (relating to indecent assault);
- (8) 18 Pa. C.S. § 4302 (relating to incest);
- (9) 18 Pa. C.S. § 4304 (relating to endangering welfare of children);
- (10) 18 Pa. C.S. § 5902(b) (relating to prostitution and related offenses); or
- (11) 18 Pa. C.S. § 6312 (relating to sexual abuse of children).

(c) **Counseling.**—In making a determination to award custody, partial custody or visitation pursuant to subsection (b), the court shall appoint a qualified professional to provide counseling to an offending parent described in subsection (b) and shall take testimony from that professional regarding the provision of such counseling prior to issuing any order of custody, partial custody or visitation. Counseling, required in accordance with this subsection, shall include a program of treatment or individual therapy designed to rehabilitate a parent which addresses, but is not limited to, issues regarding physical and sexual abuse, domestic violence, the psychology of the offender and the effects of abuse on the victim. If the court awards custody, partial custody or visitation to an offending parent described in subsection (b), the court may require subsequent periodic counseling and reports on the rehabilitation of the offending parent and the well-being of the child following an order relating to custody, partial custody or visitation. If, upon review of a subsequent report or reports, the court determines that the offending parent poses a threat of harm to the child, the court may schedule a hearing and modify the order of custody or visitation to protect the well-being of the child.

(d) **Sole custody.**—The court shall award sole custody when it is in the best interest of the child.
(Effective 8/12/90.)

APPENDIX B

SAMPLE PROTECTIVE ORDER

IN THE COURT OF COMMON PLEAS OF _____ COUNTY

CRIMINAL SECTION - TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : TERM, 19

V. : NO.

ORDER

AND NOW, to wit, this _____ day of _____, 19 _____,
it is ORDERED AND DECREED that a PROTECTIVE ORDER is entered under 18 P.S.
Section 4954 on behalf of _____

IT IS HEREBY ORDERED that the defendant _____
refrain from contacting or intimidating the above-mentioned person(s) either personally or
by family, friends, acquaintances, or agents, and that the defendant have no communication
whatsoever, directly or indirectly, with the person(s) above-named except through an attorney
for the period _____ through _____. Violation of this ORDER carries the following
penalties under 18 P.S. Section 4955.

1. You may be arrested for intimidation of witnesses or victims and/or retaliation
against witness or victim, a felony charge.

2. You may be held in contempt by this COURT.

3. These penalties may be imposed whether the violation complained of has been
committed by you personally or caused or encouraged by you.

J.

DATE ENTERED: _____

[] This ORDER has been made a condition of your probation and/or parole. If you
violate this order, your probation or parole may be revoked.

APPENDIX C

Select Articles

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DOMESTIC VIOLENCE INTERVENTION SYSTEM: A MODEL FOR RESPONSE TO WOMAN ABUSE

In the last fifteen years the citizens of Pennsylvania have begun to recognize the terrible toll that domestic violence has taken upon women and children in our communities and families. We have heard the voices of battered women, describing the indifference of our justice system to their plight. And we are now responding — "No more!" To achieve an end to violence against women in intimate relationships, those of us who serve in the justice system and those of us who have survived domestic violence have joined together to make social change — transforming our institutions to put an end to cultural supports for woman abuse and creating communities which are intolerant of domestic violence and which safeguard victims.

While many communities in Pennsylvania have made exemplary, preliminary changes in a number of the relevant components of the justice system, the Pennsylvania Coalition Against Domestic Violence has not identified a jurisdiction which has totally coordinated its institutions to safeguard victims and to stop domestic violence. Research and common sense persuade us that a justice system which is fully operational — where each component has a specific protocol on domestic violence intervention and a process for consistent implementation of that protocol — best safeguards victims and calls perpetrators to account. We are hopeful that many communities will expand their efforts in the coming year to implement comprehensive policies for intervention in domestic violence. To facilitate these efforts, we offer the following description of a model **Domestic Violence Intervention System**, which includes information on effective law enforcement, victim/witness services, prosecution, legal advocacy, judicial practice, and probation and parole activities.

LAW ENFORCEMENT.

Perhaps it seems impolitic to suggest that this first component of a comprehensive domestic violence intervention system may be more critical than others, but since law enforcement is the sector which serves as the gatekeeper for the rest of the system and is the entry point for a substantial number of victims and perpetrators, the critical role of law enforcement must be highlighted. From the dispatcher to the Chief, the actions of law enforcement are pivotal to victim safety and perpetrator accountability.

- **Arrest deterrence.** Research reveals that arrest is the most effective response of law enforcement to domestic violence. The leading research in the field demonstrates that where police arrest perpetrators of domestic violence rather than separating the couple or mediating between the victim and offender, the arrested perpetrators are significantly less likely to recidivate within six months than those offenders with whom the police take conciliatory action. Arrest more effectively deters perpetrators than any other law enforcement action, even if a case does not result in conviction. (*Ford, 1990; Sherman and Berk, 1984*) Further, victims of domestic violence who call the police appear to be less likely to be assaulted again by their partners than those who did not. There is no evidence that subsequent domestic violence crimes became more serious as a result of communication with the police. Thus, police intervention has a significant deterrent impact on domestic violence. (*Sherman and Berk, 1984*)

Experience also shows that officer safety is enhanced when responding officers approach a domestic violence crime scene with a preferred arrest perspective and when the decision to arrest or not is made quickly. (*Pence, 1989*)

- **Arrest policy.*** Each police department from the smallest, part-time force through the largest metropolitan department should adopt a domestic violence arrest policy. A policy should either strongly encourage or mandate arrest of domestic violence perpetrators. Each police officer needs to know the philosophy of the department on domestic violence. Even more important is the procedural delineation of responsibilities and authority. While no policy is self-effectuating, that which is detailed, broadly disseminated, and conspicuously endorsed by management is the policy that provides clear guidance for law enforcement response. Carefully drafted directives on interviewing the parties, assessing probable cause, and effecting arrest can greatly facilitate effective practice by responding officers.
- **Dispatcher priorities and practice.** Whether dispatch priorities are assigned by a computer or set at the discretion of the dispatcher, high priority should be given to domestic violence calls. (*The California legislature recently mandated that dispatchers assign domestic violence calls a high response priority.*)

Domestic violence injures and kills more women in this country each year than muggings, rapes, and stranger assaults. Between 31 and 50% of all female homicide victims are killed by their partners. (*F.B.I. 1980-89; Browne and Williams, 1987*)

Dispatchers should gather as much information as possible about the domestic violence incident and should communicate this to the responding officers. Dispatchers should check the Domestic Violence Risk File to see if there have been prior calls related to the alleged perpetrator, victim, and/or address. (*See below.*) The dispatcher should, likewise, check the Protection Order Registry to see if there is a current protection order. This information should be communicated to the responding officers.

- **Domestic Violence Risk File and Protection Order Registry.** Each department should implement both data bases. The Domestic Violence Risk File should contain information about law enforcement response to domestic violence incidents catalogued by perpetrator, victim and address. It will be helpful to a responding officer to have a cursory history of domestic violence, including perpetrator use of weapons, injuries to victims, and assaults on police officers. Since the severity of domestic violence appears to escalate over time, the responding officer will be better equipped to safely intervene when apprised of the pattern of perpetrator violence. Risk File data should be retained indefinitely.

Valuable information can also be gleaned from any protection order entered in the Protection Order Registry. The presence of an outstanding protection order suggests heightened danger to the victim and officer, and may provide law enforcement with additional authority for arrest.

*A model arrest policy was developed by the Pennsylvania Attorney General's Family Violence Task Force in 1989, entitled "Domestic Violence: Model Protocol for Police Response." The Protocol is reproduced in this manual at page 13. For copies of the entire document, contact Attorney General Ernest Preate, Office of Attorney General, 15th Floor, Strawberry Square, Harrisburg, PA. 17120, 717/787-3391.

