Family Violence & Protective Orders

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FAMILY VIOLENCE & PROTECTIVE ORDERS[1]

PRETRIAL CONDITIONS OF BOND

Q: What are some common pretrial bond conditions in family violence cases?

Pursuant to Article 17.40, a judge may impose any reasonable conditions of bond related to the safety of the complainant or the community. Tex. Code Crim. Prod. Art. 17.40. In family violence cases, appropriate bond conditions may include, but are not limited to, any of the following orders:

- No Contact or No Harmful or Injurious Contact
    - Typically this order includes no communication. The judge may allow communication for a specific reason like the exchange of children. In these circumstances, the judge will likely set specific limits and may include a requirement that all communications be in writing, email, or text so there is a record of the communication. The judge may also restrict communication to specific hours to avoid calls at inappropriate times (e.g., 5-7 p.m.).
- Stay Away (e.g., stay 200 yards away from the complainant or a protected location like the complainant's home or work)
- No Possession of Firearms
- GPS (full, partial, or restricted)
- Alcohol Monitoring Device

Q: How does a defense attorney try to get a bond condition ordered by the magistrate or trial judge modified?

Because there is minimal legislative guidance addressing the modification of existing bond conditions, it is incumbent on the attorney to find out how a particular judge handles the specific change sought.

For instance in my court, when an attorney seeks modification of condition of bond related to the safety of the complainant (i.e., amend a no contact order to no harmful or injurious contact; change full GPS to partial GPS for work or school), my procedure generally includes the following:

- The attorney must approach the Court about the desired modification and explain the reason for the change. (I prefer the request be in writing but I do not require it.)
- The Court requests that the State contact the complainant to discuss the modification sought and address whether the complainant has any safety concerns.

[1] This material is presented with the understanding that the author does not render legal, accounting or professional service. It is intended for educational and informational use by attorneys licensed to practice law in Texas. Because of the rapidly changing nature of the law, information contained herein may become outdated. Therefore, attorneys using the material must always research original sources of authority and update information to ensure accuracy.

- If the State doesn't object to the modification, the parties must put the agreement in writing.
- If the State objects to the change, and if additional information is necessary to rule on the request to modify the existing order, the matter is set for a hearing.

Q: What happens if my client violates a safety condition of bond in a family violence case?

If a defendant is alleged to have violated a safety condition of bond in a family violence case, a number of things could happen, including: (1) the defendant may be arrested and charged with the offense of violation of bond conditions in a family violence case, and; (2) the defendant's bond in the original case may be revoked or forfeited and the defendant denied release on bail.

Criminal Offense of Violation of Bond Conditions in a Family Violence Case

If a defendant violates certain safety condition of bond in a family violence case, he or she can be arrested and charged with a new criminal offense pursuant to Section 25.07 of the Penal Code.[2] This offense is a Class A misdemeanor, but under certain conditions, it is a third degree felony.

A person charged with this offense may be denied release on bail if, at a hearing, the Court determines by a preponderance of the evidence that the person committed the offense and the evidence demonstrates the defendant poses an imminent threat of future family violence. Tex. Code Crim. Proc. Art. 17.152(c), (e); TEX. CONST. Art. I, § 11c. The Court, in deciding whether to deny bail pursuant to Article 17.152(c), considers the following factors:[2]

- the order or condition of bond;
- the nature and circumstances of the alleged offense;
- the relationship between the accused and the victim, including the history of that relationship;
- any criminal history of the accused; and
- any other facts or circumstances relevant to a determination of whether the accused poses an imminent threat of future family violence.

Defendant's original bond may be revoked or forfeited, and the Defendant denied release on bail

A defendant may be denied bail if, after a hearing, the trial court finds by a preponderance of the evidence that the defendant has violated a bond condition related to the safety of the complainant or the community. Tex. Code Crim. Proc. Art. 17.152(b). In determining whether to deny bail, the Court is to consider the factors set out in Article 17.152(e). If the Court finds

[2] Tex. Penal Code § 25.07(a) (Violation of Certain Court Orders or Conditions of Bond in a Family Violence, Sexual Assault or Abuse, Stalking, or Trafficking Case); *Christmas v. State*, 464 S.W.3d 832 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (finding evidence sufficient to establish defendant was aware of condition of his bond prohibiting contact with the complainant, his former girlfriend, thus supporting conviction for the offense of violation of a bond condition).

that the evidence demonstrates the defendant poses an imminent threat of future family violence, the defendant's bond may be revoked or forfeited, the defendant taken into custody, and the defendant denied release on bail pending trial on the underlying case. *Id.*

If the violation of Section 25.07 allegedly involved a bond condition requiring the person not to go to or near certain places, denial of bail is permitted only if the Court determines that the defendant violated the condition of bond with intent to commit or threaten to commit family violence or stalking. Tex. Code Crim. Proc. Art. 17.152(d).

