

## **SPECIAL REPORT**

# **The Use and Abuse of Domestic Restraining Orders**



**STOP ABUSIVE AND  
VIOLENT ENVIRONMENTS**

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## DOMESTIC RESTRAINING ORDERS

A restraining order is a law enforcement tool designed to provide emergency relief in the event of imminent or actual serious physical harm. The original idea behind restraining orders was sound. But as the following example illustrates, judges are now issuing restraining orders on questionable grounds:

*On December 15, 2005, Santa Fe District Court Judge Daniel Sanchez issued a temporary restraining order to protect Colleen Nestler. According to Nestler, for the past 11 years a man had been sending her unwanted coded messages over the airwaves expressing his desire to marry her. Her alleged harasser: CBS talk show host David Letterman.*

*Asked to explain why he had issued a restraining order on the basis of such an unusual complaint, Judge Sanchez replied that Ms. Nestler had filled out the restraining order request form correctly.<sup>1</sup>*

This Special Report summarizes the two-step process of obtaining a restraining order, highlights their impact on the family structure, evaluates the extent of non-meritorious orders, and discusses other problems with such orders.

### **Issuance of a Restraining Order**

Restraining orders (known as “orders of protection” or “emergency protective orders” in some states) are typically issued by following a two-step process:

The initial temporary restraining orders (TROs) are generally issued on an emergency *ex parte* basis. The judge issues the order without the respondent having legal representation, being allowed to present opposing evidence, or even being aware of the allegation. It has been estimated that about 85% of such orders are issued against men, with the remaining 15% issued against women.<sup>2</sup>

Restraining orders are easy to obtain because state laws now define domestic violence broadly,<sup>3</sup> judges seldom require proof of abuse, and statutes invoke a “preponderance of evidence” standard. In California, for example, a restraining order appears to be as easy to obtain as a hunting license. The Sacramento Superior Court’s website instructs TRO applicants as follows:

Please present the completed domestic violence forms to the Family Law Filing Window in Room 100 of the William R. Ridgeway Family Relations Courthouse. The clerk will conduct a mini-interview with you to clarify your request and to ensure that you filled out the forms correctly.<sup>4</sup>

In most states a temporary order is followed by a full hearing 10–14 days later; at that time, a final judicial determination is reached.

## Civil Rights Violations

Despite their widespread use, many believe *ex parte* orders violate essential elements of due process, including advance notice of the proposed action, the right to face your accuser, and the opportunity to refute the allegation. Nonetheless, *ex parte* orders have been deemed legally acceptable because they are issued on a temporary basis under civil law, and proponents argue the respondent is entitled to full due process protections during the final hearing.

But in practice, the respondent may not enjoy full due process protections at the final hearing. In many cases, a restraining order becomes the legal equivalent of the old joke, “So when did you stop beating your wife?”:

- The claimant may have had weeks to prepare for the case, and may be receiving free legal help. In contrast, the respondent has only a few days to find a lawyer and develop a legal strategy.
- The respondent has limited access to evidence in the family home that may be essential to proving his or her innocence.
- If the respondent has limited financial resources, he or she may be forced to undertake more difficult *pro se* defense.\*

As one attorney notes, “the mere allegation of domestic abuse...may shift the burden of proof to the defendant.”<sup>5</sup> In some cases the judge asks, “Well, why *shouldn't* I enter this order against your client?”

This is the court transcript from a hearing in which the respondent’s attorney requested the court to vacate (i.e., remove) the order:<sup>6</sup>

*Attorney to his respondent-client:* “Can you please state your name and your address for the record?”

*Judge:* “I don’t believe I need to hear any evidence from your client. I’m going to deny your request to vacate the restraining order.”

In Washington State, a standard Temporary Order for Protection reads as follows:

IT IS THEREFORE ORDERED THAT...The respondent is directed to appear and show cause why this temporary order should not be made effective for one year or more and why the court should not order the relief requested by the petitioner or other relief which may include electronic monitoring, payment of costs, and treatment. [emphasis added]

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\* In New Jersey, the defendant is not allowed to depose the alleged victim because, according to the statutory wording, this “perpetuates the cycle of power and control whereby the perpetrator remains the one with the power and the victim remains powerless.”\* It should also be noted that the wording of the law does not employ the word “alleged” to qualify the term “perpetrator.”