- **Domestic Violence Incident Report.** Each officer that responds to a domestic violence call should complete a detailed incident report. If an officer decides not to arrest an alleged perpetrator, he/she should specifically articulate reasons for deciding not to effect an arrest. A copy of every Domestic Violence Incident Report should be furnished both to the prosecutor and the local domestic violence program for outreach and advocacy with victims. Incident reports should be preserved for at least 7 years.
- **Weapons Seizure.** The responding officer has broad authority to seize weapons used or threatened to be used in domestic violence crimes in Pennsylvania. Specifically, in the Crimes Code § 2711, an arresting police officer is required to seize all weapons used by the alleged perpetrator in the commission of the offense. Further, when a responding officer concludes that a perpetrator has violated a civil protection order and arrests the defendant, the officer is again mandated to seize all weapons used or threatened to be used during the violation of the protection order *and* during prior incidents of abuse. When the weapons are seized pursuant to violation of a protection order, the arresting officer is charged with delivering the confiscated weapons to the office of the sheriff who must maintain possession of the weapons until the court issues an order directing that the weapons be relinquished and identifying the persons to whom the weapons can be released. Many departments authorize responding officers to remove all weapons perceived to pose a danger to the victim with either the permission of the alleged perpetrator or the spouse. Research reveals that firearms are used in more than 60% of spousal or partner homicides. Handguns account for almost 80% of these firearms. Even temporary removal of weapons serves to prevent life-endangering assaults, especially at times of escalated confrontation. (*Saltzman et al, 1990*)
- **Victim's Rights Notification.** The responding officer should advise the victim of legal rights she may have, including a civil protection order, a restraining order against victim intimidation, and crime victim's compensation. The victim should also be given a referral to the local domestic violence program and advised of shelter and victim advocacy services. The victim should be given a free copy of the Domestic Violence Incident Report and apprised that copies will be sent to the local domestic violence program and the prosecutor.
- **Transportation.** The responding officer should provide or arrange transportation for the battered woman or children to medical facilities or emergency shelters if the victim requires such services.
- **Comprehensive criminal charges.** The responding officer should charge the alleged perpetrator with all of the crimes entailed in the domestic violence incident. Historically, there has been a tendency to classify domestic violence crimes as misdemeanors rather than felonies despite the presence of weapons and extensive injuries to victims. (*Langan and Innes, 1986*) Care should be taken not to minimize the gravity of domestic violence offenses.

- **Arraignment advocacy.** Experience demonstrates that domestic perpetrators pose a more serious continuing threat of violence to victims during the pendency of charges than do stranger perpetrators. Nonetheless, most domestic violence perpetrators are released on their own recognizance without any special conditions imposed on bail to afford victim safety. Officers present at arraignment should advise the court of the danger they believe the defendant may pose to the victim and suggest conditions of bail that will enhance victim safety. Requests for cash bail should be considered.
- **Mental health assessment.** Research reveals that as many as 1/3 of the men committed to mental health institutions because of depression have homicidal fantasies focused largely on their partners and family members. (*Rosenbaum & O'Leary, 1979*) Furthermore, about 1/3 of the men who kill their woman partners, then commit suicide; suggesting that suicidal ideation by a batterer is a high risk-marker for partner homicide. (*Johnson, 1987*) However, the mental health community appears resistant to any recognition that mental illness may aggravate domestic violence. Family violence perpetrators are less likely to be admitted to mental health services than non-family perpetrators. (*Gondolf et al, 1989*) Therefore, law enforcement should carefully evaluate the mental health crisis of any domestic violence perpetrator and takes steps to assure victim safety. The propriety of an emergency mental health commitment should be considered if an arrest is not effected.
- **Follow-up.** Each law enforcement agency should have a system for follow-up with victims to advise them of the charges approved, any bail conditions set, the release of the perpetrator from custody, and the availability of victim advocacy services. During follow-up, an evaluation should be made about victim safety and officers should encourage victims to engage in dangerousness assessment and safety planning with the assistance of the local domestic violence program. (*See page 103.*)
- **Training.** Recruits and veterans need regular training on domestic violence with input from domestic violence programs. This should include at least an overview of domestic violence with an emphasis on its impact on women and children, as well as clear articulation of the parameters of probable cause, use of force, authority to pursue, weapons confiscation, officer safety, relevant civil and criminal law, and victim services. (*Pence, 1989; VSA, 1988*)
- **Community education.** In community education and public relations materials, each law enforcement department should address domestic violence and child abuse.
- **Hostage-negotiation plan.** National data informs us that between 75-90% of hostage-taking in this country is an outgrowth of domestic violence. Law enforcement agencies should develop specific plans for intervention in domestic hostage situations. Since batterers may take hostages at a domestic violence program, a system for coordinated efforts between law enforcement and the shelter should be implemented.

- **Disciplinary action and employee assistance programs.** Police officers are also perpetrators of domestic violence. Safety of the public, as well as the victim, is jeopardized by officers who use violence in intimate relationships. Each department should have a procedure for response to domestic violence calls involving officer perpetrators. A system for corrective counseling and disciplinary action with officers who batter their partners and children must be implemented. The victim, a supervisor (pursuant to a domestic violence incident report of an investigating or arresting officer), or the battering officer should be able to initiate disciplinary action or corrective counseling related to domestic violence. A supervisor should notify the victim of any action contemplated so that she can make appropriate safety plans. Employee assistance programs should be put in place to afford perpetrating officers the opportunity of specialized rehabilitation services and to support victimized officers in achieving safety from abuse.

VICTIM-WITNESS ADVOCACY.

Although many believe that victims of domestic violence are less likely to follow-through with prosecution than are victims of serious stranger violence, experience demonstrates that when there is a system of support for domestic violence victims, many are committed to the successful prosecution of batterers as long as this can be achieved in the context of victim safety.

- **Victim notification.** Victims of domestic violence must be instructed as to the role of the victim in the criminal justice process and the stages of criminal prosecution, as well as the right to be present and heard at all crucial stages to the extent that this right does not interfere with the constitutional rights of the accused.

Each victim of domestic violence should be notified promptly about any changes in scheduling which may affect her appearance at trial or post-conviction proceedings.

The domestic violence victim also needs to be apprised of the defendant's status from arrest through parole. She needs to be informed of the arrest, bail conditions, and charges lodged against the defendant. She should be advised of the release of the defendant from imprisonment on bail and for furloughs, emergency leave, work-release, escape, or discharge.

- **Employer and creditor intercession.** The victim-witness program should offer to intercede with employers in order to minimize the victim-employee's loss of employment, pay and other benefits while participating in prosecution. Likewise, when domestic violence subjects the victim to serious financial strain, the victim witness program should offer to advocate with creditors for consideration in management of the victim's financial obligations.
- **Victim assistance.** The victim of domestic violence must be assisted in preparing any statements to be made at sentencing or at hearings concerning probation, pre-release plans or parole.

The victim-witness program should apprise domestic violence survivors of the right to restitution as a condition of probation or parole. The program should assist victims of domestic violence in developing a comprehensive statement of losses resulting from the crime(s) of domestic violence. Restitution claims may be made for any costs resulting from the crime, such as lost wages; expenses for relocation of residence; childcare and transportation costs associated with prosecution; medical, counseling and other treatment fees; replacement costs of any destroyed property; and shelter or advocacy costs.