AFFIRMATIVE FINDING OF FAMILY VIOLENCE

Q: Can the parties agree that there will be no affirmative finding in a family violence case even if demonstrated by the facts of the case?

In short, the parties can agree that there will be no finding of family violence, but the Court is not bound by the agreement.

The Code of Criminal Procedure states, "the court **shall make** an affirmative finding in the judgment of the case … if the court determines that the offense involved family violence, as defined by Section 71.004, Family Code …" Tex. Code Crim. Proc. Art. 42.013. Consequently, the law requires that a Court make a finding of family violence if demonstrated by the facts, regardless of any agreement by the parties.[3]

Q: In a jury trial on a misdemeanor family violence case, must the family violence issue be submitted to the jury like a deadly weapon finding in a felony case?

No. In a jury trial for a misdemeanor family violence case, the issue of family violence does not need to be submitted to the jury. This is because "family violence" is not an element of the crime, even if a jury is the fact-finder. The family violence finding is made by the Court.[4]

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[3] If a defense attorney's goal is for his or her client to avoid the negative consequences that come with a finding of family violence, many of these consequences still apply even without an affirmative finding. Unlike a deadly weapon finding, many of the negative family violence consequences are based on the actual relationship between the defendant and the complainant, not on the existence of any judicial finding. For instance, for purposes of using a prior conviction to enhance a misdemeanor family violence assault to a felony, an affirmative finding of family violence on the judgment is *prima facie* proof that the offense involved family violence. But if the judgment is silent on the issue of family violence, the State may introduce extrinsic evidence to show the offense involved family violence. *See State v. Eakins*, 71 S.W.3d 443 (Tex. Crim. App. 2002) (holding that the presence of a finding of family violence under Tex. Code Crim. Proc. Art. 42.013 is an additional method, not the only method, for proving a previous conviction for family assault).

[4] *Morimoto v. State*, No. 02-04-272-CR, 2005 Tex. App. Lexis 2906 (Tex. App.—Fort Worth, April 4, 2005, pet ref'd) (holding that in a Class A misdemeanor assault prosecution, the trial court did not have to submit the family violence issue to the jury because the Court did not

Q: What are some of the collateral consequences to a defendant when convicted of an offense involving family violence?

A conviction for a family violence offense and/or a finding of family violence may affect a defendant in many areas, depending on the defendant's circumstances.

- **Enhancements**

One of the most obvious effects of a prior conviction for an offense involving family violence is the State's ability to use that case to enhance subsequent charges. A prior "conviction" for a family violence offense includes any case in which the defendant was adjudicated guilty or pleaded no contest and was placed on regular probation or deferred adjudication probation, regardless of whether sentence was ever imposed or the defendant was successfully discharged from probation. Tex. Penal Code §22.01(f)(1).

A defense attorney should keep in mind that there are a number of family violence offenses that can be used to enhance a misdemeanor family violence assault to a felony. The offenses listed below can be used as the jurisdictional prior conviction elevating a misdemeanor family violence assault to a felony, so long as the victim of the prior offense was a member of the defendant's family or household or was in a dating relationship with the defendant. Tex. Penal Code § 22.01(b)(2), (b)(2)(A).

- Any offense in Chapter 19 of the Texas Penal Code (homicide offenses)
- Any offense in Chapter 22 of the Texas Penal Code (including assault, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, elderly or disabled individual, abandoning or endangering child, *deadly conduct*, *terroristic threat*)
- Some offenses in Chapter 20 of the Texas Penal Code (including kidnapping, aggravated kidnapping, indecency with a child
- Continuous violence against family
- Class C family violence assault

- ***Licensing***

Convictions for crimes of moral turpitude may preclude a finding of good moral character that is required by many professions. Family violence offenses may be classified as crimes of moral

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increase the sentence beyond the statutory maximum); accord, *Pierce v. State*, No. 04-02-00749-CR, 2003 Tex. App. Lexis 9799 *17 (Tex. App.—San Antonio, Nov. 19, 2003, pet. ref'd); *Rodriguez v. State*, No. 01-05-00589-CR, 2006 Tex. App. Lexis 6416 (Tex. App.—Houston [1st Dist.] July 20, 2006)(finding trial court did not err in entering a finding of family violence because the finding was supported by the evidence, did not conflict with the jury verdict, and did not enhance punishment for the underlying offense).

turpitude.[5] Licensing agencies may condition issuance or renewal of occupational licenses upon showing of good character. Any finding of family violence may be used as a basis for denial or revocation of an occupational license from a state licensing agency. Tex. Occ. Code Ch. 53. A conviction for a crime of "moral turpitude" may prevent a showing of the required good character. *Id.*

- **Immigration Issues**

If a defendant is not a United States citizen, a family violence conviction can have an adverse impact upon his or her immigration status. The conviction may result in the defendant being deported or denied naturalization under federal law. Tex. Code Crim. Proc. Art. 26.13(4).