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In short, the burden of proof rests not on the complainant, but on the respondent to prove that the order should not be extended for a full year.

Concerns about widespread due process violations have been voiced in legal circles for at least 25 years.<sup>7</sup>

- Elaine Epstein, former president of the Massachusetts Bar Association, admitted, “Everyone knows that restraining orders and orders to vacate are granted to virtually all who apply...In many cases, allegations of abuse are now used for tactical advantage.”<sup>8</sup>
- In Connecticut, attorney Arnold Rutkin charged that many judges view temporary restraining orders as a “rubber-stamping exercise” and that subsequent hearings “are usually a sham.”<sup>9</sup>
- In Missouri, a survey of judges and attorneys yielded many complaints of disregard for due process and noted that allegations of domestic violence were widely used as a “litigation strategy.”<sup>10</sup>
- In Illinois, an article in the state legal journal described legal allegations of abuse as “part of the gamesmanship of divorce.”<sup>11</sup>
- In California, the State Bar admits it is concerned that protective orders are “almost routinely issued by the court in family law proceedings even when there is relatively meager evidence and usually without notice to the restrained person ... it is troubling that they appear to be sought more and more frequently for retaliation and litigation purposes.”<sup>12</sup>

### **Impact of Restraining Orders**

Restraining orders have profound consequences. They:

- Require the respondent to immediately vacate the house.
- Prohibit the person from communicating with children.
- Bar the person who works in the military or law enforcement from carrying a weapon, may result in loss of a security clearance, thus harming the person’s career opportunities.
- Impose substantial legal defense costs. In contrast, the claimant may enjoy free legal assistance under the Legal Assistance for Victims provision of the Violence Against Women Act.

In some states, the existence of the order is not expunged from the respondent’s legal record, even if the final hearing finds the person innocent of all charges.

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Not uncommonly, the claimant files for divorce and temporary child custody while the temporary order is in effect, what has been termed the “the gamesmanship of divorce.”<sup>13</sup> In other cases, divorce attorneys have been known to offer to drop the allegation of abuse in exchange for financial concessions.<sup>14</sup>

One account sums up the process this way: “In ten days, the hypothetical husband has gone from having a normal life with a wife, children and home to being a social pariah, homeless, poor, and alone, trapped in a Kafkaesque nightmare.”<sup>15</sup>

These two cases illustrate how restraining orders serve to disrupt normal family bonds.

### *Case #1*

The following case is recounted from the perspective of Mrs. Arlene Soucie, a grandmother and mother-in-law of the “victim”:<sup>16</sup>

*In November 2002, Mrs. Soucie's daughter-in-law moved out of the family home, taking her 9-month-old son with her. For more than 3 months, the father, who worked in law enforcement, and the grandmother were not informed about the child's whereabouts.*

*They were finally granted child visitation rights, but even though the two were careful to be considerate when picking up and returning the child, the mother apparently became irate. So the mother went to a judge and claimed that she was experiencing “emotional distress” when the father and grandmother picked up the child. As a result, in October 2003, Mrs. Soucie and her son were placed under an order of protection prohibiting them from having any contact with the child. “The mother has learned the system and uses it to her advantage,” concluded the distraught grandmother.*

### *Case #2*

The Illinois Domestic Violence Act's definition of domestic violence encompasses “emotional distress.”<sup>17</sup> An actual Order of Protection is shown on the next page (the red markings were added later):<sup>18</sup>

- Box #1 indicates there was no allegation of physical assault. Rather, the wife accused her husband of “harassment” and “interference with personal liberty.”
- Box #5 shows that on the basis of those claims, the petitioner was granted physical custody of the children.
- Box #7 orders the children be removed from their father and allowed to see him every other weekend until 6:00 p.m. on Sunday.



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ORDER OF PROTECTION (CONT.)