- **Crime victim compensation advocacy.** As of October 1, 1990, victims of domestic violence may not be denied crime victim compensation for losses sustained as a result of crimes committed by their spouses/partners, unless the compensation would substantially inure to the benefit of the perpetrator. Although federal regulations compel compensation to victims of domestic violence, awards may still be difficult to achieve because of several legal hurdles that domestic violence victims must overcome. Therefore, careful monitoring of these applications and the bases for denial of awards must be made by victim-witness programs to assure just compensation of battered women and children.
- **Victim protections.** Victim witness programs must make sure that victims can participate safely in the prosecution of perpetrators. This means that victim witness programs must advocate for weapons searches of domestic violence perpetrators at all legal proceedings, safe waiting rooms for victims, modification of bail conditions, and the imposition of protective orders against victim intimidation.

PROSECUTION.

As law enforcement adopts policies encouraging or requiring officers to arrest suspects in domestic violence incidents, there is a substantial increase in the number of domestic violence cases submitted for prosecution. To expedite the handling of these cases, changes in district attorney policy and practice are essential.

- **Specialization.** District attorneys should establish domestic violence units in large offices or create specialists in smaller offices in order to permit vertical prosecution and the enhancement of expertise on domestic violence cases. Specialization has improved the success of prosecution. (*Fagan, J., 1988*)
- **Appropriate charging.** Domestic victims are entitled to the same quality of justice as victims of stranger violence. Historically, prosecutors have been reluctant to charge alleged perpetrators of domestic violence with felonies. District attorneys have often utilized evidentiary standards that are higher in domestics. Not only is this disparity unwarranted, it is counterproductive. Domestic assailants are acutely dangerous. Therefore, efforts must be made to eliminate discrepant practice in charging crimes of domestic violence.

- **Outreach efforts.** The prosecutor should review the Domestic Violence Incident Reports submitted by law enforcement in cases which do not result in arrest. Where the prosecutor concludes that prosecution is, nonetheless, warranted, he/she should attempt to contact the victim and consult about prosecution. Charges may thereafter be filed by the prosecutor or the victim.
- **Preliminary hearing prosecution.** Unless law enforcement has agreed to bear the burden of prosecution at the preliminary hearing, it is critical that a deputy district attorney appear at preliminary hearings in domestic violence misdemeanor and felony cases. In many jurisdictions, the prosecutor leaves it to the victim to persuade the court that the elements of the crime charged have been committed and that the defendant is the perpetrator of these crimes. Battered women have neither knowledge of the evidentiary requirements nor of methods for producing evidence at preliminary hearings. Furthermore, even if a victim had the knowledge and skills, her fear of the batterer and the situation may be so acute that she cannot successfully prosecute the case. Prosecution will likely fail at this juncture unless the state's case is asserted by the district attorney.
- **Investigation.** Battered women almost all claim that district attorneys never vigorously investigate their cases. The strong empirical evidence of the chronic, escalating nature of domestic violence and its acute danger to victims compels a reordering of priorities and resources to improve the prosecution of domestic violence perpetrators. (*Fagan, 1988*)
- **Victim protection.** Where victims are besieged by defendants with pleas or threats to withdraw the prosecution, prosecutors must provide victim-witnesses with protection both to assure the safety of the victim and to expedite prosecution. In Pennsylvania, the district attorney can seek a temporary protective order on behalf of victims to direct defendants to cease and desist from any conduct which would intimidate the victim or any witness and interfere with the victim's participation in prosecution. (*See 18 Pa.C.S. §4954.*)

Besides temporary protective orders, the district attorney can enlist law enforcement in victim protection strategies. Victims of domestic violence should also be eligible for witness protection programs when it is apparent that their lives may be in danger as a consequence of prosecution.

- **Property return procedures.** Law enforcement agencies and the district attorney should promptly return a victim's property held for evidentiary purposes unless there is a compelling reason for retaining it. Requests should be made of the trial court for appropriate orders to expedite the return of property to victims, including permission for photographs of the victim's property to be used as evidence at trial when no substantial evidentiary issue related thereto is in dispute. However, weapons are best held until final disposition of the criminal case.
- **Victim consultation.** The prosecutor should develop guidelines for reasonable consultation with the victim advocate and/or the victim prior to entering into any plea bargain or dismissing a case.

- **Victim testimony.** Sometimes, even in jurisdictions where prosecutors engage in all of the above, victims are reluctant to testify. In many jurisdictions, prosecutors have developed policies whereby they subpoena victims to testify on trial dates. However, where the victim persists in resistance to testify, the practice is to proceed to prosecute without victim testimony wherever possible. These policies specify that victims are not to be penalized or prosecuted for failure to testify.
- **Diversion programs.** The use of diversion as an alternative to prosecution should be carefully evaluated. Many in the justice system believe that pre-trial diversion is always inappropriate in domestic violence crimes. Others assert that diversion should only be available to first offense batterers charged with misdemeanors other than involuntary manslaughter. If diversion of domestic violence perpetrators is instituted, domestic violence defendants should not be eligible when victims object to this disposition. Diversion programs should be specifically tailored to assure victim safety and stop the violence. Participants in diversion programs should be compelled to attend educational programs on domestic violence. Restitution should be paid during the period of diversion. Breach of the conditions of the diversion program should result in termination of the program and immediate prosecution.
- **Self-defense protocol.** When perpetrators of domestic violence are not deterred from continuing violence against their wives/partners, the brutality of their violence often escalates to life-threatening proportions. (*Browne, 1987*) National research over the past 30 years has shown that when women use lethal violence against their partners, it is almost always to protect themselves or their children. (*Browne and Williams, 1987; Cazenave and Zahn, 1986*) Further, in the last 10 years women have killed their partners less, particularly in those states where comprehensive legal protections and social services are available. (*Browne and Williams, 1987*) Pennsylvania is one such state. Men, on the other hand, have been killing wives/partners in ever increasing numbers, especially after separation and divorce. (*Browne and Williams, 1987*)

Therefore, prosecutors knowledgeable about domestic violence should carefully design a protocol for investigation and charging in situations where women who have been the victims of domestic violence kill batterers. Where battered women have killed to protect themselves and prosecution does not clearly serve the interests of justice, discretion should be exercised against prosecution and the consequent re-victimization of battered women by the legal system.

LEGAL ADVOCACY.

Victim advocacy is a key component in the Domestic Violence Intervention System. Battered women who find themselves abruptly thrust into the legal system because of the violence of their partners, while often simultaneously seeking emergency shelter to protect themselves and their children, are swamped with new information and the demands for family management in these acute crisis situations. Many people who are not terrorized by violence

would find it difficult to address all of the issues impinging upon a battered women dislocated and endangered by violence. (Campbell, 1990) It is not surprising that victims may appear less invested in successful prosecution than law enforcement and prosecutors. Therefore, it is critical that advocates are available to battered women to help them understand legal process and to develop effective strategies for participation in the justice system. Legal advocacy for battered women includes:

- **Outreach.** When a battered woman has entered the legal arena, whether pursuant to police action or by her own initiation, her safety will be enhanced by discreet outreach and advocacy. Since many battered women do not know about domestic violence services, are not acquainted with the particular activities of legal advocacy, or believe that they are ineligible for services, domestic violence programs have begun to engage in outreach to battered women to provide legal advocacy.
- **Safety planning.** Each battered woman needs to construct a safety plan. Although victims are certainly competent to design plans independently of advocates, experience often lends substantial enrichment to any plan. Safety planning is an on-going process. Batterers continue to pose risks potentially forever and certainly until they believe the consequences of their violence outweigh the benefits.
- **Options counseling.** Victim advocacy includes informing battered women of the array of legal options and the procedures for exercising those options. Victim advocacy does not include giving legal advice. Battered women are referred to the prosecutor, legal services attorneys and the private bar for substantive legal advice.
- **Case investigation/preparation.** Law enforcement and the district attorney are sometimes not able to devote the time and energy needed to comprehensively develop the evidence in criminal matters. The same is true for the private sector in civil matters. Therefore, it is very helpful for battered women to gather information and provide these justice system actors with a detailed chronology of events and circumstances.
- **Court accompaniment.** Court appearances are dangerous and terribly frightening experiences for battered women. Desperate batterers may assault battered women at the courthouse. This has happened all too often. Court accompaniment by informed advocates serves to enhance the victim's physical safety, to provide emotional support, and to afford back-up consultation to justice system personnel, when necessary.
- **Systems advocacy.** Where there are inadequacies in any component of the legal system, systems advocacy may be necessary. For example, if statutory law is basically deficient on a point, advocates may draft and urge the adoption of legislation. If a prosecutor does not have the resources to provide assistant district attorneys at preliminary hearings, the victim advocate may expose the inadequate level of funding of the district attorney's office and urge local government to increase resources. Where a judge continues to place batterers in diversion programs when they have histories of criminal violence, the advocate may be able to persuade the bench to adopt local rules to eliminate this practice. If crime victim's compensation is not awarded promptly,

advocates can seek administrative change to expedite awards. Without systems advocacy the problems of the legal system may cause such discouragement of victims and resentment in other intervention system components that the system will fail. Systems advocacy is essential to improve justice system response to battered women.

