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ADVOCATE NEWSLETTER



WASHINGTON'S NEW SEXUAL ASSAULT PROTECTION ORDER

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Message from the Editor:

This issue of our Advocate Newsletter is dedicated to Washington's sexual assault protection order – an order issued by a court on behalf of a sexual assault victim. This important new law will afford many sexual assault victims a legal mechanism to obtain "stay away" protection from their assailants. The aim of the new sexual assault protection order is to fill a gap that has existed for many victims who were sexually assaulted by someone other than a family, domestic or intimate partner and have previously been relegated to use anti-harassment orders to obtain legal protection from their assailant.

While the sexual assault protection order provides some victims with a necessary legal tool, this order is not appropriate in every situation. There are limitations and challenges with the law and important factors each victim must consider before engaging in this legal process. As advocates, you play a crucial role in providing the necessary information so that victims can make informed decisions about which type of protective order is most appropriate to their circumstances.

The Legal Services Department provides training and technical assistance to advocates and attorneys across the state. Information about the new order is also available on our website at www.wcsap.org. I encourage you to contact us if you have any questions and also to inform us about the outcomes and challenges of the sexual assault protection order hearings so that we may develop resources and trainings to assist in your advocacy work around these new orders.

Sincerely,
Kelly O'Connell, Staff Attorney
WCSAP Legal Services Department

DISCLAIMER:

The legal information provided in this newsletter should not be considered legal advice. Whether a particular factual situation is contrary to federal or state law will depend on a number of circumstances specific to the victim. If you or your client needs legal advice, you should consult an attorney. Laws change both as the result of legislative and court decisions. The information here is current as of October 2006.

A NEW TOOL FOR SAFETY: INTRODUCING WASHINGTON'S SEXUAL ASSAULT PROTECTION ORDER

BY KELLY O'CONNELL, ESQ.
WCSAP STAFF ATTORNEY

"Until now, many victims of sexual assault have had no meaningful way of obtaining protection from the person who assaulted them."

It is difficult to imagine any act that would shatter your sense of physical safety more than being raped. 38% of women in Washington have reported that they are victims of rape, forced sexual contact or child sexual abuse at some time in their lives.¹ Sexual assault victims may not feel safe for months or even years after the assault, particularly if they have continued contact with their assailants. Rapists may pose ongoing threats or may use the fear instilled by the first assaults to intimidate victims and prevent them from seeking civil or criminal justice remedies.

Because victims may fear for their safety, planning to protect victims against another assault or act of abuse is a critical element of any legal representation. Protection orders are one component of individual safety plans² that place the legal burden on assailants to have no further contact with victims.

Until now, many victims of sexual assault have had no meaningful way of obtaining protection from the people who have assaulted them. For example, a victim who is raped by a customer who regularly frequents her store but with whom she has never been involved with romantically does not qualify for a domestic violence protection order. A parent whose son was molested by a neighbor down the street has little to no ability to get a civil protective order to ensure that their child is not further contacted by the assailant while playing in the neighborhood. An employee who is raped after a company party by a co-worker similarly has no legal remedy for protection.

Thankfully, a new law creating a Sexual Assault Protection Order was just enacted in Washington and many victims will now have a legal tool to address their devastated sense of physical safety following a sexual assault.³ Any victim of nonconsensual sexual conduct or penetration, including a single incident, may petition for a Sexual Assault Protection Order under the new statute.

¹ Lucy Berliner & David Fine, *Sexual Assault Experiences and Perceptions of Community Response to Sexual Assault: A Survey of Washington State Women*. Research supported by: Office of Crime Victims Advocacy, Washington State Office of Community Development (October 2001).

² Every victim has specific and unique circumstances that will determine her individual safety plan – an experienced sexual assault or domestic violence advocate is an excellent resource for developing a safety plan.

³ RCW 7.90, Sexual Assault Protection Order Act.

THE NEED FOR A SEXUAL ASSAULT PROTECTION ORDER

"Rape is the most underreported crime in America...the vast majority of victims will never see any criminal sanctions against the assailant."

"...[T]here are two aspects to the new law, both a civil and criminal provision: one allows a victim to petition civilly on their own behalf, and one that allows the prosecutor as part of a criminal proceeding to obtain a no contact order as part of a condition of sentence."