Case No. [REDACTED]

BASED ON THE FINDINGS OF THIS COURT,  WHICH WERE MADE ORALLY FOR TRANSCRIPTIONS, OR  WHICH ARE SET OUT IN A SEPARATE INSTRUMENT FILED WITH THE COURT, AND WITH THE COURT HAVING JURISDICTION OF THE SUBJECT MATTER AND OVER ALL NECESSARY PARTIES, IT IS HEREBY ORDERED THAT:

- 1. With respect to all Protected Persons, Respondent is prohibited from committing the following:
  - Physical abuse;  Harassment;  Interference with personal liberty;  Stalking
  - Willful deprivation;  Neglect;  Intimidation of a dependent;  Exploitation.
- 2. Petitioner is granted exclusive possession of the residence and Respondent shall not enter or remain in the household or premises located at: \_\_\_\_\_ (This remedy does not affect title to property)
- 3.  a. Respondent is ordered to stay away from Petitioner and other protected persons; and/or **BOLB**
- b. Respondent is prohibited from entering or remaining at \_\_\_\_\_ while any Protected Person is present; and/or
- c. Respondent is allowed access to the residence on (date) \_\_\_\_\_ at (time) \_\_\_\_\_ in the presence of (name) \_\_\_\_\_ to remove items of clothing, personal adornments, medications used exclusively by the Respondent and other items, as follows: \_\_\_\_\_

**MOM**

- 4. Respondent is ordered to undergo counseling at \_\_\_\_\_ for a duration of \_\_\_\_\_.
- 5.  a. Petitioner is granted physical care and possession of the minor child/ren; and/or
- b. Respondent is ordered to;
  - Return the minor child/ren \_\_\_\_\_ to the physical care of \_\_\_\_\_; and/or
  - Not remove the minor child/ren \_\_\_\_\_ from the physical care of Petitioner or \_\_\_\_\_

**DAD**

- 6. Petitioner is granted temporary legal custody of the minor child/ren \_\_\_\_\_
- 7.  a. Respondent is awarded visitation rights on the following dates and times or under the following conditions or parameters: (No order shall merely refer to the term "reasonable visitation") **standard visitation per local court rules specifically every other week to Sunday 6:00 P.M. COMMENCING 11-02-02.**
- b. Respondent's visitation is restricted as follows: \_\_\_\_\_
- c. Respondent's visitation is denied. \_\_\_\_\_

- 8. Respondent is prohibited from removing the minor child/ren from Illinois or concealing them within Illinois.
- 9. Respondent is ordered to appear in Courtroom \_\_\_\_\_ at the \_\_\_\_\_ on \_\_\_\_\_ at \_\_\_\_\_ m., with or without the minor child/ren.
- 10. Petitioner is granted exclusive possession of the following personal property and the Respondent is ordered to promptly make available to Petitioner said property that is in Respondent's possession or control, to wit: \_\_\_\_\_ (This remedy does not affect title to property)
- 11. Respondent is prohibited from taking, encumbering, concealing, damaging or otherwise disposing of the following personal property: \_\_\_\_\_, except as explicitly authorized by the Court
  - Further, Respondent is prohibited from improperly using the financial or other resources of an aged member of the family or household for the profit or advantage of Respondent or any other person.
- 12. Respondent is ordered to pay temporary support for  Petitioner and/or  the minor child/ren of the parties as follows: \$ \_\_\_\_\_ per \_\_\_\_\_, starting \_\_\_\_\_, payable  through the Clerk of the Circuit Court, or  directly to Petitioner.
- 13. Respondent is ordered to pay \_\_\_\_\_ as actual compensation for loss(es) to \_\_\_\_\_ on or before \_\_\_\_\_
  - Further, Respondent is ordered to pay court costs in the amount of \$ \_\_\_\_\_ and attorney fees in the amount of \$ \_\_\_\_\_ in connection with any action to obtain, modify, enforce, appeal, or reopen any order of protection, on or before \_\_\_\_\_

## How Common are Non-Meritorious Orders?

It's no secret that restraining orders are often issued without good cause. Following a New Jersey class, one lawyer revealed with astonishment, "A number of women attending the seminars smugly—indeed boastfully—announced that they had already sworn out false or grossly exaggerated domestic violence complaints against their hapless husbands, and that the device worked!"<sup>19</sup>

How many restraining orders are issued without good cause? To answer that question, an estimate is made of the total number of restraining orders issued each year. Then the proportion of those that are non-meritorious is calculated.