A conviction for a crime of moral turpitude or for multiple criminal convictions of moral turpitude can render an immigrant defendant ineligible for adjustment of immigration status (e.g., from obtaining lawful permanent residency) or citizenship. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I), § 1182(a)(2)(B). A conviction for a crime of moral turpitude or of multiple criminal convictions of moral turpitude or domestic violence subjects an immigrant defendant to deportation and denial of entry. 8 U.S.C.S. § 1227(a)(2)(A)(i)-(ii), 8 U.S.C.S. § 1227(a)(2)(E)(i).

A defense attorney should keep in mind that the question of whether a misdemeanor assault conviction is a crime of moral turpitude ("CMIT") under federal immigration law is an issue that is frequently debated in the courts. Consequently, it is incumbent on defense counsel to be familiar with the law in this area because the law that applies to a particular defendant's circumstances may be deemed "straightforward" or "clear".[6]

Both the Court and the defense attorney have obligations to a defendant who is not a United States citizen. The Court is required to admonish non-citizens and inquire into what efforts defense counsel has made to advise his or her client regarding the potential immigration consequences of the proposed disposition in the case.

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[5] *See Hardeman v. State*, 868 S.W.2d 404, 405 (Tex. App.—Austin 1993, pet. ref'd) (recognizing that an assault by a man against a woman is a crime of moral turpitude); *Ludwig v. State*, 969 S.W.2d 22, 29 (Tex. App.—Fort Worth 1998, pet. ref'd) (stating that a conviction for the misdemeanor offense of violation of a protective order may be considered a crime of moral turpitude when the conduct constituting the violation involves family violence or the direct threat of family violence).

[6] One of the significant cases on this issue is *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012). In that case, the Fifth Circuit held in *Esparza-Rodriguez v. Holder* that an alien's conviction under Texas law for assault was not categorically a CIMT for purposes of the Immigration and Nationality Act's ("INA") provision rendering an alien convicted of a CIMT inadmissible. The Court determined the assault conviction was not categorically a CIMT because a subsection of the Texas assault statute proscribed physical contact that was merely "offensive or provocative," which did not qualify as morally turpitudinous.

Defense counsel must discuss the immigration consequences with his or her client.[7] Before advising a non-citizen client, a defense attorney needs to address several questions. At a minimum, the criminal defense attorney should address the following matters:

- the client's immigration status
- length of time in the United States
- whether the crime is a removable offense (e.g., aggravated felony, crime involving moral turpitude, or controlled substances offense)
- the punishment range for the charged crime, and
- the client's criminal and immigration history.

These five aspects of a client's background are important when determining the best strategy for the criminal defense attorney to adopt when confronting the criminal case and in properly advising the defendant of the potential immigration consequences of any proposed disposition.[8]

- ***Divorce and SAPCR Proceedings***

In the context of family law, a family violence conviction can be used to deny child custody, limit visitation rights, and eliminate the minimum marriage term required to qualify for spousal support.

Joint Managing Conservatorship - A finding of family violence destroys the presumption (set out in Tex. Fam. Code § 153.131) that the parents should be joint managing conservators of the child, **AND** precludes the appointment of the abusive party as a joint managing conservator of the child. Tex. Fam. Code § 153.004(b).

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[7] *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). In *Padilla,* the Supreme Court held for the first time that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. *Padilla,* 559 U.S. at 374. Counsel's performance is deficient if counsel fails to advise a noncitizen client about deportation consequences that are "truly clear." *Padilla,* 559 U.S. at 369. Counsel's performance is deficient if counsel fails to advise a noncitizen client about deportation consequences that are "truly clear." *Padilla,* 559 U.S. at 369. "When the law is not succinct and straightforward," however, counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Padilla,* 559 U.S. at 369.

[8] A helpful discussion can be found at *CRIMMIGRATION - IT'S NOT EASY, Immigration Consequences of Criminal Activity Convictions* by Carlos Moctezuma Garcia, 13th Annual Advanced Immigration Law, February 5-6, 2015, Houston. Another helpful resource is a law review article written by Mario Castillo, the permanent briefing attorney to a United States Magistrate in the Southern District of Texas: IMMIGRATION CONSEQUENCES: A PRIMER FOR TEXAS CRIMINAL DEFENSE ATTORNEYS IN LIGHT OF PADILLA V. KENTUCKY, Baylor Law Review Dec. 2011, Mario Castillo (discussing the multiple variables that determine whether a state criminal offense will trigger immigration deportation including misdemeanor offense of assault involving domestic violence).