Many people have asked why we need a Sexual Assault Protection Order. The very question fails to recognize one of the most fundamental facts about sexual assault: rape is the most underreported crime in America. In Washington, only 15 percent of sexual assault victims reported to law enforcement authorities.⁴ Only five percent of college victims report nationally.⁵ Since approximately 85% of sexual assault victims in Washington do not report the crime to police, the vast majority of these victims will never see any criminal sanctions against the assailant. In a recent study looking at offender relationship to sexual assault victims, the largest group of offenders was acquaintances or persons known *but not related to* the victim.⁶ Almost half of offenders against children and more than two thirds of offenders against adults were known but not related to the victim.⁷

Existing civil protection orders fail to address the safety concerns of many sexual assault survivors. Civil protection orders are available under RCW 26.50 *et seq.* when a person is a victim of domestic violence, including sexual assault in an intimate relationship. A domestic violence protection order requires that the petitioner have a domestic, familial or dating relationship with the respondent. As a result, the only remedy available to many sexual assault victims who are not assaulted by family or household members has been a civil anti-harassment order under RCW 10.14 *et seq.* Civil anti-harassment orders require a "course of conduct" – rape victims often have difficulty showing that one act of sexual violence constitutes a pattern or series of acts over time. Civil anti-harassment orders are wholly inadequate for addressing sexual violence and are not designed to address the seriousness of sexual assault and rape. Thus, a victim who has been raped *only* one time, and who has no domestic, familial or dating relationship with the assailant may not be able to obtain any type of civil protection order...until now.

In the criminal context, for those victims of sexual violence who do report to law enforcement and see their cases prosecuted, there has been no provision in the criminal code⁸, to allow a judge to issue a criminal no contract order in sex offense cases to help protect the victim. The new Sexual Assault Protection Order addresses this gap as well. Thus there are two aspects to the new law, both

⁴ *Berliner & Fine*, p. 7.

⁵ U.S. Department of Justice, National Institute of Justice, *Sexual Victimization of College Women* (2000).

⁶ *Berliner & Fine*, p.6

⁷ *Berliner & Fine*, p.6.

⁸ With the exception of Superior and District Court Criminal Rules 3.2(d)(1) and RCW §10.99 *et seq.*, which is only for domestic violence victims.

⁹ Currently 12 states, (California, Colorado, Florida, Illinois, Maine, Maryland, Minnesota, Montana, Oklahoma, South Dakota, Texas and Wisconsin), have specific Sexual Assault Protective Order statutes – by definition these orders protect a sexual violence survivor regardless of what the relationship with the perpetrator.

a civil and criminal provision: one which allows a victim to petition civilly on their own behalf, and one that allows the prosecutor as part of a criminal proceeding to obtain a no contact order as part of a condition of sentence.

WASHINGTON'S NEW SEXUAL ASSAULT PROTECTION ORDER

Since June 7, 2006, sexual assault victims in Washington may seek and obtain a Sexual Assault Protection Order. Washington is the thirteenth state in the country to enact specific legislation to address the ongoing safety concerns of victims of sexual assault.⁹ The Sexual Assault Protection Order will afford rape victims similar protections that domestic violence victims have been able to obtain: protection from the assailant and a way to prevent any further contact between the victim and the assailant.

The new statute will establish procedures for obtaining Sexual Assault Protection Orders – below is a general overview of the process to obtain a civil stand alone order:

Filing a Petition. Any person who is a victim of nonconsensual sexual conduct or penetration, including a single incident, may petition for the order in the county or municipality where they reside. A person over age 16 may petition on their own behalf. A third party may file on behalf of a victim who is a minor child, a vulnerable adult or any other adult who cannot file due to age, disability, health or inaccessibility. A petition must allege the existence of nonconsensual sexual conduct or penetration which gives rise to reasonable fear of future dangerous acts. There is no filing fee.

Hearings. Sexual assault advocates are allowed to accompany victims and assist with the preparation of petitions. The court may appoint counsel to represent the petitioner if the respondent is represented by counsel. Evidence concerning prior sexual activity or reputation is generally inadmissible.