JUDICIAL PARTICIPATION.

The judiciary plays a crucial role in a Domestic Violence Intervention System.* Judicial recognition of the gravity of domestic violence sends a clear and compelling message to the perpetrator, the public and to other actors in the justice system. (Goolkasian, 1986)

"The judge told him, in no uncertain terms, that the law doesn't allow him to assault me just because I'm his wife. He said that he'll send him to jail if he's brought back for another offense. Right here in the courtroom... you should have seen the look on his face. I think he knew the judge wasn't kidding, and that's when he decided to do something about it."

— a formerly battered woman (Goolkasian, 1986, pg. 1)

When the bench is serious about domestic violence, the rest of the justice system cooperates.

Criminal matters

- **Pre-trial restrictions/requirements/recommendations.** District justices and judges, recognizing the danger to battered women throughout the pre-trial period, during which time batterers routinely harass and threaten victims for cooperation with prosecution or retaliate with life-threatening violence, are fashioning conditions on release to safeguard the victim and compel the lawful behavior of defendants prior to trial. One important method of victim protection is limiting the defendant's access to the victim either through bail conditions or "no-contact" orders. District justices and judges should terminate the practice of releasing defendants on their own recognizance in domestic cases where they would require cash bail of perpetrators of stranger violence. Arraigning judges should require the appearance of the defendant at arraignment in those jurisdictions where an appearance might otherwise be excused; the appearance will serve as a reminder of the potential consequences of future violence and may, therefore, deter pre-trial violence directed at the victim. The most effective method of victim protection is pre-trial detention which should be imposed for specific felonies and for violations of conditions on bail, of victim intimidation §4954 orders, or of civil protection orders.

Some batterers are receptive to judicial referrals to drug and alcohol or batterer treatment programs during the pre-trial phase when participation is recommended by the court. However, batterers sometimes enter a treatment program in order to gain leniency at sentencing in the event that they are convicted.

*The National Council of Juvenile and Family Court Judges recently produced comprehensive recommendations for upgrading judicial practice in domestic violence cases. See *Family Violence, Improving Court Practice — Recommendations From the National Council of Juvenile and Family Court Judges*, 1990. A copy of this report can be obtained from the Council at P.O. Box 8970, Reno, Nevada 89507, 702/784-6012.

- **Expert testimony.** The general public, including jurors, harbor many misconceptions about domestic violence, and this information shapes their participation on the jury. Expert testimony can describe the complexities of the domestic violence experience so that the jurors have the opportunity of informing their deliberations with data acquired through scientific inquiry. In Pennsylvania, expert testimony may be offered by the defense in cases where the battered person is the defendant and is asserting self-defense or justification. (*Commonwealth v. Dillon*, No. 123 E.D. Appeal Docket 1989, 10/31/91; *Commonwealth v. Stonehouse*, 521 Pa. 41, 555 A.2d 772, 1989) The strategy of the prosecution in cases where the defendant claims to be the battered person may be to challenge the credibility of the defendant by asking — "If he was so dangerous and she was so afraid, why didn't she leave?" Even when instructed by the court that the question is not relevant and must not be considered, jurors report that it is often a pivotal question. An expert can address the question of the consistency between abject terror and remaining with the batterer. For example, they could describe the phenomenon of "separation violence" and its increased potential for lethality; thus, demonstrating it may be reasonable for a battered woman to conclude that it may sometimes be more dangerous to leave or to appear to be leaving than it is to stay and accommodate the batterer. (*Mahoney*, 1991; *Ellis*, 1987)
- **Sentencing.** Judges have been reluctant to incarcerate batterers. Men who injure and terrorize their families have not been recognized as engaging in criminal conduct nor have they been viewed as dangerous. Despite irrefutable data to the contrary, they have not been identified as recidivists. Further, with jail overcrowding, cells have been saved for offenders committing stranger violence and property crimes. (*Fagan*, 1988) Batterers commit upwards of 50% of all female homicides. Seventy percent of the serious child abuse is committed by fathers or father surrogates, as is 80% of child homicides. (*Bergman et al*, 1986) Violence unchecked, escalates in severity. (*Browne and Williams*, 1987)

Sentencing should be carefully tailored to enhance victim protection. If the foremost goal of an intervention system is to protect victims, then incarceration ought to be utilized. It is the best method for denying a perpetrator access to a victim and deterring his violence. It must be acknowledged that there has been no research undertaken on the efficacy of shock detention or protracted incarceration as deterrence to recidivism of batterers. However, investigation of the merits of incarceration coupled with treatment could be undertaken by the Courts of Common Pleas in the Commonwealth.* There is no reason that batterers should be exempt from incarceration, and there may be value in short-term incarceration for some.

If a batterer is addicted to alcohol or other drugs, he will need to complete detox and inpatient treatment before he is capable of consistent non-violence. Drug and alcohol treatment for batterers should be built into conditions on probation or parole.

*One sentencing intervention experiment might be: All batterers convicted of simple assault as first time offenders could be incarcerated for 14 days followed by mandated treatment in the community, or incarcerated for 14 days subject to 2 hours of batterer education seminars daily, or placed in a post-conviction diversion program which mandates 14 weeks of batterer education or subjected to 14 day shock detention or post-conviction diversion without any treatment. At the anniversary of the batterer's conviction, the court could require that the probation office provide information on recidivism as reflected in police reports and victim statements. Subsequent inquiry about recidivism could be conducted at the second and fourth anniversaries. This intervention experiment would give courts valuable information about effective sentencing with first offense batterers.

Restitution to victims is often neglected. Courts should award generous restitution to victims and should institute systems to assure prompt collection and distribution. (See **Victim-Witness Advocacy** above, for a delineation of potential victim restoration through restitution.)

Community service might be also be an element in a comprehensive sentence. Since most batterers represent little risk to anyone other than their family members, service at a homeless shelter, at a food bank, at the children's home, on recycling projects, on landscaping crews, at youth athletic leagues, at nursing homes, etc. might provide the batterer with a reminder of the importance of refraining from his violence and perhaps even provide him with motivation for change. It should be noted that this list does not include community service to the domestic violence program. Any community service to assist programs for battered women and children should be tailored to protect the safety and confidentiality of recipients. Community service programs should be designed in consultation with the local domestic violence program. There may be work that a domestic violence program would like to undertake through community service, but often the risks outweigh the benefits.