Sole or Managing Conservatorship - A finding of family violence creates a rebuttable presumption that it is not in the child's best interest: to appoint the abusive parent as sole or managing conservator, **OR** to appoint the abusive parent as the conservator with the right to determine the child's primary residence. Tex. Fam. Code § 153.004(b).

Possessory Conservatorship - If there is a finding of family violence, the presumption that the non-managing conservator party should be appointed possessory conservator (set out in Tex. Fam. Code § 153.191) does not apply unless the Court finds that access to the child by that party: will not endanger the child; **AND** can occur without endangering the child or any other victim of the family violence. Tex. Fam. Code § 153.004(d).

Visitation – A finding of family violence creates a rebuttable presumption that it is not in the best interests of the child for the child to have unsupervised visitation with the abusive party. Tex. Fam. Code § 153.004(e).

Limited access to a child with recent violence - If there has been a finding of family violence within the preceding two years, the Court may not allow the abusive party to have access to the child unless the Court: finds that the access will not endanger the child's physical health or emotional welfare; finds that the access is in the child's best interest; **AND** renders an order of possession that protects the safety of the child and any other person who has been a victim of the abusive party (which may include restrictions on visitation, exchanges of the child, abstention from intoxicants, and completion of counseling). Tex. Fam. Code § 153.004(d)

Modification of a child custody order - If a party to a child custody order is convicted or placed on deferred adjudication for a crime of child abuse or family violence, the entry of the judgment is a material and substantial change that justifies modifying a child custody order to change conservatorship or access to a child to conform with Tex. Fam. Code § 153.004(d). Tex. Fam. Code §§ 153.103-153.104.

Spousal Maintenance - A party in a divorce suit who is found to have committed family violence against a spouse may also be required to pay spousal maintenance (Tex. Fam. Code § 8.051-8.055); *Guillot v. Guillot*, No. 01-06-01039-CV, 2008 Tex. App. Lexis 4831 (Tex. App.—Houston, June 26, 2008, no pet.) (finding that spousal maintenance properly awarded based on family violence assault that resulted in a deferred adjudication probation).

Duty to notify family law court - The prosecutor must notify a family law court of an arrest for family violence if the family law court had previously entered temporary orders. Tex. Code Crim. Proc. Art. 42.23 (notification of court of family violence conviction).

- ***Possession of Firearms***

A defendant's right to possess a firearm materially changes upon conviction for an offense involving a finding of family violence. Also, if a party is found to have committed family violence in a civil protective order case, the party is prohibited from possessing a firearm and is ineligible for a concealed handgun license when the affirmative finding of family violence is

in a protective order issued after a due process hearing, for the duration of the protective order (i.e., up to two years).

Under state law, person convicted of an offense involving family violence is prohibited from possession of a firearm before the fifth anniversary of the later of the release from confinement or the date of discharge from probation (including deferred adjudication). Tex. Penal Code § Tex. Penal Code §§ 42.0131, 46.04(b). Not only is a person's right to possess a firearm affected, but also is his ability to obtain a concealed handgun license. Tex. Gov. Code. § 411.172 et seq.

Under federal law, a person is ineligible to possess a firearm or obtain a concealed handgun license if that party has been found to have been convicted of a misdemeanor offense of domestic violence. 18 U.S.C. § 921(a)(33). While the federal statue does not expressly state that the ban on possession of a firearm is permanent, it does list circumstances under which it may be lifted. If the defendant has been pardoned and that pardon specifically restores civil liberties; if the conviction is expunged; or if the defendant has civil rights restored. *See Beecham v. U.S.*, 511 U.S. 368 (1994).

PROTECTIVE ORDERS

Q: Under what circumstances is a "Magistrate's Order For Emergency Protection" issued?

By law, a "Magistrate Order for Emergency Protection" (EPO) must be issued in family violence cases involving a deadly weapon or serious bodily injury. Tex. Code Crim. Proc. Art. 17.292(b)(1)-(2). An EPO may also be issued in less serious cases if it is requested by the complainant, the guardian of the complainant, a peace officer, or a prosecutor. Tex. Code Crim. Proc. Art. 17.292(a)(1)-(4). A magistrate judge may also decide to issue an EPO on his or her own simply based on the nature of the accusations. Tex. Code Crim. Proc. Art. 17.292(a).

Q: How long does an EPO last?

The duration of most EPOs is either 31 or 61 days, except those based on a deadly weapon have a duration of either 61 or 91 days. Tex. Code Crim. Proc. Art. 17.292(j).