### *Annual Number of Restraining Orders*

One analysis compiled data on *final* restraining orders (mostly in 2002) from 29 state court systems, and found that rates varied widely across the states. On average, the analysis revealed that 342 final restraining orders were issued per 100,000 persons. When extrapolated to the entire US population, an estimated 860,000 final orders were granted.<sup>20</sup>

That calculation parallels data from the FBI National Crime Information Center (NCIC), which includes a national registry of restraining orders. Each year 600,000 to 700,000 permanent orders are entered into the registry.

However, eight states do not participate in the NCIC registry, and many other states have incomplete coverage. For example in Texas, 25 counties do not report. In California, 17 counties do not have a reliable procedure to enter orders into their database.

Given the trend to increasing numbers of restraining orders, the best estimate of final restraining orders now issued each year is 900,000.

The national number of *temporary* restraining orders is unknown. But break-downs on temporary vs. final orders are available from three states:

- In Connecticut, 9,390 restraining orders were issued in 2004, of which 66.5% were temporary and the remaining 33.5% were permanent.<sup>21</sup>
- In Pennsylvania, 57,316 Protection From Abuse orders were issued in 2004, consisting of 39,997 temporary orders and 17,319 final orders, either by stipulation/agreement or after a hearing.<sup>22</sup>
- In Virginia, 84% of all restraining orders are emergency or temporary, 16% are permanent.<sup>23</sup>

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In Connecticut and Pennsylvania, two temporary restraining orders are issued for every final order. In Virginia, the ratio is over five to one. On the basis of this information, *we estimate that 2-3 million temporary restraining orders are issued each year in the United States.*

### *Non-meritorious orders*

What percentage of restraining orders are issued without sound basis? Restraining orders are designed to protect individuals from physical harm. So, by any reasonable standard, a restraining order—especially when issued on an emergency *ex parte* basis—that does not even *allege* violence, or at least a credible threat of imminent violence, is non-meritorious.

A 1995 study conducted by the Massachusetts Trial Court reviewed the domestic restraining orders issued in that state. The study found that less than half of the orders involved even an *allegation* of violence.<sup>24</sup> In other words, the order was issued on the basis of alleged fear or emotional distress, not because of actual or imminent violence.

A subsequent analysis examined the allegations listed in 298 abuse prevention orders that were requested by women and issued in the Massachusetts Gardner District Court in 1997. In 41% of these cases, fear was the sole allegation listed, and in 64% of the orders the woman indicated no harm had occurred.<sup>25</sup>

In a 2005 study of couples involved in custody disputes, domestic violence allegations were made in 55% of the cases. Of these allegations, 59% could not be substantiated by the courts as true.<sup>26</sup> A more recent analysis of domestic violence restraining orders issued in 2006 in Campbell County, West Virginia concluded 81% were unnecessary or false.<sup>27</sup>

Based on these studies, it is estimated that *about 60% of the 2-3 million restraining orders issued annually are unnecessary or false.* This translates into 1.2-1.8 million persons who are wrongfully accused of domestic violence each year.

### **Other Problems with Restraining Orders**

Other problems have been identified with restraining orders, in particular, gender bias in their issuance and abuse victims being accused of being perpetrators.

#### *Gender Bias*

If a man has been assaulted by his intimate partner, he should be able to obtain an order of protection. But a double standard may thwart this request.