Finally, sentencing should expose the batterer to regular and consistent monitoring by probation or parole staff. Experience across the country has demonstrated that batterers who must report regularly, often weekly, to a probation or parole agent are less likely to recidivate during a period of probation or parole than those who are under minimal scrutiny. Thus, a system for regular reporting and monitoring should be imposed. (*Pence, 1985*)

Protection from abuse orders

- **Comprehensive relief.** The Protection From Abuse Act was drafted to afford victims of domestic violence the critical relief needed to escape the physical assaults and terrorism inflicted by batterers. Commonwealth legislators recognized that it was not merely enough to enjoin the perpetrator from further abuse. Batterers should be denied access to family and household members that they abuse. Eviction of the perpetrator from the family home, prohibitions against communication with the victim, provisions limiting the batterer's geographical mobility, awards of temporary custody and support, all were incorporated to minimize batterer access. Each of these access limitations is a compliment to the other and is an essential component of a protection plan authorized by the court. With all of these carefully incorporated in protection orders, the batterer has virtually no legitimate reason for communicating with or contacting the battered woman. These provisions provide victims the best protection. (*Ellis, 1987*)

The Protection From Abuse Act further authorizes courts to protect victims from batterer access. It specifically directs courts not to disclose the address of domestic violence programs or of victims. When battered women apprehend that their husband/partner is desperate and may be contemplating homicide, they often seek to keep the location of their residence confidential. Courts of Common Pleas can direct that court personnel, law enforcement and school districts not disclose the address of the battered woman or children to any third party. If this confidentiality is maintained, battered women will have some additional relief against batterer access.

Post-separation violence — that which is potentially the most life-threatening — routinely occurs when perpetrators are exercising visitation rights. Protective measures to avert this violence can include temporary suspension of visitation, protected exchanges of children, or professionally supervised visitation.

Protection orders should not be entered against the victim/plaintiff absent a cross-petition filed by the alleged batterer, with timely service made upon the plaintiff, and a finding that the victim/plaintiff has committed acts of abuse upon the defendant. Mutual orders, restraining both parties, are virtually unenforceable and thus leave those vulnerable to abuse unprotected.

Finally, protection orders should never include language directing the plaintiff not to "entice or invite" the defendant to violate the protection order. The decision to abuse (and the decision to disobey a court order) is one exclusively made by the abuser. The victim can neither make the batterer cease or commence violence. The batterer is solely responsible for his actions. Any provision in a protection order to the contrary provides a batterer with excuses and rationale for continued violation of family members.

- **Instructions on enforcement.** Research reveals that protection orders work best in jurisdictions where police consistently enforce protection orders and arrest for violations. (Finn & Colson, 1990) In many jurisdictions it has been useful to include specific directions to police in protection orders that they arrest a batterer upon a determination that probable cause exists to believe he/she has violated a protection order and/or committed other substantive crimes. While the authority and mandate for arrest may be in statutes, law enforcement seems to respond more uniformly to specific directions from the judiciary to enforce protection orders. Beyond this, specific instructions notify batterers of the ramifications of violation of protection orders. When consequences are certain and swift, batterers maintain better compliance with protection orders. (Pence, 1985)

PROBATION AND PAROLE.

The role of probation and parole offices in a domestic violence intervention system has yet to be fully realized. The probation or parole officer is the person in the intervention system who may have the greatest number of contacts with the batterer for the longest time period. Therefore, it is critical that probation and parole personnel are unequivocal in their intolerance for domestic violence crimes and in support of victim safety. Work undertaken by probation and parole offices might include:

- **Domestic violence assessment.** Since the mandate of the probation and parole office is to help those on their caseload to avoid any violation of probation or parole, every participant should be assessed for a history of domestic violence. Those probationers or parolees who use domestic violence are likely to be program failures. Those who are victims may experience obstacles to successful participation because of domestic violence. Therefore, a history of domestic violence should be explored.

- **Sentencing investigation.** When the presenting conviction is for a domestic violence crime, sentencing investigation should gather the information about the history of domestic violence. This can probably best be acquired from the victim. Screening should also obtain information from the police or the victim regarding aggravating circumstances, including the frequency and pattern of domestic violence, any criminal record for either stranger or domestic violence, injuries sustained by this or other victims, and threats directed against victims during the pendency of prosecution. During the investigation phase, the victim impact statement should be completed and the pre-sentence investigator should explore the propriety of imposing various conditions on probation or parole to enhance victim safety. These might include excluding the offender from the marital or partnership domicile; a directive against interference with the victim's use of marital property for the duration of probation/parole; a condition directing that the perpetrator refrain from harassing his wife/partner by physical force, mail, telephone or third parties; and/or a "no-contact" order. Besides considering conditions to facilitate victim safety, the officer might consider the merits of batterer education/treatment programs and community service for the offender.
- **Specialized Services.** A specialized program for work with batterers should be set up in each office. A protocol should be designed to facilitate the rehabilitation of batterers and the safety of battered women. Staff should be particularly trained for working with this population. For example, besides batterer education/treatment programs, offenders might be subjected to close scrutiny involving regular reporting to the probation and parole office to complete reading and written assignments on domestic violence. Periodic and unannounced home visits may improve batterer compliance. Specialized staff should be trained in dangerousness assessment and crisis telephone communication with battered women. They should know about emergency mental health commitments when someone on their caseload appears to be experiencing a mental health emergency, whether it is acute depression or homicidal ideation. Officers should not be reluctant to involve law enforcement in responding to reports of on-going domestic violence. New charges should be filed for any substantive crime committed in violation of the conditions of probation/parole. Probation and parole officers should take care for their own safety when intervening with a batterer who is alleged to be using violence again.
- **Revocation.** Technical and substantive probation/parole revocation should be pursued where a batterer represents a clear and present danger to his partner. Wherever possible, the perpetrator should be detained prior to the revocation hearing. If the victim is not cooperative with the revocation, probation/parole might seek to proceed through independent testimony/evidence.
- **Victim assistance.** Partners of offenders should be fully acquainted with the benefits and limitations of probation/parole services, and staff should be prepared to give informed referrals to domestic violence programs. Each time that an officer has contact with a partner of a batterer, an assessment of dangerousness should be made. Officers

should encourage battered women to continue with development of safety plans throughout the period of probation/parole. Although domestic violence programs should provide the primary services for victims, officers should be prepared to provide emergency services to assist the victim to safe shelter and advocacy services.

SYSTEMS COORDINATION.

An intervention system is experimental in nature. It needs to be tested and revamped periodically. As case and statutory law are modified, policy and procedures must be modified in agencies in the intervention system. Changes cause ripple effects throughout the system and require parallel modifications. In most effective domestic violence intervention systems there is a coordinator or manager who works to maintain the efficacy of coordinated agency intervention. Without this coordinator, research informs us that systems begin to revert to prior practices, endangering battered women. (*Fagan, 1988; Berk, 1982*) Typically, this coordination function has been performed by the local domestic violence program.

CONCLUSION.

We have learned that the conjoint and parallel efforts of all the components of a domestic violence intervention system are essential for justice and safety to be achieved. We are hopeful that the legal system in many communities in Pennsylvania will strategically expand efforts in the coming year to implement comprehensive intervention in domestic violence situations. The Pennsylvania Coalition Against Domestic Violence welcomes feedback from justice system participants. We are willing to provide consultation upon request. Please contact Margaret Innes of PCADV, 524 McKnight Street, Reading, PA 19601, 215/373-5697.

Barbara J. Hart, Esq.
1990

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LETHALITY: ASSESSING WHETHER BATTERERS WILL KILL

Some batterers are life-endangering. While it is true that all batterers are dangerous, some are more likely to kill than others and some are more likely to kill at specific times. Regardless of whether there are charges pending, bail conditions in place, or a protection from abuse order in effect, prosecutors should evaluate whether an assailant is likely to kill his* partner or other family members and take appropriate action.

Assessment is tricky and never full-proof. It is important to conduct an assessment during every contact with the victim. A prosecutor can utilize the indicators described below in making an assessment of the batterer's potential to kill. Considering these factors may or may not reveal actual potential for homicidal assault. But, **the likelihood of a homicide is greater when these factors are present.** The greater the number of indicators that the batterer demonstrates or the greater the intensity of indicators, the greater the likelihood of a life-threatening attack.