Q: What are some of the things the EPO may order?

No Contact - Prior to September 1, 2015, an EPO could forbid only threatening communications, not all communication. Consequently, if a magistrate felt no contact was important for the complainant's safety, the magistrate had to make an additional "no contact" condition of bail. Tex. Code Crim. Proc. Art. 17.40. A new law, however, went into effect on September 1, 2015 that allows an EPO to prohibit all communications with the complainant except through an attorney.

No Firearms – An EPO may prohibit the defendant from possessing or being in the vicinity of a firearm, weapon, or ammunition. For instance, under 18 U.S.C. § 922(g)(8) (The Lautenberg

Amendment), it is a federal felony to be in possession of a weapon or ammunition while under a restraining order involving domestic violence or abuse, and the statute applies to military and peace officers.

Stay Away Orders – An EPO may prohibit the defendant from going to or near the residence, place of employment or business of a member of the family or household or of the person protected under the order; or the residence, child care facility, or school where a child protected under the order resides or attends.

Q: How can an attorney get an EPO modified, changed, or dismissed?

An attorney must approach the judge who issued the EPO for any modifications, the issuing judge can modify all or part of the order after each party has received notice and a hearing has been held. Tex. Crim. Proc. Code Art. 17.292 (j). Because EPOs are normally issued by the magistrate judge, defense counsel will need to file a motion to modify with the magistrate court so that it can be heard by the magistrate judge that issued the order.

In order to change or modify the order, the Court must find: the order as originally issued is unworkable, the modification will not place the complainant of the offense at greater risk than did the original order; and, the modification will not in any way endanger a person protected under the order. Tex. Crim. Proc. Code Art. 17.292 (j)(1)-(3).

Q: Can the trial judge to which the case is assigned modify an EPO?

The standard policy in Bexar County is that any modifications should be made by the judge who issued the EPO. However, in special circumstances it is possible for the trial judge to which the case is assigned to rule on motions to modify. Article 17.292 provides that in certain circumstances "on motion, notice, and hearing" or "on agreement of the parties" the EPO "may be transferred to the court assuming jurisdiction over the criminal act giving rise to the issuance of the emergency order for protection." Tex. Crim. Proc. Code Art. 17.292(n). If jurisdiction is accepted, on transfer, the criminal court may modify all or part of an order issued in the same manner and under the same standards as the issuing court. *Id*.

Q: How can I get a Protective Order modified, changed, or dismissed?

Protective orders can be modified "[o]n the motion of any party, the court, after notice and hearing, may modify an existing protective order to: (1) exclude any item included in the order; or (2) include any item that could have been included in the order. Tex. Fam. Code § 87.001(1)-(2).

In 2015, the Texas Legislature amended the Property Code by adding Chapter 24A. This new law makes it possible for a former protected person to apply for a court-ordered police escort to enter a former home for the purpose of recovering personal property after the protective order expires or is otherwise terminated.

EXPUNCTION AND NON-DISCLOSURE ORDERS

Q: What is the difference between an Expunction and a Nondisclosure[9]?

Article 55 of the Code of Criminal Procedure extends the "right to expunction" to "all records and files relating to the arrest" if certain conditions are met.[10] Under the Texas Government Code Section 411.081, the court may "issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication." Tex. Govt. Code § 411.081 (d).

An expunction is considered better than non-disclosure because it completely removes a case from a person's criminal history and causes all records of the arrest and prosecution to be deleted and destroyed. When an order of non-disclosure is granted, like an expunction a person may legally deny an arrest occurred, but the records are still available to law enforcement; to certain state agencies that are responsible for licensing and certification, care-giving functions, and regulating certain professions; and to certain private entities that are responsible for the safety of children and the elderly or that hire employees for security-sensitive positions.

Q: *How can I get my client's family violence arrest records removed?*

There is no method by law to expunge, destroy, or seal domestic violence convictions, probations, or deferred adjudications. Tex. Govt. Code § 411.081. With that in mind, there are really only three ways to remove a family violence arrest record. An attorney can have the records of arrest expunged if (1) the State never files a case, (2) the case is won at trial (or if convicted and then subsequently pardoned), or (3) the defendant was released with no final conviction and was not required to be placed on community supervision, including deferred adjudication. Tex. Crim. Proc. Code Art. 55.01(a)(1)-(2).

Q: Can a family violence case be expunged or an order of nondisclosure granted upon a defendant's successful completion of deferred probation?