This is borne out by research. In Massachusetts, one analysis examined all domestic *ex-parte* hearings held in the Gardner District Court in 1997. The analysis found that 34%



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of requests from men were deferred or turned down, compared to only 10% of requests from women.<sup>28</sup>

According to one Oregon attorney, “I believe many general practice attorneys who don’t specialize in domestic relations would hesitate before trying to get a restraining order for a man, whereas there would be no hesitation at all for a woman under the same set of circumstances.”<sup>29</sup>

This statement is based on the fact that in his state, the protective orders once featured the following gender-biased language: The respondent in this order is the natural/legal *father* of the below named minor children” [emphasis added].<sup>30</sup>

*A father suffered repeated assaults by his wife, on one occasion requiring medical treatment for his injuries at the local emergency room. Afraid for his children and for himself, he sought a restraining order. At the time of court hearing, he brought photographs of his injuries, medical documentation of his emergency room visit, and a copy of the police report. This was the judge’s explanation for denying the man’s request: “Well, you have to expect one knock-down drag-out fight per divorce.”<sup>31</sup>*

### *Victims Accused of Being Perpetrators*

Legal bias is not the only reason that male victims are often reluctant to seek restraining orders. There have been reports of abused men who found themselves accused of being the perpetrator.

The best data comes from a survey of 302 male victims of domestic violence. When asked about the types of psychological aggression their female partners had used, 39% of the men reported their partner had filed a restraining order against him under false pretenses.<sup>32</sup> As one man reported, “She has promised to lie and accuse me of physical abuse against her, sexual abuse of our daughter, if that helps her win custody.”

In another case, a woman severely bit her husband on the shoulder and chest. After showing the judge pictures of his injuries, the man was granted a restraining order. The next day the woman went before the same judge and, even though she had suffered no injuries, she claimed to be in “fear” for her life, saying that the man was the real abuser. On the basis of that unsubstantiated allegation, the judge reversed the original order against the wife and issued an order against the *husband*.<sup>33</sup>

Sometimes these male victims are re-victimized by being subjected to arrest. A Washington State attorney gives this advice: “Don’t call 911 unless you are bleeding and she still has a weapon in her hand. Too many men who have called 911 for help have ended up being arrested for DV.”<sup>34</sup> As family violence expert Murray Straus put it, “There are a growing number of complaints that attempts by men to obtain police protection may result in the man being arrested.”<sup>35</sup>

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When government programs ignore the actions of *perpetrators* and encourage the arrest of *victims*, this is a sure sign of a justice system turned upside down.

### **A Betrayal of Victims**

Advocates for expanding the scope of domestic violence laws claim their strategy permits society to identify future batterers, thus allowing a future tragedy to be averted. If this rationale were applied more widely, Child and Protective Services would intervene every time a mother raises a hand to her child and police would be dispatched for any schoolyard argument.

Under such a scenario, law enforcement and social welfare services would soon become inundated with minor cases. Overly-intrusive social intervention would be found to be escalating tense situations. False accusations would become rampant. And true victims would find it increasingly difficult to get help.

Many would say this is an accurate summary of our nation's *current* domestic violence system. Increasing numbers of victims are expressing the frustration that they were turned away by abuse shelters, their wishes ignored by law enforcement, and their needs ill-served by rigid criminal justice procedures. And the needs of male victims of abuse are ignored.

This frustration motivated one group to initiate a petition calling for the U.S. Department of Justice to perform an audit of domestic violence programs “for refusing victims the resources and services they desperately need.” The petition has been signed by over 11,000 victims of domestic violence.<sup>36</sup>

### **Orders Issued with a Heavy Hand**

The original idea behind domestic restraining orders may have been sound. But over the years, state definitions of abuse have been widened and evidentiary requirements relaxed.

The Fourth Amendment affirms, “The right of the people to be *secure in their* persons, *houses*, papers, and effects, *against unreasonable* searches and *seizures*, shall not be violated” [emphasis added]. It is those rights to be secure in their houses and to be protected from unreasonable seizures that are violated by unjustified restraining orders.

The U.S. Supreme Court once commented that the Fourteenth Amendment is violated by legal procedures that appear “fair on their faces,” but are administered “with an evil eye or a heavy hand.”<sup>37</sup> The same could be said about restraining orders that are freely granted without evidence or proof.

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