Use all of the information available about the batterer, current as well as past incident information. A thorough investigation will provide much of the information necessary to make this assessment.

1. Threats of homicide or suicide.

The batterer who has threatened to kill himself, his partner, the children or her relatives must be considered extremely dangerous.

2. Fantasies of homicide or suicide.

The more the batterer has developed a fantasy about who, how, when, and/or where to kill, the more dangerous he may be. The batterer who has previously acted out part of a homicide or suicide fantasy may be invested in killing as a viable "solution" to his problems. As in suicide assessment, the more detailed the plan and the more available the method, the greater the risk.

3. Weapons.

Where a batterer possesses weapons and has used them or has threatened to use them in the past in his assaults on the battered woman, the children or himself, his access to those weapons increases his potential for lethal assault. The use of guns is a strong predictor of homicide. If a batterer has a history of arson or the threat of arson, fire should be considered a weapon.

* We have assumed that the victim is a woman and the abuser is a man. It may be that the victim is a man and the abuser a woman or that the abuser and the victim are the of the same sex. Assessment is basically the same despite these gender differences. The only additional indicator to be assessed in a lesbian or gay relationship is whether the abuser has been firmly closeted and is now risking exposure as a lesbian or gay person in order to facilitate their severe, life-threatening attacks. When a person has been desperately closeted, losing the protection of invisibility in order to abuse potentially suggests great desperation and should be included in the assessment.

4. "Ownership" of the battered partner.

The batterer who says "Death before Divorce!" or "You belong to me and will never belong to another!" may be stating his fundamental belief that the woman has no right to life separate from him. A batterer who believes he is absolutely entitled to his female partner, her services, her obedience and her loyalty, no matter what, is likely to be life-endangering.

5. Centrality of the partner .

A man who idolizes his female partner, or who depends heavily on her to organize and sustain his life, or who has isolated himself from all other community, may retaliate against a partner who decides to end the relationship. He rationalizes that her "betrayal" justifies his lethal retaliation.

6. Separation Violence.

When a batterer believes that he is about to lose his partner, if he can't envision life without her or if the separation causes him great despair or rage, he may choose to kill.

7. Depression.

Where a batterer has been acutely depressed and sees little hope for moving beyond the depression, he may be a candidate for homicide and suicide. Research shows that many men who are hospitalized for depression have homicidal fantasies directed at family members.

8. Access to the battered woman and/or to family members.

If the batterer cannot find her, he cannot kill her. If he does not have access to the children, he cannot use them as a means of access to the battered woman. Careful safety planning and police assistance are required for those times when contact is required, e.g. court appearances and custody exchanges.

9. Repeated outreach to law enforcement.

Partner or spousal homicide almost always occurs in a context of historical violence. Prior calls to the police indicate elevated risk of life-threatening conduct. The more calls, the greater the potential danger.

10. Escalation of batterer risk.

A less obvious indicator of increasing danger may be the sharp escalation of personal risk undertaken by a batterer; when a batterer begins to act without regard to the legal or social consequences that previously constrained his violence, chances of lethal assault increase significantly.

11. Hostage-taking.

A hostage-taker is at high risk of inflicting homicide. Between 75% and 90% of all hostage takings in the US are related to domestic violence situations.

If a prosecutor concludes that a batterer is likely to kill or commit life-endangering violence, extraordinary measures should be taken to protect the victim and her children. The victim should be advised that the presence of these indicators may mean that the batterer is contemplating homicide and that she should contact the local battered woman's program to further assess lethality and develop safety plans.

Hart, B., "Assessing Whether Batters Will Kill," © PCADV, 1990.

WHY SHE STAYS, WHEN SHE LEAVES

Many people not involved with an abusive partner say that if their mates ever harmed them they would leave. Many battered victims remember the same resolve. Why do they stay? Why might they go back? Why do some permanently separate from abusers?

There are serious factors which weigh on the battered woman's decision to leave. This is the man she loves, or has loved. The batterer may be the father of her children. Ending an intimate relationship is very difficult, even more so when self-confidence has been destroyed by the batterer. Battered women report the following reasons for staying with the batterer or leaving him.

Hope for change. Many abusive mates become remorseful after inflicting violence. This contrite behavior may include promising never to hit again, agreeing to seek counseling if the victim does not leave, reminding the victim of how hard the perpetrator works, pointing out the incredible stresses under which he is operating, acknowledging the wrongfulness of his violence to the children and asking their help in stopping it, and demonstrating his love for her in meaningful ways. Since battered women are in committed relationships and have often built their lives around the relationship, they hope for change. When the batterer acknowledges the error of his ways, when he breaks down and cries out his despair, and concedes the need for dramatic change, hope is often born anew for battered women.

Isolation. Many battered women lose their support systems. The batterer has isolated them. For example, a batterer may prohibit a battered woman from using the phone; may humiliate her at family gatherings; may insist on transporting her to work; may censor her mail, etc. Men who batter are often highly possessive and excessively jealous. They believe that they "own" the battered woman and are entitled to her exclusive attention and absolute obedience. The batterer knows that if the truth is told about his conduct, support persons will urge the battered woman to leave or seek assistance. Therefore, batterers quickly isolate battered women in order to sustain the power of their violence.

Societal denial. Battered women fear that no one will believe their husbands or partners beat them. Batterers often are very ingratiating and popular men who keep their terrorizing, controlling behaviors within the family behind closed doors. The battered woman knows this, and it compounds her fear that no one will believe her. Battered women discover that many people and agencies in the community trivialize the impact of violence (e.g. doctors prescribe valium for coping; ministers recommend prayer and more accommodating behaviors; therapists advise better communications with the perpetrators, etc.). No one understands that she feels like a prisoner who might be severely injured or die at the hands of her jailer. She concludes that since they don't understand the seriousness of the violence, they will not support her disruption of the family.

Barricades to leaving. Even when a battered woman decides to leave, batterers put up many barricades. Many threaten to seek custody of their children, to withhold support, to interfere with her employment, to advise prospective landlords that she is not credit-worthy, to try to turn the children or family against her, to threaten to kill her or other family members if she leaves, to threaten retaliatory suicide, or in other ways to escalate his violence in an attempt to hold her in the relationship.

Belief in batterer treatment. Battered women are reluctant to leave when their partners are in treatment. They believe the treatment will motivate them to make the profound changes necessary to stop their battering. Therefore, it is very important that battered women are referred to domestic violence programs so that they can gain full information about treatment programs for batterers and evaluate whether these programs are likely to effect the change that will make life safe for them. (*Gondolf, 1988; Okun, 1986*)

Dangers in leaving. Many battered women believe that leaving is not necessarily going to make her life or the life of her children safer. Many battered women killed by their partners are killed *after* they have left or separated. (*Casanave & Zahn, 1986; Browne & Williams, 1989 & 1987*) Leaving, itself, may be a dangerous process. Many batterers, in fact, escalate their violence to coerce a battered woman into reconciliation or to retaliate for the battered woman's departure. (Please see the section on Separation Violence on page 4 of this manual.) Leaving requires strategic planning and comprehensive legal intervention to safeguard victims and their children.

Economic autonomy. But battered women do leave. The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him. Therefore, it is incredibly important that battered women obtain support awards in protection orders and are referred to battered women's programs where they can learn about other economic supports, job training and employment opportunities. (*Gondolf, 1988; Okun, 1986*)

Leaving is a process. Most battered women leave and return several times before permanently separating from the batterer. Leaving is a process. The first time a battered woman leaves may be a test to see whether he will actually get some help to stop his terrorism. When he is violent again, she may leave to gain more information about resources available to her. She may then reconcile and begin to get some economic and educational resources together in case she decides that she must later leave. She may next leave to try to break out of the isolation in which the batterer has virtually imprisoned her. Most battered women eventually leave. (*Okun, 1986*)

When friends, family and helping agencies, such as police, shelters, clergy, courts, medical personnel, educators and therapists, lend substantial and concerted efforts to assist battered women in the leaving process, battered women are more likely to leave and secure protection for themselves and their children. Therefore, when battered women stay, we as a community should look to see what we are doing to hinder the leaving process and then make changes to facilitate leaving and ultimate safety.