No. As previously explained, even if a defendant successfully served his deferred adjudication community supervision and the case was discharged and dismissed, he cannot get an

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[9] The law regarding expunctions appears in Chapter 55 of the Texas Code of Criminal Procedure. For a comprehensive resource regarding expunctions consider reading *A Basic Guide to Expunctions* by Andrea L. Westerfeld. The law for non-disclosure appears in Article 411 of the Texas Government Code

[10] *Carson v. State*, 65 S.W.3d 774, 780 (Tex. App.—Fort Worth 2001, no. pet.) (recognizing that the purpose of the expunction statute is to provide a remedy for people who have been wrongly arrested; thus the focus of the statute is the arrest, not the investigation or the ultimate charges that may be filed).

expunction because he doesn't qualify.[11] However, successful completion of pretrial diversion usually results in a complete dismissal and makes it possible to obtain an expunction.

Non-disclosure law specifically excludes anyone ever convicted of or placed on deferred adjudication probation for a case involving family violence. Tex. Govt. Code § 411.081(d).

UNAVAILABLE OR UNCOOPERATIVE COMPLAINANT

Q: The complainant is unavailable or uncooperative but the State still plans to proceed. Doesn't the State have to dismiss the case because of Crawford?

The unavailability of a victim does not mean that the State cannot proceed on the case. As a general rule, even if the victim is not available for trial for whatever reason, the State may legitimately try to prove its case against the defendant in other ways under proper rules. *See Shelvin v. State*, 884 S.W.2d 874, 877 (Tex. App.—Austin 1994, pet. ref'd). Proceeding with the case absent the actual complainant does not violate the defendant's rights, including his constitutional right to confront and cross-examine the witnesses against him or her, in that the defendant cannot direct the method or manner of the State's proof. *See Shelvin v. State*, 884 S.W.2d at 877.

Obviously, the State may attempt to introduce the complainant's out-of-court statements claiming they are non-testimonial. Typically in family violence cases, the hearsay statements at issue are the complainant's statements to the police and other first responders. Because a criminal defendant has a Sixth Amendment right to be confronted with the witnesses against him, the critical inquiry for the trial court to resolve is whether the out-of-court statements offered by the State are "testimonial" in nature. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004); *Gonzalez v. State*, 195 S.W.3d 114, 116 (Tex. Crim. App. 2006) *cert. denied*, 549 U.S. 1024 (2006). This is because only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause of the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. at 50-51.

Resolution of the testimonial/non-testimonial issue is highly fact-specific and must necessarily be made on a case-by-case basis.[12] Even if the Court determines the witness's statement is

[11] This is because the purpose of Article 55.01 is to enable persons who are wrongfully arrested or recorded as arrested to expunge their records. It was not enacted to allow a person who is arrested, pleads guilty or nolo contendere to an offense, and receives probation to expunge arrest and court records concerning that offense. Tex. Code Crim. Proc. Ann. Art. 45.001 ("The purpose of this chapter is to establish procedures for processing cases that come within the criminal jurisdiction of the justice courts."); *see also* Op. Tex. Att'y Gen. No. JC–0320 (2000) ("A person who is sentenced to pay a fine and to deferred adjudication probation in a county criminal court is not entitled to an expunction of his arrest record under article 55.01...").

[12] *See e.g., Davis v. Washington*, 547 U.S. 813, 821 (2006)(identifying emergency exception for police interrogations and clarifying that statements are "testimonial when … the primary

non-testimonial, the out-of-court statement must still be admissible pursuant to a hearsay exception. (e.g., excited utterance (Rule 803(2)), state of mind - Rule 803(3)).

Crawford does not apply when determining whether a defendant's out-of-court statements are admissible. *Crawford* also does not apply when the complainant testifies at trial.

Q: What is the doctrine of forfeiture by wrongdoing? Can the State introduce the complainant's testimonial statements if the requirements of the forfeiture by wrongdoing statute are satisfied?

Yes, assuming the State satisfies the requirements of Article 38.49 which codifies the doctrine of forfeiture by wrongdoing statue. TEX. CRIM. PROC. CODE Art. 38.49.

Although the Sixth Amendment's Confrontation Clause bars the admission of out-of-court statements by a declarant whom the criminal defendant has been unable to confront, both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized that under the doctrine of forfeiture by wrongdoing, a defendant may not assert a confrontation right if his or her deliberate wrongdoing resulted in the unavailability of the declarant as a witness.[13]

In 2013, the doctrine of forfeiture by wrongdoing was codified in the Texas Code of Criminal Procedure as an evidentiary exception. TEX. CRIM. PROC. CODE Art. 38.49. Under the statute, "A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness (1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and (2) forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing." TEX. CODE CRIM. PROC. Art 38.49.

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purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."); *Michigan v. Bryant*, 562 U.S. 344 (2011)(recognizing that in determining whether a statement is testimonial courts must examine the context in which the conversation occurred and whether an emergency existed); *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015)(reiterating that courts must consider "all of the relevant circumstances" under the "primary purpose analysis" to ultimately determine whether "in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony.").