Ex Parte Temporary Orders. Upon receipt of the petition, the court may issue an ex parte order for 14 days prior to a hearing on the matter, if the court finds by preponderance of the evidence that the petitioner was a victim on non-consensual sexual conduct or penetration that gives rise to reasonable fear of future dangerous acts and harm would likely occur if the respondent were given prior notice.

Service of Process. The court must order a hearing no later than 14 days from the date of the ex parte order. Personal service must be made on the respondent at least five days before the full hearing either by law enforcement or a person over 18 who is not a party to the action. Currently, there is no fee waiver for service of process by law enforcement in the statute - so it is possible that a petitioner may have to pay for service by law enforcement.

"Sexual assault advocates are allowed to accompany victims and assist with the preparation of petitions."

"If the respondent is ordered to attend another school, the parents or legal guardians of the person restrained in the order are responsible for transportations and other costs associated with the change of school by the person restrained in the order."

Full Orders. After the respondent has been personally served and after a **finding by a preponderance of the evidence** that the petitioner was a victim of non-consensual sexual contact or penetration, the court may issue an order prohibiting the respondent from having contact with the petitioner and staying away from certain places specified in the order for a fixed period of time, not to exceed two years. The order may be extended one or more times.

Remedy: The full sexual assault protection order may provide the following relief:

- Restrain the respondent from having any contact, including nonphysical contact, with the petitioner directly, indirectly, or through third parties regardless of whether those third parties know of the order;
- Exclude the respondent from the petitioner's residence, workplace, or school, or from the day care or school of a child, if the victim is a child;
- Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location; and
- Order any other injunctive relief as necessary or appropriate for the protection of the petitioner.

Monetary damages are not recoverable.

In cases where the petitioner and the respondent are under the age of eighteen and attend the same public or private elementary, middle, or high school, the court, when issuing the sexual assault protection order, the respondent may be required to attend another school, but only after the judge weighs the severity of the act, any continuing physical danger or emotional distress to the petitioner, and the expense difficulty, and educational disruption that would be caused by a transfer of the respondent to another school.

If the respondent is ordered to attend another school, the parents or legal guardians of the person restrained in the order are responsible for transportation and other costs associated with the change of school by the person restrained in the order. The court shall send notice of the restriction on attending the same school as the person protected by the order to the public or approved private school the person restrained by the order will attend and to the school the person protected by the order attends..

Notice: The order shall be immediately entered into the statewide computer database that law enforcement uses to verify protection orders.

Violations: When law enforcement has probable cause to believe the respondent violated the order, they shall arrest the respondent regardless of whether the violation occurred in their presence. Violation of a Sexual Assault Protection Order has the same penalties as violations of domestic violence protection orders under RCW 26.50, *et seq.*

LEGAL REMEDIES & THE EMPOWERMENT MODEL

BY CATHERINE CARROLL, ESQ.

WCSAP LEGAL DIRECTOR

"The complexity of the system requires that we know more about it in order to educate clients so they can make informed decisions about their participation in the system."

In our role as advocates we often help clients with safety planning. We do this for clients who are in crisis as well as for those we see on a continuing basis. Sometimes the client may be fleeing an abusive situation or may be figuring out how to stay safe at work because the perpetrator also works there. We know safety planning is a process that requires listening to our clients and presenting them with available options and it is largely driven by each person's individual needs, the unique situation and the choices he or she makes.

In our role as advocates we have to be creative. We have to be good listeners and we have to be able to present available options to clients in a way they can understand in order for them to make informed decisions. This can be very challenging in the legal arena because there are so many terms and processes that are often unfamiliar to clients. The complexity of the system requires that we know more about it in order to educate clients so they can make informed decisions about their participation in the system.

As legal advocates we often need to explain generally how the legal process works in order for clients to navigate what can be a very intimidating and difficult process. This is true in both the criminal courts where we provide support and accompaniment to clients and the civil system, where we often assist clients with petitioning the court for a protection order.

One of the great and on going challenges for legal advocates approaching this work from the empowerment model, is negotiating the fine line between providing information and support to clients and providing advice and opinions. When we gain experience and understanding as advocates about how the legal process works in our respective counties, we become better advocates. Similarly, we also develop more opinions and thoughts about how the system works (or doesn't work) for sexual assault survivors who are engaged in either the criminal system or the civil protection order process.