Leaving must be done in a way that does not further jeopardize the victim's safety. It is important for prosecutors to refer victims to domestic violence programs to develop plans for safe leave-taking.

Barbara J. Hart, Esq.
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APPENDIX D

DOMESTIC VIOLENCE SERVICE PROVIDERS

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

October 1, 1991

Area Served	Name, Address and Telephone Number
Adams County	Survivors, Inc. P.O. Box 3572 Gettysburg, Pennsylvania 17325 717-334-0589 (Office) 717-334-9777 (Hotline) Contact Person: Ms. Kris Bell
Allegheny County	Alle-Kiski Area Hope Center P.O. Box 67 Tarentum, Pennsylvania 15084 412-339-2500 (Office) 412-339-4673 (Hotline) Contact Person: Ms. Stephanie Ragni
Allegheny County	Crisis Center North P.O. Box 75 Allison Park, Pennsylvania 15101 412-487-4780 (Office) 412-487-4700 (Hotline) Contact Person: Ms. Valetta B. Ford
Allegheny County	Women's Ctr/Shelter of Greater Pittsburgh P.O. Box 9024 Pittsburgh, Pennsylvania 15224 412-687-8017 (Office) 412-687-8005 (Hotline) Contact Person: Ms. Martha Friday
	Womansplace P.O. Box 144 McKeesport, Pennsylvania 15134 412-678-4618 (Office) 412-678-4616 (Hotline) Contact Person: Ms. Sue M. Berman

Armstrong County	<p>HAVIN, Inc. P.O.Box 983 Kittanning, Pennsylvania 16201 412-543-1180 (Office) 412-548-8888 (Hotline) Contact Person: Ms. Melinda Fairman</p>
Beaver County	<p>Women's Center of Beaver County P.O. Box 397 Beaver, Pennsylvania 15009 412-775-0131 (Hotline/Office) Contact Person: Ms. Jill Marsilio Colonna</p>
Bedord County	<p>Bedford County Abuse Center P.O. Box 496 Bedford, Pennsylvania 15522 814-652-2031 (Office) 814-623-5682 (Hotline) Contact Person: Ms. Lu Lucko</p>
Berks County	<p>Berks County Women In Crisis P.O. Box 803 Reading, Pennsylvania 19603 215-373-2053 (Office) 215-372-9540 (Hotline) Contact Person: Ms. Rochelle Kucera-Mehra</p>
Blair County	<p>Domestic Abuse Project/Blair Co. c/o Family and Children's Service 2022 Broad Avenue Altoona, Pennsylvania 16601 814-944-3583 (Office) 814-944-3585 (Hotline) Contact Person: Ms. Jackie Sutton</p>
Bradford County	<p>Abuse and Rape Crisis Center P.O. Box 186 Towanda, Pennsylvania 18848 717-265-5333 (Office) 717-265-9101 (Hotline) Contact Person: Ms. Jane Moeller</p>
Bucks County	<p>A Woman's Place P.O. Box 299 Doylestown, Pennsylvania 18901 215-752-8035 (Office/Hotline) 215-348-9780 (Office/Hotline) Contact Person: Ms. Barbara Webber</p>

Butler County

Volunteers Against Abuse Center
P.O. Box 293
Evans City, Pennsylvania 16033-0293
412-538-3577 (Office)
412-282-3672 (Office)
412-776-6760 (Hotline)
Contact Person: Ms. Elizabeth Clark-Smith

Cambria County

Women's Help Center
809 Napoleon Street
Johnstown, Pennsylvania 15901
814-536-5361 (Office/Hotline)
Contact Person: Ms. Susan Shahade

Cameron County

Satellite - CAPSEA - See Elk County

Carbon County

Carbon County Women In Crisis
P.O. Box 155
Lehighton, Pennsylvania 18235-0155
215-377-0844 (Office)
215-377-0760 (Office)
215-826-8080 (Hotline)
215-377-0880 (Hotline)
717-427-9800 (Hotline)
717-669-9800 (Hotline)
Contact Person: Ms. Ilisa Miller

Centre County

Centre County Women's Resource Center
140 W. Nittany Avenue
State College, Pennsylvania 16801
814-238-7066 (Office)
814-234-5222 (Office)
814-234-5050 (Hotline)
Contact Person: Ms. Terri Center

Chester County

Domestic Violence Center/Chester Co.
Box 832
West Chester, Pennsylvania 19381
215-431-3546 (Office)
215-431-4130 (Hotline)
Contact Person: Ms. Barbara Huber

Clarion County	<p>SAFE (Stop Abuse For Everyone) P.O. Box 108 Clarion, Pennsylvania 16214 814-226-8481 (Office) 814-226-7233 (Hotline) 814-226-7020 (Hotline) Contact Person: Ms. Laurie Snyder-Yount</p>
Clearfield County	<p>DuBois Hope for Victims of Violence Bi-County Addictions Center, Inc. P.O. Box 896 DuBois, Pennsylvania 15801 814-371-1522 (Office) Contact Person: Ms. Ruthanne Barbazzeni</p>
Clinton County	<p>Clinton County Women's Center P.O. Box 5 Castanea, Pennsylvania 17726 717-748-9500 (Office) 717-748-9509 (Hotline) Contact Person: Ms. Leslie Mowen Miller</p>
Columbia County	<p>Women's Center/Bloomsburg 111 N. Market Street Bloomsburg, Pennsylvania 17815 717-784-6631 (Office/Hotline) Contact Person: Ms. Melissa Dyas</p>
Crawford County	<p>Women's Services/The Greenhouse P.O. Box 637 Meadville, Pennsylvania 16335 814-724-4637 (Office) 814-724-2399 (Office) 814-333-9766 (Hotline) Contact Person: Ms. Judith Griffin</p>
Crawford County	<p>Titusville Women's Center 201 N. Franklin Street Titusville, Pennsylvania 16354 814-827-2746 (Office) 814-827-9777 (Hotline) Contact Person: Ms. Jane Morrison</p>
Cumberland County	<p>Domestic Violence Services of Cumberland/ Perry Counties P.O. Box 1039 Carlisle, Pennsylvania 17013 Contact Person: Ms. Bonnie Fowler</p>

Dauphin County

YWCA, Harrisburg
215 Market Street
Harrisburg, Pennsylvania 17101
717-234-7931 (Office)
1-800-654-1211 (Hotline)
Contact Person: Ms. Patricia Schwartz

Delaware County

Domestic Abuse Project/Delaware Co.
P.O. Box 174
Media, Pennsylvania 19063
215-565-6272 (Office)
215-565-4590 (Hotline)
Contact Person: Ms. Vernoca Micheal

Elk County

CAPSEA
P.O. Box 464
Ridgeway, Pennsylvania 15853
814-772-3838 (Office)
814-772-1227 (Hotline)
Contact Person: Ms. Karen Roberts

Erie County

Hospitality House Services For
Women, Inc.
P.O. Box 1436
Erie, Pennsylvania 16512
814-454-8161 (Office/Hotline)
Contact Person: Ms. Linda Lyons-King

Fayette County

Fayette County Family Abuse Council
215 Searight Avenue
Uniontown, Pennsylvania 15401
412-437-2530 (Office)
412-439-9500 (Hotline)
Contact Person: Ms. Gloria Mickens