[13] *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879); *Davis v. Washington*, 547 U.S. 813, 833 (2006)("One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."); *Giles v. California*, 554 U.S. 353, 359, 377 (2008)(recognizing that the forfeiture by wrongdoing doctrine permits the introduction of testimonial statements of a witness where the defendant engages in conduct designed to prevent the witness from testifying); *Gonzalez*, 195 S.W.3d at 116-20 (applying the forfeiture doctrine in the context of Confrontation Clause objections).

The forfeiture statute requires that the State prove by a "preponderance of the evidence" that the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness…" TEX. CODE CRIM. PROC. Art 38.49(b),(c).

PR BONDS

Q: Since PR bonds are generally not granted in family violence cases, are there opportunities available for a defendant to be granted a PR bond?

Aside from cases where a defendant would be entitled to a PR bond under the statute, in family violence cases there are some opportunities for defendants with no prior criminal history of violence to obtain a PR bond.

Project ADVANCE Program
The PEACE Initiative's Project Advance Program is an intervention type of anger management class that is intended to break the cycle of violence and teach defendants to resolve disputes through non-physical means.

Mental Health PR Program
This program requires the defendant to reside at Haven for Hope and participate in mental health treatment. Job placement services are also offered through Haven for Hope.

DISCOVERY ISSUES

Q: What are some additional discovery matters that may come up in a family violence case?

Complainant's immigration status - Federal law allows current and former spouses who were victims of family violence at the hands of a United States citizen or lawful permanent resident to petition for lawful resident status under the Violence Against Women's Act. The fact that the petitioner for an adjustment in status is not a citizen or has entered the country illegally is not a bar to obtaining an adjustment. 8 U.S.C. § 1154(a) et seq. This does not apply if the abuser is not a United States citizen or lawful permanent resident.

Witness Mental Health Records – Although, generally speaking, there is no physician-patient privilege in criminal proceedings in Texas, that does not mean a healthcare provider will turn over a witness's mental health records to a defendant when served with a subpoena. Tex. Rule Evid. 509(b). The witness's health information may be subject to the protections of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). 45 C.F.R. § 164.502. HIPAA limits the situations in which a healthcare provider can release a patient's medical information without the patient's consent. 45 C.F.R. § 164.502.

Frequently when the defense issues a subpoena compelling the production of the complainant's mental health records, the subpoenaed party will not release the health information without a court order due to concerns of violating HIPAA. Under Section 164.512, a covered entity may disclose protected health information without the patient's authorization in certain situations.

45 C.F.R. § 164.512. HIPAA allows disclosure of this protected information for judicial proceedings in response to an order of a Court. 45 C.F.R. § 164.512(e)(1)(i).

To protect a defendant's constitutional fair trial rights, it is necessary for a trial court to conduct an *in camera* review of the documents upon request when there is a particularized showing of materiality and favorability to the defense. However, unsubstantiated requests for these records upon a vague assertion that the documents may contain details which may exculpate the defendant or otherwise be helpful to the defense will likely be denied. *See* Tex. Const. Art. 1, § 30(a)(affirming that a complainant's right to privacy is guaranteed by the Texas Constitution "throughout the criminal justice process.").

Q: What matters may a trial court consider in determining whether certain mental health records of a witness should be released to the defense?

-Whether the mental health information sought relates to a mental illness or disturbance suffered or treatment received?

-What is the proponent's explanation as to how the mental illness or disturbance is relevant to impeach the witness's credibility as a witness, mental stability or memory of the events of the alleged offense?[14]

-Are the records relevant and material to a viable defensive theory? (e.g., self-defense)

-Did the mental illness or disturbance occur before or after the offense alleged and whether it is an ongoing condition? If prior to the alleged offense, how long ago? Is it too remote in time from the events alleged to be relevant and material?

-Did the mental illness or disturbance occur when the witness was an adolescent? Was it limited to that period of time?

-Does the mental illness or disturbance establish the context of the assault?

-Does the mental illness or disturbance affect the complainant's truthfulness or ability to perceive what the accused did?

[14] *See e.g.***,** *Virts v. State,* 739 S.W.2d 25, 28 (Tex. Crim. App.1987)(observing that "evidence of a mental illness or disturbance that a witness has suffered in the recent past—before the event in question occurred—may be admissible" but the mere fact alone does not make it relevant); *Mathis v. State*, 397 SW3d 332 (Tex. App. —Dallas 2013, pet. granted)((rev'd on diff grounds) (stating that an accused's right to cross-examine a testifying State's witness includes the right to impeach the witness with relevant evidence that might reflect, among other things, an impairment or disability affecting the witness' s credibility); *U.S. V. Jimenez*, 256 F.3d 330 (5th Cir. 2001)(noting that to "be relevant, the mental health records must evince an impairment of the witness's ability to comprehend, know, and correctly relate the truth.").