"[T]his legal remedy is not a magic wand for sexual assault survivors."

The sexual assault protection order that went into effect on June 7, 2006, is intended to address the gap created by domestic violence protective orders and anti-harassment orders. Unfortunately this legal remedy is not a magic wand for sexual assault survivors. Much like other types of protection orders, this remedy is only meaningful for victims if perpetrators are likely to abide by it. Because we have lacked any meaningful remedy for survivors of sexual violence who do not qualify for an anti-harassment order or a domestic violence protection order, the sexual assault protection order is now an available remedy. However, when we talk with clients about their safety and what legal remedies may be available to them, our role is to help clients determine for themselves what remedy is best for them. This is why as advocates we truly need to understand and appreciate the

"Learning about the new protection order presents us with the opportunity to step back and think about what this order can and cannot do for our clients."

limitations of the new sexual assault protection order.

This order mainly requires the perpetrator to have no further contact with and stay away from the victim. It is a resource for those victims who have no "domestic relationship" with the perpetrator. Generally speaking, if the victim and perpetrator have any familial relationship or intimate or dating relationship, and they are seeking a protective order, if they meet the relationship element, a domestic violence protection order is a much better remedy because it has more provisions: e.g. firearm relinquishment, required attendance at a specific counseling program; temporary custody of children or exclusive possession of specific personal property. In contrast, the sexual assault protection order offers no such provisions.

Learning about the new protection order presents us with the opportunity to step back and think about what this order can and cannot do for our clients. It is also an opportunity for us to reconsider how we talk to clients about available legal remedies and help them consider whether they even want to engage the legal system and if so, how to provide them with all the relevant information so they can determine which remedy they want to pursue. Much like safety planning, it's the process of making informed decisions that creates empowerment for our clients.

In my own learning as an advocate, I know I often wanted to make things easier for the client because watching people struggle is difficult. Sometimes I know I did things for clients that they were perfectly capable of doing themselves. In retrospect I realize that sometimes I helped clients simply because it was easier than watching them struggle and because it made me feel better to do something for them.

Yet, in the work we do, we strive to empower our clients. Every time we do something for our clients that they can do for themselves, we deny their empowerment. Personally I find this a continuing challenge which indeed is why we are striving. When we approach service provision from a victim centered place and believe in empowering our clients, putting it into practice and making sure we are true to our beliefs – requires diligence, reflection and a commitment to truly only providing clients with information and resources – not answers.

We must not, in trying to think about how we can make a big difference, ignore the small daily differences we can make which, over time, add up to big differences that we often cannot foresee.

Marian Wright Edelman

SEXUAL ASSAULT PROTECTION ORDERS IN THE CRIMINAL JUSTICE SYSTEM

BY PAM LOGINSKY, Esq.

STAFF ATTORNEY, WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

Excerpted with permission from May 2006 WAPA Newsletter

This session, the Legislature determined that individuals who were sexually assaulted by someone other than a family or household member merited the same protection that was extended to domestic violence victims. Accordingly, the Legislature adopted sexual assault protection orders. These orders will be available to victims of sexual assault beginning June 7, 2006.

Sexual assault protection orders may be obtained by the victim in a "stand alone" civil proceeding, or by the prosecuting attorney in connection with a criminal matter involving a sex offense as defined in RCW 9.94A.030, the crime of sexual misconduct with a minor in the second degree, or communicating with a minor for immoral purposes. The orders obtained in connection with the criminal matter may be issued prior to trial and may be included as part of a sentence.

Whenever an individual is arrested for a sex offense, the judge authorizing the individual's release from custody before arraignment may prohibit that person from having any contact with the victim. This order, which may be issued by telephone, shall prohibit the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location. The order should be reduced to writing and provided to the restrained individual as soon as possible. A pre-charging no contact order will expire after 72 hours (3 judicial days) if no criminal charges have been filed. If charges are filed within three judicial days of the entry of the pre-charging no contact order, the pre-charging no contact order will remain in effect through the arraignment. These pre-arraignment orders need not be entered into the computer-based criminal intelligence information system, but a certified copy of the order should be provided to the victim at no charge.