Forest County

Satellite Office - Women's Center -
See Warren County

Franklin County

Women In Need, Inc.
P.O. Box 25
Chambersburg, Pennsylvania 17201
717-264-3056 (Office)
717-264-4444 (Hotline)
800-621-6660 (Hotline)
Contact Person: Ms. Barbara Channing

Fulton County	Satellite - Women In Need - See Franklin County
Greene County	Satellite - Fayette County Family Abuse Council See Fayette County
Huntingdon County	Huntingdon House P.O. Box 217 Huntingdon, Pennsylvania 16652 814-643-2801 (Office) 814-643-1190 (Hotline) Contact Person: Ms. Sue Ann Blakeslee
Indiana County	Alice Paul House P.O. Box 417 Indiana, Pennsylvania 15701 412-349-4444 (Office/Hotline) Contact Person: Ms. Lenore Patton
Jefferson County	JCCEOA/Crossroads Project 105 Grace Way/Mill Creek Center Punxsutawney, Pennsylvania 15767 814-938-3302 (Office) 800-648-3381 (Hotline) Contact Person: Ms. Jann M. Wineberg
Juniata County	Satellite - Mifflin County Abuse Network See Mifflin County
Lackawanna County	Women's Resource Center/Scranton P.O. Box 975 Scranton, Pennsylvania 18501-0975 717-346-4672 (Office) 717-346-4671 (Hotline) Contact Person: Ms. Maribeth Woody
Lancaster County	Lancaster Shelter For Abused Women P.O. Box 359 Lancaster, Pennsylvania 17603 717-299-1240 (Office) 717-299-9677 (Office) 717-299-1249 (Hotline) Contact Person: Ms. Bonnie Glover

Lawrence County

Women's Shelter/Lawrence County
P.O. Box 1422
New Castle, Pennsylvania 16103
412-652-9206 (Office)
412-652-9036 (Hotline)
Contact Person: Ms. Bonnie Robinson

Lebanon County

Domestic Violence Intervention of
Lebanon County
P.O. Box 42
Lebanon, Pennsylvania 17042
717-273-7190 (Hotline)
Contact Person: Ms. Andrea Mullin

Lehigh County

Turning Point Of Lehigh Valley
P.O. Box 1705
Allentown, Pennsylvania 18105
215-437-0222 (Office)
215-437-3369 (Hotline)
Contact Person: Ms. Bonnie McDonald

Luzerne County

Domestic Violence Service Center
P.O. Box 1662
Wilkes-Barre, Pennsylvania 18703
717-823-6799 (Office)
717-823-7312 (Hotline)
717-455-9971 (Hazelton Hotline)
Contact Person: Ms. Ellen Moyle Harris

Lycoming County

Wise Options For Women
815 W. Fourth Street
Williamsport, Pennsylvania 17701
717-323-8167 (Office)
800-624-4636 (Hotline)
Contact Person: Ms. Melinda Yowell

McKean County

Domestic Violence Program, Bradford
24 West Corydon Street
Bradford, Pennsylvania 16701
814-368-4235 (Office)
814-368-6325 (Hotline)
Contact Person: Ms. Nancy Barron-Sick

Mercer County	AW/ARE, Inc. P.O. Box 662 Sharon Pennsylvania 16146 412-981-3753 (Office) 412-981-1457 (Hotline) Contact Person: Ms. Geraldine Bennefield
Mifflin County	Mifflin County Abuse Network P.O. Box 268 Lewistown, Pennsylvania 17044 717-242-0351: Extension 127 (Office) 717-242-2444 (Hotline) Contact Person: Ms. Jane Hollister
Monroe County	Women's Resources/Monroe County, Inc. 30 North Seventh Street Stroudsburg, Pennsylvania 18360 717-421-4200 (Office) 717-421-4000 (Hotline) Contact Person: Ms. Shamita das Desupta
Montgomery County	Laurel House P.O. Box 764 Norristown, Pennsylvania 19401 215-277-0170 (Office) 215-643-3150 (Hotline) Contact Person: Ms. Nancy J. Hopkins
	Women's Center of Montgomery County Suite B-7 100 Old York Road Jenkinstown, Pennsylvania 19046 215-885-5020 (Hotline) Contact Person: Ms. Donna Byrne
Montour County	Served by Women's Center/Bloomsburg- See Columbia County
Northampton County	Turning Point P.O. Box 5355 Bethlehem, Pennsylvania 18015 215-253-1104 (Hotline)
Northumberland County	See Union County See Columbia County

Perry County	Served by Domestic Violence Services Of Cumberland/Perry Counties See Cumberland County
Philadelphia County	<p>Lutheran Social Mission's Society/ Women's Program 1340 Frankfort Avenue Philadelphia, Pennsylvania 19125 215-426-8610 (Office) 215-739-9999 (Hotline) 215-235-9992 (Hotline) Contact Person: Ms. Irene Basile</p> <p>Women Against Abuse P.O. Box 13758 Philadelphia, Pennsylvania 19101 215-386-1280 (Office) 215-739-9999 (Hotline) 215-235-9992 (Hotline) Contact Person: Ms. Carol Ray</p> <p>Women In Transition 125 South Ninth Street-Suite 502 Philadelphia, Pennsylvania 19107 215-922-7177 (Office) 215-922-7500 (Hotline) Contact Person: Ms. Roberta Hacker</p>
Pike County	Satellite Office- Served by Women's Resources/Monroe
Potter County	Served by the Clinton County Women's Center See Clinton County
Schuylkill	<p>Schuylkill Women In Crisis P.O. Box 96 Pottsville, Pennsylvania 17901 717-385-4775 (Office) 717-622-6222 (Hotline) Contact Person: Ms. Sarah Casey</p>
Snyder	Satellite Office-Served by SVWIT See Union County
Somerset	Served by Women's Help Center See Cambria County

Sullivan County	Served by Wise Options For Women See Lycoming County
Susquehanna County	Served by Women's Resource Center/Scranton See Lackawanna County
Tioga County	Tioga County Women's Coalition P.O. Box 933 Wellsboro, Pennsylvania 16901 717-724-3549 (Office) 800-332-6718 (Hotline) Contact Person: Ms. Carol McCormick
Union County	Susquehanna Valley Women In Transition P.O. Box 170 Lewisburg, Pennsylvania 17837 717-523-1134 (Office) 717-523-6482 (Hotline) Contact Person: Ms. Janice Lemon
Venango County	Served by Titusville Women's Center See Crawford County
Warren County	Women's Center, Warren P.O. Box 114 North Warren, Pennsylvania 16365 814-726-1271 (Office) 814-726-1030 (Hotline) 800-338-3460 (Hotline) Contact Person: Ms. Caroline Haslet
Washington County	Washington Women's Center P.O. Box 503 Washington, Pennsylvania 15301 412-223-9190 (Hotline) Contact Person: Ms. Michelle Robinson
Wayne County	Victim's Intervention Program P.O. Box 986 Honesdale, Pennsylvania 18331 717-253-4401 (Hotline) Contact Person: Ms. Kathy Campion

Westmoreland County

Women's Services/Westmoreland County
P.O. Box 246
Greensburg, Pennsylvania 15601
412-837-9540 (Office)
412-836-1122 (Hotline)
Contact Person: Ms. Norma F. Samide

Wyoming County

Victim's Resource Center
79 West Union Street
Wilkes-Barre, Pennsylvania 18701
717-823-0766 (Office)
717-836-5844 (Hotline)
717-836-5544 (Hotline)
Contact Person: Ms. Carol Lavery

York County

ACCESS/York, Inc.
P.O. Box 743
York, Pennsylvania 17405
717-846-5400 (Office)
800-262-8444 (Hotline)
Contact Person: Ms. Deborah Markel

Emergency Shelter

Providers to be determined
Project - Philadelphia

APPENDIX E

DOMESTIC VIOLENCE BIBLIOGRAPHY

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