-If the complainant was on medication at the time of the offense alleged, what is the relevance? What impact the presence, or absence, of the medication could have had on the witness's mental, physical or cognitive processes?

Q: When certain medical records are turned over to the defense, will the trial court issue orders intended to protect the witness's privacy?

Most likely. When a Court orders that a witness's mental health records be turned over because they are relevant, material, and potentially exculpatory, the court may require that certain information be redacted, such as the complainant's contact information if it could adversely affect the complainant's safety. The trial court may also issue specific orders limiting the use and dissemination of the mental health records to protect the complainant's privacy.

SPECIALTY COURTS

Q: If my client is charged with a family violence case, can they apply to any of the specialty court programs – Veteran's Treatment Court or Mental Health Court? What about Pretrial Diversion?

Yes, some family violence cases are accepted in the specialty courts as well as in the pretrial diversion program.

Mental Health Court - When a defendant is booked for an offense at the Magistrate's Office, a screening process is in place to identify defendants with possible mental health issues. If the defendant is flagged for possible mental health concerns, the case is given an "M-Code" classification. Unlike other misdemeanor cases, family violence cases flagged with an "M-code" at the Magistrate's Office are not automatically transferred to County Court #12 because only County Courts #7 and #13 are designated by statute to handle family violence cases. A misdemeanor case designated as family violence (i.e., coded as 702) is only transferred to County Court #12 when it is formally accepted into the Mental Health Court program. If the defendant is exited from the program for whatever reason, the case is transferred back to the originating family violence court.

In the misdemeanor family violence courts, cases flagged with an "M-code" are immediately identified so that the court can follow up with defense counsel and ensure that their clients are receiving needed mental health care and services. Prompt attention to these cases also helps facilitate the application process for possible acceptance in the mental health court program.

Veteran's Treatment Court - In the past year, nearly every veteran charged with a misdemeanor family violence case that has applied for Veteran's Treatment Court was accepted. Upon acceptance into the program, the court will transfer the case to County Court #6. If the defendant is exited from the program for whatever reason, the case is transferred back to the originating family violence court.

Pretrial Diversion - With pretrial diversion, the prosecutors in the family violence court should recommend the case for admission. Although defendants charged with misdemeanor family violence cases can apply without the prosecutor's recommendation, it is my understanding from the District Attorney's Office that the likelihood of acceptance increases exponentially with the recommendation. Once submitted, the application is evaluated by the DA's office and if it is selected, the defendant will plea into the program.

PROBATION

Q: Does my client really HAVE to take the Battering Intervention and Prevention (BIPP) course (also referred to as Family Violence Counseling (FVC)? How is BIPP different from APSE?

Yes, if the relationship between the parties was or is an intimate partner relationship. The Batterer Intervention and Prevention Program (BIPP) is an education and rehabilitation program for domestic violence offenders. The group sessions are conducted at local social service organizations and the curriculum was designed by the Texas Department of Criminal Justice.

In most cases, the defendant must attend 18, 24, or 36 weekly sessions. Participants typically pay an initial fee for intake and initiation and then a per-session fee for each week of the program that they attend. Some host organizations offer a sliding scale fee based on the defendant's ability to pay.

Q: Does my client have to pay the $100 fee to a Family Violence Center?

If a Court sentences a defendant to community supervision probation for an offense under Tex. Penal Code Title 5, the Court ***must*** assess a $100 fee against the defendant to be paid to a family violence center that receives state or federal funds and is located in the county where the court is located. Tex. Code Crim. Proc. Art. 42.12(h)(11). Although the language of Article 42.12(h)(11) is mandatory, a trial court is required to consider a defendant's ability to pay before imposing any payment or monetary condition of probation.[15]

[15] *See Mathis v. State*, 424 S.W.3d 89, 96 (Tex. Crim. App. 2014). In *Mathis v. State*, the Court of Criminal Appeals held that "[t]he trial judge is required to consider the probationer's financial ability whenever he orders payments under Article 42.12, not just when he orders payments for attorney's fees." *Mathis*, 424 S.W.3d at 96. Article 42.12 itself states "[t]he court shall consider the ability of the defendant to make payments in offering the defendant to make payments under this article. Tex. Code. Crim. Proc. 42.12 §11(b). The Court of Criminal Appeals noted that "[t]his provision is mandatory[,]" and is "a statutory recognition that the criminal-justice system may not punish people for their poverty and that probation is not merely for the rich." *Mathis*, 424 S.W.3d at 94.