At the arraignment or whenever a motion is brought to modify the conditions of the defendant's release, the court shall determine whether a sexual assault protection order should issue or be extended. Such an order may include a requirement that the defendant submit to electronic monitoring. The clerk of the court is required to immediately forward a copy of this order to the proper law enforcement agency for entry into the state's computer-based criminal intelligence information system. A certified copy of the order should be provided to the victim at no charge.

A sexual assault protection order issued at arraignment will expire when charges are dismissed or the defendant is acquitted, unless the victim files an independent action for a sexual assault protection order. If the victim files a "stand alone" petition for a sexual assault protection order, the order issued in connection with

"A sexual assault protection order [issued through the criminal system] will expire when charges are dismissed or the defendant is acquitted, unless the victim files an independent action for a [civil] sexual assault protection order."

"A sexual assault protection order imposed in conjunction with a criminal case may remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. This means that a sexual assault protection order issued...as part of a judgment and sentence may last no longer than four years."

the criminal matter may be continued by the criminal court until a full hearing is conducted on the victim's petition. Prompt notice must be given to the proper law enforcement agency of any change to a sexual assault protection order so that the amendment can be entered into the state's computer-based criminal intelligence information system.

A sexual assault protection order may be imposed as part of a judgment and sentence. A sexual assault protection order imposed in conjunction with a criminal case may remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. This means that a sexual assault protection order issued by a district or municipal court as part of a judgment and sentence may last no longer than four years. *See* RCW 35.20.255 (court's jurisdiction to enforce sentences extends for 2 years in non-DUI cases); RCW 3.50.330 (same). A no contact order imposed as part of a felony sentence may extend up to the statutory maximum of the crime. *See* RCW 9.94A.712. A copy of the post-conviction sexual assault protection order must be promptly forwarded to the proper law enforcement agency for entry into the state's computer-based criminal intelligence information system. A certified copy of the order should be provided to the victim at no charge.

A sexual assault protection order contained in a judgment and sentence may become inoperative in a number of ways. If the sentence is stayed pending an appeal from the conviction, the sexual assault protection order will also be stayed unless the sexual assault protection order is specifically exempted from the stay or the sexual assault protection order is made a part of the defendant's conditions pending appellate release. Authority for imposing conditions pending appeal can be found in both court rules and statutes. *See, e.g.,* CrRLJ 3.2(f); CrR 3.2 ; RALJ 4.3(b); CrR 3.2(f); RAP 7.2(f); RCW 9.95.062; RCW 9.95.064; RCW 10.67.025; RCW 10.67.027.

Every sexual assault protection order should be enforceable while a defendant is incarcerated. *See generally State v. Rodman*, 94 Wn. App. 930, 973 P.2d 1095 (1999). Violations of pre-trial no contact orders may result in the revocation of release and/or new criminal charges. *See* CrR 3.2(i); CrRLJ 3.2(h); RCW 10.99.040(2). Violations of a post-sentencing no contact order may result in prison or jail administrative sanctions, imposition of suspended jail time, imposition of further punishment, and/or new criminal charges. *See* RCW 9.94A.634(1); RCW 3.50.340; RCW 3.66.069.

Every sexual assault protection order issued in conjunction with a criminal matter must bear the following legend:

Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to

violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.

WASHINGTON STATE ATTORNEY REFERRALS

The sexual assault protection order law contains a unique provision that allows judges to appoint counsel to represent the petitioner when the respondent is represented by an attorney at the hearing. Given the complex evidentiary issues that often exist in sexual assault cases, when a respondent has an attorney representing their interests at a protection order hearing, the victim should have the opportunity for legal representation as well.

WCSAP maintains a list of attorneys throughout Washington state who have received training from WCSAP on sexual assault issues and have agreed to take case referrals from rape crisis centers. Please contact the Legal Services Department at WCSAP if you need an attorney referral. For more information and/or assistance in developing attorney referrals in your region or with any questions about the sexual assault protection order, please contact the WCSAP Legal Services Department.

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WCSAP is committed to fostering a culture of respect, dignity and autonomy for all individuals. We recognize that disrespect, ignorance and the abuse of disparities in power are the roots of sexual violence. To that end, WCSAP endeavors to engage with agencies and individuals who share our commitment.

